IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROMAN CATHOLIC DIOCESE OF FORT WORTH; UNIVERSITY OF DALLAS; OUR LADY OF VICTORY CATHOLIC SCHOOL; CATHOLIC CHARITIES, DIOCESE OF FORT WORTH, INC.,	)	
Plaintiffs,	)	
v.	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor, JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,	)	**Civil Action No. 4:12-CV-314-Y**
Defendants.	)	**DEMAND FOR JURY TRIAL**

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFF UNIVERSITY OF DALLAS'S MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs submit this brief in support of Plaintiff University of Dallas's motion for preliminary injunction and Plaintiffs' motion for summary judgment on Counts I-VII of their Amended Complaint, alleging a violation of the Religious Freedom Restoration Act, the Religion and Free Speech Clauses of the First Amendment, and the Administrative Procedure Act.

INTRODUCTION

Plaintiffs are part of the Roman Catholic Church. As such, they believe that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government, however, has promulgated regulations that coerce Plaintiffs into violating this sincerely-held religious belief by requiring them, through their employer health-care plans, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling (the "Mandate"). The Mandate contains a narrow exemption for entities that meet the Government's definition of a "religious employer." But despite repeated pleas from the religious community, the exemption remains strictly limited to "houses of worship and religious orders." It thus excludes numerous Catholic organizations that fulfill the Church's religious mission through service to the poor, sick, and others in need.

More specifically, the Mandate divides religious institutions like the Catholic Church into two wings: a "religious" wing, which is limited to "houses of worship and religious orders," and a "charitable" wing, which, in the Government's view, provides *secular* services. According to the Government, only "houses of worship and religious orders" are a "religious employer." But this artificial division ignores the reality that many religious groups, including the Catholic Church, engage in charity as an *exercise of religion.* As Pope Emeritus Benedict XVI stated,

"[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Yet by excluding Catholic charitable organizations from the category of exempt "religious employers," the Mandate forces a substantial part of the Catholic Church to act contrary to its sincerely-held religious beliefs.

The Government claims that its recent revisions to the Mandate, which include an "accommodation," address the concerns of religious organizations. They most emphatically do not. Indeed, the Government knew these revisions would not resolve Plaintiffs' concerns, because even before the revisions were finalized, Catholic institution repeatedly informed the Government that the proposals were inadequate.[1] This iteration of the Mandate narrowly defines "religious employers" so as to exclude Catholic charitable and educational organizations.

The Final Rule's so-called "accommodation" for "non-religious employers," moreover, is illusory because it addresses fundamental religious objections through accounting gimmicks and legal fictions. As a result, Plaintiffs remain the vehicle by which the objectionable products and services are delivered to their employees.

Indeed, the Final Rule is significantly *worse* than the proposed rule because it eliminates an important prior protection that allowed "religious employers" like the Diocese to shield their affiliated religious organizations from operation of the Mandate by including such organizations in the insurance plan of the "religious employer." The Government's revisions, therefore, increase the number of religious organizations subject to the Mandate.

[1] *See e.g.,* Comments of U.S. Conference of Catholic Bishops at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.; Comments of Archdiocese of Washington at 2 (Apr. 4, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/04/Comments-4-4-13-Archdiocese-of-Washington.pdf.

This oppressive Mandate is irreconcilable with 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 unless it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). Here, however, the Government cannot possibly show that it has a compelling interest in forcing Plaintiffs to violate their sincerely-held religious beliefs, since the Government excludes tens of millions of individuals around the country from the operation of the Mandate through a series of exemptions. There is no compelling interest in forcing the Mandate on the remaining small band of employers that seek a similar exemption on the basis of religious hardship. In any event, the Mandate is not even arguably narrowly tailored to the Government's asserted interests because the Government could easily advance its goals without commandeering Plaintiffs as the vehicle for delivering the objectionable products and services to their employees and students.

Second, the Mandate violates the First Amendment's Free Speech and Religion Clauses. It infringes on Plaintiffs' freedom of speech by requiring them to facilitate "counseling" for abortion, contraception, and sterilization—all of which Plaintiffs strongly oppose. It violates the Free Exercise Clause by deliberately targeting Plaintiffs' religious practices, offering a multitude of exemptions for *non-religious* reasons, but denying any exemption that would relieve Plaintiffs' *religious* hardship. It violates the Establishment Clause by creating a state-favored category of "religious employers," preferring some religious groups to others based on intrusive judgments about their practices, beliefs, and organizational structures. And it violates the First Amendment's protection of church autonomy, driving a wedge between the charitable and educational arms of the Church through its definition of "religious employer."

Finally, the Mandate violates the APA, because it contravenes the clear terms of at least two federal statutes. Under the Weldon Amendment, federal agencies may not impose penalties on employers for refusing to include abortion coverage in their health-care plan. And yet the Mandate does exactly that by penalizing Plaintiffs for failing to provide coverage for abortion-inducing products. Similarly, the Affordable Care Act states that none of its provisions may be implemented in a way that prohibits a college or university from offering a student health plan. The Mandate does so by making objectionable coverage a mandatory component of all insurance plans, thereby effectively prohibiting Catholic schools from offering insurance to their students.

In sum, there is no legal justification for the Government's gratuitous intrusion on Plaintiffs' religious freedom. Based on the undisputed facts and the legal authorities cited below, Plaintiffs are entitled to summary judgment on all their claims.

Moreover, Plaintiff University of Dallas urgently needs injunctive relief now, because its plan year begins January 1, 2014, when it will first be subject to the Mandate (the remaining Plaintiffs need clarity soon as well, but their first plan years subject to the Mandate will begin in the summer, providing the Court more time to consider their summary judgment if needed). Without the injunction, the University of Dallas will be forced to decide between violating its religious beliefs and violating the law—the epitome of irreparable harm. By contrast, a preliminary injunction will impose no substantial harm on the Government, which has refrained from mandating contraceptive coverage for more than two centuries. Accordingly, Plaintiff University of Dallas respectfully requests a preliminary injunction to preserve the status quo while this Court adjudicates this vital question of religious liberty.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119

(2010) (the "Affordable Care Act") requires employer "group health plans" to include insurance coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). Congress did not define "preventive care," instead delegating that duty to a division of the Department of Health and Human Services ("HHS"). *See id.* § 300gg-13(a)(4). HHS, in turn, delegated the task to the Institute of Medicine ("IOM"), which recommended that "preventive care" for women be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for [all] women with reproductive capacity." IOM, Clinical Preventive Services for Women: Closing the Gaps 164–65 (2011). HHS subsequently adopted that definition. *See* HHS, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines. Included in the category of mandatory FDA-approved contraceptives are products such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or ella), which can induce an abortion.

Consequently, under the definition of "preventive care," the Mandate requires health plans to cover abortion-inducing products, contraception, sterilization, and related counseling. Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping coverage altogether subjects certain employers to annual penalties of $2,000 per employee and/or other negative consequences. *Id.* § 4980H.

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the Act's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Moreover, the Act "specifically exempts all firms that have fewer than 50 employees—96 percent of all firms in the United States or 5.8 million out of 6 million total firms—from any employer responsibility requirements [one of the mechanisms to enforce the

Mandate]. These 5.8 million firms employ nearly 34 million workers."[2] *See* 26 U.S.C. § 4980H(a) (exempting small employers from penalties for failure to provide health coverage). By one estimate, the Government has exempted "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

The Government, however, has steadfastly refused to allow a similar exemption for religious organizations, save for a small number of organizations that qualify under the Mandate's unprecedentedly narrow definition of "religious employer." Originally, the "religious employer" exemption was available only to organizations that met all of the following four criteria: "(1) The inculcation of religious values is the purpose of the organization"; "(2) The organization primarily employs persons who share the religious tenets of the organization"; "(3) The organization serves primarily persons who share the religious tenets of the organization"; and "(4) The organization is a nonprofit organization 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." 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011). As the Government explained, this was intended "to provide for a religious accommodation that respects" only "the unique relationship between a house of worship and its employees in ministerial positions." *See id.* at 46,623.

The narrowness of the exemption set off a firestorm of intense criticism from religious groups that were suddenly faced with the choice of violating their religious beliefs or else disobeying the Mandate and incurring serious penalties. But despite the public outcry, the Government refused to reconsider its position and finalized the narrow religious exemption "without change." 77 Fed. Reg. 8,725, 8,727–28, 8,730 (Feb. 15, 2012). At the same time, the Government announced that it would offer "a one-year safe harbor from enforcement" for non-

[2] WhiteHouse.gov, The Affordable Care Act Increases Choice and Saving Money for Small Business at 1, http://www.whitehouse.gov/files/documents/health_reform_for_small_ businesses.pdf (last visited Aug. 29, 2013).

exempt religious organizations until August 1, 2013. *Id*. at 8728. As noted by Cardinal Timothy Dolan, the "safe harbor" effectively gave religious groups "a year to figure out how to violate [their] consciences."

Five weeks later, however, under continuing public pressure, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM"). The ANPRM did not revoke the Mandate, but rather set forth "possible approaches" the Government believed would be adequate to "accommodate" the persistent flow of religious objections. 77 Fed. Reg. 16,501, 16,507 (Mar. 21, 2012). After careful examination, Catholic and other religious groups explained that the "possible approaches" in the ANPRM would not relieve the burden on their religious freedom.[3]

Nevertheless, the Government issued a Notice of Proposed Rulemaking ("NPRM"), adopting the ANPRM's proposals. 78 Fed. Reg. 8456 (Feb. 6, 2013). The NPRM once again encountered strenuous opposition, including over 400,000 comments largely reiterating the previous objections.[4] Despite this opposition, the Government issued a final rule that adopts substantially all of the NPRM's proposals without significant change and applies to plan years beginning on and after January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013) ("Final Rule").

The Final Rule made three changes to the Mandate, none of which relieve the unlawful burdens imposed on Plaintiffs and other religious organizations. Indeed, one of them appears to significantly increase the number of religious organizations subject to the Mandate.

First, the Final Rule made what the Government concedes to be a non-substantive, cosmetic change to the "religious employer" exemption. In particular, it eliminated the first

[3] *See, e.g.,* Comments of U.S. Conference of Catholic Bishops at 3 (May 15, 2012) ("[The ANPRM] create[s] an appearance of moderation and compromise, [but fails to] offer any change in the Administration's earlier stated positions on mandated contraceptive coverage"), *available at* www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

[4] *See, e.g.,* Comments of U.S. Conference of Catholic Bishops, *supra* note 1, at 3 (pointing out that "the 'accommodation' still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage").

three prongs of the prior test to define a "religious employer" as simply "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)). As the Government admitted, this new definition does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. at 8,461. Instead, it continues to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* Religious organizations that have a broader mission are still not, in the Government's view, "religious employers."

Second, the Final Rule appears to increase the burden imposed on religious organizations by significantly expanding the number of religious organizations subject to the Mandate. The Government's initial interpretation of the "religious employer" exemption allowed non-exempt organizations to benefit from the exemption of affiliated religious entities. The Government had stated that if a nonexempt religious organization "provided health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, 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. For example, the Diocese offers a health plan that covers not only itself, but also Plaintiff OLV. Under the Government's initial interpretation of the religious employer exemption, if the Diocese was an exempt "religious employer" (as it clearly is under the Final Rule), then OLV would have received the benefit of that exemption.

The Final Rule, however, eliminates this safeguard, providing instead that "each employer [must] independently meet the definition of religious employer . . . to avail itself of the

exemption." 78 Fed. Reg. at 39,886. Moreover, since OLV is part of the Diocese's insurance plan, the Diocese is now required to either (1) sponsor a plan that will provide the employees of OLV with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to OLV, subjecting OLV to fines and other negative consequences if does not contract with another insurance provider that will provide the objectionable coverage. The first option forces the Diocese to act contrary to its sincerely-held religious beliefs. The second option compels the Diocese to submit to the government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

Third, the Final Rule establishes an illusory "accommodation" for certain nonexempt objecting religious entities deemed "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 nonprofit entity"; (3) "hold[] itself out as a religious organization," and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If an organization meets these criteria, it must provide the required "self-certification" to its insurance issuer or (if the organization self-insures) to its third-party administrator. That very self-certification, however, has the effect of requiring the insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,892–93 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The health insurance issuer or third-party administrator must notify the eligible organization's employees of the availability of these "payments" "contemporaneous with . . . but separate from" materials the eligible organization distributes in connection with its

health plan. 78 Fed. Reg. at 39,876. They must also provide the mandated payments "in a manner consistent" with provision of covered health benefits. *Id.* at 39,876–77.

Notably, third-party administrators are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880, so the burden falls on the objecting organization to find and identify a third-party administrator who is willing to provide the very coverage they find objectionable. Eligible organizations 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.

This so-called "accommodation" fails to resolve Plaintiffs' religious objections. Under the original version of the Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan *still* results in the provision of coverage—now in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related counseling should they self-certify. 26 C.F.R. § 54.9816-2713A(b)-(c). In both scenarios, Plaintiffs' actions trigger the provision of "free" contraceptive coverage to their employees in a manner contrary to their beliefs. The provision of the objectionable products and services are directly tied to Plaintiffs' insurance policies, as the objectionable "payments" are available only "so long as [employees] are enrolled in [the organization's] health plan." *See* 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.131(c)(2)(i)(B). For self-insured organizations, moreover, 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 (emphasis added).

Needless to say, this shell game does not address Plaintiffs' fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Government. As noted above, well before it finalized the revised Mandate, the Government was repeatedly informed that its so-called "accommodation" would not relieve the burden on Plaintiffs' religious beliefs. *See supra* note 1. Nonetheless, despite its representations to this and other courts that it was making a good-faith effort to address the religious objections of Plaintiffs and likeminded organizations, *see, e.g.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012), the Government proceeded to finalize a proposal that it knew would do no such thing. As before, the Government's unlawful Mandate coerces Plaintiffs, through threats of crippling fines and other pressure, into serving as the conduit for delivering contraception, abortion-inducing products, sterilization, and related counseling to their employees, contrary to their sincerely held religious beliefs.

II. BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe they have a religious duty to provide educational, spiritual, and charitable services to individuals of all faiths. Plaintiffs exercise this religious belief by offering a host of charitable and educational services to individuals, including the most poor and vulnerable in society. (Am. Compl. ¶¶ 2- 3, 33–96.)

Just as sincerely, Plaintiffs believe that life begins at the moment of conception, and that certain "preventive" services that interfere with the transmission of life are immoral.[5] (*Id.* ¶¶ 4, 244-46.) Accordingly, Plaintiffs believe they may not provide, pay for, and/or facilitate access to

[5] *See* Keefe Decl. ¶¶ 15 at Appx. 6; Berg Decl. ¶¶ 14 at Appx. 13; Merdian Decl. ¶¶ 12 at Appx. 20; Goosens Decl. ¶¶ 13 at Appx. 26.

contraception, sterilization, abortion, or related counseling in the manner required by the Mandate.[6]

Plaintiffs have exercised this religious belief by excluding coverage for such services from their health plans in a manner consistent with Catholic teaching.[7] The Diocese offers its employees' health plan through Christian Brothers Employee Benefit Trust, a self-funded church plan that serves Catholic employers and specifically states its intent to work "within the framework of the tenets of the Catholic Church."[8] To that end, the Diocese's plan does not cover abortion or sterilization, nor does it cover contraceptives except when prescribed to treat a medical illness and approved by the Christian Brothers Employee Benefit Trust.[9] OLV employees are offered health insurance through the Diocese's health plan as well.[10] The University offers a partially self-insured benefits plan through a healthcare consortium called CARES, which places the University's premiums in a pool designated for reimbursement of University employees' claims.[11] Under this plan, the University pays for its employees' claims, including all claims for covered preventative services, subject to an individual stop-loss limit.[12] The plan year for the University's employee health plan begins on January 1.[13] The University also provides several health plans to its students, offering a health plan for domestic students through Aetna, a health plan for international students through Starr Indemnity & Liability Co.,

[6] Keefe Decl. ¶¶ 15, 26-29 at Appx. 6, 8-9; Berg Decl. ¶¶ 14, 26-28 at Appx. 13,16-17; Merdian Decl. ¶¶ 12, 17-20 at Appx. 20-22; Goosens Decl. ¶¶ 13, 15-17 at Appx. 26-27.

[7] Keefe Decl. ¶ 9 at Appx. 5; Berg Decl. ¶ 16 at Appx. 14; Goosens Decl. ¶ 10 at Appx. 26.

[8] Berg Decl. ¶ 16 at Appx. 14.

[9] *Id.*

[10] Merdian Decl. ¶ 11 at Appx. 20.

[11] Keefe Decl. ¶ 13 at Appx. 5.

[12] *Id.*

[13] *Id.* ¶ at Appx. 6.

and a health plan for domestic students studying abroad in the University's Rome campus through STA Travel/ISIC Basic Travel Insurance Plan.[14] All of these University plans for employees and students exclude coverage for abortion-inducing products or sterilization, and cover products commonly used as contraceptives only when prescribed to treat a medical condition, not to prevent pregnancy or induce abortion.[15] Catholic Charities also offers a plan that excludes abortion, contraceptives, and sterilization, offering a health insurance plan through CIGNA.[16]

Although the Diocese is the only "religious employer" under the Mandate, the remaining Plaintiffs consider themselves "religious employers" in the plain sense meaning of that phrase because they too comprise the Roman Catholic Church. The University and OLV conduct vital educational ministries on behalf of the Church, while Catholic Charities is the social justice arm of the Church.[17] Defendants' distinction between the Diocese and the remaining Plaintiffs is thus artificial and at odds with the Church's internal organization. For example, OLV is closely associated with the Diocese, belonging to the Diocese's Schools Department and following diocesan curriculum guidelines and incorporating Diocesan policies and procedures.[18] Indeed, the State of Texas recognizes OLV's accreditation as a private Catholic school through the Texas Catholic Conference's Education Department, which is part of a state-approved private school accrediting body acting under agreement with the Texas Commissioner of Education.[19] Yet Defendants seek to separate OLV from the Diocese, finding OLV insufficiently religious (under

[14] *Id.* ¶ 21 at Appx. 7.

[15] *Id.* ¶ 16, 22 at Appx. 6,7

[16] Goosens Decl. ¶ 10 at Appx. 26.

[17] Keefe Decl. ¶¶ 5, 8, 35-37 at Appx. 4,10; Merdian Decl. ¶¶ 6,7 24-25 at Appx. 19, 22; Goosens Decl. ¶¶ 4-5, 22-24 at Appx. 25, 28-29.

[18] Merdian Decl. ¶ 7 at Appx. 19.

[19] *Id.*

the government's flawed definition of that term) to merit the same exemption afforded to the Diocese.

All Plaintiffs are harmed by the Mandate, which severely burdens Plaintiffs' exercise of religion.[20] Plaintiffs believe that abortion, sterilization, and contraception are immoral and that they are prohibited from paying for, providing, or facilitating those products and services.[21] Yet the Mandate requires employer health plans, and thus Plaintiffs as employers and providers of health insurance, to cover such services or facilitate coverage for such services. *See* 45 C.F.R. § 147.130(a)(1)(iv). And if Plaintiffs, because of their religious beliefs, refuse to adhere to the Mandate, they are subjected to substantial fines. *See* 26 U.S.C. §§ 4980D(b), 4980H(a), (c)(1).

ARGUMENT

Summary judgment is proper where the pleadings and evidence show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the summary judgment movant demonstrates the absence of a genuine dispute over any material fact, the burden shifts to the non-movant to show there is a genuine factual issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 n.3 (1986).

To obtain a preliminary injunction, a plaintiff must establish: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (quotation marks omitted).

[20] Keefe Decl. ¶¶ 17-37 at Appx. 6-10; Berg Decl. ¶¶ 20-31 at Appx. 15-17; Merdian Decl. ¶¶ 13-25 at Appx. 20-22; Goosens Decl. ¶¶ 15-24 at Appx. 27-29.

[21] Keefe Decl. ¶¶ 26-27 at Appx. 8; Berg Decl. ¶¶ 14-15 at Appx. 13-14; Merdian Decl. ¶¶ 12 at Appx. 20; Goosens Decl. ¶¶ 13, 17 at Appx. 26-27.

Here, a preliminary injunction is warranted because Plaintiff University of Dallas meets all four factors for interim relief.

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AND PLAINTIFF UNIVERSITY OF DALLAS IS LIKELY TO SUCCEED ON THE MERITS

The undisputed facts establish that Plaintiffs are entitled to a summary judgment in their favor on all their claims. The undisputed facts show that the Mandate: (1) violates RFRA by substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Am. Compl. Count I, ¶¶ 180-194); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Am. Compl. Count II, ¶¶ 195-211); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Am. Compl. Count III, ¶¶ 212-26); (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; (Am. Compl. Count IV, ¶¶ 227-231); (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 (Am. Compl. Count V, ¶¶ 232-39); (6) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church governance (Am. Compl. Count VI, ¶¶ 240-255); and (7) violates the APA by disregarding statutory prohibitions on compelled support for abortion (Am. Compl. Count VII, ¶¶ 256-269).

These are also the same reasons that Plaintiff University of Dallas, as part of its required showing for its preliminary injunction, is substantially likely to succeed on the merits. In fact,

courts have issued preliminary injunctions against the Mandate in the majority of cases brought by *for-profit* companies with religious owners.[22] If anything, a preliminary injunction is even more appropriate in this case involving *non-profit* entities.

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's legislative history confirms that it was enacted to prevent the type of regulation codified in the Mandate. Congress passed RFRA "to restore [and codify] the compelling interest

[22] Courts in at least twenty cases have afforded preliminary relief to for-profit plaintiffs challenging the Mandate. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holdings Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 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. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. #9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. 50); *Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92, 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).

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.

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." *Id.* 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.*, *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute); *see also 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"). 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, contraception, sterilization, and related counseling.

(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). The protected category of 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' description 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 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. It is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Instead, 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)). 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. 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, contraception, sterilization, or related counseling, including by contracting with an insurance company or third party administrator that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees.[23] 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.[24] 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 products and services from the Government or anywhere else.

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[23] *See* Keefe Decl. ¶¶ 15, 26-29 at Appx. 6, 8-9; Berg Decl. ¶¶ 14-15, 26-28 at Appx. 13-14,16-17; Merdian Decl. ¶¶ 12, 17-20 at Appx. 20-22; Goosens Decl. ¶¶ 13, 15-17 at Appx. 26-27.

[24] *See, e.g.,* Comments of U.S. Conference of Catholic Bishops, *supra* note 1, at 3.

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. And despite the Final Rule's oft-repeated declaration that Plaintiffs will not be required to "contract, arrange, pay, or refer for [contraceptive] coverage," see, e.g., 78 Fed. Reg. at 39,872, there can be no doubt the Mandate requires Plaintiffs to act to facilitate provision of these services.[25]

Among other things, Plaintiffs must locate and identify a third party willing to provide the very services they deem objectionable, and they must then enter into a contract with that party that will result in the provision or procurement of those services "for free."[26] Should they choose to certify their objection to the mandated coverage, that action inexorably leads to provision of the very coverage to which they object, and in the case of self-insured entities, legally "designat[es]" the third party administrator as the agent responsible for providing contraceptive benefits on Plaintiffs' behalf. 78 Fed. Reg. at 39,879. In other words, the Government has effectively made "no" mean "yes," transforming the very act of objecting to the mandated coverage into the authorization to provide such coverage.

This, of course, is to say nothing of the fact that Plaintiffs' employees would receive access to the mandated payments only by virtue of their participation in the health plan Plaintiffs choose to offer, 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B) (indicating that payments are available only "so long as" Plaintiffs' employees remain on Plaintiffs' insurance plan"), and that Plaintiffs' insurance issuer or third party administrator would only know who was entitled to receive contraceptive "payments" because Plaintiffs gave them a list of their benefits-eligible employees, cf. 78 Fed. Reg. at 39,876 (indicating that notice of the availability

[25] *See* Keefe Decl. ¶¶ 26 at Appx. 8; Berg Decl. ¶¶ 19-28 at Appx. 14-17; Merdian Decl. ¶¶ 17 at Appx. 21; Goosens Decl. ¶¶ 15 at Appx. 27.

[26] *Id.*

of "payments" must be made "contemporaneous with . . . but separate from" any application or other materials Plaintiffs distribute in connection with their health plans).[27] Accordingly, to claim after all this that Plaintiffs are not forced to "contract" or "arrange" for contraceptive coverage is the proverbial "argument only a lawyer could love."

In any case, what matters for purposes of RFRA is that Plaintiffs sincerely believe that such actions violate their religious beliefs. By forcing Plaintiffs to take such actions, the Mandate is a straightforward effort to "force [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).[28]

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception 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 717-18; *Kaemmerling*, 553 F.3d at 678 (same). In *Yoder*, for example, the

[27] *Id.*

[28] Because Plaintiffs object to taking actions required by the Mandate that facilitate access the objectionable products and services, it is irrelevant whether the Mandate also forces them to directly subsidize these products and services. *See, e.g.*, 26 C.F.R. § 54.9816-2713A(c)(2)(ii);78 Fed. Reg. at 8463. But in any event, Plaintiffs will almost certainly be required to subsidize the objectionable products and services, thereby exacerbating the violation of their religious beliefs. The Government asserts that the "accommodation" will be "cost neutral" because the cost to the insurance company of providing "free" products and services 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 8463. But even if true, the fact remains that the premiums previously going toward childbirths will now be used to provide the objectionable products and services necessary to obtain that reduction in childbirths. See Affidavit of Prof. Scott E. Harrington at 5–6, Ex. 1 to Comments of the Diocese of Pittsburgh (Apr. 8, 2013 ("The premiums paid by eligible religious organizations to issuers . . . remain the source of funding for separately provided individual coverage to employees."), *available* at http://www.becketfund.org/wp-content/uploads/2013/04/Diocese-of-Pittsburgh-4-8-13.pdf. In any event, the Government's cost-neutrality assumption is implausible, since 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 8463, 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. The Government, however, has adduced no evidence in support of those implausible assumptions. *See id.* at 4 (demonstrating why the assumptions are likely incorrect).

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 imposes enough pressure on Plaintiffs to constitute a "substantial burden." If Plaintiffs refuse to facilitate the objectionable products and services through their health plans, they will be subject to fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). And if Plaintiffs seek to exit the insurance market altogether, they could be subject to annual fines of $2,000 per full-time employee after the first thirty employees, see id. § 4980H(a), (c)(1), and/or significant competitive disadvantages in the ability to retain and recruit employees, *cf. Geneva Coll. v. Sebelius,* No. 2:12-CV-00207, 2013 WL 3071481, at *9–10 (W.D. Pa. June 18, 2013) (forcing plaintiff to drop a student health plan is a substantial burden). For the University of Dallas's student health plans, the University must facilitate access to the mandated products and services or forego providing student health insurance altogether, inhibiting its ability to recruit and retain students. *See* 45 C.F.R. § 147.131(f). 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 substantial pressure on Plaintiffs to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling, which their religion

forbids.[29]

In the face of such coercion, numerous courts, including the D.C. Circuit, have awarded preliminary relief to for-profit companies challenging the Mandate. *See, e.g., Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24) (granting an injunction pending appeal). The Seventh Circuit, for example, granted injunctions pending appeal in two cases challenging the Mandate because those plaintiffs had demonstrated a likelihood of success on their RFRA claim. In *Korte v. Sebelius*, the court ruled that plaintiffs "would have to violate their religious beliefs to operate their company in compliance with [the Mandate]." 2012 WL 6757353, at *3. In light of the penalties for non-compliance, the court held that plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4. In a companion case, the court found the Mandate posed an even greater threat to the Catholic employers' religious liberties because there the plaintiffs operated a self-insured health plan. *See Grote*, 708 F.3d at 854.[30] The Tenth Circuit, sitting en banc, likewise recently held that a for-profit religious organization was likely to succeed on the merits of a RFRA claim. The court emphasized 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. The same is true here.

It is no answer to claim that some of the Plaintiffs, unlike the *Hobby Lobby* litigants and other for-profit corporations, may be eligible for the Government's so-called "accommodation."

[29] Keefe Decl. ¶¶ 31-34 at Appx. 9-10; Berg ¶¶ 25-31 at Appx. 16-17; Merdian Decl. ¶¶ 20-22 at Appx. 22; Goosens Decl. ¶¶ 18-20 at Appx. 28.

[30] *See also Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (injunction pending appeal); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same).

For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious beliefs. Id. 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."). As described above, there can be no question that, notwithstanding the "accommodation," Plaintiffs are coerced into taking actions that violate their sincerely held religious beliefs. *See supra* Part I.A.1(i). These sincere religious beliefs are entitled to no less protection from Government coercion than the similar religious beliefs at issue in *Hobby Lobby*, *Gilardi*, *Korte,* and *Grote*.

Defendants might argue, as they have argued in other cases involving Catholic non-exempt entities, that the accommodation requires "virtually nothing" of Catholic non-exempt entities, and thus Plaintiffs' involvement in providing contraceptives under the Mandate is "*de minimis*" and too attenuated to merit relief. Defendants argue that it is no great imposition on Plaintiffs to require them to fill out forms certifying their objections and requiring Plaintiffs to select and cooperate with insurers and third-party administrators who will in turn provide the objectionable insurance coverage. In Defendants' view, coercing the Plaintiffs to take these actions is not a substantial burden because the compelled actions can be quickly and easily performed, and are administrative in nature. But this argument rests on a flawed understanding of substantial burden.

RFRA protects "*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) (emphasis added). RFRA contains no requirement that the actions required of plaintiffs be "significant" or "substantial." The word "substantial" appears in RFRA, but not in connection with the type of *actions* required of plaintiffs, but rather the type of pressure—*i.e.*, the burden—imposed by the

government. The statute states that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The word "substantial[]" modifies "burden"; it requires the court to assess how strongly the government is pressuring an individual to violate his sincerely held religious beliefs, not the nature of plaintiffs' religious exercise. *See Hobby Lobby*, 723 F.3d at 1137 (deeming "an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than *the intensity of the coercion* applied by the government to act contrary to those beliefs" to be "fundamentally flawed").

Thus, when called upon to decide whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercive mechanism employed by the government, rather than the "significance" of plaintiffs' actions. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether any inconvenience to the plaintiff—a Seventh-Day Adventist whose religion forbade work on Saturday—stemming from showing up for work on Saturday would be "*de minimis*." Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits effectively coerced her to abandon that religious exercise. *See Sherbert*, 374 U.S. at 404. In doing so, the Court ultimately concluded that the "pressure upon her to forgo [her] practice" was tantamount to "a fine imposed against [her] for her Saturday worship." *Id*.

Likewise, in *Thomas*, the Court did not ask whether the plaintiff's transfer from a factory making sheet steel to a factory producing turrets for military tanks required him to change his behavior. Rather, the Court held that the State's refusal to award Thomas unemployment

benefits when his pacifist convictions prevented him from accepting the transfer "put[] substantial pressure" on him "to violate his beliefs." *Thomas*, 450 U.S. at 718.

Despite this guidance from the Supreme Court and RFRA itself, defendants misinterpret the statute to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on plaintiffs' exercise of religion. It is, however, "not within the judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989). Indeed, to assign such a role to the judiciary would be to ignore the Supreme Court's repeated warning that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp't Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872,887 (1990). Whether an action constitutes a protected exercise of religion does "not . . . turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it] is unreasonable." *Id.* at 715.

The impropriety of courts determining whether actions are "significant" or "meaningful" enough to constitute an exercise of religion is self-evident. On the government's theory, a court could conclude that a Quaker could be compelled to swear to, rather than affirm, the veracity of his testimony on the theory that a change in verbiage is a "*de mimimis*" act. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action requires virtually nothing of him. And a Native American father could be forced to take the "purely administrative" step of submitting his daughter's social security number to the government in order for her to receive benefits. Indeed, defendants could simply require Plaintiffs to sign a single piece of paper renouncing their views on contraception upon pain of punishment—as, in

effect, they seek to do—as doing so would require little effort by plaintiffs. No "principle of law or logic" equips a court to decide the "significance" or "meaning[]" of these acts, *Smith*, 494 U.S. at 887; what may be "no big deal" to a court may be a very big deal to a believer.

At bottom, the government mischaracterizes plaintiffs' religious objection. Plaintiffs object not only to using contraceptives, but also to taking actions which facilitate their use in a morally significant way. This concept of responsibility for, and complicity in, an act committed by another is not unique to the Catholic faith. Indeed, it is the basis for the federal statute criminalizing acts that "aid" or "abet" the commission of a crime. 18 U.S.C. § 2 (2013). As Judge Gorsuch explained in *Hobby Lobby*,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

723 F.3d at 1152 (Gorsuch, J., concurring). Plaintiffs "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. That line is indisputably theirs to draw, and it is not for the Court or the government to question. *Id.* By placing substantial pressure on plaintiffs to cross this line, the government has substantially burdened plaintiffs' exercise of religion.

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.

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); *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 "tens of millions of people" from the Mandate through various exemptions. *Hobby Lobby*, 723 F.3d at 1143. For example, the Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "if you like your plan, you can keep it."[31] An interest is hardly compelling if it can be trumped by political expediency. Such broad exemptions "completely undermine[] any compelling interest in applying the preventive care coverage mandate." *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*, 904 F. Supp. 2d at 123.

The Mandate's narrow "religious employer" exemption further undermines the

[31] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/ 06/20100614e.html.

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.* Likewise, "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.

Likewise, the Government's recent announcement of a one-year delay in the enforcement of 26 U.S.C. § 4980H[32]—which imposes annual fines of $2,000 per employee on certain large employers for failure to provide group health insurance—confirms that the interests at stake are not compelling. The Congressional Budget Office ("CBO") estimates that because of this delay, "roughly 1 million fewer people are expected to be enrolled in employment-based coverage in 2014." The CBO further reports that "roughly half [of those individuals] will be uninsured," while "the others will obtain coverage through the exchanges" or other government programs.[33]

[32] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, Treasury Notes (July 2, 2013), http://go.usa.gov/jKeH.

[33] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Representative Paul Ryan, Chairman, Committee on the Budget at 4 (July 30, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/files/2013/07/EmployerPenalties-RyanLtr.pdf

The fact that the Government was willing to delay enforcement of these penalties, even though it knew such action would result in hundreds of thousands of additional women losing access to the mandated coverage in 2014, demonstrates yet again that it is not pursuing interests "of the highest order."[34]

The Government's interest also cannot be compelling where the Government has failed to "identify an actual problem in need of solving," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks and citation omitted). By the Government's own admission, at best, the Mandate would "[f]ill[]" only a "modest gap" in contraceptive coverage. *Id.* at 2741. Indeed, 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); Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs. gov/news/ press/2012pres/01/20120120a.html. Any interest in closing that "modest gap" cannot be compelling, as the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

Finally, even if there were "an actual problem," the Government cannot show that applying the Mandate to Plaintiffs is "actually necessary to the solution." *Id.* at 2738. The Government claims that increased access to contraception will increase contraceptive use, but the Government cannot rely on its "predictive judgment" and "ambiguous proof will not suffice." *Id.* at 2738–39. In fact, recent scholarship indicates that a modest increase in *coverage* for contraception is unlikely to have any significant impact on effective contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or

[34] This delay also means that hundreds of thousands of additional women will receive health coverage through the exchanges, rather than from their employers, showing that the Mandate can be achieved through means other than coercing the employer. *See infra* Part I.A.3.

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. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013). In such circumstances, the Government cannot claim to have identified a compelling interest, much less that its proposed solution will further that compelling interest in any meaningful way.

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, "[i]f 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)).

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. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

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 practioners 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, 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." 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." *Id.* at 537-38.

In addition, the Mandate is not "neutral" because it targets 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." (Am. Compl. ¶ 162). Thus, the Government went out of its way to impose an unnecessary burden on Plaintiffs' religious practices. Not only the "real operation," but also the

intended effect, of the Mandate has always been 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 speech and association, but the effect of these violations is to deny Plaintiffs their ability to engage in religious schooling, health care, and charity, 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 (2013) (quoting *Rumsfeld v. Forum for Academic and 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*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (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, contraception, and sterilization 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 they routinely counsel 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.

Second, to qualify for the so-called "accommodation," the Mandate requires Plaintiffs to provide a "certification" stating their objection to the provision of abortion-inducing products, contraception, sterilization, and related counseling. This "certification" in turn triggers an obligation on the part of Plaintiffs' third party administrator (or their insurance provider, if they do not self-insure) to provide or procure the objectionable products and services for Plaintiffs' employees. Plaintiffs object to this certification requirement both because it compels them to engage in speech that triggers provision of the objectionable products and services, and because it deprives them of the freedom to speak on the issue 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, 472 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, 271 (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 prevent the government from restraining public discussions. *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 CFR § 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. 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). 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. 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 Plaintiffs University of Dallas, Catholic Charities, and Our Lady of Victory, which express their faith by providing education and other various services to the community.

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)).

Not only do these factors favor some religious groups over others, but they discriminate 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.[35] In particular, the religious employer definition treats the Catholic Church as having two wings—a religious one and a charitable one—and treats only the former as a religious employer, when, in fact, the Church's religious and charitable arms are one and the same.[36] Thus, by refusing to recognize the Church's charitable 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. Such an arrangement is currently in place in Fort Worth, where the Diocese makes its health plan available to the employees of Our Lady of Victory.[37] By serving as the insurance provider for Our Lady of Victory, the Diocese can directly ensure that Our Lady of Victory offers its employees a health plan that is in all ways consistent with Catholic beliefs.[38] The Mandate

[35] Keefe Decl. ¶ 35-37 at Appx. 10; Berg Decl. ¶ 22-24 at Appx. 15; Merdian Decl. ¶ 24-25 at Appx. 22; Goosens Decl. ¶¶ 21-24 at Appx. 28-29.

[36] *Id.*

[37] Berg Decl. ¶¶ 19, 24-25 at Appx. 14-16; Merdian Decl. ¶¶ 11, 25 at Appx. 20, 22.

[38] Berg Decl. ¶¶ 24 at Appx. 15.

disrupts this internal arrangement by forcing the Diocese to either sponsor a plan that will provide the employees of Our Lady of Victory with access to "free" abortion-inducing products, contraception, sterilization, and related counseling; or expel Our Lady of Victory from the Diocese's plan, thereby forcing Our Lady of Victory to enter into a different contract for the objectionable coverage.[39] Either way, the Mandate directly undermines the Diocese's ability to ensure that its 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). The Mandate is "not in accordance with law" in at least two respects.

First, 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). Although the government would like to narrowly read the Weldon Amendment as applying only to hospitals and physicians, the definition of "health care entity" clearly includes "a health insurance plan or

[39] Berg Decl. ¶¶ 25 at Appx. 16.

any other kind of . . . plan." 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]."

Second, the Act states that "[n]othing in this title (or an amendment made by this title) shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan . . . ." 42 U.S.C. § 18118(c). This prohibits any law that has the effect of preventing an institution of higher education from offering a student health plan. *See* Student Health Insurance Coverage, 76 Fed. Reg. 7,767, 7,769 (Feb. 11, 2011). The requirement that student health plans include or facilitate coverage for abortion-inducing products, sterilization, contraception, and related counseling has the effect of prohibiting the University of Dallas from offering a student health-insurance plan in the future because any such plan would have to include coverage to which the University objects based on its sincerely-held religious beliefs.[40]

II. PLAINTIFF UNIVERSITY OF DALLAS IS SUFFERING ONGOING IRREPARABLE HARM

Plaintiff University of Dallas is entitled to injunctive relief because the Mandate will be enforced against it starting January 1, 2014 and will cause it 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." *Id.* (citing *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd* 546 U.S.

[40] Keefe Decl. ¶¶ 15, 21-24, 26-29, 32, 34 at Appx. 6-10.

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 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 all the Plaintiffs to violate central tenets of their religious beliefs.[41] Absent an injunction, the Government can begin enforcing the Mandate against the University of Dallas 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 the University of Dallas's religious freedoms, confronting it with the impossible choice of violating its religious beliefs or violating the law. Because this is not the type of harm that can later be remedied by monetary damages, the injury is irreparable. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) ("[irreparable] harm . . . cannot be prevented or fully rectified by the final judgment after trial").

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

The Government cannot possibly establish any substantial harm from a preliminary injunction in the University of Dallas's favor pending final resolution of this case because the Government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate against Catholic groups before its legality can be

[41] Keefe Decl. ¶¶ 26-27 at Appx. 8; Berg Decl. ¶¶ 14-15 at Appx. 13-14; Merdian Decl. ¶¶ 12 at Appx. 20; Goosens Decl. ¶¶ 13, 17 at Appx. 26-28.

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-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013) (Dkt. 10); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. 18). 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 minimus*.

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. For one thing, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859 (citing *Elrod*, 427 U.S. at 373). 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 v. Hurley,* 242 F.3d 950. 963 (10th Cir. 2001). 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).

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

For the above reasons, Plaintiff University of Dallas respectfully requests that the Court adjudicate this motion on an expedited basis and the University's request for a preliminary injunction exempting it from application of, and enforcement of, compliance with the Mandate.

All Plaintiffs also ask the Court to enter summary judgment in their favor on Counts I-VII of their Amended Complaint, and enter a declaratory judgment that the Mandate violates Plaintiffs' rights under RFRA and the First Amendment, enter a declaratory judgment that the Mandate was promulgated in violation of the APA; enter an injunction prohibiting the Defendants from enforcing the Mandate against Plaintiffs; and enter an order vacating the Mandate.

Respectfully submitted, this 9th day of October, 2013.

By: /s/ Basheer Y. Ghorayeb

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CERTIFICATE OF SERVICE

I certify that on October 9, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Basheer Y. Ghorayeb
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