IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

GRACE SCHOOLS and BIOLA UNIVERSITY, INC. *Plaintiffs,* v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	)	Case No. 3:12-cv-459

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Grace Schools ("Grace") and Biola University ("Biola") seek preliminary injunction relief against a series of regulations (the "Mandate") that force them to violate their religious beliefs. The Government has finalized the Mandate and indicated that enforcement will begin on January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). The Mandate continues to require religious organizations, including the Schools, to provide, pay for, and/or facilitate access to abortion-inducing products, and related counseling, in a manner that is directly contrary to their religious beliefs.

BACKGROUND

The Government promulgated the Mandate pursuant to its authority to require employer health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the phrase "preventive care" to include all "FDA-approved contraception," the Mandate requires employer and student health plans to cover abortion-inducing products, contraception, sterilization, and related counseling.[1] Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. *See* 26 U.S.C.§ 4980D(b). Dropping their employee health plans altogether, moreover, subjects employers to substantial penalties of approximately $2,000 per employee. *Id*. § 4980H(a), (c)(1).

The Mandate contains an extremely narrow "religious employer" exemption that is limited to churches, their integrated auxiliaries, denominations, and religious orders. 78 Fed. Reg. at 39,874 (citing 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013)). The exemption does not protect the Schools. Defendants state that the exemption "does not undermine the governmental interests furthered by the contraceptive coverage requirement." *Id*. They explain that "[h]ouses

[1] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www hrsa.gov/ womensguidelines (last visited Sep. 5, 2013). The category of mandatory FDA-approved contraceptives includes the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce abortions.

of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." *Id*. The Schools "employ people of the same faith who share the same objection,"[2] yet they are denied the exemption.

The Final Rule continues to infringe on the Schools' free exercise of religion. The vaunted "accommodation" is nothing more than an accounting gimmick whereby, as before, the Schools' health insurance plans serve as the conduit by which "free" contraception is delivered to their employees and students. Eligible religious organizations (like the Schools) must provide a "self-certification" to their insurance issuer or (for self-insureds) to their third- party administrator, objecting to coverage for some or all FDA-approved contraceptives. That very self-certification, however, has the perverse effect of requiring the Schools' own insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for their employees and students. *See* 78 Fed. Reg. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The mandated "payments" last only as long as the employees remain on the Schools' health plans.[3] And for self-insured entities (like Grace), the "self-certification actually "*designat*[*es*] . . . the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). In short, under the original version of the Mandate and the Final Rule, the end result is the same: a nonexempt religious organization's decision to offer a group health plan results in the provision of "free" abortion-inducing products

[2] First Amended Complaint ¶¶ 28, 36-37, 56, 66-67.
[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 offering insured plans, the issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

and related counseling to its employees and students in a manner directly contrary to the Schools' religious beliefs.

Needless to say, this shell game does not address the Schools' fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Government, for the Schools and like-minded religious objectors repeatedly informed Defendants that the so-called "accommodation" (as set forth in the NPRM) would not relieve the burden on the Schools' religious beliefs.[4] Despite its representations that it was making a good-faith effort to address the religious objections of the Schools and like-minded organizations, the Government finalized the NPRM's proposal without any material change. Consequently, the Schools are coerced, through threats of crippling fines and other pressure, into acting directly contrary to their sincerely held religious beliefs.

ARGUMENT

Parties seeking preliminary injunctions must establish that they have "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Once these threshold requirements are met, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). The more the balance of the equities tips in the movant's favor, the lighter the burden of demonstrating that it will ultimately prevail. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

Here, assessment of the merits and the equities points unequivocally toward granting the injunction. Accordingly, this Court should preliminarily enjoin application of the Mandate to the Schools.

[4] *See* First Amended Complaint ¶132.

I. THE SCHOOLS ARE LIKELY TO SUCCEED ON THE MERITS.

Under the Religious Freedom Restoration Act ("RFRA"), the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). Here, the Mandate cannot possibly survive scrutiny under RFRA.[5]

A. The Mandate Substantially Burdens the Schools' Exercise of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires courts to (1) identify the particular exercise of religion at issue and then (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 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"); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (distinguishing between the exercise of religion and the burden on that religious exercise). Here, the Mandate imposes a substantial burden on the Schools' religious exercise by forcing them to do precisely what their religion forbids: facilitate access to abortion-inducing products and related counseling.

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

1. *"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). 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, the Court must accept the Schools' description of their beliefs and practices, regardless of whether the Court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15. "Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Id.* at 716.

In keeping with the deference owed to private claims of religious belief, 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)); *Grayson v. Schuler*, 666 F.3d 450, 453-54 (7th Cir. 2012). By screening claims for sincerity, and 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." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). The Supreme Court has thus 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 the Schools' refusal to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling is a protected exercise of religion under RFRA. *See Korte v. Sebelius*, 2012 WL 6757353, at *3 (7th Cir. 2012) (holding that for-profit company exercises religion when it excludes morally objectionable items from its employee health plan); *Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013) (same). They invoke RFRA to vindicate the principle that the Government may not force them to take actions that violate their religious conscience. In short, by requiring the Schools to serve as the conduit by which FDA-approved abortifacients are delivered to their employees and students, the Mandate is a clear-cut effort to "force[] them to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). And "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." *Hobby Lobby*, at *22 (footnote omitted).

2. *"Substantial burden"*

Once the Schools' refusal to facilitate access to FDA-approved abortifacients is identified as a protected religious exercise, 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 716–18. In *Yoder*, for example, the Court found that a substantial burden was imposed by a $5 penalty imposed on an Amish family for refusing to follow a compulsory secondary-education law. 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.

Here, refusal to comply with the Mandate will subject the Schools to potentially fatal fines of $100 per day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If the Schools cease providing employee health insurance altogether, they will be subject to an annual fine of $2,000 per full-time employee after the first thirty employees. *See* 26 U.S.C. § 4980H(a), (c)(1). Such costs and penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 fine that was found to be a substantial burden in *Yoder*. In the face of such pressure, the Tenth Circuit recently held that a *for-profit* organization challenging the Mandate was likely to succeed on the merits of its RFRA claim, emphasizing that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 2013 WL 3216103, at *21. The same is true here. *See also Korte* at *3-*4; *Grote* at 854-55.

It is no answer to claim that the Schools, unlike the *Hobby Lobby* plaintiffs, may be eligible for the Government's so-called accommodation, because that "accommodation" does nothing to resolve the conflict with Schools' religious beliefs. For purposes of this Court's analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious beliefs. *Hobby Lobby* at *19 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact remains that the accommodation compels the Schools, through their health insurance plans, to serve as the conduit through which objectionable products and services are provided to their employees and students, in violation of

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

B. The Mandate Does Not Further a Compelling Governmental 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 dragooning "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 House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *15 (D.D.C. Nov. 16, 2012) (same). This, it cannot begin to do.

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 citation omitted); *see also O Centro*, 546 U.S. at 433; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012). Here, the Government cannot claim an interest of the "highest order" because the Mandate already exempts millions of employees—through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply

to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103, at *23; *Newland*, 881 F. Supp. 2d at 1298; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 2012 WL 5817323, at *18.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" 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 at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9. *See also Korte* at *4 (enjoining Mandate under RFRA where government invoked only "generalized interest[s]" in public health and equality); *Grote*, 708 F.3d at 855 (enjoining Mandate where government failed to justify substantial burden on religious exercise by demonstrating compelling state interest).

C. The Mandate Is Not Narrowly Tailored.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[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 (internal quotation marks and citation omitted). The government, moreover, cannot meet its burden "unless it demonstrates 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) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal (internal quotation marks and citation omitted)).

Here, the Government has myriad ways to achieve its asserted interests without conscripting the Schools to violate their religious beliefs. The Schools in no way recommend these alternatives, and, indeed, might oppose many of them as a matter of policy. But the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide abortifacient services to the few individuals who do not receive them under their health plans; (ii) offer grants to entities that already provide abortifacient services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for abortifacient services; or (iv) grant tax credits or deductions to women who purchase abortifacient services.[6] In light of these alternatives, there is no possible justification for forcing the Schools to violate their religious beliefs. *See Grote*, 708 F.3d at 855 (government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means" of advancing its stated interests).

[6] *See, e.g., Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *18 n.16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013) ("[T]he Government has not established its means as necessarily being the least restrictive."); *Newland*, 881 F. Supp. 2d at 1299 (Mandate not narrowly tailored in light of "the existence of government programs similar to Plaintiffs' proposed alternative")

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

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal quotation marks and citation omitted). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale*, 2012 WL 5817323, at *18 (citing *O Centro Espirita Beneficente União do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418). Here, coercing the Schools to facilitate access to abortifacients in direct violation of their faith is the epitome of irreparable injury.

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

The Seventh Circuit has twice concluded that forcing a conscientious objector to comply with the Mandate would impose irreparable harm. In *Korte*, the court stated, "[w]ithout an injunction pending appeal, the Kortes will be forced to choose between violating their religious beliefs by maintaining insurance coverage for contraception and sterilization services contrary to the teachings of their faith and subject their company to substantial financial penalties," deeming this choice to inflict irreparable harm upon them. 2012 WL 6757353, at *4. *See also Grote*, 708 F.3d at 854.

III. A PRELIMINARY INJUNCTION WOULD IMPOSE NO HARM ON THE GOVERNMENT.

The Government cannot possibly establish that it would suffer any substantial harm from a preliminary injunction pending final resolution of this case. The Government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate immediately against the Schools before its legality can be adjudicated. In addition, given that courts have concluded that the Mandate already contains exemptions available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot plausibly claim that it will be harmed by a temporary delay in enforcement against the Schools.

Indeed, any claim of harm to the Government is fatally undermined by the fact that it consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036, (W.D. Mo. Feb. 28, 2013) (Dkt. # 9); Order, *Hall v. Sebelius*, No. 13-cv-00295, (D. Minn. Apr. 2, 2013) (Dkt. # 11). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases."

Geneva Coll. v. Sebelius, No. 2:12–cv–00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). Indeed, "[i]f the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith*, 2013 WL 3297498, at *18. In short, especially when balanced against the serious irreparable injury being inflicted on the Schools, any harm the Government might claim from a preliminary injunction is *de minimis*.

IV. A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST.

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010. Thus, the public interest favors protecting the Schools' religious liberty by enjoining enforcement of the Mandate until it is permanently struck down.

CONCLUSION

For the foregoing reasons, this Court should grant the Schools' motion for preliminary injunction.

Respectfully submitted this 6th day of September, 2013.

s/ Gregory S. Baylor

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2013 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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