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 CROSS-MOTION FOR SUMMARY JUDGMENT

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Displaying an unprecedented disregard for religious liberty, the Government has spent the past few years asserting the extraordinary power to force Catholic and other religious groups to provide or facilitate health coverage for contraception, sterilization, and abortion-inducing products, in violation of their sincerely held religious beliefs. In its recent decision in *Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), the Seventh Circuit firmly rejected the Government's position and held that the Government may not force a for-profit company or its owners to contract with an insurer or third-party administrator ("TPA") that would provide contraceptive coverage to the company's employees over the owners' religious objections. That holding applies with even greater force here, where Plaintiffs are *non-profit religious groups* that object to facilitating contraceptive coverage through their employee health plans. In light of *Korte*, there is no question that Plaintiffs are entitled to summary judgment and injunctive relief.

Korte makes clear that, as Plaintiffs have maintained all along, "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Id*. at *23 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc)). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Id*.[1] Following that approach, the Court held that it was bound to accept the plaintiffs' sincere religious belief that complying with the Mandate "would make them complicit in a grave moral wrong." *Id.*; *see also id.* at *5 ("*As the [plaintiffs] understand their religious obligations*, providing the mandated coverage would facilitate a grave moral wrong." (emphasis added)). In light of that sincere belief, the only question for purposes of the substantial-burden analysis was whether the Government had

[1] The Government has conceded in another case that it "has no reason to question" that "Plaintiffs sincerely believe" that, *inter alia*, "signing the self-certification form would . . . facilitate evil." Argument Tr. 54:23-55:9, *Persico v. Sebelius*, No. 1:13-cv-00303 (W.D. Pa. Nov. 13, 2013).

imposed "substantial pressure" to force plaintiffs to comply with the Mandate. *Id.* at *22 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). The Court found that an easy question, noting that the Mandate would impose fines of "$100 per day per employee" if the plaintiffs did not comply. By threatening such "ruinous fines," the Mandate "placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate," thus imposing a "direct and substantial" burden on plaintiffs' religious exercise. *Id.* at *23.

In reaching that conclusion, *Korte* expressly rejected the Government's arguments—the same arguments the Government makes here—that the Mandate's burden on plaintiffs' religious exercise was too "insubstantial" or too "attenuated" to violate RFRA. *Id.* As the Court noted, the plaintiffs objected not only to *using* contraceptive drugs and services, but also "to being forced to provide insurance coverage for these drugs and services in violation of their faith." *Id.* at *24. And while the Government "posit[ed] that the Mandate [was] too loosely connected to the use of contraception to be a substantial burden," that argument "purport[ed] to resolve [a] religious question"—namely, whether taking the actions required by the Mandate would "impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church." *Id.* As the Court rightly noted, "[n]o civil authority can decide that question." *Id.* Because *the plaintiffs themselves* sincerely believed that complying with the Mandate would violate their religion, forcing them to comply through threats of onerous fines was a "substantial burden" on their religious exercise.

Korte thus squarely forecloses the Government's arguments here that the actions required of Plaintiffs by the Mandate are too "*de minimis*" or "attenuated" to be cognizable under RFRA. Gov't 2d Br. (DE #100) at 1–2. As the Seventh Circuit held, religious believers must be left free to decide for themselves whether an action is "insubstantial" or only "loosely connected" to wrongful behavior. That is ultimately a religious question, and "RFRA does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 2013 WL 5960692, at *24. Even under the so-called "accommodation," what

matters is that Plaintiffs "have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise." *Id.*

In any event, although irrelevant, the Government's assertion that the Mandate requires Plaintiffs to take nothing more than *de minimis* action is clearly wrong. The Government's argument appears to rest on the mistaken belief that the Mandate, in conjunction with the "accommodation," does nothing more than require Plaintiffs to do something they have always done—state their religious objection to providing contraception. Nothing, however, could be further from the truth. Rather, the Mandate, for the first time, makes Plaintiffs an indispensable link in the chain of delivering contraception to their employees. That is true even under the so-called "accommodation," which continues to require Plaintiffs to facilitate coverage for contraception and related services. Indeed, under the "accommodation," the burden on Plaintiffs' religious exercise is clear from the certification requirement alone, which requires Plaintiffs to give their TPA or insurer a "permission slip" to provide the objectionable coverage—something they have *never* before done. In this regard, while involving a different moral issue, the certification requirement is analogous to requiring Plaintiffs to certify their opposition to the death penalty and then making their issuance of that certification the legal authorization for the executioner to flip the switch. Under the Government's argument, issuing that certification would require Plaintiffs—who oppose the death penalty—to engage in *de minimis* conduct. That is, of course, absurd. So too here. By forcing Plaintiffs to violate their religious beliefs on pain of substantial penalties, the Mandate imposes an enormous burden on Plaintiffs' religious exercise, thereby triggering strict scrutiny under RFRA.

Korte also forecloses the Government's argument that the Mandate can survive strict scrutiny. As the Seventh Circuit held, the Government "seriously misunderstands strict scrutiny," and as a result "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." 2013 WL 5960692, at *25–26. By asserting sweeping interests in "public health" and "gender equality,"

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

Finally, Plaintiffs wish to respond to the Government's spurious assertion that their religious practices are nothing more than a sinister attempt to exercise a "veto over their employees' health coverage" or "to prevent *anyone else* from providing such coverage." Gov't 2d Br. at 6–7. Plaintiffs are, quite frankly, shocked and dismayed that the Government would launch such a demonstrably false attack on adherents of the Catholic faith. As Judge Sykes explained, "it goes without saying that [Plaintiffs] may neither inquire about nor interfere with the private choices of their employees on this subject. They can and do, however, object to being forced to provide insurance coverage for these drugs and services in violation of their faith." *Korte*, 2013 WL 5960692, at *24. Thus, Plaintiffs' only request has been that they *themselves* not be made the vehicle by which the mandated coverage is delivered. If the Government believes all women must be provided with free abortion-inducing products, sterilization, and contraceptives, Plaintiffs ask only that the Government not force them to participate in that effort. Indeed, Plaintiffs have suggested, as a potential less restrictive means, that the Government itself provide contraceptive services to women. Pls.' 1st. Br. (DE #75) at 24–25; Pls.' 2d Br. (DE #97) at 31–39. Although Plaintiffs would object to such action on *policy* grounds, it would not force Plaintiffs to be morally complicit. The claim that Plaintiffs seek "to prevent *anyone else* from providing" individuals with contraception is, therefore, a baseless distortion of Plaintiffs' sincerely held religious beliefs.

Accordingly, Plaintiffs' Cross-Motion for Summary Judgment on their RFRA claim should be granted. If this Court agrees, it need not address the other issues in this case, but

regardless, Plaintiffs are entitled to summary judgment on them as well.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

A. The Mandate Violates the Religious Freedom Restoration Act

1. *Korte* Is Dispositive

As Plaintiffs have repeatedly explained, where sincerity 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 (2) determine "whether the government [has] place[d] substantial pressure"—i.e., a substantial burden—on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140; *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013); Pls.' 1st. Br. at 12–21; Pls.' 2d Br. at 5–19. The Government's repeated attempts to dispute this test are now foreclosed by *Korte*.[2]

The Seventh Circuit in *Korte* held that the Mandate substantially burdened the religious exercise of two corporations and their Catholic owners by requiring those corporations to include contraceptive coverage in their employee health plans. In reaching this decision, the Court expressly rejected the Government's contention that the actions required by the Mandate were too "insubstantial" or too "attenuated" to impose a substantial burden on the plaintiffs. *Korte*, 2013 WL 5960692, at *23–24. As the Court explained, the Government's argument was not

[2] In *Gilardi*, the D.C. Circuit applied this test to hold that the Mandate substantially burdened the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 2013 WL 5854246, at *7–8. In so holding, the court rejected the Government's argument that the interposition of the corporate form between the Gilardis and their employees' decision to use contraception rendered the Gilardi's participation "too remote and too attenuated" to constitute a substantial burden. *Id.* at *7. Instead, the Court held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at *7 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)). The Mandate, therefore, imposed a substantial burden on the Gilardis because they were forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit in a grave moral wrong." *Gilardi*, 2013 WL 5854246, at *8. No Circuit reaching the merits of a Mandate case has adopted a contrary test.

merely factually incorrect but also legally flawed, because "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id*. at *22. "It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Id.* The Mandate, therefore, imposed a substantial burden on the plaintiffs' religious exercise because it forced them to act contrary to their religious beliefs by taking actions that they deemed to be impermissible facilitation of contraception and related services. By threatening fines of "$100 per day per employee," the Government "placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate." *Id.* at *23.

The same is true here. Just as in *Korte*, Plaintiffs have a sincere religious objection to providing or facilitating "coverage for contraception and sterilization in their employee health-care plans." *Id.* The so-called "accommodation" does not change the analysis, because even under the accommodation Plaintiffs continue to have "an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religion." *Id.* at *22. Among other things, the accommodation requires Plaintiffs to issue a certification the sole purpose of which is to grant their TPA legal permission to provide payments for abortion-inducing products, contraception, and sterilization procedures to individuals on Plaintiffs' plans. 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A. Plaintiffs "object on religious grounds to doing so," because taking such action "would make them complicit in a grave moral wrong." *Korte*, 2013 WL 5960692, at *23. It makes no difference that *the Government* believes the accommodation is adequate to dispel Plaintiffs' religious objections. What matters is that *Plaintiffs themselves* "have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.* at *24.

2. The Government's Argument That the Mandate Imposes a *De Minimis* or "Attenuated" Burden on Plaintiffs' Religious Beliefs Is Meritless

Korte forecloses the Government's argument that any action required by the Mandate is too "*de minimis*" or "attenuated" to qualify as a substantial burden under RFRA. *See* Gov't 2d Br. at 3–13. As the Seventh Circuit made clear, the Government's arguments are legally irrelevant, because courts are simply not capable of determining whether compelled conduct is so "insubstantial" or "loosely connected" to wrongdoing as to be permissible for a religious believer. Indeed, the flaw in the Government's legal argument is underscored by the fact that, here, the Government is manifestly wrong as a factual matter: the actions required by the Mandate are *enormously* significant for Plaintiffs' Catholic faith.

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

As Plaintiffs have explained and *Korte* confirms, the Government is badly confused about the meaning of the term "substantial burden." The Government's "insistence that the burden is trivial or nonexistent simply misses the point of this religious liberty claim." *Korte*, 2013 WL 5960692, at *24. "Burden" refers not to the actions required of Plaintiffs, but rather the pressure applied by the Government to perform such actions. Pls.' 2d Br. 11–19; *see also* *Korte*, 2013 WL 5960692, at *22–24 (same). It is thus nonsensical to suggest that the threat of massive fines imposes a "*de minimis* burden" on Plaintiffs' religious exercise. Pls.' 2d Br. at 11. The Government's attempt to avoid this dispositive analysis is unavailing.

Indeed, the Government's own argument makes clear that its position is irreconcilable with *Korte*. The Government accuses Plaintiffs of "attempt[ing] to convert the 'substantial burden' standard into a 'substantial pressure' standard." Gov't 2d Br. at 1, 8. That, however, is exactly what *Korte* held: "a burden on religious exercise [] arises when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 2013 WL 5960692, at *22 (quoting *Thomas*, 450 U.S. at 718). Thus, "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act

contrary to [religious] beliefs.'" *Id.* at *23 (quoting *Hobby Lobby*, 723 F.3d at 1137). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice . . . ." *Korte*, 2013 WL 5960692, at *23. In so holding, *Korte* simply followed in the footsteps of the Supreme Court's decisions in *Sherbert*, *Thomas*, and *Yoder*, and the Seventh Circuit's caselaw as reflected in *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008).[3] In light of this, the Government's assertion that, under RFRA, courts should "look not only to the magnitude of the penalty imposed, but also to the *objective* character of the actions required," Gov't 2d Br. at 1–2, 8, is foreclosed by *Korte*.

But even apart from *Korte,* the Government's argument is wrong. First, as Plaintiffs have explained, the Government's argument is precluded by RFRA's text. Pls.' 2d Br. at 12. RFRA provides that (unless it can satisfy strict scrutiny) the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1. An "exercise of religion," moreover, is defined to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added); *Korte*, 2013 WL 5960692, at *22. Here, it is undisputed that Plaintiffs' opposition to complying with the Mandate is an "exercise of religion." *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (explaining that religious exercise includes the religiously-motivated "performance of (or abstention from) physical acts"). The purportedly "objective character" of Plaintiffs' religious

[3] *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas*, 450 U.S. at 718; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). As *Korte* makes clear, the Government's suggestion that *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), employs a fundamentally different test from that applied in *Hobby Lobby* (and in *Gilardi*) is puzzling. Gov't 2d Br. at 4 n.1; *see also Korte*, 2013 WL 5960692, at *22–24 (stating that "we agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on 'the *intensity of the coercion* applied by the government to act contrary to [one's] beliefs'" (quoting *Hobby Lobby*, 723 F.3d at 1137)). *Korte* found no difficulty in pointing to the RLUIPA test as articulated in *Civil Liberties*, *Korte*, 2013 WL 5960692, at *22, as however the test is described, there is no doubt that by putting Plaintiffs to the inescapable choice of financial ruin or violating their beliefs, the Mandate has a "direct, primary, and fundamental responsibility for rendering [their] religious exercise" "effectively impracticable." *Civil Liberties*, 342 F.3d at 761.

exercise is irrelevant. The only relevant question, rather, is whether the Government is coercing Plaintiffs into foregoing that exercise of religion. It plainly is where, as here, continuing to engage in that religious exercise would subject Plaintiffs to massive penalties.

Second, while the Government insists that probing whether a religious exercise is "*de minimis*" is not a "theological" inquiry, it cannot alter reality by ipse dixit. Gov't 2d Br. at 2. No "principle of law or logic," *Smith*, 494 U.S. at 887, equips a court to decide the "significan[ce]" of a particular act of religious exercise, Gov't 2d Br. at 6; Pls.' 2d Br. at 14–15. Actions that may seem "*de minimis*" to the Government may be enormously consequential to a religious believer—such as flipping a light switch on the Sabbath, "swearing" rather than "affirming" an oath, or filing a form. Indeed, as explained below, the actions that the Mandate requires of Plaintiffs have *enormous* consequences to the exercise of their Catholic faith. *See infra* pp. 10–13. A court has no business second-guessing whether a believer finds an action "significant," much less does it have any "objective" basis to do so. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular . . . practices to a faith."); *Korte*, 2013 WL 5960692, at *24 (rejecting Government's argument that "any complicity problem [under the Mandate] is insignificant or nonexistent," because such a determination would require the court to "resolve [a] religious question" that "[n]o civil authority can decide")). Rather, Plaintiffs must be free 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.

Finally, the Government repeats its refrain that the "substantial pressure" test allows plaintiffs to identify a substantial burden simply by asserting it, purportedly causing a serious threat to the Government's regulatory interests. Gov't 2d Br. at 9, 11. Given *Korte*, this argument would be irrelevant even if accurate. But it is not accurate. As *Korte* explained, courts need only accept a plaintiff's description of his sincere religious beliefs, and courts are of course free to "[c]heck[] for sincerity and religiosity" to "weed out sham claims." 2013 WL 5960692, at *23. Even where a religious objection is sincere, a court still must determine whether the

Government has imposed "substantial" pressure on the religious believer to act in violation of his beliefs. Only then must a court proceed to the strict-scrutiny analysis. Pls.' 2d Br. at 18 & n.9. As Congress determined when it enacted RFRA, this approach does not unduly interfere with the Government's regulatory interests. It leaves the Government free to regulate however it wishes, subject only to the caveat that religious objectors *themselves* cannot be forced to take some action that contravenes their sincere beliefs unless there is a compelling need.[4]

(b) The Mandate Requires Plaintiffs to Take Actions Deeply Antithetical to Their Sincerely Held Religious Beliefs

As explained above, the Government's assertion that the Mandate requires Plaintiffs to take nothing more than *de minimis* action is legally irrelevant. It is also manifestly wrong. *See* Pls.' 2d Br. at 8–10. The Mandate requires Plaintiffs to provide insurance coverage for contraception, abortion-inducing products, sterilization, and related counseling, unless they opt for the "accommodation." 45 C.F.R. § 147.130. Under the so-called accommodation, they are still forced to find and contract with a TPA or insurer that will provide payments for contraception, and then issue a certification authorizing the TPA or insurer to make the objectionable payments to Plaintiffs' employees—payments that can be made solely by virtue of

[4] Even assuming the Government's "attenuation" argument, Gov't 2d Br. at 11–13, is anything more than a "different twist" on its *de minimis* argument, that claim was squarely rejected by *Korte*. 2013 WL 5960692, at *24; *Gilardi*, 2013 WL 5854246, at *7 (rejecting argument that the burden imposed by the Mandate was "too remote and too attenuated" to be substantial"). The Government argues that "a burden cannot be substantial when it is attenuated," and here, "plaintiffs [are] separated from the use of contraception by a series of events that must occur before the use of contraceptive services . . . would come into play." Gov't 2d. Br. at 11 (internal citation omitted). As *Korte* explained, "[t]he government focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraceptive coverage and an employee's decision to use it." 2013 WL 5960692, at *24. To argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to "purport[] to resolve the religious question underlying [this] case[]." *Id.* But "[n]o civil authority can decide that question," rather, "that's a question of religious conscience for [Plaintiffs] to decide." *Id.*

enrollment in Plaintiffs' insurance plan. Pls.' 1st Br. at 16; Pls.' 2d Br. at 8–10.[5] Indeed, Plaintiffs are barred from negating the permission slip, as they are prohibited from "directly or indirectly, seek[ing] to influence the [TPA's] decision to" provide the objectionable coverage. 26 C.F.R. § 54.9815–2713A(b)(1)(iii). It is undisputed that all of these actions require Plaintiffs to violate their sincerely-held religious beliefs. In light of this, it is simply untenable for the Government to claim that Plaintiffs need only modify their behavior in a *de minimis* way.

Although the Government's position is far from clear, it appears to believe that attaching new legal consequences to conduct that Plaintiffs have previously engaged in cannot impose a substantial burden on religious exercise. Thus, the Government asserts that in order to have a claim under RFRA, a plaintiff must "modify [his] religious behavior" and have an "inherent religious objection" to the act at issue. Gov't 2d Br. at 4–6. That is obviously false. As Plaintiffs have explained, the touchstone of the substantial burden analysis is whether Plaintiffs are compelled to act in violation of their religious beliefs.[6] In other words, the question is not whether the believer must modify his behavior compared to actions he has taken in the past, but whether he must modify his behavior compared to what he would do if free to follow his religious conscience. Pls.' 2d Br. at 12–14.

But in any event, the Government's factual premise is wrong as well, since the Mandate *does* force Plaintiffs to "modify" their behavior and take new actions they believe are "inherently" objectionable. In the past, Plaintiffs would seek out and contract with TPAs and insurers that would *not* provide the mandated coverage. Indeed, they were assiduous in that

[5] In this regard, it is noteworthy that, even on its face, the certification requirement requires Plaintiffs to do more than state their objection to abortion-inducing products, sterilization, contraception, and related counseling. In addition, the certification must "include notice" of the "[o]bligations of the third party administrator" to provide payments for contraceptive coverage. 26 C.F.R. § 54.9815–2713A(b)(1)(ii). The sole purpose of this is to ensure that the TPA provides Plaintiffs' employees with the coverage to which Plaintiffs object.

[6] *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 403-04 (same); *see also Yoder*, 406 U.S. at 218 (evaluating whether a law "compels" plaintiffs "to perform acts undeniably at odds" with their beliefs).

effort. Now, they must locate and identify TPAs and insurers that *will* provide the mandated coverage. In the past, Plaintiffs would always tell their TPA or insurer *not* to provide coverage for abortion-inducing products, contraception, and sterilization. Now, they are prohibited from making such statements. Indeed, they are forced to submit a certification *authorizing* their TPA or insurer to provide payments for these products and services to their employees. *See* Pls.' 2d Br. 14. All of these newly-required actions are "inherently objectionable" to Plaintiffs in light of their sincerely held Catholic beliefs.

Nor is there any support for the notion that a plaintiff must object to the conduct at issue in any and all circumstances. The plaintiff in *Thomas* did not have an "inherent" objection to the act of hammering sheet steel into cylinders—he objected to doing so only in circumstances where the cylinders would be attached to a military tank. *See Thomas*, 450 U.S. at 715. Nor did the plaintiff in *Lee* have an "inherent" objection to paying taxes to support a federal program—he objected to doing so when the consequence of such payment was to "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139; *see United States v. Lee*, 455 U.S. 252, 257 (1982). But in both cases, the Supreme Court found a substantial burden. Or to put a finer point on it: forcing a person to walk through the front door rather than the back may not, by itself, be morally objectionable; it obviously would be, however, if the front door was rigged with a spring gun. So too here, Plaintiffs obviously have no objection to the general requirement that they provide health insurance. To the contrary, they already provide their employees with such coverage and the Catholic Church has long been a proponent of universal healthcare.[7] But it is an entirely different matter when that requirement forces Plaintiffs to become morally complicit in the delivery of abortion-inducing products, sterilization, contraception, and related counseling.

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[7] U.S. Conference of Catholic Bishops, *A Framework for Comprehensive Health Care Reform* (June 18, 1993) ("Every person has a right to adequate health care. This right flows from the sanctity of human life and the dignity that belongs to all human persons, who are made in the image of God."), http://old.usccb.org/sdwp/national/comphealth.shtml.

In light of this, the Government does not—and cannot—cite a single case in support of its assertion that, when it comes to religious freedom and morality, context is irrelevant. And for good reason. For a court to parse through a party's religious beliefs and attempt to segregate "inherent" religious objections from "non-inherent" ones plainly lies beyond the judicial competence. *Thomas*, 450 U.S. at 718.

* * *

In short, *Korte* is dispositive. There is no question that the Mandate imposes a substantial burden on Plaintiffs' free exercise of religion, since it forces them to choose between massive fines and other penalties, on the one hand, and "complicit[y] in a grave moral wrong," on the other. *Korte*, 2013 WL 5960692, at *23. That is all *Korte* requires to establish a "substantial burden" on religious exercise. For that reason, the Mandate triggers strict scrutiny.

3. The Mandate Cannot Survive Strict Scrutiny

Joining every court to reach the issue,[8] *Korte* squarely held that the Mandate cannot survive strict scrutiny. 2013 WL 5960692, at *25–26. That holding should foreclose any inquiry into strict scrutiny in this case: if the Government cannot satisfy that test in the for-profit context, it certainly cannot do so in the non-profit context.[9]

Even assuming the question remains open to this Court, however, the Government has failed to demonstrate that the Mandate satisfies strict scrutiny. *See* Pls.' 1st Br. at 21–24; Pls.' 2d Br. at 19–39. As the Seventh Circuit explained, "[s]trict scrutiny requires a substantial

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[8] *See Gilardi*, 2013 WL 5854246, at *10–13; *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); *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-cv-6756 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012).

[9] Apparently acknowledging this reality, once the D.C. Circuit held that the Mandate could not satisfy strict scrutiny in *Gilardi*, the Government conceded that the U.S. District Court for the District of Columbia was bound by that holding. *See* Defs.' Combined Mem. in Opp'n to Pls.' Cross-Mot. for Summary Judgment at 17, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (D.D.C. Nov. 5, 2013) (Dkt. # 31).

congruity—a close 'fit'—between the governmental interest and the means chosen to further that interest." *Korte*, 2013 WL 5960692, at *25. Because the Government has framed its interests so broadly—"public health" and "gender equality"—it is "impossible to show that the mandate is the least restrictive means of furthering them." *Id.* Simply put, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing non-profit religious organizations to provide free contraception and related services. *Id.*; *see also Gilardi*, 2013 WL 5854246, at *11 ("[O]ur searching examination is impossible unless the government describes its purposes with precision.").

Even assuming the Government has a "compelling" interest in the more specific goal of "broaden[ing] access to free contraception and sterilization"—an assumption that is "both contested and contestable"—the Mandate still fails strict scrutiny because "there are many ways to increase access to free contraception" without forcing Plaintiffs to participate in the effort. *Korte*, 2013 WL 5960692, at *26.[10] Indeed, *Korte* held that the same alternatives proposed by Plaintiffs in the present case are viable, less restrictive means to advance the Government's interests in free contraception. *Compare id.* ("The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services."), *with* Pls. 1st. Br. at 25 (stating that "the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the

[10] *See also Gilardi*, 2013 WL 5854246, at *13 (stating that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate"); *Newland*, 881 F. Supp. 2d at 1299; *Beckwith*, 2013 WL 3297498, at *18 n.16 ("[F]orcing 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*, 931 F. Supp. 2d at 808 (concluding, due to existing government programs, that "the Government has not established its means as necessarily being the least restrictive").

services; (iii) directly offer insurance coverage for contraceptive services; [or] (iv) grant tax credits or deductions to women who purchase contraceptive services"); *Gilardi*, 2013 WL 5854246, at *13 (same). Thus, even assuming that the Mandate serves a compelling interest, "the government has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Korte*, 2013 WL 5960692, at *26. That holding is dispositive here.

Aside from the availability of less restrictive alternatives to the Mandate, it is also clear that providing free contraception does not rise to the level of a "compelling" interest "of the highest order." *Yoder*, 406 U.S. at 215; *see also Sherbert*, 374 U.S. at 406 ("'Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' [on religious liberty]." (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945))). At most, providing free contraception may garner some increased access in the form of modest cost savings for those who could otherwise purchase contraceptives on their own at low or no cost. Especially in light of that reality, "[e]ven giving the government the benefit of the doubt, the health concern[] underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but it does not rank as *compelling,* and that makes all the difference." *Gilardi*, 2013 WL 5854246, at *12.

The Government continues to flounder in trying to explain how the Mandate serves interests that are "compelling" while simultaneously offering myriad exemptions that allow millions of employees nationwide to go without the mandated coverage. Pls.' 2d Br. at 22–26. In a remarkable feat of hand-waving, the Government states that "aside from the religious employer exemption, the 'exemptions' referred to by plaintiffs are not specific exemptions from the contraceptive coverage requirement at all, but are instead provisions of the ACA that exclude individuals and entities from various requirements imposed by the ACA." Gov't 2d Br. at 15. It is unclear exactly what distinction the Government is trying to draw between a "specific exemption[]" and a "provision" that "exclude[s] individuals and entities" from the requirements of the law. The important point is simply that a law cannot serve a truly "compelling" interest

when the Government feels free to grant wide-ranging exemptions from the law. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 522, 547 (1993).

It makes no difference that some of the exemptions are merely "temporary," "transitional," or "pragmatic." Gov't 2d Br. at 15–16. If the Mandate truly served a "compelling" interest "of the highest order," the Government could not responsibly allow that interest to go unprotected over a span of months or years for the sake of administrative convenience. *Lukumi*, 508 U.S. at 522, 547; Pls' 2d Br. at 25. In any event, the Government acknowledges that the exemption for "religious employers" is permanent. The Government insists that it should be allowed to exempt some religious employers but not others, because otherwise it would be "discourage[d]" from "attempting to accommodate religion for fear that its actions would then cause its regulations to fail strict scrutiny." Gov't 2d Br. at 17. But the Government should not be crafting religious exemptions based on litigation strategy. Rather, under RFRA, it is the Government's solemn obligation to *always* accommodate religious liberty unless doing so would lead to "the gravest abuses, endangering paramount interests." *Sherbert*, 374 U.S. at 406. The Government offers no sensible explanation for why exempting Plaintiffs would subvert vital governmental interests, while exempting other religious employers does not. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 433 (2006); Pls.' 2d Br. at 25–26. Instead, the Government asserts in conclusory fashion that exempting Plaintiffs would somehow make it impossible to "administer the regulatory scheme in any rational manner." Gov't 2d Br. at 17. But as the Supreme Court has repeatedly recognized, and as Congress determined when enacting RFRA, a regulatory scheme exempting sincere religious objectors is perfectly rational and perfectly workable. Pls.' 2d Br. at 21–22. Thus, there is no sound basis, much less a "compelling" reason, to deny Plaintiffs a religious exemption.

Because the Mandate cannot satisfy strict scrutiny and Plaintiffs are entitled to full relief on the basis of their RFRA claim alone, this Court need not reach the other issues in this case, but regardless, they too demonstrate that Plaintiffs are entitled to relief here, as discussed below.

B. The Mandate Violates the Free Exercise Clause

The Mandate likewise violates the Free Exercise Clause because it is not neutral and generally applicable and, regardless, it was enacted with discriminatory intent. The Government's contrary arguments are wrong.

First, the Government argues that, notwithstanding the numerous exemptions in the Mandate, it is neutral and generally applicable because the "exceptions [are] for certain objectively defined categories of entities" and "such categorical exceptions do not negate general applicability." Gov't 2d Br. at 21. Even if that legal principle were correct, it would be of no use to the Government here, since the narrow "religious employer" exemption is the antithesis of an "objectively defined category." *See infra* Part I.E (noting that the exemption discriminates among religious groups and entails an intrusive inquiry into religious matters).

But in any event, the asserted legal principle is erroneous. The underlying basis for the doctrine of general applicability is to ensure that laws do not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. That reasoning plainly applies to "categorical" exemptions, since the existence of numerous exemptions for non-religious reasons—even if "categorical"—but not for religious ones, creates the very same risk that religion is being devalued. In both instances, strict scrutiny is necessary to guard against "the prospect of the government's deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999). As then-Judge Alito explained, "[i]f anything, this concern is only further implicated when the government . . . creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Id.* Indeed, *Lukumi* itself held that the animal sacrifice ordinance at issue was not of "general applicability" because it contained categorical exceptions for, among other things, "fishing," "[e]xtermination of mice and rats," and "euthanasia of 'stray, neglected, abandoned, or unwanted animals.'" 508 U.S. at 542–

44 (internal citation omitted).[11]

Second, in responding to Plaintiffs' claim that the Mandate deliberately targets the religious practices of Catholic employers, the Government touts its efforts to "accommodate religion," but the Government can hardly take credit for its efforts when it knew its "accommodation" would not resolve Plaintiffs' concerns.[12] The Government also dismissively remarks on the evidence Plaintiffs have put forward on this claim—including, for example, the remarks made by Defendant Sebelius at a NARAL fundraiser; the allegations of bias on the IOM panel; and the fact that the Mandate was modeled on a California law targeted at Catholic organizations. Pls.' 2d Br. at 41 & n.32. These allegations show that, as in *Lukumi*, the Mandate targets religious beliefs. At the very least, they raise disputed questions of material fact that preclude summary judgment for the Government.

C. The Mandate Unconstitutionally Compels Speech

Both the counseling and the certification requirements violate Plaintiffs' freedom of speech. As to the counseling requirement, the Government asserts that it does not mandate any counseling in support of contraception, but this assertion is belied by the Government's claim that the Mandate is an effort to "increase women's access to and utilization of recommended preventive services." Gov't 2d Br. at 22. The Government also argues that Plaintiffs are not compelled to subsidize any speech. But the bar on compelled speech applies whenever the Government forces someone to "help disseminate hostile views," whether via subsidy or not. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2821 n.8 (2011). The

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[11] The Government's suggestion that Free Exercise is violated only if there is "a policy that create[s] a secular exemption but refuse[s] *all* religious exemptions," Gov't 2d Br. at 23 n.9 (emphasis added), is equally erroneous. The Free Exercise Clause not only prohibits discrimination against religion, but also among religions. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 707 (1994) ("[I]t is clear that neutrality as among religions must be honored."); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257–60 (10th Cir. 2008). By treating some religions more favorably than others, the Mandate runs afoul of that principle.

[12] *See, e.g.*, Compl. ¶ 198; Comments of U.S. Conference of Catholic Bishops at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

Mandate thus compels Plaintiffs' speech by making them support the objectionable counseling.

As for the certification requirement, it compels Plaintiffs to certify their view on a specific subject matter, which *legally authorizes* their TPAs and insurers to provide Plaintiffs' employees with the objectionable coverage. The Government's only response is to argue, relying on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), that the Mandate is merely speech incidental to conduct. That, however, is manifestly incorrect: Plaintiffs are being compelled to engage in speech for no other purpose than to facilitate the Government's goal of dispensing free contraception to Plaintiffs' employees. Indeed, if the Government is correct that it lacks authority to compel TPAs of self-insured church plans to provide the mandated payments, then the *only* purpose of the certification requirement is to compel the non-exempt Plaintiffs to authorize their TPA or insurance issuer to provide those payments. In contrast, in *FAIR*, the plaintiffs were not required to make *any* statement about any of their views. This case, therefore, is akin to *Agency for International Development v. Alliance for Open Society International, Inc.*, where the Supreme Court struck down a requirement that applicants for a government program certify their opposition to prostitution and sex trafficking. 133 S. Ct. 2321, 2326 (2013). There, the Court did not give any credence to the proposition that a statement, required to access a government benefit, could be speech incidental to conduct merely because it was made on an application. This Court should similarly disregard the Government's characterization of the certification requirement here.

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

In defense of their unconstitutional "gag order," Defendants merely retreat back into their tired mantra that the regulations prevent "threats" and "interference," not speech. Gov't 2d Br. at 26–27. But the fact remains that the regulations prevent any attempt to "directly or indirectly . . . *influence*," 26 C.F.R. § 54.9815–2713A(b)(iii) (emphasis added)—they do not even mention threats or interference. Pls.' 2d Br. at 44–45. The gag rule, therefore, is a naked, content-based speech restriction that prohibits Plaintiffs from engaging in lawful speech. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011).

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

As Plaintiffs established in their brief in support of their motion for summary judgment Pls.' 2d Br. at 45–49, the "religious employer" exemption to the Mandate violates the First Amendment both by (i) creating a government-defined category of "religious employers" that is both foreign to the Catholic faith and unfavorable to the Catholic Church; and (ii) causing excessive entanglement between the government and the Catholic Church.

1. Discrimination Among Religious Groups

The Government argues that the Establishment Clause only prohibits it from "'officially prefer[ing]' 'one religious *denomination*' over another," and, therefore, allows it to discriminate against different Catholic entities. Gov't 2d Br. at 27 (internal citations omitted). That is, however, both wrong and irrelevant. It is wrong because the Establishment Clause demands that the State "must treat individual religions *and religious institutions* without discrimination or preference." *Colo. Christian*, 534 F. 3d at 1257 (emphasis added). The Government "suppl[ies] no reason to think that [it] may discriminate between 'types of institution' on the basis of the nature of the religious practice [such] institutions are moved to engage in." *Id*. at 1259.

The Government's argument is, in any event, irrelevant, because it rests on a misstatement of Plaintiffs' position. Plaintiffs are not alleging discrimination only amongst Catholic entities. Rather, they have maintained that the Mandate's narrow definition of "religious employer" discriminates in favor of religious denominations that consist primarily of "houses of worship," "integrated auxiliaries," or "religious orders," 78 Fed. Reg. 8,456, 8461 (Feb. 6, 2013), and against denominations, like the Catholic faith, that *also* exercise their religion through schools, health care facilities, charitable organizations, and other ministries. Pls.' 1st Br. at 31–33; Pls.' 2d Br. 45–47. In the same way that a law may not privilege a denomination with "well-established churches," while disadvantaging "churches which are new and lacking in a constituency," *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982), or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminate between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), neither may a law

officially prefer denominations that exercise religion principally through "churches, synagogues, mosques, and other houses of worship, and religious orders," 78 Fed. Reg. at 8,461, while disfavoring a denomination whose faith "move[s] [its adherents] to engage in" broader religious ministries, such as those practiced be Plaintiffs. *Colo. Christian*, 534 F. 3d at 1259; *Bronx Household of Faith v. Bd. of Educ.*, 876 F. Supp. 2d 419, 431 (S.D.N.Y. 2012) (barring discrimination among "religions that fit the 'ordained' model of formal religious worship services and those religions whose worship practices are far less structured"). Such preferences have been "consistently and firmly deprecated" by the Supreme Court. *Larson*, 456 U.S. at 246.

2. Excessive Entanglement

The Government offers no new challenge to Plaintiffs' argument that the religious-employer exemption violates the Establishment Clause by excessively entangling the Government in the affairs of the Catholic Church. Instead, the Government repeats its contention that Plaintiffs' claim is not ripe "because it challenges non-binding Internal Revenue Service guidance that has not been—and likely never will be—applied by the government to plaintiffs." Gov't 2d Br. at 29. But as Plaintiffs explained, they need not wait to bring suit until after the Government or a court has "troll[ed] through [their] religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *McCarthy v. Fuller*, 714 F.3d 971, 976, 978 (7th Cir. 2013); Pls.' 2d Br. at 47–49. Further, it is the Government that has made this IRS guidance central to the religious employer exemption, *see* 78 Fed. Reg. at 8,456, and as a result, Plaintiffs must meet the stated criteria in order to avoid the requirements of the Mandate. *See Colo. Christian*, 534 F.3d at 1256 (finding impermissible government discrimination in "criteria that entail intrusive governmental judgments regarding matters of religious belief and practice").

Indeed, the religious-employer exemption necessarily entails an intrusive judgment about Plaintiffs' religious beliefs and practices, including whether Plaintiffs—in the Government's view—have a sufficiently "recognized creed and form of worship." *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009); 26 C.F.R. § 1.6033-2(h); Pls.' 1st Br. at 33–35; Pls.' 2d Br. at 47–49. Governmental inquiry into Plaintiffs' religiosity

impermissibly puts the Government and this Court "in the role of arbiter of the essentially . . . religious dispute[s]." *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977). Such an intrusive inquiry cannot be squared with the Establishment Clause, which "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices." *Colo. Christian*, 534 F.3d at 1261.

F. The Mandate Interferes with Plaintiffs' Internal Church Governance

As previously explained, *see* Pls.' 1st Br. at 35–36, in addition to imposing a substantial burden on Plaintiffs' exercise of religion, the Mandate interferes with the internal governance of the Catholic entities involved in this lawsuit in further violation of the First Amendment. The Government barely addresses this argument, asserting that *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), are distinguishable. Gov't 2d Br. at 30–31. The governing principles, however, are equally applicable.

This case is about Plaintiffs' "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. And the Mandate clearly interferes in an area in which the First Amendment grants independence to the Catholic Church. As Plaintiffs have explained, it splits the Catholic Church, artificially dividing its "houses of worship" from its equally religious charitable, educational, healthcare, and public service ministries. As Pope Emeritus Benedict XVI stated, "The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Further, the Mandate interferes with the manner in which Plaintiff Diocese has chosen to supervise its subordinate entities. The "religious employer" definition thus interferes with "internal or church decision[s] that affect[] the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012); *Korte*, 2013 WL 5960692, at *17 (acknowledging churches' "autonomy to shape their own missions, conduct their own ministries, and generally govern themselves").

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

The Mandate is not in accordance with law because it violates the Weldon Amendment. Pls.' 2d Br. at 51–54. Defendants rely on the legislative history of the Abortion Non-Discrimination Act of 2002, H.R. 4691, 107th Cong. (2002), to support their position that the Weldon Amendment does not apply to the abortion-inducing products covered by the Mandate. Gov't 2d Br. at 31–33. But the legislative history belies Defendants' position. The Abortion Non-Discrimination Act—which Defendants correctly identify as a predecessor bill to the "Weldon Amendment"—was meant to restore the right to conscientiously object to providing, paying for, or facilitating what a particular person or entity viewed as an abortion. And the debate surrounding that Act confirms that it was meant to protect the right of conscience. Thus, during the same debate Defendants cite, *id.* at 32, Representative Bilirakis, another sponsor of the bill, was asked "to define what constitutes an abortion" and, specifically, "[i]s emergency contraception abortion?" 148 Cong. Rec. H6566-01, at H6577-78 (Rep. Capps). He responded: "[T]his is not about abortion. This is about freedom. . . . basically giving people the moral rights to make their decisions. That is what it is all about." *Id.* at H6578 (Rep. Bilirakis).[13] This Court should interpret the Weldon Amendment to fulfill the goal it was meant to accomplish: protecting conscientious objectors.

The Government also argues that this Court should defer to its interpretation of the term "abortion." Gov't 2d Br. at 31.[14] But the Government's argument misses the mark, as its own authority reveals. *See id.* (citing *Brotherhood of R.R. Signalmen v. Surface Transp. Bd.*, 638

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[13] *See also id.* at H6566 (Rep. Myrick) ("[T]oday a growing number of health care practices, procedures *and medications* present serious moral concerns for many health care providers. . . . Increasingly, there is pressure upon health care providers . . . to put aside personal moral beliefs in order to *facilitate convenient access to new drugs*, procedures and technologies. . . . *[The Bill would give health care providers] a right to choose not to be involved in destroying life*." (emphasis added)).

[14] Relatedly, Plaintiffs do not claim to be issuers of qualified health plans. Gov't 2d Br. at 32–33. They merely suggest that an interpretation of the Weldon Amendment that allows plan providers, rather than the Government, to identify what constitutes an abortion is consistent with the Affordable Care Act's decision to leave that determination to plan issuers. Pls.' 2d Br. at 54.

F.3d 807, 811 (D.C. Cir. 2011)). An agency is entitled to deference when it interprets a "statute it is charged with enforcing." *Brotherhood*, 638 F.3d at 811. Defendant agencies are not, however, "charged with enforcing" appropriations bills, and their interpretation of the Weldon Amendment is not entitled to deference. *See id.* For the same reasons, Congress' reenactment of the Weldon Amendment has nothing to do with the regulatory practice the Government cites and so is not an endorsement of that practice. In fact, the Government fails to cite a single "administrative or judicial interpretation" of the Weldon Amendment's language.

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

Finally, the Government argues that the HRSA Guidelines were not subject to notice and comment rulemaking because they are not legislative rules. Gov't 2d Br. at 33–34. Rather, the Government maintains that the "substantive obligations" of the Mandate were imposed by Congress when it "automatically import[ed] the content of various clinical guidelines" into the ACA. *Id.* at 34. But the statute Congress passed merely delegates authority to the HRSA to adopt guidelines and contains no substance at all. 42 U.S.C. § 300gg-13(a)(4). The Government's suggestion that the statutory language incorporated HRSA's guidelines by reference is simply disingenuous. Pls. 2d. Br. at 54–56. Indeed, the guidelines did not even exist when the statutory language was passed.[15] Congress, recognizing that HRSA would impose substantive obligations when it adopted guidelines for women's preventive care, in fact requires the Secretary to delay enforcement of any revisions to the guidelines by at least one year. *See* 42 U.S.C. § 300gg-13(b).

II. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION

Because the Mandate violates RFRA, the First Amendment, and the APA, Plaintiffs are entitled to a permanent injunction. The Government appears to believe otherwise. It concedes

[15] *Compare* Pub. L. No. 111-148, tit. I, § 2713 (Mar. 23, 2010), *with* Dep't of Health & Human Servs., Press Release, *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost* (Aug. 1, 2011) (announcing IOM's new guidelines), *available at* www.hhs.gov/news/press/2011pres/08/ 20110801b.html.

that success on the merits establishes irreparable harm. Gov't 2d Br. at 35. But it appears to believe that injunctive relief could nonetheless be denied under the "balance of equities" and "public interest" prongs. That is obviously wrong, since it would mean that there would effectively be *no relief* for an admitted violation of RFRA, the First Amendment, and the APA. The Government cites no authority for that startling proposition. To the contrary, "the analysis begins and ends with the likelihood of success on the merits of the RFRA claim," because "[a]lthough the claim is statutory, RFRA protects First Amendment free-exercise rights, and 'in First Amendment cases, the likelihood of success on the merits will often be the determinative factor.'" *Korte*, 2013 WL 5960692, at *7 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (internal citations omitted)); *see also Hobby Lobby*, 723 F.3d at 1145 (stating that "it is always in the public interest to prevent the violation of a party's constitutional [or RFRA] rights" (internal citation omitted)).[16] Because an injunction is the "only" remedy that can "vindicate the objectives of the Act," Plaintiffs are plainly entitled to one. *Weinberger*, 456 U.S. at 314.[17]

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

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[16] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008), is not even remotely to the contrary. There, the alleged violations were technical and procedural, such that even actual success on the merits would not have entitled the plaintiffs to halt the Government's behavior. *Winter*, 555 U.S. at 32 ("Given that the ultimate legal claim is that the Navy must prepare an [Environmental Impact Statement], not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security."). Here, RFRA contains a flat ban on the Government's conduct, and thus "only an injunction [can] vindicate the objectives of the Act." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).

[17] In any event, even assuming Plaintiffs had to show the remaining factors, injunctive relief is warranted for the reasons stated in Plaintiffs' prior briefs and *Hobby Lobby*. Pls.' 1st Br. at 37–40; Pls' 2d Br. at 56–60; *see also Hobby Lobby*, 723 F.3d at 1145–47. Indeed, given that, for purposes of this analysis, the Mandate, by definition, does not further a compelling governmental interest and is not narrowly tailored, enforcement of the illegal Mandate could not possibly be justified under the non-merits prongs for a permanent injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2013, I electronically filed the foregoing Plaintiffs' Reply in Support of Their 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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