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

MICHIGAN CATHOLIC CONFERENCE, *et al*., ***Plaintiffs***, **v.** **KATHLEEN SEBELIUS, *et al*.,** ***Defendants.***	Case No.: 1:13-cv-01247 The Honorable Gordon J. Quist *Electronically Filed*

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION AND REQUEST FOR ORAL ARGUMENT

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INTRODUCTION

Plaintiffs are Roman Catholic institutions and, as such, believe that life begins at conception and that artificial interference with life and conception is immoral. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government has promulgated regulations that coerce Plaintiffs to violate this sincerely held religious belief by requiring them, under threat of punitive fines, to provide their employees access to abortion-inducing products, sterilization, contraceptives, and related counseling (the "objectionable services"). *See* 45 C.F.R. § 147.130(a)(1)(iv) (the "Mandate"). The intitial version of the Mandate was met with strong criticism from the religious community and lawsuits brought by many religious organizations, including Plaintiff Michigan Catholic Conference ("MCC"). MCC's first lawsuit was dismissed on ripeness grounds when the Government announced that it was revising the exemptions to the Mandate in response to concerns about infringing on First Amendment freedoms. However, the exemption in the final version of the Mandate ("Final Rule") is even more problematic because it narrowly defines "religious employers" as "houses of worship and religious orders," excluding Catholic charitable, education, and other organizations—for example, Plaintiff Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo ("Catholic Charities").

The Mandate's narrow definition of religious employer artificially divides the Catholic Church into two wings: a "worship" wing that provides *religious* services, and a "charitable" wing that provides what the Government views as *secular* services. But this artificial distinction ignores the reality that organizations in the Catholic Church, like Catholic Charities, engage in charity and social welfare services as an *exercise of religion*. By excluding charitable and

service organizations from the definition for exempt "religious employers," the Mandate forces the heart of the Catholic Church to act contrary to its sincerely held religious beliefs.

The Final Rule added a so-called "accommodation" for non-exempt employers, but it does nothing to address the objections raised by religious institutions falling outside of the narrow definition of "religious employer." On its face, the "accommodation" shifts the cost of the objectionable coverage away from employers with religious objections, but, significantly, it still (1) mandates provision of that coverage for employees by virtue of their participation in the objecting employer's benefit plan, and (2) does nothing to prevent third parties compelled to provide the objectionable services from shifting the cost back to the employer under a different label and from using the employer's money to pay for the objectionable services. Put simply, the "accommodation" is not accommodating at all. Adjusting an accounting entry does not alleviate the unconstitutional injury the Mandate inflicts on employers carrying out the Church's mission.

The Final Rule is significantly *worse* than the initially proposed rule because it also eliminates an important protection from the initial version of the Mandate that allowed "religious employers" (MCC) to protect their affiliated religious organizations (Catholic Charities) from participation in the provision of the objectionable services by including such organizations in the plan established by the "religious employer." The Final Rule, therefore, actually *increases* the number of religious organizations subject to the Mandate.

The Mandate violates the Religious Freedom Restoration Act ("RFRA"), the First Amendment, and other federal law. *First*, under RFRA, the Government may not impose a substantial burden on Plaintiffs' exercise of religion without showing that it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). The Government has excluded tens of millions from the Mandate through a series of exemptions;

thus, it cannot show a compelling interest in forcing the Mandate on the much smaller band of employers that seek an exemption on the basis of religious hardship. Nor is the Mandate narrowly tailored because the Government could easily advance its goals without using Plaintiffs to deliver objectionable services to their employees.

Second, the Mandate violates the First Amendment's Free Speech and Religion Clauses because it infringes on Plaintiffs' freedom of speech by requiring them to facilitate "counseling" in favor of abortion-inducing products, contraception, and sterilization. The Mandate violates the Free Exercise Clause by targeting Plaintiffs' religious practices, offering a multitude of exemptions to other employers for *non-religious* reasons, but denying any exemption that would relieve Plaintiffs' *religious* hardship. The Mandate violates the Establishment Clause by creating a state-favored category of "religious employers" based on intrusive judgments about their religious practices, beliefs, and organizational structure. And, the Mandate violates the First Amendment's protection of internal church governance by splitting the Catholic Church in two and dictating to the Church which of its institutions are "religious" and which are not.

Finally, the Mandate violates the Administrative Procedure Act ("APA") because Defendants failed to conduct notice-and-comment rulemaking, and it contravenes the clear terms of the Weldon Amendment. Under the Weldon Amendment, no federal agency may impose penalties on employers for refusing to include abortion coverage in their health-care plan, but the Mandate imposes penalties for failing to provide coverage for abortion-inducing products.

In sum, there is no legal justification for the Government's gratuitous intrusion on Plaintiffs' religious freedom. Plaintiffs need injunctive relief now, without which they will be forced to decide between violating their religious beliefs or violating the law—the epitome of irreparable harm. By contrast, a preliminary injunction will impose no substantial harm on the

Government. It would instead preserve a status quo that has existed in this country for more than two centuries. Accordingly, Plaintiffs respectfully request a preliminary injunction while this Court adjudicates this vital question of religious liberty.

BACKGROUND[1]

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act") requires employer "group health plan[s]" to include insurance coverage for women's "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which has been defined by the Department of Health and Human Services ("HHS") to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA: *Women's Preventive Services Guidelines* (Ex. A). FDA-approved contraceptives include the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce an abortion. Failure to provide these services exposes non-exempt organizations to fines of $100/day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health plans subjects non-exempt organizations to substantial annual penalties of $2,000 per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

From its inception, the Act exempted health plans covering millions of people. *See* WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* (Ex. B) at 1 ("exempt[ing] . . . 96[%] of all firms . . . or 5.8 million out of 6 million total firms"); 26 U.S.C. §§ 4980D(d); 4980H(a). Plans that have not changed certain benefits or contributions are "grandfathered" and exempt. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-

[1] For additional background, see paragraphs 1-15 and 54-107 of the Complaint (Doc. 1).

1251T(g)(1)(iv). By one estimate, the Act exempts "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

From the start, however, the Government refused to exempt religious entities other than those satisfying the narrow definition of "religious employer" that was intended to "accommodate" only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Despite intense criticism, the Government finalized the narrow definition "without change." 77 Fed. Reg. 8,725, 8,727-28, 8,730 (Feb. 15, 2012).

Five weeks later, under increased pressure, the Government issued an Advanced Notice of Proposed Rulemaking ("ANPRM"), suggesting accommodations to religious objections, yet reaffirming that the "religious employer" exemption would not change. 77 Fed. Reg. 16,501, 16,501-08 (Mar. 21, 2012). Religious entities explained in detail why proposals in the ANPRM would not relieve the burden on their religious freedom. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (May 15, 2012) (Ex. C) at 3 ("[T]he ANPRM create[s] an appearance of moderation and compromise, [but] does not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage."). Yet, on February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM") adopting the ANPRM's proposals. The Government received over 400,000 comments on the NPRM, largely reiterating previous objections. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (Mar. 20, 2013) (Ex. D) at 3 (noting that religious entities are still required "to fund or otherwise facilitate the morally objectionable coverage"); Public Comments and Expert Opinion submitted by the Roman Catholic Diocese of Pittsburgh (Apr. 8, 2013) (Ex. E) (noting that "the proposed rule continues

the surprising recent detour into requiring religious objectors to fund or facilitate coverge for abortifacients, contraception, sterilization, and related education and counseling[]").

Ignoring opposition, the Final Rule adopted substantially all of the NPRM's proposals without significant change. *See* 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). Thus, the Mandate will be in effect for plan years beginning on or after January 1, 2014. The Final Rule's three changes to the Mandate fail to relieve the unlawful burdens imposed on Plaintiffs, and one change significantly *increases* the number of religious organizations subject to the Mandate.

First, the Final Rule made a cosmetic change to the "religious employer" definition by replacing the original three prongs with "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. at 39,896 (codified at 45 C.F.R. § 147.131(a)). The Government admits that this change does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules," but "restrict[s] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Thus, the Final Rule continues to focus the exemption on "the unique relationship between a house of worship and its employees in ministerial positions," 76 Fed. Reg. at 46,623, and religious entities with broader missions are still not exempt.

Second, the Final Rule *increases* the burden imposed on religious entities by *expanding* the number that are subject to the Mandate. Under the original "religious employer" definition, if a nonexempt religious employer provided health coverage to its employees through a plan that was offered by a separate but affiliated entity that was exempt, "then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its

employees." 77 Fed. Reg. at 16,502. Here, MCC operates a self-insured plan that covers itself and, among others, Catholic Charities. Declaration of Paul A. Long ("Long Decl.") (Ex. F) ¶¶ 4-16; Declaration of Frances Denny ("Denny Decl.") (Ex. G) ¶¶ 13-15. Under the original religious employer definition, if MCC was exempt, then Catholic Charities received the benefit of that exemption. Long Decl. (Ex. F) ¶ 21; Denny Decl. (Ex. G) ¶ 17. But the Final Rule eliminates that protection, providing instead that "each employer [must] independently meet the definition of religious employer . . . in order to avail itself of the exemption." 78 Fed. Reg. at 39,886; *see also* 78 Fed. Reg. at 8,467. Thus, Catholic Charities is no longer exempt under the MCC Plan. *See* Long Decl. (Ex. F) ¶ 20; Denny Decl. (Ex. G) ¶ 17.

As a result, MCC's options are to (1) sponsor a plan that will provide Catholic Charities, and other non-exempt Catholic organizations, with access to the objectionable services; (2) sponsor a plan that will require the non-exempt organizations to self-certify and facilitate provision of the objectionable services; (3) sponsor a plan that will lead to onerous fines for non-exempt organizations that fail to self-certify and facilitate provision of the objectionable services, *see* 77 Fed. Reg. at 16,502; or (4) expel these non-exempt organizations from the MCC Plan, thereby forcing expelled entities into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable services. *See* Long Decl. (Ex. F) ¶ 23. The first option violates MCC's sincerely held religious beliefs. *Id.* ¶ 24. The second option constitutes a substantial burden on MCC's religious beliefs by compelling MCC to submit to the Government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries. *Id.* ¶ 25. The second option also makes MCC and the Bishops complicit in providing objectionable coverage. *See* Declaration of the Most Rev. Michael Byrnes, S.T.D. ("Bishop Byrnes Decl.") (Ex. H) ¶ 23. The third option is not

financially feasible. Long Decl. (Ex. F) ¶ 26. The fourth option also constitutes a substantial burden on MCC's religious beliefs by compelling MCC to submit to the Government's interference with its structure and internal operations by accepting a construct that divides the Church from its ministries and prevents MCC and the Bishops from ensuring that entities in Michigan do not provide the objectionable services. *Id.* ¶ 27.

Third, the Final Rule establishes an illusory "accommodation" for non-exempt objecting religious entities that qualify as "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if self-insured, to its third party administrator. 26 C.F.R. § 54.9815-2713A(a). An eligible organization's self-certification requires a third party to provide "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,893 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). Making matters worse, self-insured organizations that self-certify are flatly prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii). For self-insured organizations, like Catholic Charities, the self-certification constitutes the religious organization's "designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. This "accommodation" fails to relieve the burden on religious beliefs because a non-exempt organization's decision to offer a group health plan still results in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. 26 C.F.R. § 54.9815-2713A(b)-(c).

Catholic Charities' provision of a group health plan and signing the self-certification form thus triggers the provision of "free" objectionable services to its employees in a manner contrary to its beliefs. Denny Decl. (Ex. G) ¶ 21. Indeed, Catholic Charities must designate the third party administrator to provide the coverage. Bishop Byrnes Decl. (Ex. H) ¶ 21. Moreover, the Bishops and MCC will be forced to facilitate provision of the objectionable services because non-exempt organizations currently insured through the MCC Plan, like Catholic Charities, will be forced to comply with the Mandate. MCC, through the Bishops, has the power to manage, oversee, and direct the plans offered, and will be forced to operate those plans in a manner that will result in the provision of objectionable services. Plaintiffs would also provide the names of the beneficiaries who would receive the free objectionable services. *Id.* ¶ 23.

In sum, the Final Rule does not address Plaintiffs' religious objections to facilitating access to the objectionable services. *See id.* ¶ 18. This should not surprise the Government, which was repeatedly notified well before it issued the Final Rule that its "accommodation" would not relieve the burden on Plaintiffs' religious beliefs. Despite representations that it was making a good-faith effort to address those religious objections, the Government issued the Final Rule that it knew would do no such thing. Plaintiffs are still coerced, under threat of crippling fines, into being the vehicle to deliver abortion-inducing products, sterilization services, contraceptives, and related counseling services to their employees, contrary to their sincerely held religious beliefs.

II. PLAINTIFFS' BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide charitable services to individuals of all faiths. Denny Decl. (Ex. G) ¶ 30. Just as sincerely, they believe that life begins at the moment of conception, and that certain "preventive services" covered by the Mandate that interfere with life and conception are

immoral. *Id.* ¶ 9; Bishop Byrnes Decl. (Ex. H) ¶ 8. Specifically, as relevant here, Plaintiffs believe that abortion and direct sterilization are prohibited and that contraceptives for the purpose of contraception are immoral. Bishop Byrnes Decl. (Ex. H) ¶ 9.

Under the internal structure and doctrine of the Catholic Church, charity and social services are the heart of the Church and no less religiously significant than worship. Bishop Byrnes Decl. (Ex. H) ¶ 27. Additionally, through the MCC Plan, the Dioceses control and oversee their close affiliates, including Catholic Charities. *Id.* ¶ 28. To ensure that these entities comply with the dictates of the Catholic Church, MCC offers health insurance to the employees of these affiliates that complies with Catholic doctrine. *See id.* Forcing MCC to expel these affiliates from the MCC Plan would interfere with the the internal structure and doctrine of the Dioceses and with the Dioceses' ability to control them. *Id.* ¶ 28.

Plaintiffs' sincerely held, longstanding beliefs are also violated in several ways if they provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. For example, the Mandate forces Plaintiffs to violate their religious beliefs by requiring them to designate a third party to administer, provide or procure the objectionable services for Plaintiffs' employees. *Id.* ¶ 21.

Plaintiffs' religious beliefs are violated by facilitating the objectionable coverage and services, even if Plaintiffs do not have to contract, arrange, pay, or refer for them. *Id.* ¶ 13. When it violates Plaintiffs' religious beliefs to perform certain conduct, Plaintiffs are equally prohibited from designating or assisting someone else to do it for them. *Id.* ¶ 14. There is no prohibition in paying a salary to Plaintiffs' employees, even if those employees may use the money to act contrary to Catholic doctrine. *Id.* ¶ 15. But that is completely different from the situation here. When the Diocese pays an employee's salary, it does not designate the employee

to purchase pornography, does not designate the employee to administer a program that supplies pornography, and does not trigger the provision of pornography. *Id.* ¶ 15.

Here, Plaintiffs are prohibited from providing this coverage, including for abortion-inducing drugs which Plaintiffs believe to be a grave moral evil, and are equally prohibited from designating or assisting their third party administrator in providing the coverage. *Id.* ¶ 21. Giving notice to the third party administrator of Plaintiffs' beliefs was not a violation in prior years because it did not trigger the provision of the objectionable services and did not designate the third party administrator to provide the objectionable coverage. *Id.*; Long Decl. (Ex. F) ¶ 18.

Additionally, Plaintiffs believe that they must bear witness, including in their deeds, to the beliefs of the Catholic Church and that it would be scandal to act inconsistently with those beliefs. *Id.* ¶ 25. For example, Plaintiffs cannot act in a way that thwarts the transmission of life. *Id.*; Denny Decl. (Ex. G) ¶ 21. The Mandate thus forces Plaintiffs to not only directly facilitate access to objectionable services, but also to participate in a government scheme specifically designed to thwart the transmission of life contrary to Plaintiffs' religious beliefs. Bishop Byrnes Decl. (Ex. H) ¶ 25; Denny Decl. (Ex. G) ¶ 21.

Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion-inducing products, sterilization, contraceptives, and related counseling, including by contracting with a third party that will, as a result, provide or procure the objectionable services for Plaintiffs' employees. Bishop Byrnes Decl. (Ex. H) ¶¶ 12-14.

It is a cruel irony that the Mandate—promulgated under a statute intended to help the poor and needy—imposes on Plaintiffs the impossible choice of either abandoning their religious principles or else violating the law and facing crippling penalties, and, that it could harm

Plaintiffs' ability to directly serve the poor and needy. For example, any money paid for fines could have otherwise supported Plaintiffs' charitable programs. Denny Decl. (Ex. G) ¶ 38.

ARGUMENT

A court should grant a preliminary injunction if, after considering four factors, it determines that the balance of equities favors such relief. *See Am. Imaging Servs., Inc. v. Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858-59 (6th Cir. 1992). The four factors that courts should consider are: A plaintiff seeking a preliminary injunction must demonstrate (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest is served. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *Int'l Res., Inc. v. N.Y. Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991). These factors are not "prerequisites [to be] satisfied" and merely "guide the discretion of the court." *Eagle-Picher*, 963 F.2d at 859. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) ("the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met."). In other words, "they are not meant to be rigid and unbending requirements," because "[a] fixed legal standard is not the essence of equity jurisprudence." *Id.* (quotation and citation omitted).

The rules and accepted practice ordinarily require expedited resolution by the Court when a preliminary injunction is sought. A preliminary injunction, moreover, is especially appropriate where it would preserve the status quo. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

Here, Plaintiffs meet all four factors for preliminary injunctive relief and the balance of harms clearly weighs in their favor. Moreover, a preliminary injunction would preserve the status quo, as Plaintiffs' insurance plans do not currently cover the objectionable services and their employees and the employees of other entities covered under their plans do not get the objectionable services for free from their third party administrator. Accordingly, Plaintiffs' Motion for a Preliminary Injunction should be promptly adjudicated and granted.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

To satisfy the "likelihood of success" factor, "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp. II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997).

Plaintiffs are likely to succeed on the merits of all of their claims, including that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 148-58); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Compl. Count II, ¶¶ 159-71); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Compl. Count III, ¶¶ 172-85); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a third party administrator's decision to provide or procure contraceptive services (Compl. Count IV, ¶¶ 186-90); (5) violates the Establishment Clause of the First Amendment because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on

intrusive judgments regarding their beliefs, practices, and organizational structure (Compl. Count V, ¶¶ 191-98); (6) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church governance (Compl. Count VI, ¶¶ 199-213); (7) violates the APA by failing to conduct notice and comment rulemaking (Compl. Count VII, ¶¶ 214-24); and (8) violates the APA by disregarding statutory prohibitions on compelled support for abortion (Compl. Count VIII, ¶¶ 225-35).

A. The Mandate Violates RFRA

Under 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 interest." 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423 (2006). Thus, once Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate to Plaintiffs furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428. Here, the Government cannot make such a showing.

RFRA was enacted to prevent the type of regulation codified in the Mandate. Congress passed RFRA "to restore [and codify] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception

services." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary,* 102d Cong., 174, 192 (1992); *see also* 139 Cong. Rec. 9,685 (1993) (statement of Rep. S. Hoyer) (noting that, post-*Smith*, a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" and that RFRA would "correct th[is] injustice[]"); *id.* at 4,660 (statement of Rep. Green) (noting that RFRA prevents the Government from "enact[ing] laws that force a person to participate in actions that violate their religious beliefs").

Here, the Mandate cannot possibly survive scrutiny under RFRA because: (1) it imposes a "substantial burden" on Plaintiffs' free exercise of religion; (2) the Government has no compelling interest in imposing this burden; and (3) it is not the least restrictive means to achieve the Government's interest. Thus, courts have issued preliminary injunctions against the Mandate in the majority of cases brought by *for-profit* companies with religious owners. [2]

In *the Geneva College* case, the Third Circuit Court relied on "Supreme Court decisions support[ing] Geneva's argument that there is a likelihood of success on the merits . . . to its

[2] Courts in at least twenty cases have afforded preliminary relief to for-profit plaintiffs challenging the Mandate. *See Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013) (en banc); *Gilardi v. HHS*, No. 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692 (7th Cir. Nov. 8, 2013); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Doc. No. 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Doc. No. 12); *Bick Holdings Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Doc. No. 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Doc. No. 43); *Lindsay v. HHS*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Doc. No. 9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Sharpe Holdings, Inc. v. HHS*, No. 2:12-cv-0092, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. HHS*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

assertion that it will suffer a substantial burden under the RFRA" absent an injunction. 2013 WL 3071481, at *8. A preliminary injunction is even more appropriate in this case involving *non-profit* entities where, as outlined below, the Mandate imposes a substantial burden on the religious exercise that is at the heart of the mission of these entities and enforcement is imminent.

(1) The Mandate Substantially Burdens Plaintiffs' Exercise Of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. This initial inquiry requires courts to (1) identify the particular exercise of religion at issue, and (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (*en banc*) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under the parallel statute RLUIPA). Here, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do what their religion forbids: facilitate access to abortion-inducing products, sterilization services, contraceptives, and related counseling services. It also prevents Plaintiffs from bearing witness to their religious beliefs, thereby causing scandal.

(i) "Exercise Of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Because the exercise of religion has been interpreted to include a diverse array of conduct, ranging from refusing to give children a formal education, *see Yoder*, 406 U.S. at 210-

19, to eating only certain foods, *see Nelson v. Miller*, 570 F.3d 868, 878-89 (7th Cir. 2009), RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). Protected religious exercise includes any act or practice that is "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted).

Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, courts must accept plaintiffs' descriptions of their beliefs and practices, regardless of whether the court, or Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714-15 (refusing to question plaintiff's moral line); *see also United States v. Lee*, 455 U.S. 252, 257 (1982); *Koger*, 523 F.3d at 797 (plaintiff's "dietary request [was] squarely within the definition of religious exercise"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting efforts to dispute plaintiff's representation that a medical test would violate his religion).

"Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Thus, "[r]epeatedly and in many different contexts," the Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Instead, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir, 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). By necessity, this is a modest inquiry that is restrained by the need to avoid excessive entanglement in religion.

See Jolly, 76 F.3d at 476. The purpose of the sincerity inquiry is simply to screen out manipulative claims based on sham beliefs that can be readily identified as such, for example, a high-school student who suddenly proclaims a religious objection to Math. Courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715.

"While it is a delicate task to evaluate religious sincerity without questioning religious verity, . . . free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." *Jolly*, 76 F.3d at 476 (emphasis omitted). By screening claims for religious sincerity, and by allowing the Government to impose burdens that are truly necessary to serve a compelling interest, courts can apply RFRA to grant bona fide religious exemptions without "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Yoder*, 406 U.S. at 216. Based on this approach, the Supreme Court has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

Here, there can be no doubt that Plaintiffs' refusal to comply with the Mandate is a protected exercise of religion under RFRA. It is undisputed that Plaintiffs have a sincerely held religious belief that they may not provide, pay for, and/or facilitate access to abortion-inducing products, sterilization services, contraceptives, and related counseling services, including by contracting with a third party that will, as a result, provide or procure the objectionable services for Plaintiffs' employees. Long Decl. (Ex. F) ¶¶ 19-27; Denny Decl. (Ex. G) ¶ 16. While courts are bound to accept Plaintiffs' description of their beliefs without resort to any independent

religious authority, here the sincerity of Plaintiffs' beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops. *See* Comments of U.S. Conf. of Catholic Bishops (Mar. 20, 2013) (Ex. D). These authoritative statements of Catholic belief make it unmistakably clear that Plaintiffs' objection to the Mandate is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.

Nor do Plaintiffs seek to impose their religious beliefs on anyone else, or "to require the government itself to conduct its affairs in conformance with [their] religion." *Kaemmerling v. Lappin*, 553 F.3d 669, 680 (D.C. Cir. 2008). On the contrary, Plaintiffs recognize that notwithstanding their religious objections, they have no legal right to prevent individuals from procuring the objectionable services from the Government or anywhere else. Plaintiffs simply invoke RFRA to enforce the law that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. In particular, the Government may not require Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, sterilization, contraceptives, and related counseling services. Nor can the Government force Plaintiffs to contract with a third party that will, as a result, provide or procure the objectionable services for Plaintiffs' employees. By imposing these requirements, the Mandate is a straightforward effort that "forces [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

It is no answer to claim that Plaintiffs may be eligible for the Government's so-called "accommodation." For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincerely held 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."); *Geneva Coll.*, 2013 WL 3071481, at *9 (noting that the "[*Thomas*] Court instructed that '[c]ourts should not undertake to dissect religious beliefs' when analyzing substantial burden questions[]" and that "[h]ere, Geneva facilitates the provision of its student health insurance, and to force it to choose whether or not to facilitate a student health plan would be, like in *Thomas*, a line which it should not be forced to cross[]") (quoting *Thomas*, 450 U.S. at 715); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013). The fact is that the "accommodation" compels Plaintiffs to contract with an insurance issuer or third party administrator that will, as a result of that contract, provide or procure the objectionable services for Plaintiffs' employees. Indeed, the third party's obligation exists *only so long as* Plaintiffs' employees remain on the MCC Plan.[3] *See* Bishop Byrnes Decl. (Ex. H) ¶¶ 21-22. Moreover, for self-insured organizations, the required self-certification constitutes the religious organization's specific "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). Finally, the accommodation forces further facilitation by leading to the requirement that MCC and Catholic Charities provide the names of the employees and dependents whose insurance is through their plans. *See* Bishop Byrnes Decl. (Ex. H) ¶ 23.

As Plaintiffs have explained to the Government, they believe their involvement in this scheme would constitute impermissible facilitation of access to the objectionable services. This sincere religious belief is entitled to no less protection than that at issue in *Hobby Lobby*, *Geneva*

[3] *See* 29 C.F.R. § 2590.715-2713A(d) (for self-insured employers, the third party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers that offer insured plans, the insurance 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[]").

College, and *Gilardi*, 2013 WL 5854246, at *7. Indeed, the Supreme Court has recognized that non-profit religious entities are entitled to more protection than for-profit corporations. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344-45 (1987) (Brennan, J., concurring).

Because Plaintiffs object to *facilitating* the objectionable services in the manner required by the Mandate, it is irrelevant whether the Mandate also forces them to directly *subsidize* these products and services. For example, it makes no difference that insurance issuers are required to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 26 C.F.R. § 54.9815-2713A(c)(2)(ii). It also makes no difference whether payments for the objectionable services will be "cost neutral" to Plaintiffs. 78 Fed. Reg. at 8,463. Indeed, Plaintiffs would be willing to pay increased premiums if that would allow them to avoid serving as the vehicle by which the objectionable services would be delivered to their employees. It is, in short, the impermissible *facilitation* of access to objectionable services that violates Plaintiffs' sincerely held religious beliefs. And it is undisputed that the Mandate forces Plaintiffs to engage in impermissible facilitation.

Additionally, Plaintiffs have an obligation to bear witness to the Church's teachings, particularly as defined by the Dioceses. Bishop Byrnes Decl. (Ex. H) ¶ 25. Being forced to act inconsistent with these teachings prevents Plaintiffs from bearing witness and causes scandal. *Id.* By forcing MCC and Catholic Charities to provide health insurance plans under the "accommodation," the Mandate prevents them from bearing witness and causes scandal. *Id.* MCC and Catholic Charities would be forced to act in a way inconsistent with the very teachings of the Roman Catholic Church. For example, the Mandate purports to function by eliminating

pregnancies and Plaintiffs simply cannot bear witness if their actions thwart the transmission of life. *Id.* Under the Mandate, MCC and Catholic Charities cannot practice what they preach.

In any event, it is also clear that, under the Mandate, Plaintiffs will almost certainly be required to subsidize the objectionable products and service, thereby further exacerbating the already impermissible substantial burden. This is so, even if the Government's dubious cost-neutrality assumption is true. Take, for example, religious organizations that procure insurance from an insurance company, wherein the insurance company must provide or procure the objectionable services for the religious organization's employees. According to the Government, the cost to the insurance company of doing so will be offset by, among other things, "fewer childbirths" that result from the use of contraception, sterilization, abortion-inducing products, and related counseling. 78 Fed. Reg. at 8,463. But even if the Mandate succeeds in reducing "childbirths" in high enough numbers to achieve cost-neutrality, the premiums previously going toward childbirths will now be used to provide the objectionable services necessary to obtain that reduction in childbirths. After all, obtaining that reduction is the very basis upon which the Government's cost-neutrality assumption is premised.

As noted, however, the Government's cost-neutrality assumption is implausible. It depends on the dubious assumption that the cost of contraception will be offset by "lower costs from improvements in women's health and fewer childbirths," 78 Fed. Reg. at 8,463, which in turn depends on the assumption that the Mandate will induce large numbers of women who do not currently use contraception to begin doing so. This, of course, demonstrates why Plaintiffs so vehemently object to the Mandate: It forces them to participate in a scheme *specifically designed to lure* women to engage in practices contrary to Plaintiffs' sincerely held religious beliefs. More important for present purposes, however, the Government has adduced *no*

evidence that women will change their behavior in sufficient numbers to achieve cost-neutrality. The same is true for self-insured organizations, for whom, the Government asserts, third party administrators will be permitted to recoup their costs through reductions in user fees on federally facilitated health exchanges. 78 Fed. Reg. at 39,882. These fee reductions are to be established through a highly regulated and bureaucratic process for evaluating, approving, and monitoring fees paid in compensation to third party administrators. Such regulatory regimes, however, invariably fail to fully compensate regulated entities for the costs and risks incurred. As a result, few if any third party administrators are likely to participate in this regime, and those that do are likely to increase fees charged to self-insured organizations. Consequently, the costs of providing the objectionable services will be passed back to religious organizations.

For these reasons, Plaintiffs' refusal to facilitate the objectionable services in the manner required by the Mandate is a protected exercise of religion. Accordingly, the only relevant question for this Court under the "substantial burden" analysis is whether the Mandate puts substantial pressure on Plaintiffs to act contrary to this religious practice.

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception and thwart transmission or life are identified as a protected religious exercises, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, a federal law "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas,* 450 U.S. at 717-18; *Kaemmerling*, 553 F.3d at 678 (same); *Gilardi*, 2013 WL 5854246, at *7–8 (same). In *Yoder*, for example, the Court found a substantial burden imposed by a $5 penalty charged to the Amish plaintiffs for refusing to follow a compulsory secondary-education law. 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 716-18. Thus, it is clear that even the threat of withholding unemployment benefits, or a $5 penalty, exerts enough pressure on a religious believer to qualify as a "substantial burden."

Here, the Mandate provides Plaintiffs an impossible choice: violating their religious beliefs or facing crippling fines. If Catholic Charities refuses to facilitate the objectionable services through their health plans, it will be subject to fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). And, if Catholic Charities seeks to exit the insurance market altogether, it could 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). These penalties, which would amount to millions of dollars and inflict significant competitive harms, clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 penalty that was a substantial burden in *Yoder*. There is no doubt that the threat of such penalties places a "substantial burden" on and indeed compels Plaintiffs to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling in violation of their religious beliefs.

The Third Circuit recently addressed a challenge by a non-profit Christian college against a previous version of the Mandate, and found that the college had established a likelihood of success on the merits where the "quintessential substantial burden" was demonstrated by the college being "forced to 'modify [its] behavior and to violate [its] beliefs' by either giving up its student health insurance generally or providing the objectionable coverage." *Geneva Coll.*, 2013 WL 3071481, at *9. Here, Plaintiffs face the same quintessential substantial burden of either

facilitating access to the objectionable services or giving up their employee health plans, plus they would have to pay substantial fines, thus modifying their behavior and services to the needy.

The Seventh and Tenth Circuits have recently addressed challenges by for-profit companies against the Mandate. The Seventh Circuit in *Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692 (7th Cir. Nov. 8, 2013) held that the Government may not force a for-profit company to contract with a third party that would provide contraceptive coverage to the company's employees over the owners' religious objections. That holding applies with even greater force here, where Plaintiffs are *non-profit religious organizations*. *Korte* makes clear that "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to religious beliefs,' [the inquiry] evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Id.* at *23 (emphasis added). Thus, the court was bound to accept the plaintiffs' sincere religious belief that complying with the Mandate "would make them complicit in a grave moral wrong." *Id.*; *see also id.* at *5 ("*As the [plaintiffs] understand their religious obligations*, providing the mandated coverage would facilitate a grave moral wrong." (emphasis added)). In light of that sincere belief, the only question for purposes of the substantial burden analysis was whether the Government had imposed "substantial pressure" to force plaintiffs to comply with the Mandate, *id.* at *22 (quoting *Thomas*, 450 U.S. at 718), to which the court found it easy to answer. By threatening such "ruinous fines," the Mandate "placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate," thus imposing a "direct and substantial" burden on plaintiffs' religious exercise. *Id.* at *23. The Tenth Circuit, sitting *en banc*, likewise recently held that a for-profit religious company was likely to succeed on the merits of a RFRA claim because 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.[4] The same is true here.

In sum, the Mandate leaves no way for Plaintiffs to continue their operations in a manner consistent with their sincerely held religious beliefs. Instead, it forces them to either abandon their beliefs by facilitating access to objectionable services, or violate the law and face severe penalties. Imposing this impossible dilemma constitutes a substantial burden on Plaintiffs' religious exercise.

(2) The Government Cannot Demonstrate That The Mandate Furthers A Compelling Government Interest.

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31 "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in forcing "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430-31; *Tyndale*, 904 F .Supp. 2d at 125-26. The Government cannot begin to meet this standard.

[4] *See also Gilardi v. HHS*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013) (affirming grant of injunction); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (granting injunction pending appeal).

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks and alteration omitted); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297-98. Here, the Government cannot claim an interest of the "highest order" where it exempts millions of employees from the Mandate through grandfathering provisions and small-employer exemptions, and the religious employer exemption. *See Gilardi,* 2013 WL 5854246, at *10 (describing these interests as "sketchy and highly abstract").

The Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "Americans who like their health plan can keep it." HHS.gov, *U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on 'Grandfathered' Health Plans [U]nder the Affordable Care Act* (June 14, 2010) (Ex. I). Grandfathering is not a "transition," it is a complete exemption with no sunset provision. Unless it makes certain specified changes, a plan can maintain its grandfathered status in perpetuity, and defendants have repeatedly stated that employers have a "right" to maintain their grandfathered status. *See, e.g.*, 75 Fed. Reg. 34,538, 34,540, 34,558, 34,562, 34,566 (June 17, 2010); *Newland*, 811 F. Supp. 2d at 1298 n.14. An interest is hardly compelling if it can be trumped by political expediency. Such a broad exemption "completely undermines any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *see also Hobby Lobby*, 723 F.3d at 1143-44; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *70-72 (W.D. Pa. Mar. 6, 2013), *injunction granted* 2013 WL 3071481, at *10 (W.D. Pa. June 18, 2013) ("[T]he mere fact that

defendants granted such a broad exemption in the first place severely undermines the legitimacy of defendants' claim of a compelling interest."); *Tyndale*, 904 F. Supp. 2d at 128. Moreover, if the Government's interests were truly of the "highest order," the preventive services mandate could have been included among the other mandates that were imposed on grandfathered plans. *See* 75 Fed. Reg. at 34,542 (grandfathered plans cannot impose lifetime limits and must extend coverage to dependent children until age 26).

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act at issue already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.*

The Government's claim that its interests are compelling is further undermined because it has no justification for distinguishing between exempt and accommodated entities. The Final Rule provides, without any evidentiary support, that the religious employer exemption is justified because the employees of those institutions are more likely to agree with their employer's view on the objectionable services and products the Mandate requires. 78 Fed. Reg. at 39,874, 39,887. Setting aside the question of how the Government could possibly claim to know the extent to which particular believers adhere to specific teachings of the Church, the corporate structure of

Catholic entities is not a reliable proxy for the religious devotion and agreement of their respective employees, and the government offers no evidence that it is. For example, some Catholic schools are exempt because they are legally part of the diocesan corporation, whereas others that are otherwise identical are accommodated because they are separately incorporated. Just like in *O Centro*, "everything the Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities that meet the Mandate's definition of "religious employer," as well as the numerous other entities that are exempt from the Mandate for non-religious reasons. *O Centro*, 546 U.S. at 433. Morevoer, "there is nothing to suggest the [Mandate] would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement." *Gilardi*, 2013 WL 5854246, at *14.

Finally, the Government's interest cannot be compelling where the Mandate would only fill, at best, a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available for free and at reduced cost and are also already covered by "over 85 percent of employer-sponsored health insurance plans."[5] 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); HHS.gov, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012) (Ex. J). The Government, moreover, has adduced "no empirical data or other evidence . . . that the provision of the FDA-approved emergency contraceptives . . . would result in fewer

[5] In other cases, the Government has claimed there would be an increase in use because the Mandate makes the objectionable services available for free from employers who currently provide them at a cost. Even if the Government were correct (and Plaintiffs dispute the Government's argument for several reasons), that could only justify requiring employers who already cover the services to provide them for free. It would not and cannot justify forcing Plaintiffs to violate their religious beliefs to fill the modest gap of people for whom the objectionable services were not previously covered at all.

unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies." *Beckwith v. Sebelius*, No. 8:13-cv-0648-T-17MAP, slip op. at 32 (M.D. Fla. June 25, 2013).

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to significantly impact contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013) (Ex. K). As such, the Government cannot claim to have "identif[ied] an actual problem in need of solving," *Brown*, 131 S. Ct. at 2738 (internal marks and citation omitted), much less that its proposed solution will address the alleged problem in any meaningful way. The Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

(3) The Government Cannot Demonstrate That The Mandate Is The Least Restrictive Means To Achieve Its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal quotations marks omitted). "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest]

without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). "Because this burden is placed on the Government, it must be the party to make this comparison." *Id.* The Government must demonstrate that "it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (explaining that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" that will achieve the government's stated goal) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

The Seventh Circuit in *Korte* recently held that the Government "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Korte*, 2013 WL 5960692, at *25-26. By asserting sweeping interests in "public health" and "gender equality," the Government has "guarantee[d] that the mandate" will fail strict scrutiny because it is "impossible to show that the mandate is the least restrictive means of furthering" those broad interests. *Id.* at *25. Moreover, even assuming the Government has a compelling interest in the more specific goal of "broaden[ing] access to free contraception and sterilization"—an assumption that is "both contested and contestable"—the Mandate still fails strict scrutiny because "there are many ways to increase access to free contraception" without forcing Plaintiffs to participate in the effort. *Id.* at *26.

Here, the Government has myriad ways to achieve its asserted interests without forcing Plaintiffs to violate their religious beliefs. Plaintiffs in no way recommend these alternatives and oppose many of them as a matter of policy, but the fact that they are available to the Government shows that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Plaintiffs to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (*i.e.*, Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's failure to consider these alternatives is fatal, as strict scrutiny requires a "serious, good faith consideration" of workable alternatives. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

B. The Mandate Violates The Free Exercise Clause

The Free Exercise Clause of the First Amendment embodies a "fundamental non-persecution principle" that prevents the Government from "enact[ing] laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that

disfavor religion. *See Lukumi*, 508 U.S. at 532; *id.* at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

In *Lukumi*, for example, the Supreme Court invalidated a municipal ordinance that imposed penalties on "[w]hoever . . . unnecessarily . . . kills any animal." *Id.* at 537. Although the ordinance was not facially discriminatory, the Court found that its practical effect was to disfavor religious practitioners of Santeria because it allowed exemptions for secular but not for religious reasons. Once the city began allowing exemptions, the Court held that the law was no longer "generally applicable," and the city could not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Id.* at 537-38. Likewise, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.), the Third Circuit invalidated a police department policy that prohibited a Sikh police officer from wearing a beard because it contained an exemption for officers who were unable to shave for medical reasons but not for religious reasons. Relying on *Lukumi*, the court found that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* at 365.

The same reasoning applies here. The Mandate is not "generally applicable" because it is riddled with exemptions, *see supra* at 4, and yet there is no such exemption for *religious* employers like Plaintiffs. It makes no difference that the Mandate contains an exemption for a narrow subset of religious groups—namely, those that meet the Government's limited definition of a "religious employer." *See, e.g.*, *Lukumi,* 508 U.S. at 520 (finding a violation even though there was already a religious exemption); *O Centro*, 546 U.S. at 433 (same). Because it offers so many secular exemptions, the Government must give equal consideration to *all* claimants who seek similar exemptions on religious grounds. The Free Exercise Clause does not merely require

equal treatment for *some* religious entities. Thus, the Mandate fails the test of general applicability, and the Government may not "refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537-38.

In addition, the Mandate is not "neutral" because it is specifically targeted at Plaintiffs' religious practice of refusing to provide or facilitate access to contraception. When the Government promulgated the Mandate, it was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government itself concedes that 85% of health plans already cover contraception, and it asserts that adding contraception to the remaining 15% is cost-neutral. If so, then the only conceivable reason why the latter plans would *not* include contraceptive coverage is a religious or moral objection. But instead of pursuing a wide variety of options for increasing access to contraception without forcing religious groups like Plaintiffs to participate in the effort, the Government deliberately chose to pick a high-profile fight by forcing religious groups to provide or facilitate access to contraception in violation of their core beliefs.

The record, moreover, establishes that the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, at a NARAL Pro-Choice America fundraiser, Defendant Sebelius stated, "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely affordable contraceptive services? Not so much." Compl. (Doc. 1) at ¶ 130; Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011) at 4-5 (Ex. L). Likewise, the original definition of "preventive service" was promulgated by an Institute of Medicine Committee that was stacked with individuals who, like Defendant Sebelius, strongly disagreed with many Catholic teachings, causing the

Committee's lone dissenter to lament that the Committee's recommendation reflected the other members' "subjective determinations filtered through a lens of advocacy." (*Id.* ¶ 68; *see also* Inst. Of Med., *Clinical Preventive Services for Women: Closing the Gaps*, at 232 (2011)). This anti-religious bias is further confirmed by the fact that it was directly modeled on a California statute, *see* 77 Fed. Reg. at 8,726 (explaining that the federal Mandate was modeled on state law); *compare* 76 Fed. Reg. at 46,626, *with* Cal. Health and Safety Code § 1376.25(b)(1), whose chief legislative sponsor made clear that its purpose was to strike a blow against Catholic religious authorities: "'59 percent of all Catholic women of childbearing age practice contraception.'" "'[88] percent of Catholics believe . . . that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.'"[6] Thus, not only the "real operation" but also the intended effect, of the Mandate is to target and suppress Plaintiffs' religious practices. *Lukumi*, 508 U.S. at 533-35.

Finally, the Mandate is subject to strict scrutiny because it implicates the "hybrid" rights of religious believers. In *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990), the Supreme Court noted that the Free Exercise Clause can "reinforce[]" other constitutional protections, such as freedom of speech and association, which are particularly important when religious beliefs and practices are at stake. The present case illustrates why. In order to carry out their religious mission, Plaintiffs must enjoy the freedom to associate in religious schools and charities without being forced to violate their core beliefs. The Mandate denies them this freedom by effectively prohibiting them from forming schools and charities unless they (a) provide or facilitate access to contraception, and (b) sponsor Government speech in the form of contraceptive "counseling." Thus, not only does the Mandate violate Plaintiffs' rights of free

[6] Editorial, *Act of Tyranny*, WASH. TIMES, Mar. 5, 2004 (quoting floor statement of Sen. Jackie Speier) (Ex. M).

speech and association, but these violations effectively deny Plaintiffs their ability to engage in religious charitable and educational works, which are essential components of their religion.

C. The Mandate Violates The First Amendment Protection Against Compelled Speech

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co., et al., v. FDA*, No. 11-5332 (D.C. Cir. Aug. 24, 2012), slip op. at 10. (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001)). Protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to provide, pay for, and/or facilitate access to "counseling" related to abortion-inducing products, sterilization services, and contraceptives for their employees. Because Plaintiffs oppose abortion and contraception, they strongly object to providing any support for "counseling" that encourages, promotes, or facilitates such practices. Indeed, opposition to abortion and contraception is an important part of the religious message that Plaintiffs preach, and Catholic Charities routinely counsels men and women against engaging in such practices. Consequently, forcing Plaintiffs to support "counseling" in *favor* of such practices, or even to give details about the availability of such practices, imposes a serious

burden on their freedom of speech. In short, Plaintiffs cannot be forced to act as mouthpieces in the Government's campaign to expand access to abortion and contraception.

Second, to qualify for the so-called "accommodation," the Mandate requires Catholic Charities and other non-exempt entities covered under the MCC Plan to provide a "certification" stating their objection to the provision of abortion-inducing products, sterilization services, contraceptives, and related counseling services. This "certification" in turn designates and triggers an obligation on the part of Plaintiffs' third party administrator to provide or procure the objectionable services for the employees of non-exempt entities on the MCC Plan. Plaintiffs object to this certification requirement both because it compels them to engage in speech that triggers provision of the objectionable services, and because it deprives them of the freedom to speak on the issues of abortion and contraception on their own terms, at a time and place of their own choosing, outside of the confines of the Government's regulatory scheme. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011) (striking down law requiring crisis pregnancy centers to issue disclaimers that they did not provide abortion-related services); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 462 n.6 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (*en banc*) (enjoining enforcement of law requiring crisis pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider").

D. The Mandate Imposes A Gag Order That Violates The First Amendment Protection Of Free Speech

At the very core of the First Amendment is the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New*

York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Indeed, the imposition of "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment

> is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

The Mandate violates this basic principle by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii). This sweeping gag order cannot withstand First Amendment scrutiny. Plaintiffs believe that contraception is immoral, and by expressing that conviction they routinely seek to "influence" or persuade their fellow citizens of that view. *See* Bishop Byrnes Decl. (Ex. H) ¶ 9; Denny Decl. (Ex. G) ¶ 27. The Government has no authority to outlaw such expression.

E. The "Religious Employer" Exemption Violates The Establishment Clause

The "religious employer" exemption violates the Establishment Clause of the First Amendment in two ways. *First*, it creates an artificial, Government-favored category of "religious employers," which favors some types of religious groups over others. *Second*, it creates an excessive entanglement between government and religion.

(1) Discrimination Among Religious Groups

The principle of equal treatment among religious groups lies at the core of the Establishment Clause. Just as the Government cannot discriminate among sects or denominations, so too it cannot "discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Because religious liberty encompasses not only the freedom of religious belief, but also the freedom to adopt different practices and institutional structures, official favoritism for certain "types" of religious institutions is just as insidious as favoritism based on creed.

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated organizations." *Id.* at 231-32. The state defended the law on the ground that it was facially neutral and merely had a disparate impact on some religious groups. The Court, however, rejected that argument, finding that the law discriminated among denominations by privileging "well-established churches that have achieved strong but not total financial support from their members," while disadvantaging "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 247 n.23 (internal quotation marks omitted). The D.C. Circuit has followed similar reasoning, stating that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between *kinds* of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (emphasis added).

Here, the Mandate violates this principle of neutrality by establishing an official category of "religious employer" that favors some religious groups over others. The exemption is defined

to include only "nonprofit organization[s] as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." As the Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. at 8,461. This definition favors religious groups that fit into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that exercise their religious faith through alternative means—including religious organizations like Catholic Charities that expresses its faith by providing various charitable and social services to the young, elderly, poor, and needy.

(2) Excessive Entanglement

"It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colorado Christian*, 534 F.3d at 1261 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits (as here)." *Id.* (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984)).

In determining eligibility for a religious exemption, the Government may not ask intrusive questions designed to determine whether a group is "*sufficiently* religious," *Univ. of Great Falls v. NLRB*, 278 F.3d at 1343, or even whether the group has a "substantial religious

character," *id.* at 1344. Rather, any inquiry into a group's eligibility for a religious exemption must be limited to determining whether the group is a "bona fide religious institution[]." *Id.* at 1343-44 (approving of a religious exemption that would include any non-profit group that "holds itself out" as religious, but reserving the question of whether groups could be required to show that they are "affiliated with . . . a recognized religious organization").

Here, the Government's criteria for the "religious employer" exemption go far beyond determining bona fide religious status. By its terms, the exemption applies to groups that are "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." This category includes (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." 78 Fed. Reg. at 8,458. The IRS, however, has adopted an intrusive 14-factor test to determine whether a group meets these criteria. *See Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). The fourteen (14) criteria ask whether a religious group has

> (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for the religious instruction of the young; and (14) schools for the preparation of its ministers.

Id. (citing *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55, 64 (1983)). Similar problems arise in evaluating whether an organization is an "integrated auxiliary," an inquiry governed by Treasury Regulations that assesses, among other things whether an organization "shares common religious doctrines, principles, disciplines, or practices with a church," or

"receives more than 50% of its support" from non-church sources. *See* 26 C.F.R. §§ 1.6033-2(h)(3)(i), (h)(4)(ii).

Not only do these factors favor some religious groups over others, but they do so on the basis of intrusive judgments regarding religious beliefs, practices, and organizational structure. For example, probing into whether a group has "a recognized creed and form of worship" not only requires the Government to determine which belief systems will be deemed "recognized creed[s]," but also demands inquiry into which practices qualify as "forms of worship." In answering such questions, the Government cannot escape being "cast in the role of arbiter of [an] essentially religious dispute." *New York v. Cathedral Acad.*, 434 U.S. 125, 132-33 (1977). Similarly, in determining whether a religious group has had "a distinct religious history," the exemption not only favors long-established religious groups, but also requires the Government to probe into potentially disputed matters of religious history. Any dispute as to whether a group's history is sufficiently "distinct" or "religious," should not be resolved by the Government. Indeed, "church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.

F. The Mandate Unconstitutionally Interferes With Plaintiffs' Rights Of Internal Church Governance

The Supreme Court has recognized that the Religion Clauses of the First Amendment prohibit the Government from interfering with matters of internal church governance. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012), the Court held that the Government may not apply anti-discrimination laws to interfere with religious groups in the hiring and firing of ministers because the First Amendment prohibits "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Indeed, because "the autonomy of religious groups . . . has often

served as a shield against oppressive civil laws," the Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring).

Here, the Mandate violates this principle by artificially splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. *See* Bishop Byrnes Decl. (Ex. H) ¶ 27; Denny Decl. (Ex. G) ¶ 29. In particular, the religious employer definition treats the Catholic Church as having two wings—a worship one and a charitable/educational one—and treats only the former as a religious employer, when, in fact, the Church's worship and charitable and educational arms are one and the same: "The Church cannot neglect the service of charity anymore than she can neglect the sacraments and the word." USCCB's Papal Visit Blog, "Benedict XVI's Plea: Put the Poor at the Heart of Catholic Life" (Mar. 25, 2008) (Ex. N). Thus, by refusing to recognize the Church's functions as those of a single, integrated "religious employer," the Mandate directly interferes with Catholic Church structure.

The Mandate, moreover, compounds this error by interfering with the Church hierarchy's ability to ensure that subordinate institutions, including various charitable and educational ministries, adhere to Church teaching through participation in a single insurance plan. *See* Bishop Byrnes Decl. (Ex. H) ¶¶ 27-28. Such an arrangement is currently in place in Michigan, where the Dioceses make the MCC Plan available to the employees of their religious affiliates, including Catholic Charities. By serving as the insurance provider for Catholic Charities, the Dioceses and Bishops can directly ensure that Catholic Charities offers its employees a health plan that is in all ways consistent with Catholic beliefs. *See* Bishop Byrnes Decl. (Ex. H) ¶¶ 27-28. The Mandate disrupts this internal arrangement by forcing MCC to (1) sponsor a plan that

will provide Catholic Charities, and other non-exempt Catholic organizations, with access to the objectionable services; (2) sponsor a plan that will require the non-exempt organizations to self-certify and facilitate provision of the objectionable services; (3) sponsor a plan that will lead to onerous fines for non-exempt organizations that fail to self-certify and facilitate provision of the objectionable services, *see* 77 Fed. Reg. at 16,50; or (4) expel these non-exempt organizations from MCC's health insurance plans, thereby forcing expelled entities into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable services. *See* Long Decl. (Ex. F) ¶ 23. Either way, the Mandate directly undermines the Dioceses' and the Bishops' abilities to ensure that their religious affiliates remain faithful to Church teaching.

G. The Mandate Is Contrary to Law And Thus Invalid Under The APA

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, because the Mandate violates the Weldon Amendment, it is "not in accordance with law."

The Weldon Amendment states that "[n]one of the funds made available in this Act [to the Departments of Labor and of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consol. Approp. Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). "Health care entity" is defined to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2). Here, the Mandate violates the Weldon Amendment by discriminating against Plaintiffs based on their refusal to

include coverage for abortion-inducing products in their "health insurance plan[s]."

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

Plaintiffs are entitled to injunctive relief because the Mandate is causing them substantial irreparable harm. "It is well settled that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) appeal dismissed, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013). "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.*, 904 F. Supp. 2d at 129 (citing *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006)) ("[The plaintiff] would certainly suffer an irreparable harm, assuming of course that it is likely to succeed on the merits of its RFRA claim.")).

The forced violation of Plaintiffs' faith is the epitome of irreparable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon *First Amendment values* constitutes irreparable injury sufficient to justify injunctive relief.") (emphasis added) (citing *Elrod*, 427 U.S. at 373). "It is well established that when First Amendment interests are either threatened, or in fact being impaired at the time relief is sought, the loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury." *Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 734 (W.D. Pa. 2011) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002)).[7] Accordingly, where Plaintiffs'

[7] The fact that Plaintiffs are likely to succeed on the merits of their First Amendment

First Amendment rights are chilled as a result of a statute, the Court has broad discretion to grant injunctive relief. *Reno*, 929 F. Supp. at 851. And, Plaintiffs' allegations of Establishment Clause violations are "sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Mullin v. Sussex County*, No. 11-580, 2012 U.S. Dist. LEXIS 67571, at *38-39 (D. Del. May 15, 2012).

The forced violation of Plaintiffs' faith is the epitome of irreparable injury. *See Am. Civil Liberties Union of Ill. V. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) (quoting *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)), for the proposition that the loss of First Amendment Freedoms constitutes irreparable harm because "quantification of injury is difficult and damages are therefore not an adequate remedy"). The Mandate forces Plaintiffs to violate central tenets of their religious beliefs by facilitating grave moral evil through the riggering of objectionable services to their employees. Absent an injunction, the Government can begin enforcing the Mandate against Plaintiffs before the final resolution of this case, while there is a serious question as to whether the Mandate violates the Constitution and other applicable law. Thus, every moment that passes without relief inflicts ongoing irreparable harm to Plaintiffs' religious freedoms. Plaintiffs thus are confronted with the impossible choice of violating their religious beliefs or violating the law. Plaintiffs need to resolve these outstanding issues before their plans go into effect for the administrative year starting on January 1, 2014 and should have more clarity before open enrollment begins in November 2013, so that they know what coverage to offer to their employees as of January 1, 2014.

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claims supports a finding of irreparable injury. *See Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("In a case in which the injury alleged is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success of the merits."), *aff'd Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

Additionally, the harms of non-compliance extend far beyond monetary loss. For example, imposing fines on Catholic Charities may well limit the charitable services it can provide, including by affecting donations. *See* Denny Decl. (Ex. G) ¶ 35. Indeed, the threat of these fines has already prevented Catholic Charities, along with other Catholic Charities affiliates, from considering any expansion of their charitable services to the poor and needy in the Diocese's region. *See id.* ¶ 38.

Because these are not the type of harms that can later be remedied by monetary damages, the injuries are irreparable. *See Mobil Oil Corp. v. Henriksen Enters., Inc.*, 490 F. Supp. 74, 77 (W.D. Mich. 1980) (holding that irreparable harm occurs when monetary damages are inadequate). And every moment that passes without relief inflicts an ongoing, cumulative harm to Plaintiffs' religious freedoms. Moreover, injunctive relief is particularly appropriate to prevent future enforcement of an unconstitutional statute. *See Bowman v. Twp. Of Pennsauken*, 709 F. Supp. 1329, 1348 (D.N.J. 1989) ("[I]njunctive relief is a particularly appropriate remedy when the harm is prospective enforcement of an unconstitutional statute.").

Similarly, Defendants' violation of Plaintiffs' rights under RFRA, which is meant to give religious exercise even greater protection than provided under the First Amendment, is also an irreparable injury. *See Gov't of Virgin Islands, Dep't of Conservation and Cultural Affairs v. Virgin Is. Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983) ("Nor is the irreparable harm factor a significant hurdle to a preliminary injunction in most statutory violation cases."), *overruled on other grounds by statute, Edwards v. HOVENSA, LLC*, 497 F.3d 355 (3d Cir. 2007); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Where Congress has enacted legislation to prevent the injury that forms the basis of Plaintiffs' claims, violating that statute constitutes irreparable injury. *See Virgin Islands Paving*,

714 F.2d at 286; *Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 647 (M.D. Tenn. 1989). Here, Congress enacted RFRA "to prevent the very injury asserted here," *Jeffreys*, 719 F. Supp. at 647, that is, the violation of Plaintiffs' sincerely held religious beliefs. The violation of RFRA is thus an irreparable injury.

III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM FROM A PRELIMINARY INJUNCTION

Ordinarily, Defendants' harms need to outweigh the burden on Plaintiffs for this factor to support denying injunctive relief. *See, e.g., Minard Run Oil Co.*, 2009 WL 4937785, at *23. Here, Defendants would need an even greater showing of harm given the strength of Plaintiffs' claims on the merits. *See Kos Pharm.*, 369 F.3d at 729 ("We have recognized that [t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.") (internal quotation and citation omitted).

Here, the Government cannot possibly establish any substantial harm from a preliminary injunction pending final resolution of this case because it has not mandated contraceptive coverage for over two centuries, has previously delayed implementation of the Mandate, and there is no urgent need to enforce the Mandate against Catholic groups before its legality can be adjudicated. In addition, given that the Mandate already contains exemptions that by some estimates are available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot possibly claim that it will be harmed by this Court granting a temporary exemption for Plaintiffs.

Indeed, any claim of harm is fatally undermined by the Government's acquiescence to preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, *Sharpe Holdings, Inc. v. HHS*, No. 2:12-cv-0092 (E.D. Mo. Mar. 11, 2013) (Doc. No. 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Doc. No. 9); *Hall v. Sebelius*,

No. 13-0295 (D. Minn. Apr. 2, 2013) (Doc. No. 10); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Doc. No. 18). As one court has already found, the Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087, at *41 (W.D. Pa. Apr. 19, 2013).

In short, when balanced against the irreparable injury to Plaintiffs if the Mandate is enforced, any harm the Government might claim from a temporary injunction is *de minimis*.

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. "The Court of Appeals for the Sixth Circuit has recognized that "'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Deja Vu*, 274 F.3d at 400 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). This same reasoning should also apply to the rights protected by RFRA, which is meant to give religious exercise even greater protection than that provided under the First Amendment. *Cf., e.g.*, *Kikumura*, 242 F.3d at 963. In particular, there is a "strong public interest in a citizen's free exercise of religion, a public interest clearly recognized by Congress when it enacted RFRA . . . ." *O Centro*, 389 F.3d 973, 1010 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006).

Here, public interest in a preliminary injunction is especially high because enforcement of the Mandate will threaten or diminish the continuation of Plaintiffs' charitable and educational activities, which serve thousands of needy individuals. If the Government goes ahead with the enforcement of the Mandate, Catholic Charities may be forced to shut down or restructure its operations, leaving a gap in the network of critical social services relied on by so many in their communities. By contrast, no public harm would come from simply preserving the *status quo*

pending further litigation. Even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization—a highly dubious assumption—these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

CONCLUSION

Applying the four factor test and balancing the equities involved, this Court should grant Plaintiffs' request for preliminary injunction. Plaintiffs have a strong likelihood of success on the merits; Plaintiffs are suffering and will continue to suffer irreparable injury without the injunction; there is no substantial harm to others, including Defendants, from the granting of a preliminary injuction; and the public interest will be furthered by granting the injunction. Plaintiffs respectfully request this Court to enter a preliminary injunction, exempting them from application of, enforcement of, and compliance with the Mandate, including exempting them from being forced to provide any self-certification to their third party administrators.

Respectfully submitted, this 20th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2013, I electronically filed the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction and Request for Oral Argument with the Clerk of the United States District Court for the Western District of Michigan using the CM/ECF system and mailed the foregoing by first class mail *via* the United States Postal Service to the following:

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