IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; CATHOLIC CHARITIES OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; SAINT ANNE HOME & RETIREMENT COMMUNITY OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC; UNIVERSITY OF SAINT FRANCIS; and OUR SUNDAY VISITOR, INC.,

***Plaintiffs*,**

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 1:12-cv-159-JD-RBC

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

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OTHER AUTHORITIES

Plaintiffs submit this memorandum of law in support of their motion for preliminary injunction on Counts I-VIII of their Amended Complaint, alleging a violation of the Religious Freedom Restoration Act, the Religion and Free Speech Clauses of the First Amendment, and the Administrative Procedure Act.

INTRODUCTION

Plaintiffs, 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, 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 Final Rule narrowly defines "religious employers" as "houses of worship and religious orders," excluding Catholic charitable, health, education, elder care, and other organizations—for example, Plaintiffs Catholic Charities, Saint Anne Home, Franciscan, Specialty Physicians, the University, and Our Sunday Visitor.

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 Catholic Church to act contrary to its sincerely-held religious beliefs.

The Final Rule'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 mule by which the objectionable products and services are delivered to their employees. Indeed, the Final Rule is significantly *worse* than the proposed rule because it eliminates an important prior protection that allowed "religious employers" (*e.g.*, the Diocese) to shield their affiliated religious organizations (*e.g.*, Catholic Charities) from operation of the Mandate by including such organizations in the insurance plan of the "religious employer." Now, although the Diocese is likely exempt from the Mandate, to shield Catholic Charities from the Final Rule, the Diocese is forced to maintain its plan's grandfathered status at a cost of approximately $180,000 per year. 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 schools, health care, and charities.

Finally, the Mandate violates the Administrative Procedure Act ("APA") because it contravenes the clear terms of at least two federal statutes. Under the Weldon Amendment, no federal agency may impose penalties on employers for refusing to include abortion coverage in their health-care plan, but the Mandate imposes penalties for failing to provide coverage for abortion-inducing products. Similarly, the Act may not be implemented in a way that prohibits a college or university from offering a student health insurance plan, but the Mandate makes objectionable coverage a mandatory component of all insurance plans.

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. *Id.* § 4980H(a), (c)(1).

From its inception, the Act exempted health plans covering millions of people. *See* WhiteHouse.Gov, "The Affordable Care Act Increases Choice and Saving Money for Small Business" (Ex. B) at 1 ("exempt[ing] 96[%] of all firms . . . or 5.8 million out of 6 million total firms"); 26 U.S.C. §§ 4980D(d); 4980H(a). Plans that have not changed certain benefits or contributions are "grandfathered" and exempt. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(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 the 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. 16,501-08 (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, largley 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, 39,872 (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 "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. 39,896 (codified at 45 C.F.R. § 147.131(a)). The Government admits that this change does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules," but "restrict[s] the exemption primarily to group health plans established or

maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Thus, the Final Rule mirrors the original definition's focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. 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. 16,501, 16,502 (Mar. 21, 2012). For example, Plaintiff Diocese operates a self-insured plan that covers itself and Catholic Charities. Under the original religious employer definition, if the Diocese was an exempt "religious employer," then Catholic Charities 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. 39,886; *see also* 78 Fed. Reg. at 8,467 (NPRM). Thus, Catholic Charities is no longer exempt under the Diocesan health plan. As a result, the Diocese is, at great ongoing expense, foregoing premium increases to maintain the Diocesan employee health plan's grandfathered status in order to protect Catholic Charities from the Mandate.[1]

[1] Other options are to (1) provide Catholic Charities' employees with access to "free" objectionable products and services; or (2) expel Catholic Charities, subjecting Catholic Charities to massive fines if it does not contract with an insurer that will provide the objectionable coverage. The first option forces the Diocese to act contrary to its sincerely-held religious beliefs, and the second option makes the Diocese complicit in providing objectionable coverage and compels it to submit to Governmental interference with its structure and internal operations. Affidavit of Joseph Ryan ("Ryan Aff.") ¶ 33.

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"; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if self-insured, to its third party administrator. 26 C.F.R. § 54.9815-2713A(a). An eligible organization's self-certification requires the insurance issuer or third party administrator to provide "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). Making matters worse, self-insured organizations that self-certify are flatly prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii). 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 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 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, the Government issued the Final

Rule that it knew would do no such thing. Plaintiffs are still coerced, under threat of crippling fines, into being the vehicle to deliver contraception, abortion-inducing products, sterilization, and related counseling to their employees, contrary to their sincerely-held religious beliefs.

II. PLAINTIFFS' BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide 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 certain "preventive" services covered by the Mandate that interfere with life and conception are immoral. 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, e.g.*, Ryan Aff. ¶¶ 22, 34-35; Affidavit of Lisa Young ("Young Aff.") ¶¶ 15-16, 20; Affidavit of Jason Wardwell ("Wardwell Aff.") ¶¶ 18-22; Affidavits of Sister Jane Marie Klein ("Sister Klein-Fraciscan Aff.") ¶¶ 8-9, 19-23 and ("Sister Klein-SPI Aff.") ¶¶ 10-17; Affidavit of Sister Elise Kriss ("Sister Kriss Aff.") ¶¶ 6, 10-14; Affidavit of Gregory Erlandson ("Erlandson Aff.") ¶¶ 15-19.

It is a cruel irony that the Mandate—promulgated under a statute that was intended to help the poor and needy—imposes on Plaintiffs the impossible choice of either abandoning their religious principles or else violating the law and facing crippling penalties. For example, Franciscan—a hospital system providing over 3.5 million outpatient services annually at its thirteen facilities in two states, and spending over $180 million dollars annually through its various medical care and community service programs helping over 500,000 people living in poverty—estimates that "[w]ith approximately 18,000 full-time employees, [it] could face hundreds of millions in fines" if it fails to comply with the Mandate. Sister Klein-Franciscan

Aff. ¶ 25. *See also, e.g.*, Wardwell Aff. ¶¶ 23-24; Sister Klein-SPI Aff. ¶ 15; Sister Kriss Aff. ¶¶ 34-35; Erlandson Aff. ¶ 22. The Diocese foregoes approximately $180,000 anually in increased premiums in order to maintain its plan's grandfathered status, which shields Catholic Charities from the Mandate. Ryan Aff. ¶ 27. That is money that could have otherwise supported those entities' charitable programs and services. Young Aff. ¶ 19.

ARGUMENT

In evaluating a motion for preliminary injunction, "A court should grant a preliminary injunction if, after considering four factors, it determines that the balance of equities favors such relief. *See Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000). The moving party must show (1) that it is "reasonably likely to succeed on the merits," (2) that it is "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted," (3) that "there is no adequate remedy at law," and (4) that "an injunction would not harm the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (citing *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 619 (7th Cir. 2004)). Once the moving party meets that burden, the district court applies a "sliding scale" analysis: "the district court must exercise its discretion to determine whether the balance of harms weighs in favor of the moving party or whether the nonmoving party or public interest will be harmed sufficiently that the injunction should be denied." *Christian Legal Soc'y*, 453 F.3d at 859; *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994) ("[T]he greater the moving party's chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor."). Here, a preliminary injunction is warranted because Plaintiffs meet all four factors for such interim relief and the balance of harms clearly weighs in their favor.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

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 (Am. Compl. Count I, ¶¶ 262-72); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Am. Compl. Count II, ¶¶ 273-85); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Am. Compl. Count III, ¶¶ 286-99); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a third party administrator's decision to provide or procure contraceptive services; (Am. Compl. Count IV, ¶¶ 300-04); (5) violates the Establishment Clause of the First Amendment because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on intrusive judgments regarding their beliefs, practices, and organizational structure (Am. Compl. Count V, ¶¶ 305-12); (6) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church governance (Am. Compl. Count VI, ¶¶ 313-27); (7) violates the APA by disregarding statutory prohibitions on compelled support for abortion (Am. Compl. Count VII, ¶¶ 328-38); and (8) violates the APA by failing to conduct notice and comment rulemaking (Am. Compl. Count VIII, ¶¶ 339-49).

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

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

in the majority of cases brought by *for-profit* companies with religious owners.[2] If anything, a preliminary injunction is even more appropriate in this case involving *non-profit* entities.

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

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* This initial inquiry requires courts to (1) identify the particular exercise of religion at issue, and (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute); *see also Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"). Here, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do what their religion forbids: facilitate access

[2] Courts in at least twenty cases have afforded preliminary relief to for-profit plaintiffs challenging the Mandate. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holdings Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); *Lindsay v. HHS*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. #9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. 50); *Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. HHS*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

to abortion-inducing products, contraception, sterilization, and related counseling.

(i) "Exercise of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Because the exercise of religion has been interpreted to include a diverse array of conduct, ranging from refusing to give children a formal education, *see Yoder*, 406 U.S. at 210-19, to eating only certain foods, *see Nelson v. Miller*, 570 F.3d 868, 878-89 (7th Cir. 2009), RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). 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, and/or facilitate access to abortion-inducing products, contraception, sterilization, or related counseling, including by contracting with an insurance company or third party administrator that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. *See* Ryan Aff. ¶¶ 22, 34-35; Young Aff. ¶¶ 15-16, 20; Wardwell Aff. ¶¶ 18-22; Sister Klein-Fraciscan Aff. ¶¶ 8-9, 19-23; Sister Klein-SPI Aff. ¶¶ 10-17; Sister Kriss Aff. ¶¶ 6, 10-14; Erlandson Aff. ¶¶ 15-19. 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 an insurance provider (or third party administrator) 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*, 2013 WL 3206103, at *17 ("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.[3] Moreover, for self-insured organizations, the required self-certification constitutes the religious organization's specific "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. 39,879. (emphasis added).

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* Ryan Aff. ¶¶ 22, 34-35; Young Aff. ¶¶ 15-16, 20; Wardwell Aff. ¶¶ 18-22; Sister Klein-Fraciscan Aff. ¶¶ 8-9, 19-23; Sister Klein-SPI Aff. ¶¶ 10-17; Sister Kriss Aff. ¶¶ 6, 10-14;

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

Erlandson Aff. ¶¶ 15-19. This sincere religious belief is entitled to no less protection than that at issue in *Hobby Lobby*.

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. The Diocese is forgoing approximately $180,000 a year in increased premiums to maintain grandfathered status for this very reason. Ryan Aff. ¶ 27. It is, in short, the impermissible *facilitation* of access to objectionable products and services that violates 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 service, thereby further exacerbating the already impermissible substantial burden. This is so, even if the Government's dubious cost-neutrality assumption is true. Take, for example, religious organizations that procure insurance from an insurance company, wherein the insurance company must provide or procure the objectionable 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 dubious assumption that the cost of contraception will be offset by "lower costs from improvements in women's health and fewer childbirths," 78 Fed. Reg. at 8,463, which in turn depends on the assumption that the Mandate will induce large numbers of women who do not currently use contraception to begin doing so. This, of course, demonstrates why Plaintiffs so vehemently object to the Mandate: It forces them to participate in a scheme *specifically designed to lure* women to engage in practices contrary to Plaintiffs' sincerely-held religious beliefs. More important for present purposes, however, the Government has adduced *no evidence* that women will change their behavior in sufficient numbers to achieve cost-neutrality. The same is true for self-insured organizations, for whom, the Government asserts, third party administrators will be permitted to recoup their costs through reductions in user fees on federally facilitated health exchanges. *See* 78 Fed. Reg. 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 contrary to this religious practice.

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, a federal law "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas,* 450 U.S. at 717-18; *Kaemmerling*, 553 F.3d at 678 (same). In *Yoder*, for example, the 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 Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (Feb. 24, 2012) (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.

This Circuit and the Tenth Circuit have recently addressed challenges by for-profit companies against a previous version of the Mandate in a pair of closely related cases. In two cases in this Circuit, the district court granted injunctions pending appeal against enforcement of the Mandate because the plaintiffs demonstrated a likelihood of success on their RFRA claim. In *Korte v. Sebelius*, the court ruled that the "[t]he contraception mandate applies to [plaintiffs] as an employer of more than 50 employees," and that, as Catholics, they "would have to violate their religious beliefs to operate their company in compliance with it." No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012). In light of the penalties for non-compliance, plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4. In the companion case, on a nearly identical challenge, the court found that the Mandate would present an even greater burden on the plaintiffs' religious liberties because they operated self-insured health plans. *See Grote,* 708 F.3d at 854.[4] The Tenth Circuit, sitting *en banc*, likewise recently held that a for-

[4] *See also Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24) (granting injunction pending appeal); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (same); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS

profit religious organization 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*, 2013 WL 3216103, at *21. 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* Ryan Aff. ¶ 37; Young Aff. ¶ 36; Sister Klein-Franciscan Aff. ¶ 25. *See also, e.g.*, Wardwell Aff. ¶¶ 23-24; Sister Klein-SPI Aff. ¶ 15; Sister Kriss Aff. ¶¶ 34-35; Erlandson Aff. ¶ 22. 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"

(continued…)

26633 (8th Cir. Nov. 28, 2012) (same).

into serving as the instruments by which its purported goals are advanced. *Id.* at 430-31; *Tyndale*, 904 F .Supp. 2d at 125-26. The Government cannot begin to meet this standard.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotiation 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*, 2013 WL 3216103, at *23; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *70-72 (W.D. Pa. Mar. 6, 2013), *injunction granted* 2013 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.

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, slip op. at 32 (M.D. Fla. June 25, 2013).

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to significantly impact contraceptive *use*, "because the group of women

with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvare, *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. Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

3. The Government Cannot Demonstrate that the Mandate Is the Least Restrictive Means to Achieve Its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal quotations marks omitted). "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means."

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

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

B. The Mandate Violates the Free Exercise Clause

The Free Exercise Clause of the First Amendment embodies a "fundamental non-

persecution principle" that prevents the Government from "enact[ing] laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that *disfavor* religion. *See Lukumi*, 508 U.S. at 532. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

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

The same reasoning applies here. The Mandate is not "generally applicable" because it is

riddled with exemptions, *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." *Id.* at 537-38.

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

The record, moreover, establishes that the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, at a NARAL Pro-Choice America fundraiser, Defendant Sebelius stated, "Wouldn't you think that people who want to reduce the

number of abortions would champion the cause of widely affordable contraceptive services? Not so much." (Am. Compl. ¶ 244). Thus, the Government went out of its way to impose an unnecessary burden on Plaintiffs' religious practices. Not only the "real operation," but also the intended effect, of the Mandate has always been to target and suppress Plaintiffs' religious practices. *Lukumi*, 508 U.S. at 533-35.

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

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

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321 (2013) (quoting *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)). Thus, "[a]ny attempt by the government either to compel

individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co., et al., v. FDA*, No. 11-5332 (D.C. Cir. Aug. 24, 2012), slip op. at 10. (citing *United States v. United Foods, Inc*., 533 U.S. 405, 410-11 (2001)). Protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to provide, pay for, and/or facilitate access to "counseling" related to abortion-inducing products, 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, 472 n.6 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc) (enjoining enforcement of law requiring crisis pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider").

D. The Mandate Imposes a Gag Order that Violates The First Amendment Protection of Free Speech

At the very core of the First Amendment is the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Indeed, the imposition of "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment

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

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

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

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

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

1. Discrimination Among Religious Groups

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

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated

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

Here, the Mandate violates this principle of neutrality by establishing an official category of "religious employer" that favors some religious groups over others. The exemption is defined to include only "nonprofit organization[s] as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." As the Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,461. This definition favors religious groups that fit into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that exercise their religious faith through alternative means—including religious organizations, like Plaintiffs Catholic Charities, Saint Anne Home, Franciscan, Specialty Physicians, Saint Francis, and Our Sunday Visitor, which express their faith by providing healthcare and health services, education, and other various services to the elderly, poor, and needy. 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." *Colorado Christian*, 534 F.3d at 1261 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits (as here)." *Id.* (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984)).

In determining eligibility for a religious exemption, the Government may not ask intrusive questions designed to determine whether a group is "*sufficiently* religious," *Univ. of Great Falls v. NLRB*, 278 F.3d at 1343, or even whether the group has a "substantial religious character." *Id.* at 1344. Rather, any inquiry into a group's eligibility for a religious exemption must be limited to determining whether the group is a "bona fide religious institution[]." *Id.* at 1343-44 (approving of a religious exemption that would include any non-profit group that "holds itself out" as religious, but reserving the question of whether groups could be required to show that they are "affiliated with . . . a recognized religious organization").

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

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

Id. (citing *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55, 64 (1983)).

Not only do these factors favor some religious groups over others, but they do so on the basis of intrusive judgments regarding religious beliefs, practices, and organizational structure. For example, probing into whether a group has "a recognized creed and form of worship" not only requires the Government to determine which belief systems will be deemed "recognized creed[s]," but also demands inquiry into which practices qualify as "forms of worship." In answering such questions, the Government cannot escape being "cast in the role of arbiter of [an] essentially religious dispute." *New York v. Cathedral Acad.*, 434 U.S. 125, 132-33 (1977). Similarly, in determining whether a religious group has had "a distinct religious history," the exemption not only favors long-established religious groups, but also requires the Government to

probe into potentially disputed matters of religious history. Any dispute as to whether a group's history is sufficiently "distinct" or "religious," should not be resolved by the Government. Indeed, "church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id*. at 133.

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

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

Here, the Mandate violates this principle by artificially splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. *See, e.g.*, Sister Klein-Franciscan Aff. ¶ 26; Sister Kriss Aff. ¶ 36. 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.

The Mandate, moreover, compounds this error by interfering with the Church hierarchy's ability to ensure that subordinate institutions, including various charitable and educational ministries, adhere to Church teaching through participation in a single insurance plan. Such an arrangement is currently in place in Fort Wayne-South Bend, where the Diocese makes its self-insured health plan available to the employees of its religious affiliate, Catholic Charities. By serving as the insurance provider for Catholic Charities, the Diocese can directly ensure that Catholic Charities offers its employees a health plan that is in all ways consistent with Catholic beliefs. The Mandate disrupts this internal arrangement by forcing the Diocese to either maintain its plan's grandfathered status to protect Catholic Charities; sponsor a plan that will provide the employees of Catholic Charities with access to "free" abortion-inducing products, contraception, sterilization, and related counseling; or expel Catholic Charities from the Diocese's self-insurance plan, thereby forcing Catholic Charities to enter into a different contract for the objectionable coverage. Ryan Aff. ¶ 33. Either way, the Mandate directly undermines the Diocese's ability to ensure that its religious affiliates remain faithful to Church teaching.

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

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

First, the Weldon Amendment states that "[n]one of the funds made available in this Act [to the Departments of Labor and of Health and Human Services] may be made available to a

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

Second, the Act states that "[n]othing in this title (or an amendment made by this title) shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan . . . ." 42 U.S.C. § 18118(c). This prohibits any law that has the effect of preventing an institution of higher education from offering a student health plan. *See* Student Health Insurance Coverage, 76 Fed. Reg. 7,767, 7,769 (Feb. 11, 2011). The requirement that student health plans include or facilitate coverage for abortion-inducing products, sterilization, contraception, and related counseling has the effect of prohibiting the University from offering a student health-insurance plan in the future because any such plan would have to include coverage to which the University objects based on its sincerely-held religious beliefs. Sister Kriss Aff. ¶ 23.

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

Plaintiffs are entitled to injunctive relief because the Mandate is causing them substantial irreparable harm. "It is well settled that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (quoting *Elrod v. Burns*,

427 U.S. 347, 373 (1976)) *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *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.")).

The forced violation of Plaintiffs' faith is the epitome of irreparable injury. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) (quoting *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)), for the proposition that the loss of First Amendment Freedoms constitutes irreparable harm because "quantification of injury is difficult and damages are therefore not an adequate remedy"). The Mandate forces Plaintiffs to violate central tenets of their religious beliefs. *See* Ryan Aff. ¶¶ 22, 34-35; Young Aff. ¶¶ 15-16, 20; Wardwell Aff. ¶¶ 18-22; Sister Klein-Fraciscan Aff. ¶¶ 8-9, 19-23; Sister Klein-SPI Aff. ¶¶ 10-17; Sister Kriss Aff. ¶¶ 6, 10-14; Erlandson Aff. ¶¶ 15-19. 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 Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) ("[irreparable] harm . . . cannot be prevented or fully rectified by the final judgment after trial").

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

The Government cannot possibly establish any substantial harm from a preliminary injunction pending final resolution of this case 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," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot possibly claim that it will be harmed by this Court granting a temporary exemption for Plaintiffs.

Indeed, any claim of harm is fatally undermined by the Government's acquiescence to preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, *Sharpe Holdings, Inc. v. HHS*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013) (Dkt. 10); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. 18). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087, at *41 (W.D. Pa. Apr. 19, 2013).

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

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. For one thing, the Seventh Circuit has recognized that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859 (citing *Elrod*, 427 U.S. at 373); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing

constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."). This same reasoning should also apply to the rights protected by RFRA, which is meant to give religious exercise even greater protection than that provided under the First Amendment. *Cf., e.g.*, *Kikumura v. Hurley,* 242 F.3d 950. 963 (10th Cir. 2001). In particular, there is a "strong public interest in a citizen's free exercise of religion, a public interest clearly recognized by Congress when it enacted RFRA . . . ." *O Centro*, 389 F.3d 973, 1010 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006).

Here, public interest in a preliminary injunction is especially high because enforcement of the Mandate will threaten or diminish the continuation of Plaintiffs' charitable and educational activities, which serve thousands of needy individuals. *See, e.g.*, Ryan Aff. ¶¶ 10-21; Young Aff. ¶¶ 6-14; Wardwell Aff. ¶¶ 5-14; Sister Klein-Franciscan Aff. ¶¶ 8-12; Sister Klein-SPI Aff. ¶¶ 4-6; Sister Kriss Aff. ¶¶ 7-19; Erlandson Aff. ¶¶ 7-10. 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 6th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2013, I electronically 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 Northern District of Indiana using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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