UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE CATHOLIC DIOCESE OF NASHVILLE; CATHOLIC CHARITIES OF TENNESSEE, INC.; CAMP MARYMOUNT, INC.; MARY, QUEEN OF ANGELS, INC.; ST. MARY VILLA, INC.; DOMINICAN SISTERS OF ST. CECILIA CONGREGATION; and AQUINAS COLLEGE, ***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,** ***Defendants.***	**Case No. 3:13-cv-01303** **Chief Judge William J. Haynes, Jr.** **Magistrate Judge E. Clifton Knowles**

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

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Plaintiffs—Catholic Diocese of Nashville ("Diocese"); Catholic Charities of Tennessee ("Catholic Charities"); Camp Marymount; Mary, Queen of Angels ("MQA"); St. Mary Villa; Dominican Sisters of St. Cecilia Congregation ("Congregation"); and Aquinas College submit this memorandum of law in support of their motion for preliminary injunction on Counts I-V of their Complaint, alleging violations of the Religious Freedom Restoration Act and the Religion and Free Speech Clauses of the First Amendment.

INTRODUCTION

Plaintiffs, as part of the Roman Catholic Church, believe that life begins at conception and that artificial interference with life and conception is immoral. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government has promulgated regulations that coerce Plaintiffs to violate this sincerely held religious belief by requiring them, under threat of punitive fines and other negative consequences, to facilitate access to abortion-inducing products, artificial contraception, sterilization procedures, and related counseling. *See* 45 C.F.R. § 147.130(a)(1)(iv) ("Mandate"). Despite repeated pleas from the religious community, the Mandate narrowly defines "religious employers" as "houses of worship and religious orders," excluding Catholic charitable, health, education, elder care, childcare, and other ministries, including Plaintiffs Catholic Charities, Camp Marymount, MQA, St. Mary Villa, and Aquinas College.

More specifically, the Mandate divides the Catholic Church into two wings: (1) a "religious" wing limited to "houses of worship and religious orders" that provide *religious* services; and (2) a "charitable" wing that provides what the Government views as *secular* services. But this artificial distinction ignores the reality that many entities in the Catholic Church engage in charity as an *exercise of religion*. By excluding Catholic charitable

organizations from the category of exempt "religious employers," the Mandate forces a substantial wing of the Church to act in contravention of its sincerely held religious beliefs.

The Government claims that its recent revisions to the Mandate address the concerns of religious organizations. They most emphatically do not. Indeed, the Government knew these revisions would not resolve Plaintiffs' concerns, because Plaintiffs and other religious organizations repeatedly informed the Government that the now codified proposals were inadequate. Like its predecessors, this iteration of the Mandate narrowly defines "religious employers" so as to exclude Catholic charitable and educational organizations, including Plaintiffs Catholic Charities, Camp Marymount, MQA, St. Mary Villa, and Aquinas College.

The Mandate's so-called "accommodation" for "non-religious employers," moreover, is illusory because it addresses fundamental religious objections through accounting gimmicks. As a result, Plaintiffs remain the vehicle through which the objectionable products and services are delivered to their employees. Indeed, the Final Rule is significantly *worse* than the Government's original rule because it eliminates an important prior protection that allowed "religious employers" (*e.g.*, the Diocese and the Congregation) to shield their affiliated religious organizations (*e.g.*, Catholic Charities, Camp Marymount, and Aquinas College) from operation of the Mandate by including such organizations in the insurance plan of the "religious employer." Now, although the Diocese is exempt from the Mandate, the ministries that share its plans—Catholic Charities and Campt Marymount—are not exempt. Similarly, although the Congregation is likely exempt from the Mandate, it can no longer shield Aquinas College from the Mandate. The Final Rule, therefore, actually *increases* the number of religious organizations subject to the Mandate.

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 without showing that it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). The Government has excluded tens of millions from the Mandate through a series of exemptions; thus, it cannot show a compelling interest in forcing the Mandate on the much smaller band of employers that seek an exemption on the basis of religious hardship. Nor is the Mandate narrowly tailored because the Government could easily advance its goals without using Plaintiffs to deliver objectionable products and services to Plaintiffs' employees.

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" in favor of abortion, contraception, and sterilization. It violates the Free Exercise Clause by targeting Plaintiffs' religious practices, offering a multitude of exemptions to other employers for *non-religious* reasons, but denying any exemption that would relieve Plaintiffs' *religious* hardship. It violates the Establishment Clause by creating a state-favored category of "religious employers" based on intrusive judgments about their religious practices, beliefs, and organizational structure. And, it violates the First Amendment's protection of internal church governance by splitting the Catholic Church in two and denying "religious employer" status to those entities carrying out the Church's religious mission through charitable, health care, childcare, and education ministries.

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

harm on the Government, which has refrained from mandating contraceptive coverage for more than two centuries. Accordingly, Plaintiffs respectfully request 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 "Act") requires employer "group health plan[s]" to include insurance coverage for women's "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which has been defined by the Department of Health and Human Services ("HHS") to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Women's Preventive Services Guidelines (Ex. A). FDA-approved contraceptives include the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce an abortion. Failure to provide these services exposes Plaintiffs to fines of $100/day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health plans subjects Plaintiffs to substantial annual penalties of $2,000 per employee over 30 employees. *Id.* § 4980H(a), (c)(1).

From its inception, the Act exempted health plans covering millions of people. *See* WhiteHouse.Gov, "The Affordable Care Act Increases Choice and Saving Money for Small Businesses" (Ex. B) at 1 ("exempt[ing] 96[%] of all firms . . . or 5.8 million out of 6 million total firms"); *Id*. §§ 4980D(d); 4980H(a). Plans that have not changed certain benefits or contributions are "grandfathered" and exempt. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). By one estimate, the Act exempts "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

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

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

Ignoring opposition, the Final Rule adopted substantially all of the NPRM's proposals without significant change. *See* 78 Fed. Reg. 39,870, 39,899 (July 2, 2013) ("Final Rule"). Thus, the Mandate will be in effect for plan years beginning on or after January 1, 2014. The Final Rule's three changes to the Mandate fail to relieve the unlawful burdens imposed on Plaintiffs, and one change significantly *increases* the number of religious organizations subject

to the Mandate.

First, the Final Rule made a cosmetic change to the original "religious employer" exemption by replacing the first three prongs of the "religious employer" definition with "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. 39,870, 39,896 (July 2, 2013) (codified at 45 C.F.R. § 147.131(a)). The Government admits that this change does "not expand the universe of employer plans that qualify for the exemption beyond that which was intended in the 2012 final regulations," but "restrict[s] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Thus, the Final Rule mirrors the original definition's focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Religious entities with broader missions are still not considered "religious employers."

Second, the Final Rule *increases* the burden imposed on religious entities by expanding the number that are subject to the Mandate. Under the original "religious employer" definition, if a nonexempt religious entity provided health coverage to its employees through a plan offered by a separate but affiliated entity that was exempt, "then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. at 16,502. For example, Plaintiff Diocese operates a plan that covers its own employees as well as those of Plaintiffs Catholic Charities and Camp Marymount. Under the original religious employer definition, if the Diocese was an exempt "religious employer," then Catholic Charities and Camp Marymount received the benefit of that exemption. But the Final Rule eliminates that protection, providing instead that "each employer [must] independently

meet the definition of religious employer . . . in order to avail itself of the exemption." 78 Fed. Reg. at 39,886; *see also* 78 Fed. Reg. at 8,467 (NPRM). As a result, the Diocese is foregoing cost savings and premium increases to maintain the grandfathered status of one of its healthcare plans that protects its non-exempt affiliated entities from the Mandate.[1]

Third, the Final Rule establishes an illusory "accommodation" for nonexempt objecting religious entities that qualify as "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; (4) self-certify that it meets the first three criteria; and (5) provide a copy of the self-certification either to its insurance company or, if self-insured, to its third party administrator. 26 C.F.R. § 54.9815-2713A(a), (b). An eligible organization's self-certification requires the insurance issuer or third party administrator to provide "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,895 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). This "accommodation" fails to relieve the burden on religious organizations' religious beliefs because a non-exempt organization's decision to offer a group health plan still results in the provision of coverage—now in the form of "payments"—for

[1] Other options are to (1) provide Catholic Charities and Camp Marymount employees with access to "free" objectionable products and services; or (2) expel Catholic Charities and Camp Marymount from the plan, subjecting them to massive fines if they does not contract with an insurer that will provide the objectionable coverage. The Congregation faces the same dilemma. Under the original rule, the Congregation could shield Aquinas College from the Mandate by sharing its health plan with the College's employees. That is no longer an option. Karlovic Decl. ¶¶ 12, 14. The Congregation, moreover, does not have the benefit of a grandfathered plan, so its options are limited to (1) providing Aquinas College employees with the objectionable services or (2) expelling Aquinas College from its plan. The first option forces the Diocese and the Congregation to act in contravention of their sincerely held religious beliefs, and the second option would make the Diocese and the Congregation complicit in providing objectionable coverage and compel them to submit to Governmental interference with their structure and internal operations. Choby Decl. ¶ 27-40; Robinson Decl. ¶ 9-11; Karlovic Decl. ¶¶ 15.

abortion-inducing products, contraception, sterilization, and related counseling. *Id*. § 54.9815-2713A(b)-(c). Plaintiffs' provision of group health plans triggers the provision of "free" objectionable products and services to their employees in a manner contrary to their beliefs.

In sum, the Final Rule does not address Plaintiffs' religious objections to facilitating access to the objectionable products and services. This should not surprise the Government, which was repeatedly notified well before it issued the Final Rule that its "accommodation" would not relieve the burden on Plaintiffs' religious beliefs. Despite representations that it was making a good-faith effort to address those religious objections—including before this very Court in a previously filed case by some of the same Plaintiffs[2]—the Government issued the Final Rule that it knew would do no such thing. Plaintiffs are still coerced, under threat of crippling fines and other negative consequences, into being the vehicle to deliver contraception, abortion-inducing products, sterilization, and related counseling to their employees, contrary to their sincerely held religious beliefs.

II. PLAINTIFF'S BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide educational, spiritual, health, and charitable services to individuals of all faiths. Just as sincerely, they believe that life begins at the moment of conception, and that "preventive" services covered by the Mandate that interfere with life and conception are immoral. *See* Choby Decl. ¶¶ 7-10; Robinson Decl. ¶ 4; Sinclair Decl. ¶ 7; Hagey Decl. ¶ 10;

[2] *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796, at *4 (M.D. Tenn. Nov. 21, 2012) (dismissing action for lack of standing because "Defendants announced their intention to develop alternative means of providing contraceptive services free of charge to employees of non-exempt, nongrandfathered organizations with religious objections to contraceptive coverage" and "published their plan to amend the Rules to address the exact concerns Plaintiffs raise in this action"; noting that "the Government's actions are entitled to a good faith presumption").

Glascoe Decl. ¶ 12; Miller Decl. ¶ 10; Karlovic Decl. ¶¶ 6-8; Galbraith Decl. ¶ 5. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling, including by contracting with a third party that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. *See* Choby Decl. ¶¶ 12-26; Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-17; Karlovic Decl. ¶¶ 18-22; Galbraith Decl. ¶¶ 10-13.

It is a cruel irony that the Mandate—promulgated under a statute that was intended, at least in part, to help the poor and needy—imposes on Plaintiffs the impossible choice of either abandoning their religious principles or else violating the law and facing crippling penalties. For example, Catholic Charities and MQA, organizations that provide critical services to the most vulnerable in the community, may be forced to limit these critical services if it were to incur the Mandate's draconian fines. Sinclair Decl. ¶¶ 3, 23-24; Glascoe Decl. ¶¶ 6, 23-24. That is money that could have otherwise supported those entities' charitable programs and services.

ARGUMENT

A court should grant a preliminary injunction if, after considering four factors, it determines that the balance of equities favors such relief. *See In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992). The four factors courts should consider are:

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest.

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 400 (6th Cir. 2001); *Int'l Res. v. N.Y. Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 732 (M.D. Tenn.

Feb. 17, 2012). These factors do not all need to be met and instead merely "guide the discretion of the court." *Eagle-Picher*, 963 F.2d at 859; *Dreyzehner*, 853 F. Supp. 2d at 734. In other words, "they are not meant to be rigid and unbending requirements," because "'[a] fixed legal standard is not the essence of equity jurisprudence.'" *Eagle-Picher*, 963 F.2d at 859 (citation omitted). Here, a preliminary injunction is warranted because Plaintiffs meet all four factors for such interim relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

To satisfy the "likelihood of success" factor, "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Dreyzehner*, 853 F. Supp. 2d at 734 (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997)).

Applying this standard, Plaintiffs are likely to succeed on the merits of all of their claims, including that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 228-38); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Compl. Count II, ¶¶ 239-51); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Compl. Count III, ¶¶ 252-65); (4) violates the Establishment Clause of the First Amendment because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on intrusive judgments regarding their beliefs, practices, and organizational structure (Compl. Count IV, ¶¶ 266-73); and (5) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church

governance (Compl. Count V, ¶¶ 274-88).

A. The Mandate Violates RFRA

Under RFRA, the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423 (2006). Thus, once Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate to Plaintiffs furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428. Here, the Government cannot make such a showing.

RFRA was enacted to prevent the type of regulation codified in the Mandate. Congress passed RFRA "to restore [and codify] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary,* 102d Cong. 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. It is not surprising, then, that the only court to have reached the merits of similar RFRA claims brought by Catholic Dioceses and affiliated organizations concluded that plaintiffs have a likelihood of prevailing on their RFRA claim and granted preliminary relief enjoining the Government from enforcing the Mandate. *See Zubik, et al. v. Sebelius, et al.*, No. 2:13-cv-01459 (W.D. Pa. Nov. 21, 2013) and *Persico, et al. v. Sebelius, et al.*, No. 1:13-cv-00303 (W.D. Pa. Nov. 21, 2013), Mem. Op. Re: Pls.' Mot. for Exp. Prelim. Inj. (Ex. I) ("*Zubik/Persico* Slip Op.") at 4, 61, 65.[3]

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[]

[3] Courts have also issued preliminary injunctions against the Mandate in the majority of cases brought by for-profit companies with religious owners. If anything, a preliminary injunction is even more appropriate in this case involving non-profit entities. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Doc. 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) (Doc. 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Doc. 12); *Bick Holdings Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Doc. 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Doc. 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) (Doc. 9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. 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).

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*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"). 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. *See Zubik/Persico* Slip Op. at 53.

(i) "Exercise of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Because the exercise of religion has been interpreted to include a diverse array of conduct, ranging from refusing to give children a formal education, *see Yoder*, 406 U.S. at 210-19, to eating only certain foods, *see Nelson v. Miller*, 570 F.3d 868, 878-89 (7th Cir. 2009), RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). Protected religious exercise includes any act or practice that is "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted).

Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, courts

must accept plaintiffs' 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," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Thus, "[r]epeatedly and in many different contexts," the Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Instead, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). By necessity, this is a modest inquiry that is restrained by the need to avoid excessive entanglement in religion. *See Jolly*, 76 F.3d at 476. The purpose of the sincerity inquiry is simply to screen out manipulative claims based on sham beliefs that can be readily identified as such, for example, a high-school student who suddenly proclaims a religious objection to Math. Courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715.

"While it is a delicate task to evaluate religious sincerity without questioning religious verity, . . . free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." *Jolly*, 76 F.3d at 476 (emphasis omitted). By screening claims for religious sincerity, and by allowing the Government to impose burdens that

are truly necessary to serve a compelling interest, courts can apply RFRA to grant bona fide religious exemptions without "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Yoder*, 406 U.S. at 216. Based on this approach, the Supreme Court has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

Here, there can be no doubt that Plaintiffs' refusal to comply with the Mandate is a protected exercise of religion under RFRA. It is undisputed that Plaintiffs have a sincerely held religious belief that they may not provide, pay for, 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. *See* Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-17; Galbraith Decl. ¶¶ 10-13. While courts are bound to accept Plaintiffs' description of their beliefs without resort to any independent religious authority, here the sincerity of Plaintiffs' beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops. *See supra* at 5. 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. Plaintiffs simply invoke RFRA to enforce the law that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. In particular, the Government may not require Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, and related counseling. Nor can the Government force Plaintiffs to contract with a third party that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. By imposing these requirements, the Mandate is a straightforward effort that "forces [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

It is no answer to claim that Plaintiffs, unlike the *Hobby Lobby* litigants and other for-profit corporations, may be eligible for the Government's so-called "accommodation." For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincerely held religious beliefs. *Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact is that the "accommodation" compels Plaintiffs to contract with an insurance issuer or third party administrator that will, as a result of that contract, provide or procure the objectionable products and services for Plaintiffs' employees. Indeed, the insurance issuer or third party administrator's obligation exists *only so long as* Plaintiffs' employees remain on Plaintiffs' insurance plan.[4]

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

As Plaintiffs have explained to the Government, they believe their involvement in this scheme would constitute impermissible facilitation of access to the objectionable products and services. *See* Choby Decl. ¶¶ 12-26; Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-17; Karlovic Decl. ¶¶ 18-22; Galbraith Decl. ¶¶ 10-13. *See also Zubik/Persico* Slip Op. at 47-49 ("[T]he 'accommodation' requires [plaintiffs] to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that 'shifting responsibility' does not absolve or exonerate them from the moral turpitude created by the 'accommodation'; to the contrary, it still substantially burdens their sincerely-held religious beliefs.").

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

(continued…)

(for employers that offer insured plans, the insurance issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

Plaintiffs' sincerely held religious beliefs. And it is undisputed that the Mandate forces Plaintiffs to engage in impermissible facilitation.

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

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

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

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

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception is correctly 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 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 unemployement 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); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventive Health Care Services Requirements of the Patient Protection and Affordable Care Act (Feb. 24, 2012) at 7 (asserting that this fine applies to employers that violate the "preventive care" provision of the Act). On the other hand, if Plaintiffs seek to exit the insurance market altogether, they could be subject to an annual fine of $2,000 per full-time employee after the first thirty employees. *See* 26 U.S.C. § 4980H(a), (c)(1). These penalties, which would amount to millions of dollars and inflict significant competitive harms, clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 penalty that was a substantial burden in *Yoder*. There is no doubt that the threat of such penalties compels Plaintiffs to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling, which their religion forbids.

The only federal district court to address substantial burden with respect to similarly situated plaintiffs has applied binding Supreme Court precedent and *Korte* to hold that the Mandate "places a substantial burden on plaintiffs' right to freely exercise their religion – specifically their right to <u>not</u> facilitate or initiate the provision of contraceptive products, services, or counseling." *Zubik/Persico* Slip op. at 53.

First, the court applied the test from *Korte* that "[a]t a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of [his] religious beliefs. *Id.* at 46 (quoting *Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692, at *22 (7th Cir. Nov. 8, 2013)). This test analyzes the plaintiffs' sincerely held religious beliefs as articulated, without questioning their scope:

> . . . the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. See (sic) *Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 715-16. Indeed that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] . . . correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion.

Id. at 48 (quoting *Korte*, 2013 WL 5960692, at *22). Thus the Court must accept Plaintiffs' articulation of their sincerely held religious beliefs, if unchallenged by the Government, that prohibit them from signing the self-certification and participating in the accommodation process. *See* Choby Decl. ¶¶ 12-26; Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-17; Galbraith Decl. ¶¶ 10-13.

Second, the court determined that the accommodation substantially burdens plaintiffs' religious exercise because it requires them "to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling." *Zubik/Persico* Slip op. at 48; *see id.* at 48-53. Despite the clear legal standard, in that case the Government argued that the accommodation did not require plaintiffs to violate their religious beliefs or modify their behavior because eligible entities "merely [had to] sign a piece of paper" and inform their third party administrator ("TPA") of the same religious objections they had prior to the issuance of the Mandate. *Id.* at 47. The court rejected that argument, however, because plaintiffs sincerely

believe that the accommodation requires action that violates their religious beliefs. *See, e.g.*, *id.* at 49 ("The Government is asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose, and thus, they cannot provide it."). Although plaintiffs may be engaging in the same conduct as they did before the Mandate, the effect is significantly different: "in the past, such actions *barred* the provision of contraceptive products, services or counseling. Now, this type of information previously submitted to an insurer or TPA will be used to *facilitate/initiate* the provision of contraceptive products, services or counseling – in direct contravention of their religious tenets." *Id.* at 48 (emphasis added). Moreover, the participation of the TPA does not affect the analysis, nor "absolve" plaintiffs:

> the "accommodation" requires [plaintiffs] to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

Id. at 49. This is especially true because the Government acknowledged the effect of signing the self-certification and conceded plaintiffs' sincerely held religious beliefs. *See* Slip op. at 47.

Third, the court in *Zubik* and *Persico* also rejected the Government's attempt to distinguish for-profit cases like *Korte*. For example, during oral argument in *Zubik* and *Persico*, Defendants asserted:

> unlike the for-profit cases where the regulations do actually require the employers to provide contraceptive services in their employee plans, here again it's a third party that provides payment for contraceptive services. So the burden in these cases, in these nonprofit cases, is accommodated, really this entity is far more attenuated and unsubstantial.

Zubik and *Persico* Nov. 13, 2013 Oral Arg. Tr. at 52:17-24 (excerpt attached at Ex. J). The district court disagreed, however, and "found the recent decisions pertaining to secular, for-profit

organizations to be *instructive* . . . ." *Zubik/Persico* Slip op. at 39 (emphasis added).

Finally, the court in *Zubik* and *Persico* found a substantial burden in the distinction between exempt and accommodated entities: by dividing the Catholic Church into a "worship arm" and "'good works' arm[]", "the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." *Id.* at 53. The court questioned: "Why should religious employers who provide the charitable and educational services of the Catholic Church be required to facilitate/initiate the provision of contraceptive products, services, and counseling, through their health insurers or TPAs, when religious employers who operate the houses of worship do not?" *Id.* at 50-51. The court found the religious employer exemption "enigmatic" in the manner in which it "allows the same members of the same religion to completely adhere to their religious beliefs at times (when the 'exemption' applies), while other times, forces them to violate those beliefs (when the 'accommodation' applies)." *Id.* at 52 (emphasis in original). The Bishops "while wearing their 'house-of-worship' hats, are not in any moral peril; yet, when they wear their 'head-of-the-"good works"-agencies' hats, they must take affirmative actions which facilitate/initiate the provision of contraceptive products, services, and counseling in violation of their religious tenets." *Id.* at 51-52. Additionally, the court was "constrained to understand" why charitable, social services agencies

> would not be treated the same as the Church itself with respect to the free exercise of that religion. If the contraceptive mandate creates such a substantial burden on the Dioceses' exercise of religion so as to require the religious employer "exemption," the contraceptive mandate obviously creates the same substantial burden on the nonprofit, religious affiliated/related organizations like Plaintiffs . . . , which implement the "good works" of the Dioceses.

Id. at 52. The same applies here.

As noted and relied upon by the Western District of Pennsylvania, the Seventh and Tenth

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

problematic." *Hobby Lobby*, 723 F.3d at 1141.[5] The same is true here.

In sum, the Mandate leaves no way for Plaintiffs to continue their operations in a manner consistent with their sincerely held religious beliefs. Instead, it forces them to either abandon their beliefs by facilitating access to objectionable products and services, or violate the law and face severe penalties. *See* Choby Decl. ¶¶ 12-26; Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15, 17; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-18; Karlovic Decl. ¶¶ 13, 18-22; Galbraith Decl. ¶¶ 10-13, 17. Imposing this impossible dilemma constitutes a substantial burden on Plaintiffs' religious exercise. This burden is exacerbated by the fact that the Mandate will almost certainly require Plaintiffs to subsidize the objectionable products and services.

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*

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

House Publishers, Inc. v. Sebelius, 904 F .Supp. 2d 106, 125-26 (D.D.C. 2012). 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) (internal quotation marks and alteration omitted); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297-98. Here, the Government cannot claim an interest of the "highest order" where it exempts millions of employees from the Mandate through grandfathering provisions and small-employer exemptions. The Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "Americans who like their health plan can keep it." HHS.gov, "U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on 'Grandfathered' Health Plans [U]nder the Affordable Care Act" (June 14, 2010) (Ex. E). An interest is hardly compelling if it can be trumped by political expediency. Such a broad exemption "completely undermines any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *see also Hobby Lobby*, 723 F.3d at 1144; *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 434 (W.D. Pa. 2013), *injunction granted* 2013 U.S. Dist. LEXIS 85107 (W.D. Pa. June 18, 2013); *Tyndale*, 904 F. Supp. 2d at 128.

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's

alleged interest in public health and safety when the Act at issue already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.* 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.

That the Government's own religious employer exemption undermines its alleged compelling interest was confirmed in *Zubik* and *Persico*, where the court reasoned that the religious employer exemption "is an acknowledgment of the lack of a compelling governmental interest as to religious employers who hire employees for their 'houses of worship,'" and the Government's claim that there is such a compelling interest as to "a different religious affiliated/related employer fails." *Zubik/Persico* Slip op. at 55-56. Indeed, the court concluded that the Government's justification for the distinction between exempt and accommodated entities is "speculative and unsubstantiated by the record and, therefore, unpersuasive." *Id.* at 56-57.[6] Ultimately, the court court found there was no compelling interest *because of* the religious employer exemption:

> If there is no compelling governmental interest to apply the

[6] The court also explained that recognizing such a compelling interest "would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and 'good works,' thereby entangling the Government in deciding what comprises 'religion.'" *Zubik/Persico* Slip op. at 56; *see also infra* at Sect. I.D.2.

> contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases.

Slip op. at 56.

Finally, the Government's interest cannot be compelling where the Mandate would only fill, at best, a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available 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); HHS.gov, "A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius" (Jan. 20, 2012) (Ex. F). The Government, moreover, has adduced "no empirical data or other evidence . . . that the provision of the FDA-approved emergency contraceptives . . . would result in fewer unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies." *Beckwith v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013).

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to significantly impact contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013). As such, the Government cannot claim to have "identif[ied] an actual problem in need of solving," *Brown*, 131 S. Ct. at 2738

(internal marks and citation omitted), much less that its proposed solution will address the alleged problem in any meangful way. *See Zubik/Persico* Slip Op. at 57 (holding that the Government provided no evidence that "women who receive their health coverage through employers like plaintiffs would face negative health and other outcomes"). Simply put, 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.

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)).

The Western District of Pennsylvania found that in light of the Government's failure to meet its burden on compelling interest it "need not consider whether the 'accommodation' was the least restrictive means of meeting the stated compelling interests." *Zubik/Persico* Slip op. at 58. "Nevertheless," the court concluded that "the Government failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing those interests." *Id.* at 58, 60. Indeed, "there is nothing in the record to establish, or even hint, that a broader 'religious employer' exemption, to include Plaintiffs . . . , would have any impact at all on 'the entire statutory scheme'", *id.* at 60, despite the Government's assertion that the "accommodation" was the "'only possible means' of furthering the two [alleged] compelling governmental interests . . . ." *Id.* at 58. In that case, all the Government could point to in support of its least restrictive means argument was one page of the Federal Register (78 Fed. Reg. 39,888 (July 2, 2013))—a page that "clearly announces that the alternatives to the current regulations—including the contraceptive mandate—would not advance the Government's interests 'as effectively as' the contraceptive mandate and the 'accommodation.'" *Id.* at 60 (emphasis in original). But, as the court noted: "Greater efficacy does not equate to the least restrictive means." *Id.* at 60.

The Seventh Circuit in *Korte* has also recently held that the Government "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Korte*, 2013 WL 5960692, at *26. By asserting sweeping interests in "public health" and "gender equality," the Government has "guarantee[d]

that the mandate" will fail strict scrutiny because it is "impossible to show that the mandate is the least restrictive means of furthering" those broad interests. *Id.* at *25. Moreover, even assuming the Government has a compelling interest in the more specific goal of "broaden[ing] access to free contraception and sterilization"—an assumption that is "both contestable and contested"—the Mandate still fails strict scrutiny because "there are many ways to increase access to free contraception" without forcing Plaintiffs to participate in the effort. *Id.* at *25-26.

Here, the Government has myriad ways to achieve its asserted interests without forcing Plaintiffs to violate their religious beliefs. Plaintiffs in no way recommend these alternatives and oppose many of them as a matter of policy, but the fact that they are available to the Government shows that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Plaintiffs to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (*i.e.*, Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's utter failure to consider these alternatives is fatal, because strict scrutiny requires a "serious, good faith consideration" of workable alternatives. *Grutter*, 539 U.S. at 339; *Zubik/Persico* Slip Op. at 59 (holding that the Government could not meet its burden to establish that the "accommodation" is the least restrictive means because it failed to "offer[] any evidence [in the administrative record]

concerning: (1) the identity of all other possible 'least restrictive means' considered by the Government; (2) the analysis of each of the 'means' to determine which was the 'least' restrictive; (3) the identity of the person(s) involved in the identification and evaluation of the alternative 'means'; or (4) 'evidence-based' analysis as to why the Government believes that the 'accommodation' is the 'least restrictive means'").

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 (internal citation omitted). Likewise, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359,

365-67 (3d Cir. 1999) (Alito, J.), the Third Circuit invalidated a police department policy that prohibited a Sikh police officer from wearing a beard because it contained an exemption for officers who were unable to shave for medical reasons but not for religious reasons. Relying on *Lukumi*, the court found that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* at 365.

The same reasoning applies here. The Mandate is not "generally applicable" because it is riddled with exemptions, *see supra* at 4, and yet there is no such exemption for *religious* employers like Plaintiffs. It makes no difference that the Mandate contains an exemption for a narrow subset of religious groups—namely, those that meet the Government's limited definition of a "religious employer." Because it offers so many secular exemptions, the Government must give equal consideration to *all* claimants who seek similar exemptions on religious grounds. The Free Exercise Clause does not merely require equal treatment for *some* religious entities. Thus, the Mandate fails the test of general applicability, and the Government may not "refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537.

In addition, the Mandate is not "neutral" because it is specifically targeted at Plaintiffs' religious practice of refusing to provide or facilitate access to contraception. When the Government promulgated the Mandate, it was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government itself concedes that 85% of health plans already cover contraception, and it asserts that adding contraception to the remaining 15% is cost-neutral. If so, then the only conceivable reason why the latter plans would *not* include contraceptive

coverage is a religious or moral objection. But instead of pursuing a wide variety of options for increasing access to contraception without forcing religious groups like Plaintiffs to participate in the effort, the Government deliberately chose to pick a high-profile fight by forcing religious groups to provide or facilitate access to contraception in violation of their core beliefs.

The record, moreover, establishes that the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, at a NARAL Pro-Choice America fundraiser, Defendant Sebelius stated, "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely affordable contraceptive services? Not so much." (Compl. ¶ 209). 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—essential components of their faith.

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

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic 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. 2d 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. In short, Plaintiffs cannot be forced to act as mouthpieces in the Government's

campaign to expand access to abortion and contraception.

Second, to qualify for the so-called "accommodation," the Mandate requires 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, 462 n.6 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc) (enjoining enforcement of law requiring crisis pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider").

D. The "Religious Employer" Exemption Violates the Establishment Clause

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

1. Discrimination Among Religious Groups

The principle of equal treatment among religious groups lies at the core of the Establishment Clause. Just as the Government cannot discriminate among sects or

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

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated organizations." *Id.* at 231-32. The state defended the law on the ground that it was facially neutral and merely had a disparate impact on some religious groups. The Court, however, rejected that argument, finding that the law discriminated among denominations by privileging "well-established churches that have achieved strong but not total financial support from their members," while disadvantaging "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 246 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] described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." As the

Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. at 8,461. This definition favors religious groups that fit into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that exercise their religious faith through alternative means—including religious ministries, like Plaintiffs Catholic Charities, Camp Marymount, MQA, St. Mary Villa, and Aquinas College, which express their faith by providing other various charitable services to the elderly, poor, and needy and educating young people. As Cardinal Donald Wuerl stated, "[n]ever before has the government contested that institutions like Archbishop Carroll High School or Catholic University are religious. Who would? But HHS's conception of what constitutes the practice of religion is so narrow that even Mother Teresa would not have qualified." Cardinal Wuerl: Defending Our First Freedom In Court (Ex. G).

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." *Colo. 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)." *Colo. Christian*, 534 F.3d at 1261 (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*, 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 1343-45 (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 do so on the

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

E. The Mandate Unconstitutionally Interferes with Plaintiffs' Rights of Internal Church Governance

The Supreme Court has recognized that the Religion Clauses of the First Amendment prohibit the Government from interfering with matters of internal church governance. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012), the Court held that the Government may not apply anti-discrimination laws to interfere with religious groups in the hiring and firing of ministers because the First Amendment prohibits "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Indeed, because "the autonomy of religious groups . . . has often served as a shield against oppressive civil laws," the Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring).

Here, the Mandate violates this principle by artificially splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. *See, e.g.*, Choby Decl. ¶¶ 27-40; Robinson Decl. ¶¶ 9; Karlovic Decl. ¶¶ 11-17. 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: "The Church cannot neglect the service of charity anymore than she can neglect the sacraments and the word." USCCB's Papal Visit Blog, "Benedict XVI's Plea: Put the Poor at the Heart of Catholic Life" (Mar. 25, 2008) (Ex. H). 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. *See also Zubik/Persico* Slip Op. at 53 (holding that by dividing the Catholic Church into a "worship arm" and a "good works arm[]", "[t]he Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs"); *id.* at 50-52.

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 the Nashville Diocese, where the Diocese makes its health plan available to the employees of its religious affiliates, including Catholic Charities and Camp Marymount. By serving as the insurance provider for these organizations, the Diocese can directly ensure that these organizations offers its employees a health plan that is in all ways consistent with Catholic beliefs. The Congregation has adopted the same arrangement, insuring its lay employees as well as the employees of Aquinas College and other schools on the same

plan. The Mandate disrupts this internal arrangement by forcing the Diocese to either maintain its plan's grandfathered status to protect Catholic Charities and Camp Marymount; sponsor a plan that will provide the employees of Catholic Charities and Camp Marymount with access to "free" abortion-inducing products, contraception, sterilization, and related counseling; or expel Catholic Charities and Camp Marymount from the Diocese's plan, thereby forcing them to enter into a different contract for the objectionable coverage. Similarly, the Congregation must either sponsor an objectionable plan or expel Aquinas College from its plan. Either way, the Mandate directly undermines the Diocese's and the Congregation's ability to ensure that their religious affiliates remain faithful to Church teaching.

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

Plaintiffs are entitled to injunctive relief because the Mandate is causing them substantial irreparable harm. "It is well settled that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale*, 904 F. Supp. 2d at 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. 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.")); *cf. Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 647-48 (M.D. Tenn. 1989) (citing *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984)).

The forced violation of Plaintiffs' faith is the epitome of irreparable injury. *See, e.g., Mobil Oil Corp. v. Henriksen Enters.*, 490 F. Supp. 74, 77 (W.D. Mich. 1980) (holding that

irreparable harm occurs when monetary damages are inadequate). The Mandate forces Plaintiffs to violate central tenets of their religious beliefs. *See* Choby Decl. ¶¶ 12-26; Robinson Decl. ¶¶ 15, 19; Sinclair Decl. ¶¶ 13-15; Hagey Decl. ¶¶ 15-20; Glascoe Decl. ¶¶ 16-19; Miller Decl. ¶¶ 13-17; Karlovic Decl. ¶¶ 18-22; Galbraith Decl. ¶¶ 10-13. Absent an injunction, the Government can begin enforcing the Mandate against Plaintiffs before the final resolution of this case, while there is a serious question as to whether the Mandate violates the Constitution and other applicable law. Thus, every moment that passes without relief inflicts ongoing irreparable harm to Plaintiffs' religious freedoms, confronting them with the impossible choice of violating their 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 Mobil Oil Corp.*, 490 F. Supp. at 77; *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 BALANCE OF HARMS WEIGHS IN FAVOR OF PLAINTIFFS

Any harm that may result from granting preliminary relief to Plaintiffs necessarily "pales in comparison" to the serious harms to their religious freedoms that will be continued absent that relief. *Newland*, 881 F. Supp. 2d at 1295. On the one hand, as described above, enforcement of the Mandate will plainly cause Plaintiffs irreparable harm by forcing them to violate their religious beliefs of pay oppressive fines until the merits of this suit are conclusively resolved. On the other hand, preliminary relief would not cause the Government appreciable harm because it 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 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," *Id.* 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. 11); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. 19). 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, the Sixth Circuit has recognized that "it is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu*, 274 F.3d at 400 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). This same reasoning should also apply to the rights protected by RFRA, which is meant to give religious exercise even greater protection than that provided under the First Amendment. *Cf., e.g.*, *Kikumura 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 at 1010, *aff'd* 546 U.S. 418 (2006).

Here, public interest in a preliminary injunction is especially high because enforcement of the Mandate will threaten or diminish the continuation of Plaintiffs' charitable, health care, childcare, and educational activities, which serve thousands of needy individuals. *See, e.g.,*

Sinclair Decl. ¶¶ 6, 23-24; Hagey Decl. ¶¶ 7-9, 24-25; Glascoe Decl. ¶¶ 6, 23-24; Miller Decl. ¶¶ 5, 20-21. If the Government goes ahead with the enforcement of the Mandate, Plaintiffs may be forced to shut down or restructure their operations, leaving a gap in the network of critical social services relied on by so many in their communities. By contrast, no public harm would come from simply preserving the *status quo* pending further litigation. Even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization—a highly dubious assumption—these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adjudicate this motion on an expedited basis and grant Plaintiffs' request for a preliminary injunction exempting Plaintiffs from application of, and enforcement of, compliance with the Mandate.

Respectfully submitted, this 26th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I filed the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction with the Clerk of the United States District Court for the Middle District of Tennessee using the CM/ECF system and and mailed the foregoing by first class mail via the United States Postal Service to the following:

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