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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION, OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Cont.)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

STATUTES

TABLE OF AUTHORITIES
(Cont.)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Cont.)

Page

INTRODUCTION

The resolution of this case turns on the answer to a straightforward question: absent interests of the highest order, can the Government force religious organizations to take actions that violate their sincerely held religious beliefs?

The Government does not dispute that Plaintiffs' sincerely held religious beliefs bar them from participating in a scheme to supply their employees with health plans that provide access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Nor does the Government dispute that the regulations at issue here (the "Mandate") require Plaintiffs to participate in just such a scheme on pain of substantial financial penalties. Rather, the Government contends that if Plaintiffs participated in this scheme, their involvement would be "*de minimis*" and "attenuated." The Mandate, the Government insists, "require[s] virtually nothing" of Plaintiffs beyond the "mere act of certifying that they are eligible for an accommodation." The Government finds it "[r]emarkabl[e]" and "extraordinary" that Plaintiffs would object to what the Government apparently believes to be inconsequential actions.

In fact, the Mandate requires far more of Plaintiffs than the "mere act of certifying that they are eligible for the accommodation." It compels Plaintiffs to do something they affirmatively believe to be wrong: namely, to provide their employees with a health plan that is the vehicle by which they receive access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Indeed, Plaintiffs cannot avoid this Mandate either by offering a health insurance plan that does not provide access to the objectionable services or by dropping health insurance coverage altogether, as either action would subject them to crippling fines and/or other negative consequences. Thus, under the Mandate, Plaintiffs must find a third party willing to provide the mandated coverage, contract with that party, and subsequently authorize that party to provide the very products and services to which Plaintiffs

object. Those products and services would be offered to Plaintiffs' employees only so long as they remain on Plaintiffs' health plans, and only by virtue of Plaintiffs' authorization of a third party to provide the coverage. The Government's vaunted "accommodation," therefore, is materially indistinguishable from the regulation applicable to for-profit entities: both require employers to offer health plans that cover contraceptives—the only difference is that Plaintiffs' contraceptive coverage is effectively written into their policies in invisible ink. Thus, there can be no serious question that the Mandate compels Plaintiffs to act in violation of their beliefs.

The implications of the Government's arguments to the contrary are breathtaking. At bottom, the Government is not asking this Court to evaluate the *legal* question of whether the Mandate places a substantial burden on Plaintiffs' exercise of religion. Instead, it is asking this Court to make a *religious* judgment that the actions required by the Mandate are "*de minimis*" or too "attenuated" to count as significant violations of Plaintiffs' religious beliefs. This, of course, is clearly wrong as a factual matter, for the reasons explained above. More importantly, however, this inherently religious judgment lies well beyond the power of federal courts. Indeed, to rule in favor of the Government, this Court would have to "rule that [Plaintiffs]"—who sincerely believe they cannot in good conscience participate in the mandated scheme—"misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988).

This radical transformation of the substantial-burden test from an evaluation of the pressure placed on objectors to violate their religious beliefs into a judicial exploration of moral theology would "cast the Judiciary in a role that [it was] never intended to play." *Id.* It "cannot be squared with the Constitution or with [Supreme Court] precedents," *id.*, which clearly establish that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982). As

explained in Plaintiffs' initial brief, far from inviting courts to wade into matters of Catholic doctrine, the substantial burden test is limited to an inquiry into the sincerity of Plaintiffs' beliefs and the degree of pressure the Government places on them to violate those beliefs. *See* Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' 1st Br.") at 13–21; *see also Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716–18 (1981); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (*en banc*).

Thus, the question for this Court is not whether compliance with the Mandate is a *substantial violation* of Plaintiffs' beliefs; instead, the question is whether the Mandate *substantially pressures* Plaintiffs to violate those beliefs as Plaintiffs understand them. *See Thomas*, 450 U.S. at 717–18. While courts can question whether the pressure or "burden" placed on Plaintiffs to violate their beliefs is "substantial," under no circumstances may courts assess whether a particular action transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [courts]" to question. *Id.* at 715.

Here, once the moral "line" drawn by Plaintiffs is properly identified, it becomes readily apparent that the Mandate places substantial pressure on Plaintiffs to cross that line. In accordance with Catholic teaching, Plaintiffs oppose taking the actions required by the Mandate to facilitate access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. The Mandate, however, threatens Plaintiffs with millions of dollars in fines and other negative consequences if they do not do precisely what they believe their religion forbids. It is thus beyond question that the Mandate imposes a substantial burden on Plaintiffs' religious exercise. This burden, moreover, cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

Accordingly, the Mandate is irreconcilable with the Religious Freedom Restoration Act

("RFRA"), the First Amendment, and other federal laws. This Court therefore should enter a preliminary injunction against enforcement of the Mandate or, alternatively, grant Plaintiffs' Motion for Summary Judgment. For the same reasons, the Government's Motion to Dismiss or, in the Alternative, for Summary Judgment, should be denied.

ARGUMENT

As shown in Plaintiffs' initial brief, Plaintiffs have demonstrated that they are entitled to a preliminary injunction on their claims that the Mandate violates RFRA, the First Amendment, and the Administrative Procedure Act ("APA"). For largely the same reasons, as discussed further below, they are also entitled to summary judgment.

Summary judgment is proper if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Not every dispute between the parties makes summary judgment inappropriate; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. When considering a motion for summary judgment, a court may only consider admissible evidence and must disregard bald and conclusory assertions. *Bradley v. Work*, 154 F.3d 704, 707 (7th Cir. 1998); *Morris v. Ford Motor Co.*, No. 2:10-cv-504, 2012 WL 5947753, at *2 (N.D. Ind. Nov. 28, 2012).

Here, the undisputed facts demonstrate not only that that the Mandate violates RFRA, but also that that the Mandate violates Plaintiffs' First Amendment rights and was passed in violation of the APA. As such, Plaintiffs are entitled to summary judgment on all counts.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS AND ARE ALSO ENTITLED TO SUMMARY JUDGMENT

A. The Mandate Violates the Religious Freedom Restoration Act

Under RFRA, the federal government may not "substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b). Here, Plaintiffs have demonstrated that the Mandate imposes a substantial burden on their religious exercise, while the Government has failed to show that the Mandate is the least restrictive means of furthering a compelling interest.

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Where the sincerity of Plaintiffs' beliefs is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry. A court must (1) "identify the religious belief" at issue, and once that is accomplished, (2) determine "whether the government [has] place[d] substantial pressure"—*i.e.*, a substantial burden—on the plaintiff to violate that belief. *See Hobby Lobby*, 723 F.3d at 1140; *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008).[1]

Under the first step of this analysis—identifying the religious exercise at issue—the court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). Its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Id.* "An inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom." *Id.* After all, it is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith." *Thomas*, 450 U.S. at 716. Courts must therefore generally accept plaintiffs' description of their religious exercise, regardless of whether the court, or the

[1] *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) (indicating that "prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise"); *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) (same).

Government, finds the beliefs that animate that exercise "logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff).[2]

Under the second step of this analysis, the court must determine whether the Government has substantially burdened that exercise of religion. The Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds" with his religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18.

Here, application of this test results in the inescapable conclusion that the Government has substantially burdened Plaintiffs' exercise of religion. Plaintiffs exercise their religion by, *inter alia*, refusing to take certain actions that facilitate access to abortion-inducing products, contraceptives, sterilization, or related education and counseling. Plaintiffs, along with the U.S. Conference of Catholic Bishops, have confirmed that such actions would violate Catholic beliefs. Pls.' 1st Br. at 14–16. Moreover, were Plaintiffs to sponsor a plan that triggered provision of the mandated coverage to their employees, they would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.[3] This Court is bound to accept Plaintiffs' representations regarding their beliefs, and the Government has not disputed Plaintiffs' sincerity, nor has it challenged the religious nature of those beliefs. The question then becomes whether the Mandate substantially pressures Plaintiffs to act contrary to their religious beliefs. It plainly

[2] *See also Lee*, 455 U.S. at 257 (same); *United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (finding error where court questioned claimant's "interpretation of Islamic doctrine"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely held religious beliefs"); *Koger*, 523 F.3d at 797 (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Jolly*, 76 F.3d at 477 (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

[3] *See* Ryan Aff. ¶¶ 22, 34-35 (App. 4, 7); Young Aff. ¶¶ 15-16, 20 (App. 12-13); Wardwell Aff. ¶¶ 18-22 (App. 18-19__); Sister Klein-Franciscan Aff. ¶¶ 8-9, 19-23 (App. 24, 26-27); Sister Klein-SPI Aff. ¶¶ 10-17 (App. 32-34); Sister Kriss Aff. ¶¶ 6, 10-14 (App. 38-39); Erlandson Aff. ¶¶ 15-19 (App. 49-50).

does, as it forces Plaintiffs to provide their employees with an insurance plan that is the vehicle by which objectionable products and services are provided to them. Plaintiffs can neither provide a plan that does not facilitate access to such products and services, nor even refuse to provide insurance coverage at all, without exposing themselves to crippling fines and/or other negative consequences. Needless to say, where, as here, the Government has forced Plaintiffs to choose between (1) taking actions that violate their religious beliefs, or (2) paying crippling monetary penalties and/or suffering additional negative consequences, "it is difficult to characterize the pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140.

The Government, however, apparently finds it "[r]emarkabl[e]" and "extraordinary" that Plaintiffs continue to object to the Mandate. Defs.' Mem. in Opp ("Opp'n") at 2–3. According to the Government, Plaintiffs cannot seriously oppose the Mandate, because it requires almost "no action" on their part. *Id.* at 12 (internal quotation marks omitted). To the extent it involves them at all, the Government asserts that Plaintiffs' participation in the scheme to provide contraceptive coverage to their employees is "*de minimis*" and too "attenuated" to merit relief. *Id.* at 11–21. Ultimately, the Government's discussion of the substantial burden analysis amounts to an extended effort to convince this Court that the Mandate is "no big deal."

For Plaintiffs, however, the Mandate is a very big deal—the Catholic Church does not litigate lightly, and the very fact that this case is pending demonstrates the gravity of the matter at hand. Contrary to the Government's assertions, the Mandate forces Plaintiffs, themselves, to take actions that violate their religious beliefs. More significantly, however, the Government's arguments rest on a fundamentally flawed understanding of the substantial burden inquiry that conflates the two steps described above. Though this Court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant[s] to violate th[eir]

belief[s]," *Hobby Lobby*, 723 F.3d at 1137, the Government would instead have this Court assess whether the Mandate requires Plaintiffs to violate their beliefs in a "significant" or "meaningful" way. As detailed below, such a test distorts the substantial burden analysis beyond recognition, and would require this Court to make determinations that lie well beyond its competence.

(a) The Mandate Requires Plaintiffs to Act in Violation of Their Sincerely Held Religious Beliefs

The Government argues that the Mandate requires Plaintiffs to engage in almost no action, and therefore, cannot violate RFRA. Opp'n at 2–3 (asserting that Plaintiffs object to "regulations [that] require virtually nothing of them"). Nothing could be farther from the truth. As explained, Plaintiffs are required to provide a health care plan that serves as the vehicle for the delivery of objectionable products and services. Plaintiffs, moreover, are forced to take numerous concrete steps towards that end, including locating and identifying a third party willing to provide the very services they deem objectionable, entering into a contract with that party that will result in the provision of those services, and authorizing the provision of those services through self-certification. And indeed, despite the Government's claims to the contrary, it is likely that Plaintiffs' funds will subsidize the provision of these services. Pls.' 1st Br. at 17–18. Plaintiffs cannot avoid these requirements without subjecting themselves to crippling fines and/or other negative consequences.

Indeed, for all practical purposes, the Mandate as applied to Plaintiffs is indistinguishable from the requirements invalidated by the en banc Tenth Circuit in *Hobby Lobby*. There, a private employer's decision to offer a group health plan automatically resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. So too here, Plaintiffs' decision to offer a group health plan results in the provision of coverage—in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related

counseling. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the employers' actions result in "free" contraceptive benefits for their employees. Those benefits are directly tied to the employers' insurance policies: they are available only "so long as [employees] are enrolled in [the organization's] health plan, " 29 C.F.R. § 2590.715-2713A, they must be provided "in a manner consistent" with the provision of explicitly covered health benefits, 78 Fed. Reg. at 39,876–77, and they will be offered only to individuals the organization identifies as its employees, *cf. id.* at 39,876 (indicating that notice of the availability of "payments" must be made "contemporaneous with . . . but separate from" materials employers distribute regarding their health plans). Nor can the Government contend that Plaintiffs are alleviated of costs private employers must bear, as it has repeatedly asserted that the Mandate is cost-neutral. *E.g.*, *id.* at 39,877. For the Government to claim after all of this (as it does, repeatedly) that Plaintiffs are not forced to "contract" or "arrange" for contraceptive coverage is the proverbial "argument only a lawyer could love." *E.g.*, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013); Opp'n at 2, 3, 7, 8.

In any case, what matters for purposes of RFRA is that Plaintiffs sincerely believe the actions detailed above violate their religious beliefs. By forcing Plaintiffs to take such actions, the Mandate is a straightforward effort to "force [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). While the Government may find it "[r]emarkable" or "extraordinary" that Plaintiffs hold such beliefs, Opp'n at 2, RFRA protects Plaintiffs' religious exercise regardless of whether the Government finds it "acceptable, logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714–15.

The Government is thus wrong to claim that this case is analogous to situations where a plaintiff states a religious objection to an "'activit[y] of [a third party], in which [he] play[ed] no role.'" Opp'n at 13–14 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)).

In *Kaemmerling*, the plaintiff objected "to the government collecting his DNA information from any fluid or tissue sample" *already in the government's possession*. 553 F.3d at 678. Notably, Kaemmerling made it "abundantly clear that he d[id] not challenge the collection of any particular DNA carrier." *Id.* In other words, he did not object to the process whereby the Government obtained samples of his blood, saliva, skin, or hair. *Id.* He objected only "to the government extracting DNA information from the specimen." *Id.* at 679. The D.C. Circuit thus concluded that Kaemmerling failed to state a claim under RFRA because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* The extraction of DNA from samples already in the Government's possession involved "no action" by Kaemmerling, and thus imposed no "restriction on what Kaemmerling c[ould] believe or do." *Id.* at 679–80. [4]

Here, provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Plaintiffs] play[] no role." *Id.* To the contrary, as described above, Plaintiffs object to the requirements the Mandate imposes on *them* to impermissibly facilitate access to contraceptives. Indeed, even the Government concedes that the Mandate forces Plaintiffs to participate at some level in the mechanism by which their employees receive contraceptive coverage. *E.g.*, Opp'n at 2. This case thus involves a straightforward application of the long-settled principle that absent circumstances of the highest order, the Government cannot force individuals—in their own conduct—to take actions that violate their religious beliefs.

[4] The reasoning of *Kaemmerling* was derived largely from *Bowen v. Roy*, 476 U.S. 693 (1986). In that case, the Supreme Court concluded that Roy failed to establish that his religious exercise was substantially burdened when he objected to the conduct of a third party, namely, to the government's use of a social security number to administer his daughter's public welfare benefits. *Id.* at 700. Roy, however, also objected to the requirement that *he provide* the government with his daughter's social security number in order for her to receive benefits. *Id.* at 701–712 (opinion of Burger, C.J.). A majority of the court would have held that this requirement imposed a substantial burden on his exercise of religion. *See id.* at 715–716 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, and dissenting in part); *id.* at 733 (White, J., dissenting). This forecloses the Government's assertion that so-called "purely administrative" or *de minimis* acts receive no free exercise protection.

(b) The Government's Arguments Rest on a Fundamentally Flawed Understanding of the Substantial Burden Test

The Government also argues that the Mandate imposes only a *de minimis* or attenuated burden on Plaintiffs' exercise of religion. This, too, is plainly wrong. Plaintiffs' decision to obey their religious beliefs rather than the Mandate subjects them to crippling fines—an obvious substantial burden. *Yoder*, 406 U.S. at 208, 218 ($5 fine is a substantial burden). The Government's contrary argument rests on a misunderstanding of the substantial burden test.

As detailed above, and as the en banc Tenth Circuit explained in *Hobby Lobby*, once a plaintiff's sincere religious beliefs have been identified, a court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant to violate [those] belief[s]." *Hobby Lobby*, 723 F.3d at 1137; *id.* at 1139 ("[T]he burden analysis . . . turn[s] . . . on the coercion the claimant feels to violate his beliefs."). Indeed, an "understanding of 'substantial burden'" that looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs" is "fundamentally flawed." *Id.* at 1137.[5]

In arguing that that the actions required of Plaintiffs by the Mandate are *de minimis* and too attenuated to merit relief, the Government has misinterpreted RFRA to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on Plaintiffs' exercise of religion. Indeed, this is the only plausible explanation for the Government's otherwise risible assertion that "the regulations place no burden *at all* on plaintiffs," Opp'n at 12—one can hardly maintain that the threat of millions of dollars in fines fails to pressure Plaintiffs to violate their religious beliefs. This distinction is not without a difference, and the Government's reading fails for two reasons.

[5] The Government's attempt to marginalize this holding as supported by only a "bare majority of the en banc Tenth Circuit" is misleading. Opp'n at 16 n.9, 20 n.13. In fact, the majority opinion garnered five votes, with three dissents. None of the dissenters disputed the validity of this test. *Hobby Lobby*, 723 F.3d at 1175–76 (Briscoe, C.J., concurring in part, dissenting in part); *id.* at 1189–90 (Matheson, J., concurring in part, dissenting in part).

(i) RFRA Protects "Any Exercise of Religion"

As an initial matter, the Government's reading is plainly contrary to the statutory text. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). RFRA contains no requirement that the actions required of plaintiffs be "significant" or "substantial": "*any* exercise of religion" is protected. *Id.* (emphasis added). Here, because Plaintiffs' refusal to facilitate access to the objectionable products and services clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a protected exercise of religion for purposes of RFRA.

Contrary to the Government's contention, this does not "read[] the word 'substantial' out of RFRA." Opp'n at 17. It simply puts the word in its proper place—modifying "burden" rather than "exercise of religion." As is plain from the statutory text, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather the type of pressure—*i.e.*, the burden—imposed by the Government. 42 U.S.C. § 2000bb-1 ("*Government* shall not substantially burden a person's exercise of religion." (emphasis added)). The word requires the court to assess how strongly the Government is pressuring a plaintiff to violate his religious beliefs—it has nothing to do with the nature of the plaintiff's religious exercise.

Supreme Court precedent confirms this analysis. When called upon to decide whether Government action imposes a substantial burden on religious exercise, the Court has consistently evaluated the magnitude of the coercive mechanism employed by the Government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh Day Adventist plaintiff of working on Saturday was "*de minimis*." Opp'n at 12. Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the

resulting denial of unemployment benefits effectively coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to forgo [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404. Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory producing turrets for military tanks "require[d him] to change his behavior in any significant way." Opp'n at 3. Rather, the Court evaluated the "coercive impact" of the State's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18.

Despite the Government's assertions to the contrary, Opp'n at 15–16, RFRA's protections are not limited to laws that require plaintiffs to significantly modify their conduct. The touchstone of the substantial burden analysis is not whether plaintiffs are forced to modify their behavior, but rather, whether they are compelled to act in violation of their religious beliefs. *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry "begin[s]" with an assessment of whether the "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 398 (same); *see also Yoder*, 406 U.S. at 218 (evaluating whether the law "compels" plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious beliefs). The fact that a plaintiff must outwardly modify his behavior is sufficient, but not necessary, evidence that he or she is being forced to act in violation of his or her beliefs. Indeed, if the Government were correct, it could, for example, pass a law compelling Plaintiffs to pay into a fund used to feed the homeless, and it could continue to require Plaintiffs to pay into that fund if it subsequently decided to use those monies to subsidize abortion: as Plaintiffs were already paying into the fund, the fact that the fund's new purpose would violate Plaintiffs' religious beliefs would be, in the

Government's view, irrelevant. That is plainly not the law. Obviously, changed circumstances can make it morally untenable to keep doing what one has done before. While the physical act may remain the same, a change to the meaning and consequences of that act can render it illicit.

In any case, as noted above, the Mandate *does* force Plaintiffs to modify their behavior: in the past, Plaintiffs have always sought to enter into health insurance contracts that would *not* result in the provision of contraceptive coverage to their employees.[6] Under the Mandate, Plaintiffs must now enter into contracts that *will* result in the provision of the objectionable coverage. They are, moreover, required to take numerous additional steps as part of the overall scheme, including the completion of a self-certification form that effectively authorizes a third party to provide contraceptive coverage to their employees "for free." Accordingly, even under the Government's erroneous understanding of the law, Plaintiffs are required to modify their behavior in a way that runs directly contrary to their sincerely held religious beliefs.

(ii) Improper Evaluation of Religious Beliefs

The Government's reading of RFRA also would impermissibly "cast the Judiciary in a role that [it was] never intended to play." *Lyng*, 485 U.S. at 458. The consequences of the Government's misplaced modifier are grave. In effect, rather than asking this Court to evaluate whether the pressure placed on Plaintiffs to violate their beliefs is "substantial," the Government asks this Court to determine whether compliance with the Mandate constitutes a "substantial" violation of Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter analysis involves an inherently *religious* inquiry. The judiciary, however, has no competence to determine the significance of a particular religious act; "[i]t is not within the judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v.*

[6] Ryan Decl. ¶ 12 (App. 56); Wardwell Decl. ¶ 8 (App. 70); Sister Klein-Franciscan Decl. ¶ 7 (App. 76); Sister Klein-SPI Decl. ¶ 7 (App. 82); Sister Kriss Decl. ¶ 7 (App. 88); Erlandson Decl. ¶ 6 (App. 94).

Comm'r, 490 U.S. 680, 699 (1989). Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is "significant" or "meaningful" is self-evident. Opp'n at 3, 11. On the Government's theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that a change in verbiage is a "*de mimimis*" act. *Id.* at 12. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] virtually nothing of [him]." *Id.* at 2. And a Native American father could be forced to take the "purely administrative" step of submitting his daughter's social security number to the government for her to receive benefits. *Id.* at 14; *supra* note 4. Indeed, the Government could simply require Plaintiffs to sign a piece of paper renouncing their views on contraception—as, in effect, they seek to do—as doing so would "require them to do next to nothing" and would certainly only take "a matter of minutes." Opp'n at 11, 14. No "principle of law or logic" equips a court to decide the "significan[ce]" or "meaning[]" of these acts, *Smith*, 494 U.S. at 887; Opp'n at 3, 11; what may be "no big deal" to the Government may be a very big deal to a believer.

The Government's arguments on "attenuat[ion]" further illustrate this point. Opp'n at 18–21. First, the Government argues that Plaintiffs cannot obtain relief under RFRA because they are "separated from the use of contraception by a series of events that must occur before the use of contraceptive services to which plaintiffs object would come into play." *Id.* at 19. This is not an evaluation of the pressure placed on Plaintiffs to violate their beliefs, but is rather a particularly obvious invitation for the Court to assess whether Plaintiffs' conduct is sufficiently remote from the use of contraceptives so as to absolve them from moral culpability for their

actions. Courts, however, have no competence to make this religious determination. If Plaintiffs interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699.

Once again, Supreme Court precedent is instructive. For example, in holding that denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his religious exercise, the Court did not question whether working in the factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of his pacifist convictions as a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the line the plaintiff drew. *Id.* at 715. And in *Lee*, the Court rejected the Government's contention that payment of social security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the Amish plaintiffs' own representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257. "As the Supreme Court accepted the religious belief in *Lee* [and *Thomas*,] so [too] must [this Court] accept [Plaintiffs'] beliefs." *Hobby Lobby*, 723 F.3d at 1141.[7]

Likewise, the Government's argument that there is no meaningful distinction between the payment of wages and the provision of access to contraceptive benefits, *see* Opp'n at 18, 20, involves "impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). The question of whether one action (paying wages that may

[7] As the *Hobby Lobby* court explained, the religious belief in *Lee* was similar to the belief at issue here. Part of the objection to paying into the social security system was that it would "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139. "Thus, the belief at issue in *Lee* turned in part on a concern of facilitating others' wrongdoing." *Id.*; *see also id.* at 1137 (rejecting the notion that "one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties"). Here, Plaintiffs "stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables some else to behave in a manner he considered immoral." *Id.* at 1141.

be used to purchase contraception) is morally indistinguishable from another (providing access to "payments" for certain services) is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Whether a competing moral analysis stems from a coreligionist or the Government, it is not the business of the judiciary to determine whether claimants "correctly perceive[] the commands of their [own] faith." *Thomas*, 450 U.S. at 716. Indeed, even if the line between providing a salary and complying with the Mandate were "unreasonable," it would not be for a court to second-guess how Plaintiffs have drawn that line. *See id.* at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate tanks); *Hobby Lobby*, 723 F.3d at 1141 ("[Plaintiffs] have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable.").

But in any case, the line here is eminently reasonable. Employees may use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary belongs to the employee, and the employer has no input into its use. But when an employer complies with the Mandate, it ensures that its employees are furnished with a health plan "coupon" that can *only* be redeemed for contraceptives—as often as the employee chooses, for as long as the employment relationship lasts. The employer is thus made part of, and complicit in, the purchase of products to which it objects. In that respect, providing access to payments for contraceptives through compliance with the Mandate is qualitatively different from leaving it to employees to use their paychecks as they see fit. [8]

[8] Insofar as the Government contends that Plaintiffs' religious beliefs are not violated because they "are free . . . to voice their disapproval of contraception, and to encourage their employees to refrain from using

It is important to pause here to clarify what Plaintiffs are saying, and what they are not saying. Plaintiffs do not contend that the "mere fact" that they "claim" the Mandate "imposes a substantial burden on their religious exercise . . . make[s] it so." Opp'n at 15. Far from it. This Court need only accept Plaintiffs' description of the nature of their religious exercise. In other words, because RFRA protects "any exercise of religion" and because the Constitution bars the judiciary from weighing in on matters of theology, this Court must defer to Plaintiffs' claims at step one of the RFRA analysis. *Supra* pp. 5, 14–18. But that does not end the inquiry. To determine whether a substantial burden exists, the Court must proceed to step two, where it conducts an independent analysis to determine whether the Government has imposed substantial pressure on Plaintiffs to violate their religious beliefs. *Supra* pp. 6, 11–14. Here, however, for the reasons explained above, that inquiry is a simple one, since the Government imposes crippling fines on Plaintiffs if they refuse to conform their conduct to the requirements of the Mandate.[9]

* * *

At bottom, the Government appears to misunderstand Plaintiffs' religious objection. Plaintiffs object not only to using contraceptives, but also to taking actions that facilitate their

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contraceptive services," Opp'n at 12, that conclusion misinterprets the nature of Plaintiffs' beliefs. This is not a circumstance where believers merely want to express a religious viewpoint and the government has limited the channels to express that viewpoint. *Cf. Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011). Rather, Plaintiffs are forced to take action they affirmatively believe to be wrong. *See, e.g.*, *Thomas*, 450 U.S. at 713–18 (concluding that compelling plaintiff to take action that would violate his pacifist beliefs imposed a substantial burden, without analyzing whether his beliefs could be expressed in other ways, such as participation in antiwar demonstrations). No amount of counter-speech can cure that harm. *Cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (stating that the government cannot force religious groups to express their beliefs "only at the price of evident hypocrisy"); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15–16 (1986) (plurality op.) (refusing to force objectors "to affirm in one breath that which they deny in the next").

[9] Thus, despite the Government's evident concern, Opp'n at 17–18, this standard does not give religious actors carte blanche to exempt themselves from federal law. Even after accepting plaintiffs' description of their religious exercise, courts still must evaluate whether (1) the belief is sincerely held, (2) the belief is religious in nature, (3) the law places "substantial pressure" on adherents to modify their beliefs, (4) the Government has a "compelling interest" in the law, and (5) the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b). Likewise, 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 none of those circumstances are at issue here, for decades, these safeguards have proved more than equal to the task of preventing religious actors from becoming a law unto themselves. *See Hobby Lobby*, 723 F.3d at 1141 n.16 (rejecting a similar argument on analogous grounds).

use in a morally significant way. *Cf. Hobby Lobby*, 723 F.3d at 1140; *Korte v. Sebelius*, No. 12-3844, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012); *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013). In addition, Plaintiffs sincerely believe that by complying with the Mandate, they would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings. *Supra* note 3. This concept of responsibility for an act committed by another is not unique to the Catholic faith. Indeed, it is the basis for statutes criminalizing acts that "aid" or "abet" the commission of a crime by another. 18 U.S.C. § 2. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, so too may a Catholic violate the moral law if in certain circumstances he or she cooperates in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

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

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

2. The Government Cannot Demonstrate That the Mandate Furthers a Compelling Government Interest

Once a plaintiff shows that governmental action substantially burdens the exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation

furthers a compelling government interest. *O Centro*, 546 U.S. at 429–31. Here, the Government has proffered two generalized interests: (i) the "promotion of public health" and (ii) "assuring that woman have equal access to health care services," or, more broadly still, "gender equality." Opp'n at 22–23. As every court that has addressed the question in the context of the Mandate has concluded, these interests are not compelling, for numerous reasons.[10]

(a) The Government Has Not Established a Compelling Interest in Applying the Mandate to the Plaintiffs

"[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). "[U]nder RFRA[,] invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—*the particular claimant* whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31 (quoting 42 U.S.C. § 2000bb-1) (emphasis added). This standard requires courts to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. The Government must demonstrate with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption" to the religious claimants before the court. *Yoder*, 406 U.S. at 236. This, the Government has not begun to do.

[10] *Hobby Lobby*, 723 F.3d at 1143–44; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433-35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013) (App. 1000); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

Simply put, the Government has not demonstrated a compelling interest in the specific activity at issue here: forcing religious institutions and their affiliates—or even employers generally—to provide their employees with access to FDA-approved contraceptive services and products. Regardless of how important the Government's interests are in the abstract, without a showing that it is necessary to conscript these "particular claimant[s]" to achieve the Government's aims, *O Centro*, 546 U.S. at 430–31, the "mere invocation of the general characteristics" of public health or gender equality "cannot carry the day," *id.* at 432; *Hobby Lobby*, 723 F.3d at 1143 ("We recognize the importance of these interests. But they nonetheless in this context do not satisfy the Supreme Court's compelling interest standards."); *Tyndale*, 904 F. Supp. 2d at 119–20. Thus, even assuming the Government could show that increased access to contraceptives promotes "health" and "gender equality," it has not demonstrated that such access must be facilitated by Plaintiffs via the Mandate.

The Government appears to dispute the workability of this test. *See* Opp'n at 23 n.15. The Supreme Court, however, 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)). Indeed, by enacting RFRA, "Congress determined that [this] '*is* a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Id*. (quoting 42 U.S.C. § 2000bb-1(a)) (emphasis added). The Government's attempt to claim that the Supreme Court did not mean what it said in *O Centro* does not alter this reality, particularly when the appellate authority the Government cites for its position predates that case. *See* Opp'n at 23 n.15 (citing cases).

The Government's one attempt to justify application of the Mandate to Plaintiffs is the claim that an exemption for Plaintiffs would be "completely unworkable" and would "undermine defendants' ability to enforce the regulations in a rational matter," Opp'n at 23 n.15, 27. The Tenth Circuit rejected the same claim in *Hobby Lobby*. 723 F.3d at 1143. Such vague (and unsubstantiated) assertions cannot satisfy the Government's heavy burden to establish that the particular exemption requested would "seriously compromise its ability to administer the program" at issue. *O Centro*, 546 U.S. at 435. The Government offers no explanation for why an exemption for Plaintiffs—as opposed to the bevy of already exempt employers, *infra* Part I.A.2(b)—would "undermine" its ability to enforce the Mandate. Rather, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436. The Supreme Court has consistently "rejected [such] slippery-slope argument[s]." *Id.* Ultimately, because the Government cannot show that an exemption for Plaintiffs would compromise its stated interests, it cannot show that those interests are "compelling." *Hobby Lobby*, 723 F.3d at 1143 (finding the Governmment's interests insufficient because it "offer[ed] almost no justification for not granting specific exemptions to particular religious claimants").

(b) The Mandate Is Riddled with Exemptions

A compelling interest is one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of religious exercise. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Here, however, while steadfastly maintaining the necessity of enforcing the Mandate against Plaintiffs, the Government has seen fit to exempt a host of other

employers from the Mandate because, *inter alia*, their health plans are "grandfathered" or they meet the Government's narrow definition of "religious employer." Moreover, the Government has exempted small employers—those with fewer than fifty employees—from one of the Mandate's principal enforcement mechanisms. 26 U.S.C. § 4980H(a). As numerous courts have found, these exemptions "completely undermine[] any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *Tyndale*, 904 F. Supp. 2d at 129; *Geneva Coll.*, 929 F. Supp. 2d at 434; *see also Hobby Lobby*, 723 F.3d at 1143.

Indeed, the Government has recently taken steps that will ensure that even fewer women receive access to the mandated coverage by announcing a one-year delay in one of the key mechanisms to enforce the Mandate—26 U.S.C. § 4980H, which imposes annual fines of $2,000 per employee on certain large employers for failure to provide group health insurance.[11] The Congressional Budget Office ("CBO") estimates that because of this delay, "roughly 1 million fewer people are expected to be enrolled in employment-based coverage in 2014." The CBO further reports that "roughly half [of those individuals] will be uninsured," while "the others will obtain coverage through the exchanges" or other government programs.[12] Whatever the justification for the Government's actions, the fact it was willing to delay enforcement of these penalties, even though it knew such action would deprive thousands of women of the mandated coverage in 2014, provides further evidence it is not pursuing interests "of the highest order."

The Government attempts to side-step these fatal flaws in its compelling interest argument by seeking to minimize the significance of these exemptions. It first asserts that "grandfathering is not really a permanent 'exemption,' but rather . . . a transition in the

[11] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, Treasury Notes (July 2, 2013) (App. 108).

[12] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Representative Paul Ryan, Chairman, Committee on the Budget (July 30, 2013) at 4 (App. 110).

marketplace." Opp'n at 26. But semantics cannot save the Government here. Whatever word it uses to describe grandfathering, by declining to require such plans to provide contraceptive coverage, the Government was willing to ignore "appreciable damage to [its] supposedly vital interest." *Lukumi*, 508 U.S. at 547. By the Government's own estimates, this means that at least 49% of all health plans, *covering more than 90 million employees*, will be grandfathered at the end of 2013. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Geneva Coll.*, 929 F. Supp. 2d at 434. The Government provides no explanation for why those 90 million employees do not currently require access to employer-sponsored contraceptive coverage, while Plaintiffs' employees do. To the contrary, "[e]verything the Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities sponsoring grandfathered plans. *O Centro*, 546 U.S. at 433. The Government's argument is further undermined by its decision to exclude the Mandate from the requirements that *were* imposed on grandfathered plans, such as the ban on lifetime limits and the extension of coverage for dependent children until age 26. *See* 75 Fed. Reg. at 34,542. An interest cannot be "compelling" where the Government "fails to enact feasible measures to restrict other conduct producing . . . alleged harm of the same sort." *Lukumi*, 508 U.S. at 522.[13]

Moreover, the Government's characterization of grandfathering as a "transition" is belied by the fact that there is no sunset on grandfathering status. Unless an employer makes certain specified changes to a grandfathered plan, that plan can maintain its status in perpetuity. Indeed, the grandfathering exemption "makes good on President Obama's promise that Americans who

[13] The Government also attempts to minimize the significance of exempting small employers from one of the mechanisms to enforce the Mandate. Opp'n at 26. But the Government cannot credibly argue that such action does anything but undermine whatever alleged interest it has in compelling *employers* to provide the mandated coverage. Were employer participation truly necessary to achieve the Government's interests, it would not have established a system whereby employees of small employers could be forced onto the exchanges.

like their health plan can keep it,"[14] and the Government has repeatedly stated that employers have a "right" to maintain grandfathered status. *See, e.g.*, 75 Fed. Reg. at 34,540, 34,558, 34,562, 34,566. The Government's litigating position cannot be squared either with the President's statements, the administrative record, or its own regulatory language.

This is not to say that the Government cannot balance "competing interests" when implementing a "complex statutory scheme." Opp'n at 25. But if it does so, the Government cannot claim to be pursuing interests "of the highest order," *Lukumi*, 508 U.S. at 547. By definition, the Government's interest in requiring employers to facilitate access to contraceptive benefits cannot be "paramount," *Collins*, 323 U.S. at 530, when that interest takes a backseat to interests of administrative and political expediency.[15]

The Government next asserts that the only "true exemption" from the Mandate is for "the group health plans" of those it deems "religious employers." Opp'n at 26. This is, of course, not true. But even if it were, as Plaintiffs explained in their initial brief, Pls.' 1st Br. at 22–23, the Supreme Court has found that a single exemption for one religious group is enough to doom the Government's efforts to deny a similar exemption to other religious practitioners, *O Centro*, 546 U.S. at 433. In *O Centro,* the Court held that the exemption from the Controlled Substances Act for the religious use of peyote undermined the Government's claimed interest in refusing to provide a similar exemption for the religious use of hoasca. *See id.* So too here, the Government's exemption from the Mandate for certain "religious employers" undermines the

[14] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010) (App. 116).

[15] Nor can the grandfathering exemption be deemed irrelevant because it "is not specifically limited to the preventive services coverage regulations." Opp'n at 25. It clearly applies to those regulations and, indeed, provides an even broader exemption from the requirement to cover preventive services than that sought by Plaintiffs. The Government cannot plausibly assert that their claimed interest in enforcing the Mandate against these Plaintiffs is compelling while exempting other employers from the entire regulatory scheme that gave rise to the Mandate.

Government's claimed interest in refusing to provide a similar exemption to Plaintiffs. The Government contends that the distinction is justified because the employees of employers it deems "religious" are more likely to agree with their employer's views regarding contraceptives. Opp'n at 26. But it offers no evidence to support this bald assertion—indeed, it has conceded that it has no such evidence—which is fatal as Government bears the burden of proof. *See Roman Catholic Archdiocese of New York, et al. v. Kathleen Sebelius, et al.*, No. 12-cv-02542 (BMC) (E.D.N.Y.), Excerpt from the Deposition of Gary M. Cohen Transcript ("Cohen Dep. Tr.") at 34:9–24 (App. 120) (stating that there was "no evidence" that employees of organizations like Plaintiffs are "are more likely not to object to the use of contraceptives"). This evidentiary void is not surprising, as it is difficult to discern how the Government could possibly claim to know the extent to which particular believers adhere to specific teachings of the Church.

In any case, the corporate structure of Catholic entities is hardly a reliable proxy for answering the question of how devout their respective employees are likely to be. A large diocese, for example, may well employ numerous individuals who do not share the Church's beliefs. Indeed, two Catholic schools, one that is legally part of the diocesan corporation, and another that is separately incorporated, may be materially indistinguishable from one another in terms of admissions standards, employment requirements, and curriculum. Yet these schools are treated differently under the Mandate because one is separately incorporated (and hence subject to the Mandate) and the other is part of the diocese (and thus exempt). The corporate structure of such entities, however, says *nothing* about the devotion of their employees to the teachings of the Church. To satisfy strict scrutiny, the Government must do more than engage in pure speculation regarding "how religious" Plaintiffs' employees may or may not be.

(c) The Government has Not Demonstrated an Actual Problem in Need of Solving

To satisfy the compelling interest test, the Government "must specifically identify an actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). Although the Government asserts "public health," *see* Opp'n at 21, and "equal access to health care services" as its compelling interests, see Opp'n at 22, it provides woefully little evidence that there is a public health crisis or that access to health care services is unequal.

With respect to public health, the Government claims that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at 39,887. But to say that lack of access has negative health implications does not establish that there is actually a lack of access or that poor health outcomes are prevalent. The IOM Report indicates that only 1 in 20 American women have an unintended pregnancy each year. IOM Report at 102 (AR at 400). And of course, not all unintended pregnancies involve adverse health consequences. The studies cited in the IOM Report appear to at best establish a correlation, not causation, between unintended pregnancy and negative health outcomes, and the Report makes no effort to determine the extent of even the correlation. *See id.* at 103–04 (AR at 401–02). The percentage of American women experiencing negative health outcomes correlated to unintended pregnancy is thus likely even lower than 5%.

The Government also presents little evidence of inadequate access to contraception. In fact, the IOM Report cited a study reporting that "[m]ore than 99 percent of U.S. women aged 15 to 44 years who have ever had sexual intercourse with a male have used at least one contraceptive method." *Id.* at 103 (AR at 401). This statistic suggests that access is not really a problem. Indeed, the Government acknowledges that contraceptives are widely available at free

or reduced cost and that "over 85 percent of employer-sponsored health insurance plans" already cover them. *See, e.g.*, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); Pls.' 1st Br. at 20.

Given the small percentage of unintended pregnancies relative to the female population and the still smaller percentage of women suffering adverse health effects from unintended pregnancy, the Government's interest in promoting positive health outcomes by requiring employers to provide cost-free contraception can only be seen as addressing a "modest gap" in coverage. Any interest in closing such a "gap" cannot be compelling, as the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9 (no compelling interest in closing 20% gap).

The Government attempts to avoid this uncomfortable reality by claiming that the real benefit of the Mandate comes not from increased access to contraception, but from "eliminat[ing] cost-sharing." Opp'n at 22 n.14. But the Government has not only admitted that "85 percent of employer-sponsored health insurance plans cover[] preventive services," but also that they do so "without [beneficiaries] having to meet a deductible"—that is, without a significant form of cost sharing. 75 Fed. Reg. at 41,732. And, of course, exempting Plaintiffs would do *nothing* to undermine whatever alleged benefits result from eliminating cost-sharing for the many secular employers who have no objection to providing coverage for the mandated products and services.

The Government nonetheless attempts to bolster its claim that an "actual problem" exists by conflating contraceptive services with broader "preventive services." Opp'n at 4–5, 21–22. Relying on the IOM Report, the Government asserts that, "[d]ue largely to cost, Americans used preventive services at about half the recommended rate," and that "many women forgo preventive services because of cost-sharing." *Id.* at 4–5, 22 n.14. But the cited pages of the IOM Report rely in part on a study that though addressing "preventive services" *did not consider*

contraceptive coverage. IOM Report at 20 (AR at 318). Rather, it "asked women whether they had received a set of recommended preventive screening tests: blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens."[16]

In any event, assuming that the correlation between unintended pregnancy and certain harmful health effects is an "actual problem," the Government must establish that applying the Mandate to objecting employers is "actually necessary to the solution" and that there is a "direct causal link" between employer-provided cost-free contraception coverage and better public health. *Brown*, 131 S. Ct. at 2738–39. The Government's reasoning, however, appears to take no fewer than four inferential leaps: first, that the Mandate will increase access to contraceptive services; second, that increased access will lead to increased use of contraception; third, that this increased use will result in fewer unplanned pregnancies; and fourth, that fewer unplanned pregnancies will lower the incidence of "conditions harmful to women's health and well-being." Opp'n at 22. The evidence, however, simply does not bridge these leaps.

The Government must have convincing evidence that its solution will actually fix the problem. It cannot simply rely on its "predictive judgment" to show a compelling interest, and mere offers of "ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2738–39; *id.* at 2739 (stating that the government's cited studies failed to "prove that violent video games *cause* minors to act aggressively" but at best "show[ed] at best some correlation"). Here, much of the research cited by the Government appears to be "based on correlation, not … causation." *Id.* For example, the Report itself cites to material indicating that evidence on causation is correlative. IOM Report at 103 (AR at 401) (citing IOM, *The Best Intentions* 65 (1995), which asks whether negative health outcomes are "caused by or merely associated with unintended pregnancy").

[16] Robertson, *et al.*, *Women at Risk: Why Increasing Numbers of Women Are Failing to Get the Health Care They Need and How the Affordable Care Act Will Help*, REALIZING HEALTH REFORM'S POTENTIAL 8-9 (2011) (App. 134).

In fact, much of the evidence actually cuts against the Government's claims. For example, sources cited *in the IOM Report* indicate that 89% of women at risk of unintended pregnancy are already using contraceptive services.[17] Other sources cited in the Report also reveal that cost is not the primary reason why women fail to use contraception, even among the most at-risk populations.[18] *See* Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 398–99 (2013) (App. 236-37) ("[T]here are many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost. . . . [D]ue to both method and use failures, contraception use does not guarantee the prevention of pregnancy.").[19] Indeed, studies indicate that a modest increase in employer-provided coverage for contraceptive services is unlikely to have any significant impact on effective contraceptive use. Alvare, *supra*, at 380 (concluding that an increase in coverage of this nature is unlikely to 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'");

[17] The Guttmacher Inst., *Fact Sheet on Contraceptive Use in the United States* (Aug. 2013) (App. 158).

[18] R. Jones, *et al.*, *Contraceptive Use Among U.S. Women Having Abortions*, 34 Perspectives on Sexual and Reproductive Health at 294-303 (Nov./Dec. 2002) (App. 275).

[19] Affidavit of Prof. Scott E. Harrington, Ex. 1 to Comments of the Diocese of Pittsburgh (Apr. 8, 2013) (App. 361) (stating that "responses to the mandate" "would be complex and related to employees' age, marital status, education, income, and numerous other factors, none of which appear to have been analyzed by the Departments or the studies on which they rely, [n]or is there any analysis or evidence that considers the extent to which the demographics and behavior of employees of religious [entities] could differ from those of secular organizations"). Contrary to the Government's assertion, this Court's review of Plaintiffs' claims, and in particular those under RFRA and the Constitution, is not limited to the administrative record. *E.g., Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990). To the extent the Government claims such evidence cannot be considered, this only shows the record is incomplete and should be supplemented and the rule reconsidered in light of a complete record. The Government obviously cannot craft a record that allegedly supports its position, then purport to exclude all contrary evidence from consideration.

Pls.' 1st Br. at 23–25. In sum, even if the Government had adequately identified a public health problem, the evidence does not establish that the Mandate would solve it.[20]

Accordingly, as numerous courts have held, the Government simply does not have a compelling interest in forcing Plaintiffs to facilitate access to abortion-inducing products, contraceptives, sterilization, and related counseling, contrary to their sincerely held beliefs.

3. The Mandate Is Not the Least Restrictive Means to Achieve the Government's Asserted Interests

Finally, even if the Government had shown that the Mandate furthers its asserted interests in "public health" and "gender equality"—and it has not—the Government has not shown that the Mandate is the least restrictive means to those ends.

The "least restrictive means" test "is a severe form of the more commonly used 'narrowly tailored' test." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). The Government must show that "'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). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). This test "necessarily implies a comparison with other means," and because the burden is on the Government, "it must be the party to make this comparison." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). It is not enough to "assume [that] a plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824. The Government bears

[20] The Government's claim that the Mandate also addresses the problem of unequal access to health care services fares even worse. *See* 78 Fed. Reg. at 39,887. The Government's argues that, given the "unique health care needs" of women, the Mandate will ensure that they "achiev[e] health outcomes on an equal basis with men," which would, in turn, "help[] women contribute to society to the same degree as men." *Id.* The Government, however, does not cite a shred of evidence that, as a result of those costs, women have worse health outcomes or that they contribute less to society. But even if the Government could establish that women contribute less than men and have worse health than men, the Government offers no evidence establishing a direct link between access to contraception on one hand and women's health and contributions to society relative to men on the other. Instead, the Government invites the Court to pile abstract, unsupported inference upon abstract, unsupported inference.

the "ultimate burden of demonstrating" that workable alternatives do not suffice. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). And "[o]n this point, the [Government] receives no deference." *Id.* Although a "serious, good faith consideration of workable . . . alternatives" is necessary, "it is not sufficient to satisfy strict scrutiny." *Id.* "[I]t remains at all times the [Government's] obligation to demonstrate, and the Judiciary's obligation to determine," that "no workable . . . alternatives" would achieve the Government's goals. *Id.*

As Plaintiffs demonstrated in their initial motion, there are several alternatives available to the Government to pursue its asserted interests here. *See* Pls.' 1st Br. at 25 (noting that the Government could, *inter alia*, directly provide the services, offer grants to entities that currently provide the services, offer related tax credits or deductions, or allow Plaintiffs to offer services consistent with their beliefs). The Government has not even attempted to carry its burden of showing that these alternatives would be ineffective.

For example, the most obvious alternative is for the Government to provide contraception services for women whose health care plans do not provide such coverage—either directly, or through grants or tax credits. Indeed, this alternative arguably would be more effective than the exception-riddled Mandate in achieving the Government's claimed interests because it would ensure that even more women have access to cost-free contraception. And it would do so without requiring the active participation of objecting employers in arranging the coverage.

Implementing this alternative would not be unworkable because it would merely build on the vast federal machinery that already exists for providing health care subsidies on a massive scale. For example, the Government could simply extend contraception coverage through the Medicaid program to women whose employers do not provide the required coverage. Although this would require some tweaks to the program, it is already undergoing a massive expansion due

to the Affordable Care Act. *See* American Public Health Association, "Medicaid Expansion" (App. 285). A minor adjustment to provide coverage for contraception services for women who cannot obtain such coverage through their employers would be insignificant by comparison. So too would be the increased monetary costs to the Government. After all, the Government itself acknowledges that "over 85 percent" of employer health care plans already cover contraception services. 75 Fed. Reg. at 41,732. The added cost of providing contraception coverage through Medicaid—hardly a prohibitive expense—for the small percentage of women whose employers will not provide such coverage is miniscule compared to the enormous cost of expanding Medicaid eligibility to greater numbers of people as required by the Affordable Care Act.

The Government, which, it bears emphasis, has the burden of proof here, points to no evidence in the administrative record actually demonstrating that the foregoing alternatives would not work.[21] Instead, it simply asserts that all of the proposed alternatives would not be "feasible." 78 Fed. Reg. at 39,888; Opp'n at 29 (same). But "conclusory claims" that lack any evidentiary support cannot meet the Government's burden of offering "*affirmative evidence* that there is no less severe alternative." *Johnson v. City of Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002) (emphasis added).[22] The Government must "demonstrate[] that [it] 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 Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (explaining that strict scrutiny requires "serious, good faith consideration of workable . . . alternatives"). The Government's cursory rejection of proposed alternatives in the Final Rule fails to satisfy this requirement.

[21] In fact, the Government has elsewhere admitted that it had not considered whether it could expand Medicaid as an alternative to the Mandate. Cohen Dep. Tr. at 35:17–36:11, 48: 6–14, 57:8–15 (App. 121, 127, 130).

[22] Nor can "conclusory assertions" be considered on the Government's motion for summary judgment. *See Morris*, 2012 WL 5947753, at *2; *Bradley*, 154 F.3d at 707.

Nor is it enough for the Government to rely on sweeping, unsupported assertions that Plaintiffs' proposed alternatives would impose "considerable new costs and other burdens on the government." Opp'n at 29. For one thing, the Government does not have, and has never asserted, a compelling interest in providing contraceptive services to women at no cost *to itself*. To recognize such a compelling interest would gut the least restrictive means test because less restrictive means often involve additional cost to the Government. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 799–800 (1988) (indicating that a state could conduct a public information campaign and more "vigorously enforce its antifraud laws," rather than forcing professional fundraisers to make their own disclosures). It is the Government's obligation to "adduce facts establishing that . . . government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women." *Newland*, 881 F. Supp. 2d at 1299. Yet the Government has not produced a single fact—not even a cost estimate—showing that offering contraception coverage through an already-existing program like Medicaid for the small percentage of women at issue here would be so costly and onerous as to be infeasible.

Notwithstanding the utter lack of any evidentiary support, the Government's claim that Plaintiffs' proposed alternatives are impractical is not credible given that the Government already spends millions of dollars to "provide[] free contraception to women," *id.*,[23] through numerous programs.[24] And the Government's claim makes even less sense when viewed in light

[23] *See* HHS, Office of Population Affairs, Announcement of Anticipated Availability of Funds for Family Planning Service Grants (App. 298) ("The President's Budget for Fiscal Year (FY) 2012 requests approximately $237 million for the Title X Family Planning Program."); The Guttmacher Inst., Facts on Publicly Funded Contraceptive Services in the United States (July 2013) (App. 321) (noting that "public expenditures," including state and federal funding, "for family planning services totaled $2.37 billion in FY 2010").

[24] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, *et seq.*; the Teenage Pregnancy Prevention Program, Pub. L. No. 112-74, 125 Stat. 786, 1080; the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 701; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*; the Indian Health Service,

of the Affordable Care Act—one of the largest pieces of social legislation in American history. The Government cannot credibly maintain that implementation of the Affordable Care Act is doable—notwithstanding its countless mandates and complex regulatory structure—while at the same time maintaining that Plaintiffs' modest proposal is too costly and burdensome. Because the Government already provides these services through myriad programs, it can easily achieve its stated goals without requiring religious employers violate their religious beliefs.[25]

But even if it were infeasible for the Government itself to provide the coverage through Medicaid or other already-existing programs, there are still other alternatives that would achieve the Government's objectives without mandating the participation of Plaintiffs. The Government could offer tax credits or deductions to women for the purchase of contraceptives, it could compel manufacturers or distributors of contraceptives to provide them at reduced rates, or it could work with the numerous "community health centers, public clinics, and hospitals" already providing such services to increase public awareness of contraceptives available for free or reduced rates.[26] There is no reason to believe the Government could not "accomplish [its] goal with a broader educational campaign," *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006), regarding the ready availability of free contraceptives due to the millions of dollars it and other organizations have already spent on such services, *see supra* notes 23, 24; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (plurality op.) (striking

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25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq.*; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 281; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

[25] *See Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *18 n.16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 808 (E.D. Mich. 2013) (App. 1014) (concluding that, in light of existing government programs, "the Government has not established its means as necessarily being the least restrictive").

[26] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012) (App. 325).

down ban on advertising alcohol prices because of less restrictive alternatives, including educational campaigns on the dangers of excessive drinking).[27]

In addition to claiming that the proposed alternatives are infeasible, the Government also claims that they would not be "equally effective" in advancing its asserted interests. Opp'n at 29; *see also* 78 Fed. Reg. at 39,888 (same). Not surprisingly, the Government again cites no evidence for this assertion. Instead, it posits that the Affordable Care Act "provid[es] coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888. From this premise, the Government conjectures that "[i]mposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." *Id.* On this point, however, the Government "receives no deference." *Fisher*, 133 S. Ct. at 2420. Mere conjecture does not suffice.[28] The Government must produce "affirmative evidence" that the proposed alternative will not further its asserted interests. *Johnson*, 310 F.3d at 505. Here, however, the Government fails to cite a single study showing that any meaningful number of women will be dissuaded from obtaining free contraception coverage merely because they have to sign up for it through a non-employer-based program. Indeed, the Government conceded as much when its Rule 30(b)(6) deponent in a related case testified that he was unaware of "any studies that show that contraception or sterilization services, if provided by or subsidized by the government, is less efficient than if provided by an employer health plan." *See* Cohen Dep. Tr. at 48:6-14 (App. 127).

[27] Indeed, there are apparently "309 distribution points" for free condoms within a "five mile" radius in New York City, not to mention multiple sites where other types of contraceptives can be obtained for free or reduced rates. Charles C. W. Cooke, *My Contraceptive Haul*, Nat'l Rev. Online (Feb. 29, 2012) (App. 326).

[28] Nor does mere conjecture satisfy the summary judgment evidentiary standard. *See Morris*, 2012 WL 5947753, at *2; *Bradley*, 154 F.3d at 707.

But even if the Government were right that the proposed alternatives would be less effective, it still has not satisfied its burden. The least restrictive means test does not require a strict one-to-one correspondence between the challenged law and alternatives. In other words, "the government [cannot] 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).[29] Indeed, courts routinely identify least restrictive means that are arguably less optimal than the challenged law.[30]

Unable to show that the proposed alternatives are actually infeasible or ineffective, the Government resorts to arguing that its hands are tied—in other words, that the relevant agencies lack statutory authority to implement the alternatives. Opp'n at 28; *see also* 78 Fed. Reg. at 39,888 (same). But in a challenge to a federal regulation under RFRA, the question is whether *the federal government*—not an individual agency—could adopt a proposed less restrictive means. *See* 42 U.S.C. §§ 2000bb-1(b) (stating that the "Government" cannot substantially burden religious exercise unless doing so furthers a compelling governmental interest and "is the least restrictive means of furthering that compelling governmental interest"). In any case, as the Government's willingness to exempt other entities makes plain, they are certainly not *required*

[29] *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (describing the inquiry as a question of whether there are less restrictive means that "promote the substantial interest about as well and at tolerable administrative expense"); *Blount v. SEC*, 61 F.3d 938, 943–44 (D.C. Cir. 1995) (asking "whether less restrictive alternatives to the rule would accomplish the government's goals equally or almost equally effectively").

[30] *See, e.g.*, *Playboy*, 529 U.S. at 800 (allowing individual households to request cable operators to block undesired channels was less restrictive than compelling cable operators to either block or limit transmission of sexually explicit signals); *Riley*, 487 U.S. at 799 (having "the State . . . vigorously enforce its antifraud laws" or disclose information itself was less restrictive than forcing professional fundraisers to reveal to donors what percentage of their donation would actually go to charity); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009) (finding "enhanced education campaign" to be "less-restrictive means" than restricting the sale of violent video games to minors); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 185, 202 (3d Cir. 2008) (holding that instead of making it a crime to post online "material that is harmful to minors," Congress could simply "encourage the use of [internet] filters" by "giv[ing] strong incentives to schools and libraries to use them"); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (instructing the FCC to limit its ban on the indecent broadcasting to the hours of 6:00 a.m. to 10:00 p.m., instead of 6:00 a.m. to 12:00 a.m., as originally planned); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009) (finding "enhanced education campaign" to be "less-restrictive means" of achieving goal).

by the statute to violate Plaintiffs' free exercise rights under RFRA. Nothing prohibits the agencies from granting a similar exemption to Plaintiffs as well.

The Government's only remaining argument is that the proposed alternatives would not be any less restrictive than the Government's purported "accommodation." *See* Opp'n at 28–29. The Government contends that, under Plaintiffs' alternatives, their religious beliefs would still be violated because Plaintiffs would still somehow impermissibly "'facilitate' the availability of [contraceptive] coverage." *Id.* at 29.[31] But that is simply not so. The Mandate, unlike these alternatives, makes Plaintiffs the vehicle by which objectionable products and services are delivered to Plaintiffs' employees and, therefore, crosses the line into impermissible facilitation of what Plaintiffs regard as immoral conduct. Because they do not require the same level of cooperation, Plaintiffs' proposed alternatives—which, as noted, Plaintiffs would oppose as a matter of policy—do not cross that line. In arguing to the contrary, the Government is, in effect, arguing that Plaintiffs do not understand their own religious beliefs. This reflects the same fundamental error the Government has made throughout its brief: it invites the Court to make an inherently religious judgment about the nature of Plaintiffs' beliefs. But as Plaintiffs have explained at length, *see supra* Part I.A.1, it would violate bedrock constitutional principles for either the Government or this Court to second-guess the line Plaintiffs have drawn.

[31] The Government also suggest that Plaintiffs proposed alternatives cannot be least restrictive because Plaintiffs have stated that they "'oppose many of' the alternatives they put forth" and Plaintiffs "cannot plausibly contend that the regulations are not the least restrictive means while simultaneously asserting that they would oppose their own suggested alternatives." Opp'n at 28–29. What Plaintiffs actually said was that they would "oppose many of [the proposed alternatives] *as a matter of policy*." Pls.' 1st Br. at 25 (emphasis added). Plaintiffs, unsurprisingly, generally do not believe that the dissemination of contraceptives is a good policy choice. But that in no way implies that Plaintiffs religious beliefs would be violated by such action. Plaintiffs only object to being compelled to participate in such a scheme—to the extent a scheme does not mandate their participation, while Plaintiffs might think it unadvisable, that scheme would not violate their religious beliefs.

B. The Mandate Violates the Free Exercise Clause

As explained in Plaintiffs' initial brief, the Mandate violates the Free Exercise Clause because it is neither generally applicable nor neutral with respect to religion. Pls.' 1st Br. at 25–28. The Mandate is not "generally applicable" because the government has chosen to exempt millions of employers and individuals. *See Geneva Coll*, 929 F. Supp. at 435–37; *Sharpe Holdings v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012); *supra* Part I.A.2. And the Mandate is not "neutral" because it specifically targets Plaintiffs' religious practices.

Despite the Government's claims, this case is simply not analogous to *Employment Division v. Smith*. *Smith* addressed an "across-the-board criminal prohibition," holding that religious beliefs cannot trump the Government's power to "enforce generally applicable prohibitions of socially harmful conduct." 494 U.S. at 884-85. That is a far cry from the present case, where the process of implementing the Mandate was "replete with examples of the government . . . exempting vast numbers of entities while refusing to extend the religious employer exemption to include entities like" Plaintiffs. *Geneva Coll.*, 929 F. Supp. 2d at 437.

Smith itself made clear that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* at 884. Once the Government begins granting exemptions, it must take care that it does not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. As the Third Circuit has observed:

> While the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a

> categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Fraternal Order of Police v. Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J).

The Government also claims that the Mandate is not discriminatory because it allows exemptions only for "objectively defined categories of entities." Opp'n Br. at 31–32. But there is nothing "objective" about the Government's categories, which necessarily reflect value judgments as to which interests are sufficiently important to merit an exemption from the Mandate. The Government has apparently determined that various economic and logistical concerns merit an exemption for grandfathered plans and a partial exemption for small employers. Moreover, the Government has concluded that an exemption is warranted for *some* religious organizations but not others. Having determined that these other interests are valuable enough to warrant exemptions from the Mandate, the Government may not discount Plaintiffs' claim for a religious exemption, which threatens to "devalue" the importance of Plaintiffs' religious beliefs compared to other private and religious interests. *Lukumi*, 508 U.S. at 538.

At bottom, the Mandate reflects the Government's determination that Plaintiffs' interest in religious freedom is less important than the Government's goal of promoting access to contraception. *Fraternal Order*, 170 F.3d at 365. The Government, however, is entitled to make that determination only if it treats all other private and religious interests the same, equally subordinating all to its paramount regulatory interest, as when it "enforce[s] generally applicable prohibitions of socially harmful conduct." *Smith,* 494 U.S. at 884-85. Even assuming "general applicability does not mean absolute universality," Opp'n at 32, the "fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best." *Geneva Coll.*, 929 F. Supp. 2d at 437.

Finally, the Government claims that it was not targeting certain religious beliefs for disfavored treatment, asserting that the Mandate was enacted "not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." Opp'n at 31. But the Government knew that over 85 percent of employer health plans already provided coverage for contraception, and that the remaining "gap" was due largely to employers that were motivated by moral or religious concerns. Pls.' 1st. Br. at 27. Indeed, if, as the Government asserts, provision of contraceptive coverage is cost-neutral, then the only conceivable reason why employers would not provide it is due to religious or moral objections. Yet with full knowledge of these facts, the Government determined that recalcitrant employers' religious practices needed to yield to what it deemed to be the more important goal of expanding access to contraception. In short, suppressing religious conduct and expanding access to contraception were two sides of the same coin—the Government's goal was to squelch the small number of religious hold-outs whose views were incompatible with the Government's desire to maximize the availability and use of contraceptives, abortion-inducing drugs, sterilization, and related counseling. As in *Lukumi*, "the effect of [the Mandate] in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. This is particularly true where, as here, there is evidence that the Mandate was promulgated by individuals hostile to Plaintiffs' religious beliefs.[32]

[32] As Plaintiffs have explained, Defendant Sebelius asserted at a NARAL Pro-Choice America fundraiser, that "[w]e are in a war," and mocked those who disagree with her position on contraception. *See* Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011) at 5 (App. 334). Likewise, the original definition of "preventive service," was promulgated by an Institute of Medicine Committee that was stacked with individuals who strongly disagreed with many Catholic teachings, *see* Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts ¶ 3, causing the Committee's lone dissenter to lament that the Committee's recommendation reflected the other members' "subjective determinations filtered through a lens of advocacy." IOM Report at 232 (AR at 530). This anti-religious bias is further underscored by the fact that the Mandate was directly modeled on a California statute, *see* 77 Fed. Reg. 8,726; *compare* 76 Fed. Reg. 46,626, *with* Cal. Health and Safety Code § 1376.25(b)(1), where the chief sponsor made clear that its purpose was to strike a blow against Catholic religious authorities. *See* Editorial, *Act of Tyranny*, Wash. Times (Mar. 5, 2004) (App. 335) ("'Let me point out that 59 percent of all Catholic women of childbearing age practice contraception. [Eighty-eight] percent of Catholics

Accordingly, the Government's argument that the Mandate is a neutral law of general applicability is incorrect. Instead, under the Free Exercise Clause, it is subject to strict scrutiny, which it cannot survive. *See supra* Part I.A.2–3.

C. The Mandate Violates Plaintiffs' Freedom of Speech

As Plaintiffs explained in their initial brief, the Mandate violates the First Amendment prohibition on compelled speech in two ways. First, it requires Plaintiffs to facilitate access to "counseling" related to abortion-inducing products, contraception, and sterilization for their employees. Second, to qualify for the so-called "accommodation," the Mandate requires Plaintiffs to provide a "certification" that effectively authorizes a third party to provide or procure objectionable products and services for Plaintiffs' employees. Pls.' 1st Br. at 28–30. To counter Plaintiffs' free-speech claims, the Government mischaracterizes them both.

First, as to the counseling requirement, the Government claims, incredibly, that the counseling required need not support the use of contraception. This disavowal is incompatible not only with the description of such services in the IOM Report,[33] but also with the Government's argument that the Mandate serves an allegedly compelling interest in promoting the use of contraceptives. Opp'n at 21–27. If the "related" counseling is, in fact, not intended to encourage use of those products and services, the Government has no (alleged) interest in forcing Plaintiffs to facilitate that speech. The counseling requirement thus either serves the claimed interest in improving women's health (by encouraging pro-contraception counseling), or it fails to advance the Mandate's asserted purpose, confirming that interest is not compelling.

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believe . . . that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.'" (quoting floor statement of Sen. Jackie Speier)).

[33] IOM Report at 107 (AR at 405) ("Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits . . ., and provide instruction in effective use of the chosen method.").

But even if the requirement only covers contraception as a topic, and does not mandate a pro-contraceptive viewpoint, it still impermissibly compels speech because it deprives Plaintiffs of the freedom to speak on the issue of abortion and contraception on their own terms, 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); *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*). The (implausible) assertion that the requirement mandates only a presentation of facts does not solve the First Amendment problem, because protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

Nor is it of any constitutional significance that Plaintiffs remain free "to express whatever views they may have on the use of contraceptive services" or to "encourage their employees not to use contraceptive services." Opp'n at 35. Plaintiffs will still be forced to facilitate speech with which they disagree, and the Government cannot force Plaintiffs "to affirm in one breath that which they deny in the next." *Pac. Gas & Elec.*, 475 U.S. at 16; *supra* note 8.

Second, as for the required certification, the Government attempts to dismiss this requirement as mere "speech incidental to the regulation of conduct." Opp'n at 35. But the Government's breezy invocation of this complex First Amendment doctrine belies the fact that the "accommodation" makes certification a trigger for the provision of services to which Plaintiffs vehemently object. That is, if an eligible organization certifies its religious objections to the Mandate, that statement obliges a third party to provide or procure the objectionable services. Consequently, Plaintiffs are forced to engage in speech that, in turn, is the trigger for the provision of products and services to which they are fundamentally opposed. In *Arizona*

Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2820 (2011), however, the Supreme Court held that such arrangements violate the First Amendment, striking down a state law that made speech supporting a privately funded candidate the trigger for his opponent's receipt of public financing. *Id.* at 2820 ("[F]orcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." (internal quotation marks omitted)). The Mandate here employs the same forbidden "trigger" effect and, therefore, is unconstitutional.[34] *See supra* Part I.A.2–3.

D. The Mandate Imposes a Gag Order that Violates The First Amendment

The Mandate also violates the First Amendment 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); Pls.' 1st Br. at 30–31. This sweeping gag order cannot withstand strict scrutiny. While the Government attempts to portray this rule as a prohibition on "an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party" through the use of "threats," Opp'n at 37, that limitation appears nowhere in the regulation. Indeed, the regulation prohibits *any* attempt to "influence" third party administrators. Consequently, Plaintiffs are barred, for example, from publicly announcing, "we will not enter into any contract with a third-party administrator that would, as a result of our contract, provide contraception, abortion-inducing drugs, sterilizations, and related counseling to our employees."

The Government's assertedly "analogous" cases provide no support for the gag order. *See* Opp'n at 37 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Ohralik v. Ohio*

[34] Plaintiffs' free-speech claims do not depend on whether they *subsidize* the objectionable speech, because there is no question that the certification makes their objections the *cause* of that speech. In the *Arizona Free Enterprise* case, the plaintiffs were not made to subsidize opposition speech, only to trigger it by their own speech.

State Bar Ass'n, 436 U.S. 447, 457 (1978)). Both cases cited by the Government involved circumstances where one party was "economically dependent" on the other, *NLRB*, 395 U.S. at 617, or particularly susceptible to pressure, *Ohralik*, 436 U.S. at 457. No such circumstances apply here, as third party administrators are not obliged to contract with objecting employers, 78 Fed. Reg. at 39,880, and the Government has not demonstrated that third party administrators are so "economically dependent" on Plaintiffs that they would be susceptible to coercion.

Accordingly, for the reasons stated above, this prohibition violates Plaintiffs' First Amendment rights, cannot survive strict scrutiny, *see supra* Part I.A.2–3, and must fail.

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

The "religious employer" exemption violates the Establishment Clause in two ways. First, it creates an artificial, government-defined category of "religious employers" that favors some types of religious groups over others. Second, it fosters excessive entanglement between government and religion. Pls.' 1st Br. at 31–35.

1. Discrimination Among Religious Groups

Though acknowledging that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," the Government maintains that the Mandate does "not grant any denominational preference or otherwise discriminate among religions" because it does "not refer to any particular denomination." Opp'n at 38. According to the Government, the religious employer exemption is "available on an equal basis to organizations affiliated with any and all religions." Opp'n at 39. For the same reasons these arguments failed to carry the day in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), they cannot prevail here.

Like the appellants in *Larson*, the Government maintains that "a statute's disparate impact among religious organizations is constitutionally permissible when such distinctions

result from application of secular criteria." *Larson*, 456 U.S. at 246 n.23. The Court in Larson was not persuaded, however, because while the law at issue did not expressly identify any religious sects or denominations, it nonetheless "ma[de] explicit and deliberate distinctions between different religious organizations." *Id.* By discriminating against religious organizations that received over half of their funding from non-members, the law "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand," and "'churches which are new and lacking in a constituency, or which ... favor public solicitation over general reliance on financial support from members,' on the other hand." *Id.*; *cf. Lukumi*, 508 U.S. at 534–35 (considering the practical effect of a law to evaluate discrimination or targeting under the Free Exercise Clause). The same reasoning applies here. Regardless of whether it "refer[s] to any particular denomination," Opp'n at 38, the religious employer definition plainly favors "houses of worship" or "religious orders" and the denominations that primarily rely on them to carry out their ministry, while disadvantaging groups that exercise their faith through alternative means. Indeed, with respect to integrated auxiliaries, the analogy to *Larson* is precise, as one of the factors in determining whether an entity qualifies for the exemption is whether it "[n]ormally receives more than 50 percent of its support" from non-affiliated sources. 26 C.F.R. § 1.6033-2(h)(4)(ii).

By effectively asserting that the Mandate is constitutional because it "distinguishes not between types of religions, but between types of institutions," the Government's argument is also akin to the State's in *Colorado Christian*. 534 F.3d at 1259. The Tenth Circuit, however, found this to be a "puzzling and wholly artificial distinction." *Id.* While it is true that "any religious denomination" could choose to exercise its faith primarily through houses of worship or religious orders, it is likewise true that "any religion could engage in animal sacrifice or instruct its

adherents to refrain from work on Saturday rather than Sunday." *Id.* (citing *Lukumi*, 508 U.S. at 524–25, *Sherbert*, 374 U.S. at 399). That fact did not stop the Supreme Court from striking down laws that discriminated on those bases. That a group can "change" its religious exercise to obtain the benefit of the exemption hardly means the exemption is nondiscriminatory. *Id.*

Indeed, in other contexts, courts have repeatedly affirmed that where a regulation has a disproportionate impact on adherents of a particular faith, it is of no moment that, in theory, it applies across the board. For example, a regulation prohibiting the display of "nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays." *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996); *see also Smith*, 494 U.S. at 877–78 (stating that "[i]t would doubtless be unconstitutional … to prohibit bowing down before a golden calf," whatever the basis for the prostration). And while non-Jews may wear yarmulkes, "[a] tax on wearing yarmulkes is [still] a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Thus, while the exemption may, in theory, be "available . . . to organizations affiliated with any and all religions," Opp'n at 38, given the Catholic Church's well-known stand on contraception and commitment to social ministries, in "practical terms," *Lukumi*, 508 U.S. at 536—which is what counts under the First Amendment—Catholic organizations will disproportionately be denied the benefit of the exemption. This discrimination cannot survive strict scrutiny. *Supra* Part I.A.2–3.

2. Excessive Entanglement

As noted in Plaintiffs' initial brief, the required inquiry into a group's eligibility for an exemption goes far beyond determining whether the entity is a "bona fide religious institution[]." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343–44 (D.C. Cir. 2002). Instead, it involves intrusive judgments regarding the religious beliefs, practices, and structure of the entity, including, for example, whether a group has "a recognized creed and form of worship." *Found.*

of Human Understanding v. United States, 88 Fed. Cl. 203, 220 (2009) (listing fourteen-factor test to determine whether a group qualifies as a church or religious order); 26 C.F.R. § 1.6033-2(h) (listing factors to determine integrated auxiliary status); Pls.' 1st Br. at 33–35.[35] These sorts of assessments impermissibly "cast [the Government] in the role of arbiter of essentially . . . religious dispute[s]," *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977), forcing it to answer inherently religious questions, such as what constitutes "worship."[36]

The Government's claim that no government body would be called upon to make these sorts of determinations defies belief. Opp'n at 41. While no application may be required for religious employer status, there can be little doubt that the Government will enforce its own regulations, and if it does not, private citizens will. *See, e.g.*, 29 U.S.C. § 1132(a)(1)(B) (authorizing private suits under ERISA). And courts are no more entitled to decide religious questions than Government bureaucrats. *Cathedral Acad.*, 434 U.S. at 133; *supra* Part I.A.1.

Nor is it relevant that these determinations have yet to be made. With respect to government determinations regarding matters of religion,"[i]t is not only the conclusions that may be reached [that] may impinge on rights guaranteed by the Religion Clauses, *but also the very process of the inquiry leading to findings and conclusions*." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (emphasis added). "Religious questions are to be answered by religious bodies," and there is harm to the "authority and autonomy of the Church" that arises even from empowering a government body to answer such questions. *McCarthy v. Fuller*, 714 F.3d 971, 976, 978 (7th Cir. 2013). Thus, when asked on interlocutory appeal to evaluate the propriety of a

[35] Contrary to the Government's assertions, Plaintiffs' challenge is not limited to the fourteen-factor test, but includes challenges to all "intrusive judgments" that may be made regarding their beliefs and practices, including any that may be required by 26 C.F.R. § 1.6033-2(h). Am. Compl. ¶ 310.

[36] Courts have no competence to determine what constitutes "worship." *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (concluding that such attempts would "inevitably to entangle the State with religion in a [forbidden] manner"); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 855 F. Supp. 2d 44, 63 (S.D.N.Y. 2012) (holding that the government cannot "decide for itself which religious practices rise to the level of worship").

jury question that would have required a determination of a matter of religious doctrine, the Seventh Circuit did not wait for the jury to make its determination but instead invalidated the instruction. *McCarthy*, 714 F.3d at 976 (noting that the error could "in principle be corrected on appeal from a final judgment" but that "practice and principle are likely to diverge in this case"). To do otherwise—to wait until the jury had improperly decided a religious matter—could "cause confusion, consternation, and dismay in religious circles." *Id.* So too here. Plaintiffs should not be made to wait for the Government or a court to "troll[] through [their] religious beliefs," before they are permitted to file suit. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

The Government's claims that this entanglement will not be pervasive or comprehensive miss the point. Opp'n at 41. While entanglement may be "procedural—where the state and church are pitted against one another in a protracted legal battle" or where the government engages in prolonged monitoring and investigation, it may also "be substantive—where the government is placed in the position of deciding between competing religious views." *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006). Here, because the inquiry at issue necessarily involves "intrusive judgments regarding contested questions of religious belief or practice," *Colo. Christian*, 534 F.3d at 1261, the duration of that inquiry is of no moment. The Mandate thus violates the Establishment Clause and must be struck down.

F. The Mandate Interferes with Plaintiffs' Internal Church Governance

The First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). Such organizations are constitutionally guaranteed "an independence from secular control or manipulation . . . [and the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This right

extends to any internal decision determining "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). Among other things, religious organizations are allowed to establish their own hierarchy, *Kedroff*, 344 U.S. at 116, to "establish their own rules and regulations for internal discipline and government," *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724 (1976), and to select "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor*, 132 S. Ct. at 710. Here, the Mandate interferes with matters of internal church governance in two primary ways: by artificially splitting the Catholic Church in two—separating its faith from its works as performed through its charitable, educational, and public service ministries, and by interfering with the manner in which the Diocese has chosen to supervise its subordinate entities. Decl. of Reverend Monsignor Michael Heintz, Ph.D. ¶ 27 (App. 100); Pls.' 1st Br. at 35–36.

Rather than deferring to Plaintiffs' decisions regarding the entities that will "carry out their mission," the Mandate's "religious employer" definition splits the Church in two. This artificial division between "houses of worship and religious orders" and charitable and educational organizations ignores the reality that many religious groups, including the Catholic Church, offer charitable and educational services as an exercise of religion. By excluding these organizations from the category of exempt "religious employers," the Mandate "interferes with "internal church decision[s] that affect[] the faith and mission of the church itself," *Hosanna-Tabor*, 132 S. Ct. at 707, namely, by effectively preventing the Church from structuring its operations in the manner it has chosen to carry out its mission.

Additionally, the First Amendment also affords religious organizations freedom from government interference with respect to their chosen organizational and hierarchical structure. *Cf. Hosanna-Tabor*, 132 S. Ct. at 704–07; *Milivojevich*, 426 U.S. at 724; *Kedroff*, 344 U.S. at

115–16. Plaintiff Diocese has chosen to administer one self-insured healthcare plan for Diocesan employees and the employees of Plaintiff Catholic Charities, its equally religious charitable ministry. In this manner, the Diocese ensures that its subordinate ministries adhere to Catholic doctrine. However, the Mandate disrupts this internal arrangement, forcing the Diocese to forego substantial cost savings to remain grandfathered in order to maintain its unified healthcare plan. Were it to abandon its plan, it would be required to facilitate access to the objectionable products and services for the employees of Catholic Charities or expel Catholic Charities from its plan—options that would alter the organizational structure the Diocese has designed to further its faith and mission. The Mandate thus "violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 132 S. Ct. at 706.

For these reasons, the Government is wrong to assert that this case does not involve "any other matters of church governance." Opp'n at 42. The Government is equally wrong that "plaintiffs may choose whatever organizational structure they wish," *id.* at 43, as the Mandate clearly impedes the ability of Plaintiff Diocese to administer its operations and relationships with subordinate institutions as it chooses. And while *Hosanna-Tabor* may have specifically addressed "the selection of clergy," *id.* at 42, it follows a long line of cases establishing the right of churches to be free from government interference in their internal operations, *see*, *e.g.*, *Milivojevich*, 426 U.S. at 724; *Kedroff*, 344 U.S. at 115–16. This is not a "mere[] restatement of plaintiffs' substantial burden theory," Opp'n at 42, but rather an independent claim that requires the Mandate be struck down in light of the "special solicitude" afforded to "religious organizations" by the First Amendment. *Hosanna-Tabor*, 132 S. Ct. at 706.

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

The APA 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 one critical respect: it violates the Weldon Amendment.

The Weldon Amendment states that "[n]one of the funds made available in this Act may be made available [to the Department of Labor and the Department of Health and Human Services] . . . if such agenc[ies] . . . subject[] 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." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). Here, the Mandate violates the Weldon Amendment because it subjects Plaintiffs to discrimination based on their refusal to include coverage for abortion-inducing products (such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella)) in their "health insurance plan[s]."

The Government's contention that the Plaintiffs are not within "the zone of interests to be protected or regulated" by the Amendment, Opp'n at 43, is belied by the statute's plain text. As quoted above, the Amendment protects any "health care entity," broadly defined to include "a health insurance plan." *See* Pub. L. No. 112-74, div. F, tit. V, § 507(d), 125 Stat. at 1111. The Mandate violates this principle by discriminating against Plaintiffs based on their refusal to offer abortion-inducing products in their "health insurance plan[s]." Because Plaintiffs each maintain a health insurance plan, Plaintiffs fall well within the applicable zone of interests.

But even if Plaintiffs do not qualify as health care entities solely by virtue of their health insurance plans, the Government concedes that at least three Plaintiffs—Saint Anne Home, Franciscan Alliance, and Specialty Physicians—do qualify. Opp'n at 43. Although that alone should establish prudential standing, the Government contends that the Amendment only protects health care entities from discrimination in their capacity as health care providers, not in their

capacity as employers. *Id.* But nothing in the text of the Amendment supports such a distinction. Even if there were some doubt about the scope of the Amendment's zone of interests, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Given that the prudential standing test "is not meant to be especially demanding," *id.* (internal quotation marks omitted), it is easily met here.

The Government's argument that the meaning of "abortion" in the Weldon Amendment does not encompass the abortion-inducing products required by the Mandate is also erroneous. *See* Opp'n at 44–45. Conspicuously absent is any authoritative agency interpretation of the word "abortion" as found in the Amendment. Instead, the Government relies on an HHS press release, the IOM Report, and a 1997 FDA notice pertaining to "emergency contraception," *see id.*, none of which purported to interpret the Amendment. And even if they did, the Court would not owe these interpretations the same deference as an agency interpretation of a statute within "the agency's particular expertise and special charge to administer," *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991), because neither HHS nor FDA are specially charged—or have any particular expertise—to enforce appropriation bills.

Not only is there no authoritative agency interpretation of the term "abortion" in the context of the Weldon Amendment, the Government cites no statutory definition, no medical definition, and no case interpreting the term in that context.[37] The Government's unwillingness to reference a medical dictionary is unsurprising. Stedman's Medical Dictionary, for example, defines "abortion" as the "[e]xpulsion from the uterus of an embryo or fetus [before] viability."

[37] The Government does cite a floor statement made by Representative Weldon years before the Amendment was passed, *see* Opp'n at 45 n.25, but that is hardly persuasive evidence of meaning since "[w]hat motivate[d] one legislator to make a speech about a statute [in 2002] is not necessarily what motivate[d] scores of others to enact it" in 2012. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 n.17 (2002) (rejecting reliance on floor statements).

STEDMAN'S MED. DICT. 4 (27th ed. 2006) (App. 951).[38] On this definition, some of the Mandate's covered services clearly qualify as "abortion."

In any event, the Government is wrong to suggest that Plaintiffs' understanding of what constitutes abortion is irrelevant. If the medical definition does not apply, then at the very least, the definition should be determined by the plan provider who claims to have been subjected to discrimination (rather than the Government). The Weldon Amendment, after all, was meant to protect the rights of conscientious objectors who were required to provide or facilitate what they viewed as an abortion.[39] This interpretation is also consistent with the Affordable Care Act, which itself prohibits compelling "qualified health plans" to cover abortion services and specifically provides that "the issuer" of the plan—not the Government—"shall determine" whether or not the plan covers abortion. *See* 42 U.S.C. § 18023(b)(1)(A)-(B).

H. The Mandate Violates the APA's Notice and Comment Requirements.

Finally, the Government also violated the APA because it enacted the Health Resources and Services Administration ("HRSA") guidelines—the substance of the requirement that Plaintiffs must cover abortion-inducing drugs, contraception, and sterilization—via a press release. *See* HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (App. 337). That plainly violates the APA. 5 U.S.C. § 553(b). The Government claims that the HRSA guidelines were not subject to any administrative procedure whatsoever, because the guidelines were simply "clinical recommendations" adopted from the IOM and that this process did not constitute "rulemaking" under the APA. Opp'n at 47–48.

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[38] *See also* DORLAND'S ILLUS. MED. DICT. 1500 (30th ed. 2003) (defining pregnancy as "the condition of having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon").

[39] Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 528–30 (2007) (App. 340); 148 Cong. Rec. H6566 *et seq.*, 2002 WL 31119206 (daily ed. Sept. 25, 2002).

This argument cannot withstand scrutiny. Without the HRSA guidelines, the Mandate has no substance. The Affordable Care Act merely delegates to HRSA the authority to enact "comprehensive guidelines" that are binding on health plans. 42 U.S.C. § 300gg-13(a)(4). And the Mandate simply mirrors the statute. *See* 45 C.F.R. § 147.130(a)(1)(iv). It is well established that rules enacted pursuant to statutory delegations of authority are quintessential "legislative rules" subject to notice-and-comment rulemaking. And, "when a statute does not impose a duty on the persons subject to it but instead authorizes . . . an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169 (7th Cir. 1996); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 620–21 (D.C. Cir. 1980). By setting "standards governing conduct," the agency is legislating, so those standards are "subject to notice and comment procedures." *Farmworkers*, 628 F.2d at 620–21; *see Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003).

Farmworkers, for example, involved a statutory exemption to child-labor laws for the harvesting of short-seasoned crops. 628 F.2d at 607. The exemption delegated to the Department of Labor ("DOL") the ability to grant waivers to those laws if the pesticides used on the crops would not harm children. Under the agency's regulations, a company needed to submit evidence that the specific pesticides it used were not harmful, unless those pesticides fell within the agency's "approved list." *Id.* at 607–10. As with the HRSA guidelines, DOL created the "approved list" by adopting recommendations received from a third party. *Id.* at 621. The court held that the approved list violated the APA because it had not been subject to notice-and-comment rulemaking. *Id.* The list was "exactly the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism." *Id.*

So, too, the determination that Plaintiffs must include coverage for abortion-inducing products, contraception, and sterilization is the very heart of the Mandate. Without the guidelines, "there is no legislative basis for [an] enforcement action" for refusing to cover those items. The guidelines thus "necessarily create[] new rights and impose[] new obligations" that must be enacted via notice-and-comment rulemaking. *Hemp*, 333 F.3d at 1088. In this respect, the Government's argument that the HRSA guidelines are not "designed to implement . . . or prescribe law or policy," Opp'n at 48, is remarkable.[40] In short, without the HRSA guidelines, the Mandate has no substance at all—yet these guidelines were not even published in the Federal Register nor put through notice and comment.[41] This evidences a clear violation of the APA. *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95-97 (D.C. Cir. 2002) (finding that a press release from the Department of Agriculture that set forth bid procedures constituted a rule and that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure").

II. PLAINTIFFS ARE SUFFERING CONTINUING IRREPARABLE HARM AND THE BALANCE OF HARMS WEIGHS IN PLAINTIFFS' FAVOR

A. Plaintiffs Are Suffering a Continuing, Irreparable Violation of Their Religious Freedoms

Because Plaintiffs have a strong likelihood of success on the merits, they are entitled to a preliminary injunction even if their irreparable injuries were relatively weak. *See Eli Lilly Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000) ("[T]he more likely that the plaintiff

[40] The Government's argument that the "substantive obligations that are imposed on group health plans and health insurance issuers were imposed by Congress" under 42 U.S.C. 300gg-13(a), Opp'n at 48, is simply inaccurate. As described above, the statute merely delegates to HHS the authority to enact "comprehensive guidelines." 42 U.S.C. 300gg-13(a). Congress could not have "imported by reference" the HRSA guidelines at the time it passed 42 U.S.C. 300gg-13(a), Opp'n at 48, because *the statute was passed before the guidelines were developed or published*.

[41] Tellingly, the same provision in the Affordable Care Act under which the guidelines were promulgated, 42 U.S.C. § 300gg-13(a)(3), also requires HRSA to develop "comprehensive guidelines" for *children's* preventive care. *Id.* As with the Mandate, the Government promulgated a rule mirroring that statutory language. *See* 45 C.F.R. § 147.130(a)(1)(iii). But, unlike with the Mandate, the Government published the guidelines governing *children's* preventive services in the Federal Register. *See* 75 Fed. Reg. 41,726, 41,740 (July 19, 2010).

will succeed on the merits, the less the balance of harms need favor him."). Far from imposing only a slight injury, the Mandate causes Plaintiffs substantial, irreparable harm because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) ("[V]iolations of First Amendment rights are presumed to constitute irreparable injuries."); Pls.' 1st Br. at 27–38. The violation of an individual's rights to exercise his religion freely also constitutes an irreparable injury under RFRA. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Hummel v. Donahue*, No. 1:07-cv-01452-DFH-TAB, 2008 WL 2518268, at *8 (S.D. Ind. June 19, 2008). Accordingly, "[t]his factor strongly favors entry of injunctive relief." *Newland*, 881 F. Supp. 2d at 1295.

The Government offers no independent argument as to whether Plaintiffs demonstrated irreparable harm. Rather, it maintains that here, "the merits and irreparable injury prongs of the preliminary injunction analysis merge together." Opp'n at 48–49. As Plaintiffs have shown a likelihood of success on the merits, they have likewise established irreparable harm.

Moreover, the Mandate has an immediate effect on Plaintiffs' operations. Plaintiff Diocese is forced to decide, right now, for the Diocesan Employee Health Plan year starting January 1, 2014, whether to continue to incur $180,000 annually in increased premiums to protect Plaintiff Catholic Charities from the Mandate.[42] The remaining Plaintiffs are likewise forced to decide, right now, for their new health plan years starting January 1, 2014, whether to comply with the Mandate or face crippling fines and other negative consequences.[43]

[42] Ryan Decl. ¶ 22 (App. 58).

[43] Young Decl. ¶ 20 (App. 65-66); Wardwell Decl. ¶ 17 (App. 72); Sister Klein-Franciscan Decl. ¶ 16 (App. 78); Sister Klein-SPI Decl. ¶ 16 (App. 83-84); Sister Kriss Decl. ¶ 16 (App. 90). Defendants suggest that the Mandate has no "imminent" effect on Plaintiff Our Sunday Visitor, Opp'n at 49 n.27, but Our Sunday Visitor is being forced to consider, right now, for its new health plan year starting October 1, 2014, whether to self-certify pursuant to the accommodation and facilitate the provision of objectionable products and services to their employees via third party administrators, or to refuse to comply with the Mandate and the accommodation and pay crippling

B. The Balance of Harms Weighs in Plaintiffs' Favor

Any harm that may result from granting preliminary relief to Plaintiffs in this matter necessarily "pales in comparison" to the serious harms to their religious freedoms that will continue absent that relief. *Newland*, 881 F. Supp. 2d at 1295. On the one hand, enforcement of the Mandate would cause Plaintiffs irreparable harm by coercing them to violate their religious beliefs until the merits of this suit are conclusively resolved. *See id.* On the other hand, the Government states that a preliminary injunction "would undermine [its] ability to achieve Congress's goals" of improving women's health and gender equity. Opp'n at 49.

The Government, however, has not shown that its interest in promoting health and gender equality through enforcement of the Mandate against Plaintiffs is compelling, nor that the Mandate in fact furthers those interests. *See Tyndale*, 904 F. Supp. 2d at 129–30; *see also Beckwith*, 2013 WL 3297498, at *18 ("In light of the several millions Americans already exempted from coverage under the contraceptive mandate, the Court is not persuaded that there is any real harm to the government in this case."); *Monaghan v. Sebelius*, 916 F. Supp. 2d 802, 812 (E.D. Mich. 2012) (finding alleged harm to Government "comparatively minimal"); *supra* Part I.A.2–3. And the Government has consented to injunctions in similar cases. Pls.' 1st Br. at 39. Moreover, while a preliminary injunction would only preserve the status quo—where millions remain exempt from the Mandate's requirements—absent a preliminary injunction, "Plaintiffs are at the risk of being sued, in addition to either being subject to the considerable financial penalties stemming from the failure to comply with the contraceptive coverage mandate, or being forced to violate their stated religious beliefs." *Tyndale*, 904 F. Supp. 2d at 130. And

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fines. Erlandson Decl. ¶ 14 (App. 95). It must also budget in order to be prepared to pay the punitive and crippling finds that will soon result from violating the Mandate.

during this time, as the Government admits, contraception will be available not only to those who can afford it but also at "community health centers, public clinics, and hospitals."[44]

III. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW FOR THE IRREPARABLE HARMS THEY ARE SUFFERING

There is no adequate remedy at law for the harms the Mandate is imposing on Plaintiffs. No amount of money can restore Plaintiffs' religious freedoms, and each day that goes by represents an ongoing, irreparable harm to Plaintiffs. *See Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583, 589–90 (3d Cir. 2008) (recognizing that loss of religious freedoms is irreparable). Where a Plaintiff is suffering irreparable harm, such as violations of religious freedoms, any remedy that is not immediate is by definition inadequate. Thus "[t]he adequate remedy and irreparable harm prongs of the test for a preliminary injunction are intertwined." *Mfr. Direct LLC v. DirectBuy, Inc.*, 2:05-CV-451, 2006 WL 319254, at *6 (N.D. Ind. Feb. 10, 2006). Plaintiffs are suffering irreparable harm to their religious freedoms, and a preliminary injunction is the only relief adequate to prevent the harm Plaintiffs are suffering now.

IV. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. For one thing, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859; *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The [remedy] of a continuing constitutional violation . . . certainly would serve the public interest."). This same reasoning applies to the rights protected by RFRA. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004); *Kikumura*, 242 F.3d at 963.

The Government claims the public interest is served by enforcement of the Mandate because of its interest in making the objectionable products and services available to Plaintiffs'

[44] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012) (App. 325).

employees and their families. Opp'n at 49–50. These interests, however, are "outweighed by the harm to the substantial religious-liberty interests on the other side." *Korte*, 2012 WL 6757353, at *4. The Mandate already "include[s] exemptions and other provisions excluding a large number of people from [its] scope." *Tyndale*, 904 F. Supp. 2d at 129. With numerous plans excluded from the Mandate, *see supra* Part I.A.2(b), the Government cannot seriously assert that temporarily excluding Plaintiffs' plans would result in significant public harm. *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013) (noting that an injunction will merely preserve the status quo).

Additionally, the public, including Plaintiffs' employees, have a direct interest in the injunctive relief, without which Plaintiffs could be subject to crippling fines. Such fines could lead to a reduction in the services that Plaintiffs provide and a reduction in the number of people that Plaintiffs may employ in the execution of those services.[45] This result is undeniably inequitable, would harm Plaintiffs' employees, and is plainly contrary to the public interest. *Cf. Feed the Children, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 330 F. Supp. 2d 935, 948 (M.D. Tenn. 2002) (noting that "it is generally in the public interest for charities to be able to raise money [or donate services] without undue interference from government").

CONCLUSION

For the forgoing reasons, the Court should grant Plaintiffs' request for a preliminary injunction as well as Plaintiffs' motion for summary judgment, and deny defendants' motion to dismiss or, in the alternative, for summary judgment.

[45] Ryan Decl. ¶¶ 18-21 (App. 57-58); Young Decl. ¶¶ 15-19 (App. 64-65); Wardwell Decl. ¶¶ 14-16 (App. 72); Sister Klein-Franciscan Decl. ¶¶ 13-15 (App. 77-78); Sister Klein-SPI Decl. ¶¶ 13-15 (App. 83); Sister Kriss Decl. ¶¶ 13-15 (App. 89-90); Erlandson Decl. ¶¶ 11-13 (App. 95).

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, I electronically filed the foregoing Plaintiffs' Reply in Support of their Motion for Preliminary Injunction, Opposition to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, and Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment 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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