Consolidated Case Nos. 14-1430 & 14-1431

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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-Appellees,

&

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,
Plaintiffs-Appellees,

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-Appellants.

Appeal from the United States District Court for the Northern District of Indiana
District Court Case Nos. 1:12-CV-159 & 3:12-CV-459
The Honorable Jon E. DeGuilio

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case:

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.

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this Court:

Barnes & Thornburg LLP; Burt, Blee, Dixon, Sutton & Bloom, LLP; Hall & Gooden LLP; Jones Day

3. None of Appellees have parent corporations, except for Appellee Specialty Physicians of Illinois, whose sole member is Appellee Franciscan Alliance, Inc. No publicly held company owns 10% or more of any of Appellees' stock.

Respectfully submitted, this the 6th day of June, 2014.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case:

Grace Schools and Biola University, Inc.

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this Court:

Alliance Defending Freedom, Faegre Baker Daniels LLP, Schmiesing Blied Stoddart & Mackey

3. Neither of Appellees have parent corporations. No publicly held company owns 10% or more of any of Appellees' stock.

Respectfully submitted, this the 6th day of June, 2014.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Plaintiffs-Appellees submit that oral argument would assist the Court in its adjudication of these issues. The statutory requirements of the Affordable Care Act are complex, and oral argument would assist the panel in its understanding of the effects of the contraceptive-coverage mandate on Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

Appellees agree that the jurisdictional statement contained in the Government's brief is complete and correct.

INTRODUCTION

The Government has promulgated a regulatory mandate that forces Plaintiffs-Appellees[1] to violate their religious beliefs by participating in a regulatory scheme to provide their employees[2] with coverage for abortion-inducing products, contraceptives, and sterilization. 42 U.S.C. § 300gg-13(a)(4); 78 Fed. Reg. 39,870 (July 2, 2013) (collectively, the "Mandate"). Under the Mandate, Appellees must hire third parties that will provide their employees with coverage for these products and services, which Appellees find deeply objectionable on religious grounds. Appellees must also sign and submit a form designating the third parties as the provider of the objectionable coverage and then must take numerous additional steps to maintain their contractual relationship with those third parties, thus keeping open the pipeline by which the products and services will flow to Appellees' employees. Appellees sincerely believe, and the Government does not dispute, that they cannot take those actions without violating their religious beliefs. The resolution of these cases thus turns on the answer to a straightforward question: absent interests of the highest order, can the Government force

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[1] Plaintiffs-Appellees consist of the Diocese of Fort Wayne-South Bend, Inc. ("Diocese"); Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc. ("Catholic Charities"); Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc. ("Saint Anne Home"); Franciscan Alliance, Inc.; Specialty Physicians of Illinois, LLC ("Specialty Physicians"); University of Saint Francis ("Saint Francis"); Our Sunday Visitor, Inc. (collectively, the "Fort Wayne Appellees"); Grace Schools ("Grace") and Biola University, Inc. ("Biola") (Grace and Biola are referred to as "the Schools"). All Plaintiffs-Appellees are referred to collectively as "Appellees."

[2] And, in the case of Grace and Biola, their students.

religious organizations to take actions that violate their sincerely held religious beliefs?

Under the Religious Freedom Restoration Act ("RFRA"), the answer is clearly no, as courts have held in twenty-three out of twenty-five cases to consider the question.[3] RFRA prohibits the Government from imposing a

[3] *Catholic Benefits Ass'n v. Sebelius*, No. CIV-14-240-R, 2014 U.S. Dist. LEXIS 75949 (W.D. Okla. June 4, 2014); *Dordt Coll. v. Sebelius*, No. C 13-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *Fellowship of Catholic Univ. Students v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014), *reconsideration granted in part and denied in part*, 2014 WL 2441742 (May 30, 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius* ("*RCNY*"), No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S. Ct. 1022 (Jan. 24, 2014) (mem.); *Mich. Catholic Conference v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius* ("*RCAW*"), No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Univ. of Notre Dame v. Sebelius*,

"substantial burden" on Appellees' exercise of religion unless that burden is the least restrictive means of advancing a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), this Court held that the Mandate substantially burdened the religious exercise of for-profit corporations because it "force[d] [plaintiffs] to do what their religion tells them they must not do." *Id.* at 685. So too here. Though the particular religious exercise at issue differs, the Mandate still "forces [Appellees] to do what their religion tells them they must not do." *Id.* Just as in *Korte*, "[t]hat qualifies as a substantial burden on religious exercise, properly understood." *Id.* As the Government concedes that *Korte* forecloses any argument that the Mandate can survive strict scrutiny,[4] Appellees are entitled to injunctive relief.

This Court's recent decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), does not alter this analysis. As the panel majority in that case made clear, its decision was necessarily "tentative," *id.* at 552, case-specific, and based on a standard of review that was highly "deferential[]" to the district court's discretionary decision to deny preliminary injunctive relief, *id.* at 553 (citation omitted). Here, under the same deferential standard, the district

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743 F.3d 547 (7th Cir. 2014); *Diocese of Cheyenne v. Sebelius*, No. 14-0021, 2014 WL 1911873 (D. Wyo. May 13, 2014).

[4] Defs.' Surreply in Opp. to Fort Wayne Pls.' Cross-Mot. for Summ. J. (Doc. 105), at 2 n.1 ("Defendants recognize that *Korte* forecloses their arguments that the regulations satisfy strict scrutiny."). In their briefing on appeal, the Government now argues that *Korte* is distinguishable, and that the Mandate, as applied to these Appellees, is the least restrictive means to further a compelling governmental interest. *See* Gov't Br. at 26-27. As the Government failed to develop this argument below, they are foreclosed from raising it on appeal. *See Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 781 (7th Cir. 2013).

court's discretionary rulings should be affirmed on the specific facts of these cases, where Appellees' RFRA claims raise unique issues that were not pressed or passed upon in *Notre Dame*.

STATEMENT OF THE ISSUE

Whether the contraceptive-coverage Mandate of the Affordable Care Act violates the Religious Freedom Restoration Act by substantially burdening Appellees' exercise of religion.

STATEMENT OF THE CASE

These are appeals from the district court's grant of Appellees' motions for a preliminary injunction against the Affordable Care Act's contraceptive-coverage Mandate, which forces Appellees to violate their religious beliefs by facilitating access to insurance coverage for abortion-inducing products, contraception, sterilization, and related education and counseling services (the "objectionable products and services" or the "objectionable coverage").[5]

A. Procedural History

The Fort Wayne Appellees filed their complaint on May 21, 2012 (FW-Doc. 1), and their amended complaint on September 6, 2013 (FW-Doc. 73).[6] The Schools filed their complaint on August 23, 2012 (GS-Doc. 1), and their

[5] The Schools' objection is limited to abortion-inducing products and related counseling.

[6] Citations to documents in the Short Appendix are "SA__." Citations to documents in the Joint Supplemental Appendix are "AA__." Citations to the Records on Appeal are "FW-Doc. __," or "GS-Doc. __," referencing the Fort Wayne Appellees' or Schools' district court Document Number in the CM/ECF system, respectively. Page citations are to the document's pagination, not the CM/ECF-assigned pagination.

amended complaint on September 6, 2013 (GS-Doc. 54). In their amended complaints, Appellees allege that the Mandate substantially burdens their exercise of religion in violation of RFRA and the Free Exercise Clause, compels and prohibits speech in violation of the First Amendment, excessively entangles the government with religion in violation of the Establishment Clause, and violates the Administrative Procedures Act ("APA"). (*Id.*; FW-Doc. 73 at 29-35.)[7] Facing an enforcement date of January 1, 2014, the Fort Wayne Appellees also moved for a preliminary injunction on September 6, 2013, raising all of the claims alleged in their amended complaint. (FW-Doc. 74.) While the district court considered that motion, the Government filed a motion to dismiss, or in the alternative, for summary judgment (FW-Doc. 85), and the Fort Wayne Appellees filed their cross-motion for summary judgment (FW-Doc. 95).

The Schools also moved for a preliminary injunction on September 6, 2013. (GS-Doc. 55). The Mandate was to begin applying to Grace's employee plan on January 1, 2014; to Biola's employee plans on April 1, 2014; to Grace's student plan on July 25, 2014; and to Biola's student plan on August 1, 2014. During the pendency of that motion, the Government filed a motion to dismiss, or in the alternative, for summary judgment (GS-Doc. 60), and the Schools filed their cross-motion for summary judgment (GS-Doc. 69).

On December 27, 2013, the district court granted Appellees' motions for preliminary injunction. (SA1; SA40.) In its opinions, the district court

[7] The Schools also claimed that the Mandate violates the Due Process Clause and their freedom of expressive association protected by the Free Speech Clause.

addressed only Appellees' RFRA claims. (*Id.*) The opinion is silent as to the other six bases for relief that the Fort Wayne Appellees raised in their preliminary injunction motion. (*Id.*)

Nearly two months later, on February 24, 2014, the Government filed its notices of interlocutory appeal. (FW-Doc. 123, GS-Doc. 91.) On March 3, this Court consolidated these appeals, encouraging the two sets of appellees to file a joint brief or a joint appendix, or to adopt parts of a co-appellee's brief. (Order, Mar. 3, 2014.) Appellees have opted to file a joint brief and a joint supplemental appendix.

B. The Mandate

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") requires "group health plan[s]" to include insurance coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). The Government has defined "preventive care and screenings" to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 3, 2014). The category of FDA-approved contraceptive methods and sterilization procedures, in turn, includes intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. (Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), AA386-AA387.) If an employer's group health plan does not include the required coverage, the

employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b)(1). Dropping employee health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year, per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1). Student health plans must also include the objectionable coverage. *See* 76 Fed. Reg. 7767, 7772 (Feb. 11, 2011).

1. Exemptions from the Mandate

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). All told, by the Government's own estimates, over 90 million individuals participate in health plans that may be excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Geneva College v. Sebelius*, 941 F. Supp. 672, 684 & n.12 (W.D. Pa. 2013).

Moreover, in an apparent acknowledgment of the burden the Mandate places on religious exercise, the Government created an exemption for plans sponsored by so-called "religious employers." That exemption, however, is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8724, 8727-28, 8730 (Feb. 15, 2012). For religious entities that do not qualify as a "house of worship," there is no exemption from the Mandate.

Despite sustained criticism from religious groups, the Government refused to expand the "religious employer" exemption from the Mandate. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (noting that the Government would continue to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders"). Instead, the Government devised what it inaptly termed an "accommodation" for non-exempt religious organizations, which went into effect "for plan years beginning on or after January 1, 2014." 78 Fed. Reg. at 39,870. The purpose and effect of the accommodation continues to be "expanding access to and utilization of" contraceptive services by requiring coverage of such services for beneficiaries of a religious organization's healthcare plan so long as they are enrolled in the plan. *Id.* at 39,887; 77 Fed. Reg. at 8728 (declining to consider a "broader exemption" due to the unsupported belief that "[i]ncluding these employers within the scope of the exemption would subject their employees to the religious views of the employer").

2. The "Accommodation"

To be eligible for the "accommodation," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If an organization meets these criteria and wishes to partake of the "accommodation," it must provide the required "self-

certification" to its insurance company or (if the organization has a self-insured health plan) to its third party administrator ("TPA"). *Id.*

When an "eligible organization" signs and submits the self-certification form, it confers upon its insurance company or TPA both the authority and an obligation to procure "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(c). Absent the self-certification, neither an insurance company nor a TPA may provide such payments under the accommodation. These "payments for contraceptive services," however, are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan. *See* 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). The "self-certification [also] notifies the TPA or issuer of their obligations [1] to provide contraceptive-coverage to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain these benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11.

For self-insured organizations, the Mandate has additional implications. The self-certification form serves as the official "designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. In addition, the regulations provide that the self-certification form "shall be an instrument under which the plan is operated." 29 C.F.R. § 2510.3–16. In fact, the Government has conceded that "in the self-insured [context], technically, the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health]

plan." *RCAW*, No. 13-1441, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013). Once the organization signs and submits the form, moreover, the religious organization is prohibited from "directly or indirectly, seek[ing] to influence [its] third party administrator's decision" to provide contraceptive coverage, 26 C.F.R. § 54.9815–2713A(b)(1)(iii), and thus cannot terminate or threaten to terminate its relationship with the TPA because of the TPA's arrangements to provide the objectionable coverage, *id.*; *see also* Defs.' Mem. in Opp'n to Fort Wayne Pls.' Mot. for Preliminary Inj. (FW-Doc. 84), at 37. In addition, because TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880, the burden falls on the religious organization to find and contract with a TPA that is willing to provide the objectionable coverage.

In short, under the accommodation, religious organizations must identify and designate a third party to provide the very coverage they find morally objectionable. "The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *S. Nazarene*, 2013 WL 6804265, at *8. "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* "If the institution does sign the permission slip, and only if the institution signs the permission slip, the institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

Before the "accommodation" was finalized, Christian religious authorities made clear that it would not actually accommodate Christian organizations because it would still require them to act in violation of their religious beliefs. As the U.S. Conference of Catholic Bishops pointed out, although the "accommodation" was designed to "create an appearance of moderation and compromise," in substance it failed to "offer any change in the Administration's earlier stated positions on mandated contraceptive coverage." (Comments of U.S. Conference of Catholic Bishops at 3 (May 15, 2012), *see infra* note 8.) That is because, at the end of the day, "non-exempt religious organizations [would] still be required to provide plans that serve as a conduit for contraceptives and sterilization procedures to their own employees." (*Id.*) While pointing out that it would be practically impossible to segregate fees and premiums from contraceptive payments given the fungible nature of money, the U.S. Conference of Catholic Bishops also made clear that the issue of payment for contraceptive services was ultimately irrelevant to the religious objection:

> [E]ven if premium dollars of an objecting employer did not actually pay for contraceptives, the plan itself would be functioning as a gateway to such payments. Thus . . . the self-insured plan would serve as a kind of "ticket" for "free" contraceptives. It would be morally objectionable for an employer to provide anyone such a "ticket," even if the ticket costs the employer nothing to provide.

(*Id.* at 14; Comments of the Schools, *infra*, note 8.)

Despite this clear statement that the "accommodation" would still require non-exempt Christian organizations to violate their religious beliefs, the Government refused to reconsider an expansion of the "religious employer" exemption. Instead, the Government finalized the "accommodation" and began

falsely proclaiming that it had reached a compromise that would satisfy religious objections to the Mandate.

C. The Appellees

The Fort Wayne Appellees provide a wide range of spiritual, educational, and social services to both Catholic and non-Catholic members of their communities. The Schools are Christ-centered institutions of higher learning. All Appellees are organized exclusively for charitable, religious, and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. (Fort Wayne Compl., AA1 ¶¶ 19-25; Grace Compl., AA407 ¶¶ 10-11.)

1. Diocese of Fort Wayne-South Bend

The Diocese encompasses fourteen counties in Northeast Indiana, and through its eighty-one local community parishes and two oratories, serves the spiritual needs of its population of approximately 160,000 Catholics. (Ryan Aff., AA276 ¶¶ 4, 6.)

The Diocese has approximately 2,502 employees, with over 1,400 classified as full-time (working an average of at least 30 hours per week). (*Id.* ¶ 23.) Consistent with Church teachings on social justice, the Diocese makes health insurance benefits available to its religious personnel, seminarians, and full-time employees through the self-insured Diocesan Health Plan. (*Id.* ¶¶ 24-25.) That health plan also covers the employees of non-exempt, affiliated entities such as Appellee Catholic Charities. (*Id.* ¶ 26.)

The Diocesan Health Plan meets the Affordable Care Act's definition of a "grandfathered" plan. (*Id.* ¶ 27.) Although the Diocese qualifies as a "religious

employer" under the Mandate and is thus exempt from facilitating access to the objectionable coverage for its employees, this exemption does not apply to the employees of Catholic Charities. (*Id.* ¶ 31.) Accordingly, the Diocese foregoes approximately $180,000 a year in increased premiums to maintain its health plan's grandfathered status. (*Id.* ¶ 27.) The Diocese's only other options would be to sponsor a plan that would facilitate access to the objectionable coverage, and thereby act contrary to its sincerely-held religious beliefs, or to no longer extend its plan to Catholic Charities, which compels the Diocese to submit to the Government's interference with its structure and internal operations. (*Id.* ¶ 33.)

2. Catholic Charities of the Diocese of Fort Wayne-South Bend

Catholic Charities provides a number of critical services within the Northeast Indiana community, including services involving refugee resettlement, refugee employment, immigration, adoption, pregnancy services, emergency services and food pantries, translation services, employment, and residential living for seniors. (Young Aff., AA284 ¶ 3.) In 2011, it provided these services to over 22,500 people. (*Id.* ¶ 6.) As previously explained, Catholic Charities is not an exempt "religious employer" pursuant to the Mandate, but its employees receive health insurance through the Diocesan Health Plan. Under this arrangement, the Diocese foregoes a substantial amount of funds in order to maintain its health plan's grandfathered status. These are funds that could flow to Catholic Charities' programs and services to benefit the Fort Wayne-South Bend community at large. (*Id.* ¶ 19.)

3. Saint Anne Home & Retirement Community

Saint Anne Home provides quality and compassionate care for the aged in a home-like setting within a spiritual environment. (Wardwell Aff., AA290 ¶ 5.)

Saint Anne Home offers its employees health coverage under its own self-insured health plan. (*Id.* ¶ 15.) Because of changes in the plan over the last few years, Saint Anne Home's plan is not grandfathered, and Saint Anne Home does not qualify for the religious employer exemption. (*Id.* ¶ 17.) Saint Anne Home does not, because of its sincerely held religious beliefs, offer coverage of the objectionable products and services through its plan. (*Id.* ¶ 19.) Accordingly, Saint Anne Home is forced to self-certify to its TPA, which would be antithetical to the Catholic faith. (*Id.* ¶ 21.) Otherwise, Saint Anne Home would be exposed to significant liability. (*Id.* ¶ 23.)

4. Franciscan Alliance, Inc.

Franciscan Alliance has approximately 18,000 employees and is one of the strongest regional health systems in the country and in Indiana. (Klein Aff., AA297 ¶¶ 4, 25.) Franciscan Alliance provides a number of health benefits programs to its eligible employees. (*Id.* ¶¶ 14-17.) These plans are both fully-insured and self-insured, and the great majority of the plans lost their grandfathered status. (*Id.*) None of the plans, however, provide the objectionable products or services, nor does Franciscan Alliance qualify for the religious employer exemption. (*Id.* ¶ 20.)

5. Specialty Physicians of Illinois

Specialty Physicians is a nonprofit organization providing specialty healthcare services with five practice sites in Illinois. (Klein Aff., AA305 ¶ 4.) Specialty Physicians offers its 317 benefits-eligible employees health coverage through a pair of fully-insured plan options. (*Id.* ¶ 7.) These plans are not grandfathered and do not cover the objectionable products or services. (*Id.* ¶ 11.) The plans' insurer, Blue Cross Blue Shield of Illinois ("Blue Shield"), informed Specialty Physicians that it would not provide health plans without the objectionable coverage unless Specialty Physicians signed an agreement indemnifying Blue Cross for any cost incurred relating to Blue Cross's obligation to comply with the Mandate. (*Id.* ¶ 8.) Accordingly, Specialty Physicians is currently indemnifying Blue Cross and has a current financial obligation pursuant to this indemnification agreement. (*Id.*)

6. University of Saint Francis

Saint Francis has approximately 2,400 undergraduate and graduate students, and is composed of five undergraduate schools and one graduate school. (Kriss Aff., AA311 ¶¶ 6, 9.) Saint Francis offers its employees a self-insured health care plan that does not cover the objectionable products and services. (*Id.* ¶¶ 26, 29.) The plan lost its grandfathered status in 2012, and Saint Francis does not qualify for the religious employer exemption. (*Id.* ¶ 26.) Consequently, Saint Francis will be exposed to particularly draconian fines should it decide to adhere to its religious beliefs and refuse to sign the self-certification. (*Id.* ¶ 34.) Additionally, Saint Francis does not offer its students a

health plan. (*Id.* ¶ 23.) Because of the Mandate's requirement that any student health plan include the objectionable coverage, Saint Francis is unable to extend a health plan to its students in the future. (*Id.*)

7. Our Sunday Visitor

Our Sunday Visitor is a nonprofit Catholic publishing company responsible for the writing and promotion of six religious periodicals. (Erlandson Aff., AA321 ¶¶ 4-5.) It offers its 317 benefits-eligible employees health insurance coverage through a self-insured health plan. (*Id.* ¶¶ 11-12.) That plan lost its grandfathered status in 2012, and Our Sunday Visitor does not qualify for the religious employer exemption. (*Id.* ¶ 13.) Therefore, should Our Sunday Visitor adhere to its religious beliefs and decline to execute the self-certification, it will be subject to significant fines. (*Id.* ¶ 22.)

8. Grace Schools

Grace Schools is a Christ-centered institution of higher learning. (Grace Compl., AA407 ¶ 10.) It operates Grace College and Grace Theological Seminary. Its aspirational vision is to "be an exceptional learning community that transforms people to live their lives for God and others." (*Id.* ¶ 21.) Consistent with its religious commitments, Grace provides a self-insured health plan to its employees. (*Id.* ¶ 44.) It also offers a health insurance plan to its students. (*Id.* ¶ 50.) Neither plan covers abortion-inducing products. (*Id.* ¶¶ 46, 50.) In June 2010, Grace made changes to its employee plan that deprived it of grandfathered status. (*Id.* ¶ 49.) Grace is not eligible for the Mandate's narrow religious exemption, even though it "employ[s] people of the

same faith who share the same objection" to abortifacient coverage—the Government's stated rationale for its religious exemption. (*Id.* ¶ 247.) 78 Fed. Reg. 39870, 39874.

9. Biola University

The mission of Biola University is biblically-centered education, scholarship, and service—equipping men and women in mind and character to impact the world for the Lord Jesus Christ. (*Id.* ¶ 52.) To fulfill its religious commitments and duties in the Christ-centered educational context, Biola promotes the spiritual and physical well-being and health of its employees and students by offering health insurance. (*Id.* ¶ 68.) Those plans reflect its religious belief in the dignity of human life from the moment of conception. (*Id.* ¶ 65.) Like Grace, Biola draws its employees and students from among those who share its religious convictions; as such, it should qualify for the religious exemption from the Mandate. However, it does not. (*Id.* ¶¶ 65, 247.)

* * *

For these Appellees, the "accommodation" does not resolve their religious objections to the Mandate because it requires them to take numerous actions in violation of their religious beliefs. (*See* Heintz Decl., AA372 ¶¶ 8-26; Grace Compl., AA407 ¶¶ 5, 178, 182.) Broadly stated, the "accommodation" requires Appellees to take the affirmative step of providing health insurance through an insurance company or TPA authorized to provide contraceptive coverage to employees enrolled in Appellees' health plans. 26 C.F.R. § 54.9815-2713A(a)-(c). Specifically, Appellees must identify and contract with a third party willing

to provide the objectionable coverage to Appellees' employees. *Id.* § 54.9815-2713A(b)(2); 78 Fed. Reg. at 39,880. Appellees must then sign and submit a "self-certification" that "designat[es]" their TPA or insurer as the provider of contraceptive benefits for beneficiaries enrolled in Appellees' health plans, and notify the TPA or insurance company of its obligations under the accommodation. 26 C.F.R. § 54.9815-2713A(a)-(c); 29 C.F.R. § 2510.3–16. Even after they have taken these steps, Appellees must take numerous additional steps to maintain the arrangement whereby the mandated coverage is provided to their employees. Among other things, Appellees must pay fees and premiums to the TPA or insurance company authorized to provide the objectionable coverage. And Appellees must identify for their TPA or insurance company which of their employees will participate in the health plans, thus identifying the beneficiaries that will then receive the objectionable coverage. These actions violate Appellees' sincerely held Christian religious beliefs. (*See, e.g.*, Kriss Aff., AA311 ¶¶ 31-33; Grace Compl., AA407 ¶¶ 210-12.) Appellees believe that complying with the Mandate and its "accommodation" gives rise to scandal in a manner that violates their religious beliefs. (*See, e.g.*, Kriss Aff., AA311 ¶¶ 32-33; Heintz Decl. AA372 ¶ 25; Grace Compl., AA407 ¶¶ 2, 5.)

As indicated above, the Government *knew* the "accommodation" would not relieve the pressure on Appellees to act contrary to their religious beliefs, because the U.S. Conference of Catholic Bishops and the Schools informed the

Government that the now-codified "accommodation" was inadequate.[8] That concern, however, has been ignored. As the district court granted Appellees' motions for preliminary injunction, Appellees have been shielded from having to make a choice that no government should require: either violate your religious beliefs, or pay the price.

SUMMARY OF ARGUMENT

The district court, which considered the particular facts of these Appellees, properly applied the Religious Freedom Restoration Act as interpreted by this Court in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). RFRA prohibits the Government from imposing a "substantial[] burden" on "any" exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. §§ 2000bb-1, 2000bb-2(4), 2000cc-5(7). In *Korte*, this Court held that the Mandate as applied to for-profit corporations violated RFRA because it imposed substantial pressure on them to act contrary to their religious beliefs, and could not satisfy strict scrutiny. 735 F.3d at 682–87. The Government concedes that, in light of *Korte*, the Mandate cannot survive strict scrutiny in this case. *Supra* note 4. Thus, the only issue before this Court is whether the Mandate imposes a

[8] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013) (AA383-AA406); Comments of U.S. Conference of Catholic Bishops (May 15, 2012), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf (last visited June 3, 2014); Comment on Notice of Proposed Rulemaking, File Code CMS–9968–P by Grace Schools and Biola University (April 8, 2013), http://www.regulations.gov/contentStreamer?objectId=0900006481285f7e&disposition=attachment&contentType=pdf (last visited June 3, 2014).

"substantial burden"—that is, whether it imposes substantial pressure on Appellees to act contrary to their religious beliefs. But *Korte* answers that question, too: It is undisputed that Appellees have a sincere religious objection to the actions required under the Mandate, even under the so-called "accommodation." But if they fail to take those actions, they will be subject to the same coercive penalties—the same "substantial pressure"—that was at issue in *Korte*.

As *Korte* held, "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" 735 F.3d at 683 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013) (No. 13-354)); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013) (same). "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." *Korte*, 735 F.3d at 683. Thus, the exact "religious exercise" at issue is irrelevant to the substantial burden analysis. So long as the plaintiff has an "'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do, conflicts with his religion," *id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)), this Court's "only task is to determine whether" "the government has applied substantial pressure on the claimant" to act contrary to his faith. *Hobby Lobby*, 723 F.3d at 1137; *Korte*, 735 F.3d at 683–85 (same).

Here, the Government does not dispute that Appellees have an "honest conviction" that their religion forbids them from taking the actions required under the "accommodation." Among other things, Appellees believe they may not contract with any third party authorized to provide objectionable coverage to their employees, sign and submit the required "self-certification," or maintain health plans that will serve as the conduit for the objectionable coverage. While those actions are slightly different than the actions that were at issue in *Korte*, that difference is irrelevant to the substantial burden inquiry. What matters is that Appellees have a sincere and uncontested religious objection to the actions they are indisputably required to take, but if they refuse to take those actions they will be subject to crippling fines. That is a substantial burden. As this Court and the Supreme Court have repeatedly held, coercing believers to act contrary to their sincerely held beliefs is the very definition of a "substantial burden" on religious exercise. *Korte*, 735 F.3d at 685; *see also Thomas*, 450 U.S. at 717; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Government attempts to persuade this Court otherwise, repeatedly asserting that the "accommodation" allows Appellees to "opt out" of providing contraceptive coverage. (Gov't Br. at 13.) But the "accommodation" is not a true "opt out" because it still requires Appellees to engage in numerous religiously objectionable actions. (Heintz Decl., AA372 ¶¶ 8-26.) In short, Appellees sincerely believe that taking the actions required under the "accommodation" would make them "complicit in a grave moral wrong" and

"undermine their ability to give witness to the moral teachings of their church[es]." 735 F.3d at 683. That is a religious judgment, based on Christian moral principles regarding the permissible degree of entanglement with wrongdoing.

Yet, according to the Government, Appellees do not really object to the actions the Mandate requires *of them*, but rather to the actions the Mandate requires *of third parties*. (Gov't Br. at 16.) In essence, the Government asks this Court to rule that there is no substantial burden because the actions Appellees must take under the "accommodation" do not *really* violate their faith. But as *Korte* makes clear, this Court cannot "purport[] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the" Appellees and their churches? *Korte*, 735 F.3d at 685. "No civil authority can decide that question." *Id.* Indeed, in the face of Appellees' express representations that they may not comply with the accommodation, accepting the Government's argument in this case would require informing Appellees that they "misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Such an approach is irreconcilable with the jurisprudence of both this Court and the Supreme Court, which holds 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) (quoting *Thomas*, 450 U.S. at 716); *Korte*, 735 F.3d at 683–85. Simply put, "federal courts are not empowered to

decide . . . religious questions." *McCarthy v. Fuller*, 714 F.3d 971, 980 (7th Cir. 2013). While the Government may "feel[] that the accommodation sufficiently insulates [Appellees] from the objectionable services, . . . it is not the Court's role to say that [Appellees] are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. The "line" between religiously permissible and impermissible actions is for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Should this Court disagree with the district court's adjudication of Appellees' RFRA claim, Appellees ask that the Court consider extending injunctive relief while this case is back before the district court. As previously explained, the Fort Wayne Appellees timely and diligently raised a number of arguments in support of their motion for a preliminary injunction, including claims that the Mandate violates the Free Exercise Clause, Free Speech Clause, and Establishment Clause of the U.S. Constitution, and that it violates the APA.[9] The district court did not reach those claims because it granted relief based on Appellees' RFRA claims alone. It would thus be inequitable to deny Appellees temporary injunctive relief—and thus force them to violate their religious beliefs on pain of crippling fines—even though they raised all of their arguments in their original motion below. Along the same lines, the Schools should be given the opportunity to pursue preliminary injunctive relief based on the other claims asserted in their amended complaint and thoroughly

[9] The Fort Wayne Appellees also raised these same issues in their extensive briefing in the court below. *See* AA74-AA275.

addressed in the parties' cross-motions for summary judgment. Accordingly, should this Court find that the district court abused its discretion in granting Appellees' motions for preliminary injunction, Appellees ask this Court to reverse and remand the district court's judgment while maintaining the injunction. *See Faber v. Parent*, 164 F. App'x 596, 599 (9th Cir. 2006) (reversing and remanding but stating that "the injunction shall remain intact for a reasonable time not to exceed 90 days from the date on which this disposition is filed or until an earlier date on which the district court enters a succeeding preliminary injunction.").

ARGUMENT

Appellees are entitled to a preliminary injunction because (1) they are likely to succeed on the merits of their claims, (2) they are "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted," (3) "there is no adequate remedy at law," and (4) "an injunction would not harm the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The district court's legal conclusions are reviewed de novo, its factual findings for clear error, and its balancing of the injunction factors for an abuse of discretion. *Id.*

I. APPELLEES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. The Mandate Violates RFRA

Under RFRA, the Government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "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 compelling governmental interest." 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). This Court's decision in *Korte* sets the analytical framework for applying RFRA to the facts of this case.

Korte makes clear that "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" 735 F.3d at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Following that approach, this Court held that it was bound to accept the representations of two for-profit corporations that the particular action required of them—which, in that case, was the inclusion of contraceptive coverage in their employee health plans—"would make them complicit in a grave moral wrong." *Id.* In light of that sincere religious belief, the only question for purposes of the substantial burden analysis was whether the Government had imposed "substantial pressure" on the plaintiffs to comply with the Mandate. *Id.* at 683–84. This 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. *Id.* 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 683-84. Because that burden was not the least restrictive means to further a compelling

government interest, the Court enjoined application of the Mandate. *Id.* at 685–87.

Here, the Government concedes that *Korte* forecloses its argument that the Mandate satisfies strict scrutiny.[10] *Supra* note 4. Thus, for purposes of RFRA, the only question before this Court is whether the Mandate imposes a substantial burden on Appellees' exercise of religion. That analysis, however, is likewise controlled by *Korte*, for the reasons detailed below.

1. The Mandate Imposes a Substantial Burden on Appellees' Exercise of Religion

The Mandate imposes a "substantial burden" on Appellees' exercise of religion because it coerces them "'to act contrary to [their] [religious] beliefs.'" *Korte*, 735 F.3d at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137).

Where, as here, 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" on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216;

[10] Many of the amicus briefs focus on the interests that the Government seeks to further with the Mandate. *See* Br. of Nat'l Women's Law Center, et al., at 15-27 (discussing public health and gender equality); Br. of Julian Bond, et al., at 13 (discussing gender equality); Br. of Nat'l Health Law Program, et al., at 3 (discussing public health). But, as already mentioned, this Court has already determined that there are less restrictive means of furthering the government's asserted interests of promoting public health and gender equality through access to the objectionable products and services. *Korte*, 735 F.3d at 687. Moreover, much of the amicus briefing in this case was also filed in *Korte*. *See* Br. of Nat'l Health Law Program, at 1 (filed Mar. 7, 2013) & Br. of Nat'l Women's Law Center, et al., at 12 (filed Mar. 8, 2013), *Korte v. Sebelius*, No. 12-3841 (7th Cir.).

see also Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute).

Under the first step, a court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (citation omitted); *see Korte*, 735 F.3d at 682–83. This step "does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 735 F.3d at 685. After all, it is not "'within the judicial function'" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must therefore accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714 (refusing to question the moral line drawn by plaintiff); *Lee*, 455 U.S. at 257 (same). To that end, "[i]t 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." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). In other words, it is left to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.[11]

[11] Under step one, a court may "[c]heck[] for sincerity and religiosity" "to weed out sham claims." *Korte*, 735 F.3d at 683. "These are factual inquires within the court's authority and competence." *Id.* Here, neither the Government nor the court below contend that Appellees' objection is anything but "sincere and religious in nature." *Id.*

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216–18.

Here, it is clear that the Mandate substantially burdens Appellees' exercise of religion. Appellees exercise their religion by, *inter alia*, refusing to take certain actions that, in Appellees' religious judgment, cause them to facilitate or become entangled in the provision of access to objectionable coverage in violation of their religious beliefs. By threatening Appellees with onerous penalties unless they take precisely those actions their religious beliefs forbid, the Mandate substantially pressures them to act contrary to their religious beliefs.

(a) Appellees Exercise Their Religious Beliefs by Refusing to Comply with the Mandate

The "exercise of religion" includes "the performance of (or abstention from) physical acts." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "'*any* exercise of religion . . . *whether or not compelled by, or central* to, a system of religious belief." *Korte*, 735 F.3d at 682 (quoting 42 U.S.C. § 2000cc-5(7)(A)); *see also* 42 U.S.C. § 2000bb-2(4)). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735

F.3d at 674. Here, Appellees exercise their religion by refusing to take actions in furtherance of a regulatory scheme to provide their employees with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling.[12]

Most obviously, Appellees believe that submitting the required self-certification violates their religious beliefs, because doing so renders them "complicit in a grave moral wrong" and "undermine[s] their ability to give witness to the moral teachings" they embrace. *Korte*, 735 F.3d at 683; Ryan Aff., AA276 ¶ 34; Young Aff., AA284 ¶ 20. That form is far more than a simple statement of religious objection to the provision of contraceptive coverage. To the contrary, it "designat[es]" Appellees' "third party administrator(s) as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879, serves as "an instrument under which the plan[s are] operated," 29 C.F.R. § 2510.3–16(b), and "notifies the TPA or issuer of their obligations to provide contraceptive-coverage benefits to [Appellees'] employees [and to inform them] of their ability to obtain these benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. In other words, under the accommodation, Appellees are required to amend the documents governing their health plans to designate third parties to provide the very coverage to which they object.

Likewise, Appellees cannot, consistent with their religious beliefs, offer health plans to their employees that serve as conduits for the delivery of the

[12] Again, the Schools' objection is limited to abortion-inducing products and related counseling.

objectionable products and services. (*See, e.g.*, Young Aff., AA284 ¶ 18; Wardwell Aff., AA290 ¶ 20.) Yet upon issuance of the self-certification, that is exactly what Appellees' health plans become. The objectionable coverage is available to Appellees' employees only by virtue of their enrollment in Appellees' plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, in related litigation, the Government has conceded that once a self-insured organization (such as Appellees Catholic Charities, Saint Anne Home, Saint Francis, Grace, and some Franciscan Alliance plans) provides the certification, "technically, the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health] plan." *RCAW*, 2013 WL 6729515, at *22. In this regard, the Government's vaunted "accommodation" is materially indistinguishable from the regulation applicable to for-profit entities this Court enjoined in *Korte*. Both require employers to offer health plans that cover objectionable products and services. The only difference is that for Appellees, the coverage is written into their plans in invisible ink.

But even beyond these actions, once Appellees "turn on the tap" by offering health plans and self-certifying, they are required to take numerous additional steps to ensure that the pipeline for abortion-inducing products, contraceptives, and sterilization continues to flow. Among other things, the "accommodation" requires Appellees to do all of the following:

- Contract with and pay premiums to insurance companies or TPAs that are authorized to provide Appellees' employees with the objectionable coverage.

- Offer enrollment paperwork for employees to enroll in a health plan overseen by an insurance company or TPA that is authorized to provide the objectionable coverage.

- Send health-plan-enrollment paperwork (or tell employees where to send it) to an insurance company or TPA that is authorized to provide the objectionable coverage.

- Identify for their insurance companies or TPAs which employees will participate in Appellees' health plan, when the insurance companies or TPAs are authorized to provide objectionable coverage to those participating employees.

- Refrain from canceling their insurance arrangements with insurance companies or TPAs authorized to provide objectionable coverage to their employees.

Appellees sincerely believe that taking these steps would make them "complicit in a grave moral wrong" and "undermine[s] their ability to give witness to the moral teachings" of their faith. *Korte*, 735 F.3d at 683. In other words, Appellees "ha[ve] an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religio[us beliefs]." *Id.* (quoting *Thomas*, 450 U.S. at 716).

As the Supreme Court has made clear, the "exercise of religion" includes actions or forbearance motivated by religious belief. *Smith*, 494 U.S. at 877. Here, Appellees exercise their religion by refusing to engage in the actions and forbearances necessary to comply with the "accommodation." While the religiously motivated actions and forbearances here are slightly different from those that were at issue in *Korte*, that distinction is entirely irrelevant because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). For that reason, it makes no difference that Appellees here have a religious objection to complying with the "accommodation," while the plaintiffs

in *Korte* objected to complying with a slightly different regulatory regime. Under *Korte*, the precise nature of the religious exercise at issue *is irrelevant* to the substantial burden analysis. 735 F.3d at 682–84. The Court's only task at this stage is to determine whether the asserted exercise—whatever that may be—is sincere and religious before proceeding to assess the "coercive effect of the governmental pressure on the adherent's religious practice" at step two. *Id.* at 683. What matters is that in this case, as in *Korte*, "[t]he contraception mandate forces [Appellees] to do what their religion tells them they must not do." *Id.* at 685.

Critically, there is no dispute as to whether Appellees sincerely believe that they may not take the specific actions necessary to comply with the "accommodation." Neither the religiosity nor the sincerity of Appellees' beliefs were questioned by the Government, or by the court below. *Cf. Korte*, 735 F.3d at 683 (noting that courts can inquire into religiosity and sincerity). That being the case, to determine whether the Mandate imposes a substantial burden on Appellees' religious exercise, the only question for this Court is whether Appellees face "substantial pressure" to act in violation of their religious beliefs, as detailed above.

(b) The Mandate Places "Substantial Pressure" on Appellees to Violate Their Religious Beliefs

Once Appellees' refusal to take the actions described above is identified as a protected exercise of religion, the "substantial burden" analysis is straightforward. As this Court held in *Korte*, "[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.'" 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718). In *Yoder*, for example, the Supreme Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes a substantial burden on Appellees' religious exercise. Failure to take the actions required under the Mandate subjects Appellees to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b)(1). If Appellees seek to drop health coverage altogether, they will be subject to a fine of $2,000 per year, per full-time employee after the first thirty employees, *see id.* § 4980H(a), (c)(1); Klein Aff., AA297 ¶ 25. These penalties, which could involve millions of dollars, clearly impose the type of pressure that qualifies as a substantial burden.

In short, the Government has put Appellees to a stark choice: violate their religious beliefs or pay crippling fines. This is the exact choice, and the exact penalties, that this Court found imposed a substantial burden in *Korte*. Just as in *Korte*, "the federal government has placed enormous pressure on [Appellees] to violate their religious beliefs and conform to [the Government's] regulatory mandate. Refusing to comply means ruinous fines, essentially forcing [Appellees] to choose between [onerous penalties] and following the moral teachings of their faith." 735 F.3d at 683–84. In such circumstances,

"there can be little doubt that the contraception mandate imposes a substantial burden on [Appellees'] religious exercise. *Id.* at 683; *see also Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." (quoting *Thomas*, 450 U.S. at 718)); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic"). A majority of courts to have considered virtually identical cases have come to the same conclusion. *See supra* note 3.

2. The Government's Arguments to the Contrary Are Without Merit

(a) *Notre Dame* Is Not Controlling

Throughout its brief, the Government places great weight on this Court's decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). But contrary to the Government's insistence, the *Notre Dame* panel went out of its way to highlight the provisional and case-specific nature of its ruling. Unlike the cases at hand, the Court in *Notre Dame* was asked "to reverse the district court's denial of a preliminary injunction." *Id.* at 551. The panel thus felt the "need to emphasize the limitations [of its] consideration of the appeal." *Id.* Noting that "[t]he lawsuit was only a few weeks old [and t]he parties . . . thus had little opportunity to present evidence," the Court stressed that the "question before [it wa]s *not* whether Notre Dame's rights ha[d] been violated,"

but instead, the far narrower question of "whether the district judge abused his discretion in refusing to grant a preliminary injunction." *Id.* (emphasis added).

As the *Notre Dame* panel observed, "'because of the uncertainty involved in balancing the considerations that bear on the decision whether to grant a preliminary injunction—an uncertainty amplified by the unavoidable haste with which the district judge must strike the balance,'" appellate judges must review a district court's decision to deny a preliminary injunction "'deferentially.'" *Id.* at 553 (quoting *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013)). Accordingly, the panel cautioned that "everything [said] in [its] opinion about the merits of Notre Dame's claim and the government's (and intervenors') response is necessarily tentative, and should not be considered a forecast of the ultimate resolution of this still so young litigation." *Id.* at 552.

In short, though the Government claims that "[i]n *Notre Dame*, this Court considered the same claim and held that [it wa]s not a basis for a preliminary injunction," Gov't Br. at 2, what the *Notre Dame* panel actually held was that, under a highly deferential standard of review and the circumstances of that case, it was not an abuse of discretion for the district court to deny preliminary injunctive relief to Notre Dame. Here, because several key factors distinguish these cases from *Notre Dame*, this Court should apply the same highly deferential standard of review to affirm the district court's grant of preliminary injunctive relief.

Much of the panel's discussion in *Notre Dame* focused on the irreparable harm prong of the preliminary injunction test. *See Notre Dame*, 743 F.3d at 552–54. In particular, the panel relied heavily on the fact that Notre Dame had already submitted the self-certification form and "thus complied with the statute, albeit under duress." *Id.* at 552. With the filing of the self-certification form, Notre Dame's TPA had begun the process of providing contraceptive coverage to the University's employees. *Id.* That left the panel "with the question: what does Notre Dame want *us* to do?" *Id.* The panel's inability to find a satisfactory answer to its inquiry led it to conclude that the University had failed to establish "a sine qua non" for injunctive relief: "proof of irreparable harm if the injunction is denied." *Id.* at 553. In other words, because the panel was unable to "figure out what Notre Dame wants in the way of preliminary relief, [it could not] make a determination that [the University would] suffer irreparable harm [were the court to] affirm the denial of such relief." *Id.* at 554.

Setting aside the question of whether that analysis was proper, this panel does not face the same "puzzle" that confounded the panel in *Notre Dame*. *Id.* at 552. Here, Appellees have been protected by the district court's preliminary injunctions. Thus, they are not compelled to sign the self-certification form, their TPAs or insurance companies are not authorized to provide the objectionable coverage, and their employees are not being offered access to such coverage. The relief Appellees request is straightforward: affirm the injunctions ordered by the district court and preclude the Government from

requiring Appellees to comply with the requirements of 26 C.F.R. § 54.9815-2713(a)(1)(iv), 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713(a)(1)(iv), 29 C.F.R. § 2590.715-2713A, 45 C.F.R. § 147.130(a)(1)(iv), and 45 C.F.R. § 147.131, insofar as they relate to the provision of Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.[13] Accordingly, whether or not the *Notre Dame* panel was justified in concluding that the University would not suffer irreparable harm in the absence of an injunction, the basis for the panel's conclusion is absent from the case at hand.

Notre Dame's analysis of the likelihood of success on the merits does not control here because Appellees in these cases assert a religious objection that was not squarely presented in *Notre Dame*. As Appellees have explained, they exercise their religious beliefs not only by refusing to submit the self-certification form,[14] but also by refusing to offer health plans that could serve as a conduit for the delivery of the objectionable coverage. *See supra* Part

[13] The *Notre Dame* panel also faulted the University for filing "suit at the last minute." 743 F.3d at 553. Again, that concern is not present here, where the Fort Wayne Appellees' suit has been on file since May 2012 and the Schools' complaint was filed in August 2012. See Compl., *Diocese of Ft. Wayne-S. Bend v. Sebelius*, No. 1:12-cv-00159 (N.D. Ind. filed May 21, 2012); *Grace Schs. v. Sebelius*, No. 3:12.cv-00459 (N.D. Ind. filed Aug. 23, 2012). *See also supra* note 9 (outlining extensive briefing below).

[14] For reasons explained by Notre Dame in its Petition for Rehearing En Banc, Appellees believe that the *Notre Dame* panel's analysis of the self-certification requirement is fundamentally flawed. But even assuming this panel is bound by *Notre Dame*'s "necessarily tentative" evaluation of the self-certification requirement, 743 F.3d at 552, that decision does not foreclose a ruling in Appellees' favor here.

I.A.1.a. In *Notre Dame*, the Court dismissed a similar religious objection solely because, according to the panel majority, Notre Dame's counsel admitted at oral argument that Notre Dame "would have no problem if each of its female employees signed and mailed" a form to the Notre Dame's TPA, which would then provide them with free contraceptive coverage by virtue of their enrollment in Notre Dame's health plan. 743 F.3d at 557.[15] Whatever the merits of that ruling, there has been no such concession in these cases. Instead, Appellees have consistently maintained that they may not offer a health plan through an insurance company or TPA that will provide objectionable coverage to enrolled employees or students, because such a plan would serve as a conduit for objectionable coverage.[16] Because the "accommodation" forces Appellees to offer such a plan in violation of their religious beliefs, it substantially burdens their exercise of religion.

Ultimately, while the *Notre Dame* panel found that the district court did not abuse its discretion in denying preliminary injunctive relief on the unique

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[15] In fact, Notre Dame's counsel made no such concession, as the transcript in that case reflects. But in any event, the *Notre Dame* panel's decision was plainly premised on the notion that such a concession had been made.

[16] Whether the plan at issue is insured or self-insured is irrelevant to Appellees' religious objection. In both cases, Appellees' employees will receive access to the objectionable coverage only "so long as [they] are enrolled in [Appellees'] health plan," 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B), and only because Appellees decided to offer health insurance in the first place. Furthermore, "'in the self-insured context,' once Appellees self-certify, 'contraceptive coverage [will be provided to Appellees' employees as] part of the[ir health] plan.'" *RCAW*, 2013 WL 6729515, at *22. Offering a health plan under either scenario violates Appellees' sincerely held religious beliefs. (*See* Wardwell Aff., AA290 ¶¶ 15, 21; Klein Aff., AA297 ¶¶ 14, 22; Grace Compl., AA407 ¶¶ 5-7, 153, 163. 175-78.)

facts of that case, it does not follow that the district court abused its discretion here by granting injunctive relief on different facts. Because Appellees timely filed suit, obtained injunctions, and are making no concessions with respect to their religious beliefs, *Notre Dame* does not control the matter at hand.

(b) The Fort Wayne Appellees Asserted Unique RFRA Claims Not Pursued in *Notre Dame*

In addition, the *Notre Dame* analysis does not control here because that case did not address the unique RFRA claim pressed here by the Diocese. As the court held below, the Mandate substantially burdens the Diocese's religious exercise by forcing it to incur "almost $200,000 annually in order to maintain its grandfathered status" to avoid its health plan becoming a conduit for objectionable coverage for Catholic Charities' employees who are enrolled in its health plan. (SA28.) In short, "the Diocese is forced to modify its behavior and incur substantial costs to stay grandfathered under the ACA, or else it will be compelled to violate its religious beliefs by having Catholic Charities' employees provided with a plan that covers objectionable contraceptive services." (*Id.*) Because no such claim was at issue in *Notre Dame*, it remains a matter of first impression here.

Moreover, the Fort Wayne Appellees also pursued the claim that the Mandate has the additional effect of artificially dividing the Catholic Church into a "worship" arm (the Diocese) and a "good works" arm (the remaining Fort Wayne Appellees)—the former of which is protected by the "religious employer" exemption and the latter of which is subject to the so-called "accommodation." As the district court aptly found:

> The application of the two regulations—the exemption and the accommodation—has the ultimate effect of dividing the Catholic Church into two separate entities, despite overlapping membership and leadership. *See Zubik*, 2013 U.S. Dist. LEXIS 165922, 2013 WL 6118696, at *26-27. The regulations protect those who work inside a church's walls, but not those engaging in the fulfillment of the religious and charitable missions of the Diocese and Catholic Church—despite the fact that all of the plaintiffs claim the same burden is imposed on their religious exercise rights by the mandate and its accommodation. The Court concludes that this divide and its resulting consequences has similarly created a substantial burden on the Diocese and Catholic Charities, and as a result, the government must justify its regulations under the compelling interest test.

SA28-SA29; *see also* Heintz Decl., AA372 ¶¶ 27-30. This claim was not raised in *Notre Dame* and therefore is also of first impression to this Court.

(c) The Mandate Does Not Allow Appellees to "Opt Out" of Actions That Violate Their Religious Beliefs

The Government insists that the "accommodation" allows Appellees to "opt out" of providing contraceptive coverage. Gov't Br. at 13. This assertion either misunderstands or mischaracterizes Appellees' religious objection. To be sure, Appellees object to facilitating the objectionable coverage via payment. But as their undisputed testimony establishes, Appellees also object to taking the actions required to comply with the "accommodation." Among other things, Appellees cannot, consistent with their religious beliefs, maintain contractual relationships with entities authorized to provide the objectionable coverage to their employees, submit the self-certification form authorizing such coverage, or offer health plans that serve as conduits for delivery of the mandated coverage. *Supra* Part I.A.1.a. Thus, the Government's opt-out argument boils down to the assertion that Appellees can "opt out" of one action that violates

their religious beliefs by taking different actions that violate their religious beliefs.

The error of the Government's position is readily apparent. For example, on the Government's theory, the religious exercise of a pacifist would be protected by a law allowing him to "opt out" of military service by working in a munitions factory. *Cf. Thomas*, 450 U.S. 707. Needless to say, the Government cannot relieve a substantial burden by offering an alternative that also requires claimants to act contrary to their beliefs. In essence, the Mandate forces Appellees to pick their poison: provide objectionable coverage under the arrangement struck down in *Korte*, or take the actions necessary to comply with the "accommodation." Either option violates Appellees' religious beliefs. *See* SA24; SA61 ("That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs.").

At bottom, the Government's assertion that the "accommodation" relieves the burden on Appellees' religious exercise rests on an improper assessment of Appellees' religious beliefs. *Supra* Part I.A.1. The only way to view the "accommodation" as a true "opt out" is to make the *religious judgment* that Appellees do not really object to taking the actions required by the "accommodation." But "question[s] of religious conscience" are for Appellees, not the Government, "to decide." *Korte*, 735 F.3d at 685. Here, Appellees have determined that taking the actions required by the "accommodation" make

them "complicit in a grave moral wrong," and "undermine their ability to give witness to the moral teachings" they hold, thereby creating scandal, *Korte*, 735 F.3d at 683. Thus, for the Government to assert that "the accommodation sufficiently insulates [Appellees] from the objectionable services," *RCNY*, 2013 WL 6579764, at *14, is to "simply disagree[]" with Appellees' religious judgment to the contrary, *McCarthy*, 714 F.3d at 978. "[T]he federal judiciary has no authority to entertain [that] argument." *Id.*

In any event, it is inaccurate to assert that the "accommodation" allows Appellees to "opt out" of the process of providing objectionable coverage. As the Solicitor General recently conceded before the Supreme Court: "nonprofit religious organizations don't get an exemption [from the Mandate]." Tr. of Oral Argument at 57:17-18, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-345 (Mar. 25, 2014), *available at* http://www.supremecourt.gov/oral_arguments/ argument _transcripts/13-354_3ebh.pdf. It is therefore not true that Appellees "need only attest to their religious beliefs and step aside." Gov't Br. at 15 (citation omitted). Rather, Appellees must take "affirmative steps" "to qualify their employees for certain contraceptive services." *Reaching Souls,* 2013 WL 6804259, at *7.

At the most basic level, Appellees must contract with or maintain a relationship with third parties willing to procure the mandated coverage for Appellees' employees. 26 C.F.R. § 54.9815-2713A(b)(2); 45 C.F.R. § 147.131(b). Self-insured organizations must amend their plan documents to "designat[e their] third party administrator as the plan administrator" for contraceptive

services through the self-certification, which is an "instrument under which [Appellees'] plan is operated" and without which the TPA may not provide the mandated coverage. 29 C.F.R. § 2510.3-16(b); *id.* § 2590.715-2713A(b)(2). Appellees must also "notif[y] the TPA or issuer of their obligations [1] to provide contraceptive-coverage benefits to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain those benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. By taking such actions, Appellees enable and incentivize the third party to provide the mandated coverage, which the Government admits is then "technically" "part of the [self-insured organization's] plan," *RCAW*, 2013 WL 6729515, at *22, and which in all events will only be available to beneficiaries "so long as [they] are enrolled in [Appellees'] health plan[s]," 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B); *id.* § 156.50 (making TPAs that provide the mandated payments upon receipt of a self-certification eligible for government funds covering the TPA's payments plus ten percent). But Appellees' obligations do not end there. They must continue to maintain their health plans, providing fees, services, and documentation to sustain the infrastructure necessary to deliver the mandated coverage. *See supra* Part I.A.1.a.[17]

[17] The Government is thus wrong to suggest that exempting Appellees would mean a court must award a similar exemption to a pacifist who objects to his exemption from the military draft because the military will draft another person in his place. Gov't Br. at 18 (citing *Univ. of Notre Dame*, 743 F.3d at 556). First, assuming an individual asserted such a belief, a court would still have to evaluate that individual's sincerity, and then apply strict scrutiny before any exemption could be granted. *See* 42 U.S.C. § 2000bb-1. Moreover, the Government's hypothetical is far afield from this case because, as detailed

If Appellees fail to take these actions, their insurance company or TPA will not provide the mandated coverage to Appellees' employees, and Appellees will incur ruinous penalties. Thus, contrary to the Government's claims, Appellees' TPAs or insurance companies will provide the objectionable coverage "*because of*," not "*despite*," actions Appellees are forced to take. Gov't Br. at 18. Appellees' "self-certification and the group health plans they put into place *are necessary* to their employees' obtaining the free access to the contraceptives." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *22 (emphasis added). "It is the insurance plan [Appellees] put into place, the issuer or TPA [Appellees] contracted with, and the self-certification form[s] [Appellees] complete[] and provide[] the issuer or TPA, that enable the employees to obtain the free access to the" objectionable coverage. *Id.*; *S. Nazarene Univ.*, 2013 WL 6804265, at *8 (describing the "self certification" as "a permission slip which must be signed by the institution to enable the plan beneficiary to get access" to the mandated coverage); Hr'g Tr., RCAW, No. 1:13-cv-01441-ABJ, at 12-13 (D.D.C. Nov. 22, 2013) (conceding a TPA must receive a self-certification to provide the mandated coverage). Far from allowing Appellees to "opt out," the "accommodation" requires them to violate their beliefs by playing an integral role in the delivery of coverage they find objectionable.[18]

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above, the "accommodation" is not an "exemption." The correct analogy would be to an "accommodation" that would excuse the pacifist from combat service but require him to work in a munitions factory—an occupation that would similarly violate his religious beliefs. *Cf. Thomas*, 450 U.S. 707.

[18] Though the Government contends the Diocese is "exempt," Gov't Br. at 10, it ignores the argument that the Diocese is substantially pressured to

(d) Courts Cannot Judge the Nature of Appellees' Religious Exercise When Conducting the Substantial Burden Analysis

The Government's entire substantial burden analysis is based on the flawed premise that this Court should assess the nature of the actions the Mandate requires Appellees to take, rather than analyzing the substantiality of the pressure the Government has placed on Appellees to take those actions. As Appellees have explained, the focus of the substantial burden analysis is on the "'*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Korte*, 735 F.3d at 683 (citation omitted); *supra* Part I.A.1.b. Indeed, despite this Court's clear admonition in *Korte* regarding the scope of the substantial burden analysis, the Government never once discusses the "coercive effect of the [Mandate] on [Appellees'] religious practice." *Korte*, 735 F.3d at 683.

The Government's focus on religious exercise, as opposed to substantial burden, is fatal to its position. It is black-letter law that 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); *Korte*, 735 F.3d at 674 ("'[E]xercise of religion' should be understood in a generous sense."); *Gilardi*, 733 F.3d at 1216 (religious exercise is "broadly defined"). Indeed, to establish that a religious exercise is protected under RFRA, "[i]t is enough that the claimant has an 'honest conviction' that what the

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violate its beliefs because its plan serves as a conduit for the delivery of the objectionable coverage to the employees of non-exempt Appellees participating in its plan. (Ryan Aff., AA276 ¶¶ 31-33.)

government is requiring, prohibiting, or pressuring him to do"—whatever that may be—"conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). To be sure, that does not end the inquiry—a court must still determine whether the plaintiff's representations are sincere, whether the law in question places substantial pressure on the plaintiff to take the required actions, and if so, whether the law passes strict scrutiny. *Supra* Part I.A.1. But Congress and the courts could not have been clearer in indicating that the nature of the required actions has no bearing on the substantial burden analysis. Instead, RFRA simply asks whether the Government places "substantial pressure on an adherent to modify [their] behavior and to violate [their] beliefs." *Korte*, 735 F.3d at 682 (citation omitted).

Indeed, focusing on the nature of the *act*, rather than the degree of *pressure* to act in that way, puts courts in the untenable position of judging the relative merits of religiously motivated actions. For example, to say that it is impermissible to force an Orthodox Jew to sell pork at his kosher deli, but permissible to force the same individual to flip a light switch on the Sabbath, is to make the *religious* judgment that adherence to kosher laws is more significant to the Jewish religion than the command of Sabbath rest. By the same token, to say—as this Court has—that it is impermissible to force a plaintiff to pay for objectionable coverage, *id.* at 687, but permissible to compel Appellees to comply with the "accommodation," would be to conclude that the latter exercise of religion is not as important to the Christian faith as the former. No "principle of law or logic," *Smith*, 494 U.S. at 887, equips a court to

make those determinations, and RFRA and Supreme Court precedent prohibit them from trying, 42 U.S.C. § 2000cc-5(7); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

For that reason, the Government's attempts to minimize the significance of the self-certification are inappropriate. *E.g.*, Gov't Br. at 7 (stating that Appellees "need only complete a form"). The Government's argument "that the simple act of signing a piece of paper" "cannot be morally . . . repugnant [is] belied by too many tragic historical episodes to be canvassed here." *S. Nazarene*, 2013 WL 6804265, at *8. As cogently explained by the district court:

> The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees (to comply with their own religious tenants and to avoid the ACA's fines for failing to meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs).

SA24; SA61. Moreover, the Government's representations are inaccurate. Appellees must do far more than merely "complete a form" to comply with the "accommodation," and the form itself is much more than a statement of Appellees' religious objection to contraceptives. *Supra* Parts I.A.1.a & I.A.2.b.

(e) Appellees Object to Actions They Must Take, Not to the Actions of Third Parties

The Government also attempts to recast Appellees' religious objection as an objection to the actions of third parties. According to the Government, Appellees object not to actions they themselves must take, but rather to federal law that requires insurers and TPAs to provide the Mandated coverage. *See* Gov't Br. at 2. This assertion cannot be reconciled with Appellees' clear, consistent, and unrebutted testimony regarding their religious beliefs and is ultimately a thinly veiled attempt to assert that Appellees do not "correctly perceive[] the commands of their" faith. *Thomas*, 450 U.S. at 716.

It is of course true that for religious exercise to be protected, it must involve some action on the part of the plaintiff. But unlike the situation in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), "this is not a case in which the religiously offensive consequence" "occurs only after, and independently of, any act or forbearance on [Appellees'] part." *E. Tex.*, 2013 WL 6838893, at *22. In *Kaemmerling*, the D.C. Circuit went to great lengths to emphasize that the prisoner did not have a religious objection to any action he was required to take. The prisoner "[did] not allege that his religion require[d] him not to cooperate with collection of a fluid or tissue sample." 553 F.3d at 679. Instead, he objected to "the government extracting DNA information" from biological specimens that could be obtained without any action on his part—such as by "sweeping up his hair after a haircut or wiping up dust that contains particles of his skin." *Id.* at 678-79. Based on these facts, the court emphasized that the prisoner's religious objection was only to activity of the

government—*i.e.*, extracting DNA from a sample through a procedure in which he "play[ed] no role and which occur[red] after the [government] ha[d] taken his fluid or tissue sample (to which he does not object)." *Id.* at 679.[19] Thus, at most, *Kaemmerling* stands for the unremarkable principle that a plaintiff cannot enjoin government action that does not require him to act in violation of his faith—a principle plainly inapposite here, where Appellees are forced to take actions they find religiously objectionable.[20] *Supra* Part I.A.1.a

Indeed, *Bowen v. Roy*, 476 U.S. 693 (1986), which *Kaemmerling* followed, 553 F.3d at 680, demonstrates the flawed nature of the Government's argument. *Bowen*, like *Kaemmerling*, draws a distinction between actions taken by third parties and actions taken by plaintiffs themselves. Thus, when the Supreme Court considered the plaintiffs' objection to the actions of a third party—the government—it concluded they were not entitled to relief. *Bowen*, 476 U.S. at 700. But when considering the plaintiffs' objection to an action

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[19] Significantly, although the prisoner sought to enjoin the government from collecting fluids or tissue samples, "he [did] not allege that his religion require[d] him not to cooperate with collection of [those] sample[s]." 553 F.3d at 679. The D.C. Circuit emphasized that Kaemmerling's objection to "DNA sampling, collection and storage," was not an objection to the collection of tissue samples from his person. *Id.* at 678 (citation omitted). Instead, it referred to the extraction of DNA from samples in the Government's possession. *Id.* (stating that Kaemmerling's "objection to 'DNA sampling and collection'" was a "specific objection to collection of the DNA information contained within any sample").

[20] *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), are likewise inapposite because the plaintiffs there did not articulate a religious objection to any actions they were required to take, 403 U.S. at 689; 392 U.S. at 249, but objected only to the Government's subsidization of activities they found objectionable as taxpayers.

they were required to take—submitting a form with their daughter's social security number—"[f]ive justices" "expressed the view that the plaintiffs '*were entitled* to an exemption' from [this] 'administrative' requirement." *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) (quoting Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1127 (1990)).

(f) Any "Burden" Placed on Third Parties Has No Bearing on the Substantial-Burden Inquiry

For the first time in this litigation, the Government argues that any assessment of the "substantial burden" the Mandate imposes on religious exercise must account for "the burden on third parties" that would result from a religious exemption. Gov't Br. at 22-24. But to the extent third-party burdens are relevant to a RFRA claim, they factor into whether the Government can satisfy the compelling interest standard and not whether it has substantially burdened the exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 720, 723 (2005) (holding that the "'compelling governmental interest' standard" ensures religious exemptions "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). This is readily apparent from the cases the Government cites. In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Supreme Court found that the challenged law *did* substantially burden religious exercise, but nonetheless upheld the law as the least restrictive means of advancing a compelling governmental interest, including the Government's interest in providing benefits to third parties. The substantial-burden inquiry asks only if the Government has imposed

"substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Korte*, 735 F.3d at 682 (citation omitted). Whether the law in question "benefits" a third party has no impact on that analysis.[21] The Government's attempt to revive its strict scrutiny argument under a different heading must fail.

In any event, the Government is wrong to contend that exempting Appellees would deny their employees "benefits to which they [a]re entitled by federal law." Gov't Br. at 23. The argument is circular: it assumes employees of religious objectors have a legal entitlement to free contraceptive coverage through their employer-provided health plans, which is the very question in dispute here. In fact, a fair application of RFRA makes clear that employees of religious objectors have no such entitlement. By its express terms, RFRA is incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3(b). Because the Affordable Care Act did not reject RFRA, the Government cannot create any benefit under the Act that violates RFRA. Specifically, the Government cannot force a religious believer to provide a "benefit" to a third party in violation of his conscience unless doing so is the least restrictive means of advancing a compelling governmental interest. For example, a federal regulation requiring the Catholic Church to hand out free birth control during Mass might purport to create a "benefit" for third parties.

[21] For example, a law dispossessing the Diocese of its cathedral would substantially burden its religious exercise whether the law required it to "donate" the church to a third party or raze it to the ground.

But any such "benefit" would be plainly unlawful, and thus declining to provide it would not "deprive" anyone of anything to which they were legally entitled.[22]

* * *

In summary, Appellees do not and have never maintained that a court must accept their assertion that the Mandate substantially burdens their exercise of religion. Gov't Br. at 24-25. Far from attempting to "collaps[e] the question of substantial burden into the sincerity of their beliefs," *id.* at 25, Appellees have emphasized that the substantial burden analysis as set forth in *Korte* and other controlling precedent requires a two-step process: a court must 1) identify the religious exercise at issue, and then 2) determine whether the Government has placed substantial pressure on the plaintiff to forego that exercise. *Supra* Part. I.A.1. This Court is only required to accept Appellees'

[22] For similar reasons, amici are wrong to argue that exempting Appellees would violate the Establishment Clause. Americans United Br. at 31-34. First, by raising arguments not addressed below, amici seek to circumvent the "long-standing rule against considering new arguments on appeal." *Domka v. Portage Cnty.*, 523 F.3d 776, 784 (7th Cir. 2008). This Court requires issues to be raised first in the district court so "that parties may have the opportunity to offer all the evidence they believe relevant to the issues." *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 812 (7th Cir. 1988) (citation omitted). "Just as a party is barred procedurally from raising for the first time on appeal an argument it failed to include in its Opening Brief, so too an *amicus* ordinarily may not press arguments on appeal that the parties have waived by raising them belatedly." *Charles v. Daley*, 846 F.2d 1057, 1059 n.1 (7th Cir. 1988) (citation omitted). In any event, amici's argument is meritless. Amici rely on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), where the Supreme Court struck down a state statute giving employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." *Id.* at 709. As the Supreme Court explained, the law in *Thornton* was unconstitutional because it "unyielding[ly] weigh[ted]" interests of Sabbatarians "over all other interests." *Cutter,* 544 U.S. at 722 (citation omitted). RFRA is free of that defect because it protects third-party interests through the strict-scrutiny test. *See id.*

representations at step one of this process—*i.e.*, that taking the actions required of them by the Mandate violates their Christian beliefs. *Id.* It must still resolve the legal question of whether the law at issue substantially pressures Appellees to violate those beliefs. *Id.* In other words, while it is true that "[w]hether a burden is 'substantial' under RFRA is a question of law, not a question of fact, proven by the credibility of the claimant'" Gov't Br. at 24, "substantiality" refers to the degree of pressure placed on plaintiffs to act in violation of their beliefs. *Korte*, 735 F.3d at 683. Here, the answer to that question is straightforward: the "mandate forces [Appellees]"—on pain of substantial penalties—"to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.* at 685.

II. THE REMAINING EQUITABLE FACTORS SUPPORT AN INJUNCTION

In addition to demonstrating that they are (1) "reasonably likely to succeed on the merits," Appellees have also shown (2) that they are "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted"; (3) that "there is no adequate remedy at law"; and (4) that "an injunction would not harm the public interest." *Christian Legal Soc'y*, 453 F.3d at 859.

Whatever regulatory interests the Government may have, they pale in comparison to the serious harm that would be inflicted on Appellees' religious liberty should the district court's grant of injunctive relief be reversed. In *Korte*, the Government conceded that if the Mandate violated RFRA, then the

equitable factors favored a preliminary injunction. *See* 735 F.3d at 666. That concession was inevitable because, as *Korte* explained, "RFRA protects First Amendment free-exercise rights," *id.*, and "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," even if borne for only "minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Indeed, *Korte* made clear that, under both RFRA and the First Amendment, "once the moving party establishes a likelihood of success on the merits, [(1)] the balance of harms normally favors granting preliminary injunctive relief [and (2)] injunctions protecting First Amendment freedoms are always in the public interest." *Korte*, 735 F.3d at 666 (citation omitted). *See also Hobby Lobby*, 723 F.3d at 1145 ("it is always in the public interest to prevent the violation of a party's constitutional [or RFRA] rights") (citation omitted); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) ("pursuant to RFRA, there is a strong public interest in the free exercise of religion"), *aff'd sub nom Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). Moreover, because preserving injunctive relief is the only way to stop the Government from enforcing the Mandate, Appellees have no adequate remedy at law.

CONCLUSION

The Government has forced Appellees to choose between onerous penalties and violating their religious beliefs. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may a Christian violate the moral law if in certain

circumstances he facilitates the commission by others of acts contrary to Christian 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). Appellees' 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 Appellees' to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Appellees to cross this line, the Government has substantially burdened Appellees' exercise of religion.

The district court acted within its discretion in granting injunctive relief after considering these Appellees' RFRA claims and the particular facts of these cases. Accordingly, this Court should affirm the district court's judgments. But, should this Court decide otherwise, Appellees respectfully request that this Court maintain the injunctions while instructing the district court to consider the other arguments raised in the motion for a preliminary injunction, or in the case of the Schools, in their cross-motion for summary judgment.

Respectfully submitted, this the 6th day of June, 2014.

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CIRCUIT RULE 30(D) STATEMENT

I hereby certify that the Required Short Appendix to the Principal Brief of Appellees contains all the material required by 7th Circuit Rules 30(a) and (b).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitations set out for principal briefs in Federal Rule of Appellate Procedure 32(a)(7)(B). The brief, including headings, footnotes, and quotations, contains 14,984 words, as calculated by the Microsoft Word word count function.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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APPENDIX TABLE OF CONTENTS

Required Short Appendix of Plaintiffs-Appellees

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-159 JD
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

Memorandum Opinion and Order

Plaintiffs Diocese of Fort Wayne-South Bend, Inc. ("Diocese"), Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc. ("Catholic Charities"), Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc. ("Saint Anne Home"), Franciscan Alliance, Inc. ("Franciscan"), Specialized Physicians of Illinois, LLC ("Specialty Physicians"), University of Saint Francis ("University"), and Our Sunday Visitor, Inc. ("Our Sunday Visitor") (collectively "plaintiffs"), have filed their first amended verified complaint [DE 73] seeking declaratory and injunctive relief claiming that the government defendants have violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, the First Amendment of the Constitution of the United States, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, by enacting the "contraception mandate" which requires certain employers to provide coverage for contraception and sterilization procedures in their employee health care plans on a no-cost-sharing basis, or face stiff financial penalties and the risk of enforcement actions for the failure to do so. Although the defendants have since moved to dismiss the amended complaint and the parties have sought summary judgment on the various

claims presented [DE 85; DE 95], the Court focuses only on plaintiffs' request for injunctive relief and defendants' objection thereto,[1] in an effort to prevent the possibility of any unjust enforcement of the contraception mandate against plaintiffs come the first of the year.

For the reasons that follow, plaintiffs have shown that their RFRA claim stands a reasonable likelihood of success on the merits, that irreparable harm will result without adequate remedy absent an injunction, and that the balance of harms favor protecting the religious-liberty rights of the plaintiffs. As such, the Court enters a preliminary injunction barring enforcement of the contraception mandate against plaintiffs.

I. Background

The Contraception Mandate

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg–13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg–13(a)(4). The HRSA, an agency of the U.S. Department of Health and Human Services (HHS), then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to

[1]The Court has also carefully considered the supplemental notices of authority and responses filed by counsel, along with the amicus curiae briefs filed by counsel for the American Civil Liberties Union and the American Center for Law & Justice along with 79 Members of the United States Congress.

provide the government with independent expert advice on matters of public health. After reviewing the type of preventive services necessary for women's health and well-being, the IOM recommended that the following preventive services be required for coverage: annual well-woman visits; screening for gestational diabetes and breast-feeding support, supplies, and counseling; human papillomavirus screening; screening and counseling for sexually transmitted infections and human immune-deficiency virus; screening and counseling for interpersonal and domestic violence; and contraceptive education, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 9, 2013). Based on the IOM's recommendations, the HRSA issued comprehensive guidelines requiring coverage of (among other things) "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling[2] for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well–Being, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 9, 2013). These include hormonal methods such as oral contraceptives (the pill), implants and injections, barrier methods, intrauterine devices, and emergency oral contraceptives (Plan B and Ella).[3] *See* FDA, Birth

[2]The defendants clarify that this requirement does not indicate that such education and counseling need necessarily be 'in support of' certain contraception services or contraception in general.

[3]As the government points out, the list of FDA approved contraceptive methods does not include abortion, however, the terms "abortifacients" or "abortion inducing drugs" as used throughout this opinion refers to plaintiffs' characterization of contraception that artificially

Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (lasted visited Dec. 9, 2013). On February 15, 2012, HHS published final regulations incorporating the HRSA guidelines. 77 Fed. Reg. 8725 (Feb. 15, 2012). The agency made the mandate effective in the first plan year on or after August 1, 2012, *see* 45 C.F.R. § 147.130(b)(1), however, a temporary enforcement safe harbor for nonexempt nonprofit religious organizations that objected to covering contraceptive services was also created, making the mandate effective in the first plan year on or after August 1, 2013 for those qualifying organizations who did not meet the religious employer exemption. 77 Fed. Reg. 8728-29. The government then undertook new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered[4] nonprofit religious organizations with religious objections to covering contraceptive services. *Id*.

On March 21, 2012, the government issued an Advance Notice of Proposed Rulemaking that stated it was part of the government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). On February 1, 2013, the government issued a Notice of Proposed Rulemaking (NPRM), setting forth a proposal that stated it was to "amend the criteria for the religious

---

interferes with life and conception in violation of their religious beliefs.

[4]"Grandfathered" plans are those health plans that do not need to comply with the ACA's coverage requirements because they were in existence when the ACA was adopted and did not make certain changes to the terms of the plan. 42 U.S.C. § 18011. The purpose of grandfathering plans was to allow individuals to maintain their current health insurance plan, to reduce short term disruptions in the market, and to ease the transition to market reforms that phase in over time. *See* 75 Fed. Reg.. 34,546 (June 17, 2010). The number of grandfathered plans is expected to decline over time.

employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). On June 28, 2013, the government issued final rules adopting and/or modifying the proposals in the NPRM. *See* 78 Fed. Reg. 39,870. The regulations challenged here (the "final rules") include the new regulations issued by the government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering contraceptive services. *See* 78 Fed. Reg. 39,870.

The final rules state that they "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed. Reg. 39,871. Under the new definition, an exempt "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 78 Fed. Reg. 39,874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. 39,874 (citing 78 Fed. Reg. 8461). The 2013 final rules' amendments to the religious employer exemption apply

to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See id.* at 39,871.

The 2013 final rules also included an "accommodation" regarding the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. 39,874–80; 45 C.F.R. § 147.131(b)-(f). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,874. To be relieved of the obligations that otherwise apply to non-grandfathered, nonexempt employers, the 2013 final rules require that an eligible organization complete a self certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id.* at 39,878–79. In the case of an organization with an insured group health insurance issuer, upon receipt of the self certification, the organization's health insurance issuer must provide separate payments to plan participants and beneficiaries for

contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,875–77. The government expects that its insurers will have options to achieve cost neutrality, including by way of cost savings from improvements in women's health and fewer pregnancies, and by including the cost of contraceptive services as an administrative cost that is spread across the issuer's entire risk pool (excluding plans established or maintained by eligible organizations). *Id*. at 39,877-78. In the case of an organization with a self-insured group health plan, upon receipt of the self certification, the organization's TPA is designated as plan administrator and claims administrator for purposes of providing or arranging separate payments for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,879–80. Under the 2013 final rules, costs incurred by TPAs relating to the coverage of contraception services for employees of eligible organizations can be reimbursed through an adjustment to Federally-Facilitated Exchange user fees. *See* 78 Fed. Reg. 39,880. The contraceptive services provided are directly tied to the employer's insurance policy, and are available only so long as the employees are enrolled in the organization's health plan. 45 C.F.R. § 147.131(c). The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. 39,872.

Ultimately, several exemptions from the ACA's coverage requirements have survived the law's revisions, including exemptions for smaller employers—those with fewer than fifty full time employees, 26 U.S.C. § 4980H, and employer health plans that are grandfathered, 42 U.S.C. § 18011. In addition, religious employers meeting the narrow definition of religious employer

are exempted from the contraceptive coverage requirement. 45 C.F.R. § 147.131(a). A noncomplying employer who does not meet an exemption will face large fines, specifically, $2,000 per year per full time employee (less 30 employees) for not providing insurance meeting the coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the coverage required by the contraception mandate, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

As detailed below, the Diocese itself is exempted from the mandate under the religious employer exemption, while the remaining plaintiffs are subject to its accommodation [DE 73 at ¶¶ 10, 14] created for nonprofit religiously affiliated employers—which the Seventh Circuit has characterized as "an attempted workaround whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (Rovner, J., dissenting). The plaintiffs argue that compliance with the contraception mandate, even via the accommodation, violates their religious exercise rights.

Factual Background

The plaintiffs have verified the facts applicable to their claims and request for injunctive relief via various affidavits and declarations[5] [DE 76-82; DE 98-1 at 00001-00107].

[5]Unless specifically noted herein, the government defendants do not contest these facts, which are admitted for preliminary injunction purposes. In addition, no hearing was necessary given the controversy was controlled by the undisputed facts detailed in this order.

1. The Plaintiffs' Religious Beliefs

In sum, Plaintiffs are all religious entities that are part of the Roman Catholic Church [DE 76 at ¶ 4; DE 77 at ¶¶ 5, 20; DE 78 at ¶ 18; DE 79 at ¶ 7; DE 80 at ¶ 10; DE 81 at ¶ 5; DE 82 at ¶¶ 4, 15]. The Catholic Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, that artificial interference with life and conception are immoral [DE 76 at ¶ 29]. Thus, plaintiffs believe that human life must be respected and protected absolutely from the moment of conception, that contraception is immoral, and that the termination of pregnancy before viability is an abortion [DE 98-1 at 99-100; DE 98-2 at 978].

Catholic religious teaching also prohibits subsidizing, providing, and/or facilitating coverage for abortion-inducing products, sterilization services, artificial contraceptives, and related counseling services [DE 98-1 at 99]. Thus, offering a health insurance plan that provides coverage for or facilitates access to[6] abortion-inducing products, contraceptives, sterilization, and related education and counseling, as permitted by the contraception mandate and its accommodation, is inconsistent with plaintiffs' core moral and religious beliefs [DE 98-1 at 99-104]. Plaintiffs' provision of health benefits to their employees reflects the Catholic social teaching that healthcare is among those basic rights that flow from the sanctity and dignity of human life [DE 98-1 at 103].

And while the government argues plaintiffs only speculate about the likely impact of any

[6]Defendants dispute that the regulations require plaintiffs to provide or facilitate the provision of contraceptive services to which plaintiffs object; however, this is plaintiffs' characterization of what the mandate requires of them were the plaintiffs to complete the self-certification form and provide a copy of it to their issuer/TPA.

fines, the plaintiffs assert that as a result of the substantial fines to be imposed for non-compliance with the ACA's coverage requirements, they may be forced to limit the significant services they provide to the community and they may even be required to downsize [DE 98-1 at 57-58, 64, 72, 77-78, 83, 89, 95]. Further, plaintiffs are concerned that fines will likely result in a reduction of donations because donors will be concerned that their money will be used to pay fines as opposed to being used in support of charitable and other community services. *Id*.

2. The Plaintiffs

The Diocese

As Chief Financial Officer of the Diocese, Joseph Ryan, provided sworn statements indicating that the Diocese is the civil law entity for the Diocese of Fort Wayne-South Bend, which is the local embodiment of the Universal Roman Catholic Church, a community which encompasses fourteen counties located in Northeast Indiana and consists of the baptized who profess the Catholic faith, share in sacramental life, and has been entrusted since January 2010 to the ministry of Bishop Kevin C. Rhoades [DE 98-1 at 54]. Bishop Rhoades is also a member of plaintiff Catholic Charities and of Saint Anne Home, and as chairman of their boards, Bishop Rhoades oversees the management of Catholic Charities and Saint Anne Home, which are integral components to the fulfillment of the religious and charitable missions of the Diocese and Catholic Church. *Id*. at 55.

The Diocese itself has approximately 2,502 employees, with over 1,400 classified as full-time (working an average of at least 30 hours per week) and over 1,200 classified as part-time (working an average of less than 30 hours per week) [DE 76 at ¶ 23]. The Diocese employs Catholic and non-Catholic teachers in its schools who must have a knowledge of and respect for

the Catholic faith, abide by the tenets of the Catholic Church as they apply to that person, exhibit a commitment to the ideal of Christian living, and be supportive of the Catholic faith. *Id*. at ¶ 22.

Consistent with Church teachings on social justice, the Diocese makes health insurance benefits available to its religious personnel, seminarians, and full-time employees through the Diocesan Health Plan. *Id*. at ¶ 24. Approximately 116 active and retired priests, religious sisters and seminarians of the Diocese, and approximately 1,034 of the Diocese's full-time employees participate in the Diocesan employee health plan. *Id*. The Diocesan Health Plan is a self-insured plan that is administered by a TPA, which handles the administrative aspects of the plan. *Id*. at ¶ 25. While the Diocese itself meets the religious employer exemption, *id*. at ¶ 31, the Diocesan Health Plan also includes the employees of non-exempt, affiliated entities such as Catholic Charities. *Id*. at ¶ 26. 33. Currently, the Diocesan Health Plan also meets the ACA's definition of a grandfathered plan and includes a statement in plan materials provided to participants or beneficiaries that it believes it is a grandfathered plan, as is required to maintain its grandfathered status [DE 76 at ¶ 27]. But in order to maintain its grandfathered status, the Diocese foregoes approximately $180,000 a year in increased premiums, so that it can protect Catholic Charities from the contraceptive mandate. *Id*. at ¶¶ 27, 32. Absent maintaining its grandfathered status at great expense, the only other options would be to either (1) sponsor a plan that will provide the employees of Catholic Charities with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to Catholic Charities, subjecting it to massive fines if it does not contract with another insurance provider that will provide the objectionable coverage [DE 76 at ¶ 33]. The Diocese asserts that the first option forces the Diocese to act contrary to its sincerely-held religious beliefs, and the

second option makes the Diocese complicit in the provision of objectionable coverage and compels the Diocese to submit to the Government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries. *Id*. ¶¶ 33- 36. The Diocesan Health Plan year begins on January 1. *Id*. at ¶ 28.

Catholic Charities

Interim Executive Director of Catholic Charities, Lisa Young, confirms in her affidavit that Catholic Charities is a nonprofit corporation affiliated with the Diocese and created in 1922 to provide organized, concerted charitable efforts [DE 77 at ¶¶ 2, 5, 7]. Catholic Charities' 36 full-time employees are offered health insurance through the Diocesan Health Plan, which, in accordance with Catholic Church teachings (as Catholic Charities bears witness to), has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its multi-employer health plan. *Id*. at ¶¶ 16, 20. And every dollar foregone by the Diocese in order to maintain its employee health plan's grandfathered status is a dollar that cannot be funneled to Catholic Charities in the execution of its programs, and yet compliance with the contraception mandate or its accommodation would be contrary to Catholic Charities' beliefs. *Id*. at ¶¶ 19, 21.

Saint Anne Home

According to the affidavit of Jason Wardwell, the Director of Human Resources of Saint Anne Home and Retirement Community of the Diocese, Saint Anne Home serves the local community by offering residential apartments, a nursing facility, rehab suites, and adult day services [DE 78 at ¶¶ 2, 8, 14]. It has approximately 310 employees, of which approximately 220 are eligible for health insurance via the Saint Anne Home Health Plan, which is a

self-insured plan administered by a TPA. *Id*. at ¶¶ 15, 23. Because the Saint Anne Home Health Plan is not grandfathered and the plan year begins on January 1, at that time it must be prepared to comply with the contraception mandate. *Id*. at ¶¶ 16, 17.

Saint Anne Home is part of the Roman Catholic Church which bears witness to the Church's teachings [DE 78 at ¶¶ 18, 22]. All of Saint Anne Home's facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time. *Id.* at ¶ 11. Saint Anne Home also abides by The National Catholic Bioethics *Center's A Catholic Guide to End-of-Life Decisions: An Explanation of Church Teaching on Advanced Directives, Euthanasia, and Physician-Assisted Suicide*. *Id*. Accordingly, though Saint Anne Home provides health insurance to its employees, it has historically excluded coverage for abortion, abortion-inducing products, contraceptives, sterilization, and related education and counseling from its health plan. *Id*. at ¶ 19. To comply with the contraception mandate and its accommodation, in order to avoid significant fines, would violate Saint Anne Home's religious beliefs by facilitating access to objectionable contraceptive services. *Id*. at ¶¶ 20-25.

Franciscan

Sister Jane Marie Klein, O.S.F., the Chair of Franciscan, provided an affidavit on behalf of the Franciscan Alliance, Inc., establishing that Franciscan is a nonprofit health system that includes eleven facilities in Indiana and two facilities in Illinois [DE 79 at ¶¶ 2, 4]. Franciscan's benefits-eligible employees may participate in a number of health benefits programs, depending on the region in which they work: Central Indiana Region, Northern Indiana Region, Western

Indiana Region, and the South Suburban Chicago Region in Illinois. *Id*. at ¶ 13. Franciscan's approximately 4,369 benefits-eligible employees in its Central Indiana Region are offered six Advantage Health Solutions, Inc. fully-insured benefits program options that are not grandfathered. *Id*. at ¶ 14. Franciscan's approximately 8,719 benefits-eligible employees in its Western Indiana and Northern Indiana Regions are offered six benefits plan options, four of which are self-insured plans administered by a TPA, Advantage Health Solutions, Inc., and two of which are Blue Cross Blue Shield of Illinois fully-insured benefits plans—none of them are grandfathered. *Id*. at ¶ 15. Franciscan's approximately 1,733 benefits-eligible employees in its South Suburban Chicago Region are offered three benefits plan options, two of which are Blue Cross Blue Shield of Illinois fully-insured benefits plans, and one of which is a self-insured benefits plan that is administered by the TPA Blue Cross Blue Shield of Illinois—none of the plans have grandfathered status. *Id*. at ¶ 16. Because Franciscan's health plans' years begin on January 1, Franciscan must comply with the contraception mandate by that date. *Id.* at ¶ 18.

Since its founding in 1875, Franciscan has been faithful to the tenets of the Catholic Church [DE 79 at ¶¶ 7, 19, 23]. All of Franciscan's facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time. *Id.* at ¶ 9. Accordingly, none of the benefits plans offered by Franciscan covers abortion, sterilization, or contraceptives, and yet, compliance with the accommodation forces Franciscan to facilitate access to contraceptive products and services antithetical to its Catholic faith. *Id.* at ¶¶ 20-26.

Specialty Physicians

Sister Jane Marie Klein, O.S.F., also filed an affidavit on behalf of Specialty Physicians establishing that Specialty Physicians is a member managed nonprofit limited liability company providing physician and related healthcare services in Illinois, and its sole member is Franciscan Alliance, Inc. [DE 80 at ¶¶ 2, 4]. The approximately 317 benefits-eligible employees are offered the choice of a Blue Cross Blue Shield of Illinois fully-insured health maintenance organization option, or a BCBSI fully-insured preferred provider organization option. *Id*. at ¶ 7. As of January 1, 2014, both of Specialty Physicians' plans will no longer be grandfathered because of changes made to the amount of employee contributions [DE 73 ¶ 128; DE 80 at ¶ 15], which means Specialty Physicians must comply with the contraception mandate by that date or face significant fines [DE 80 at ¶¶ 9, 15].

All of Specialty Physicians' facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time [DE 80 at ¶ 6]. And because Specialty Physicians is faithful to the Roman Catholic Church and its teachings, *see id.* at ¶¶ 10, 14, Specialty Physicians has historically excluded coverage for abortion, contraceptives (except when used for noncase contraceptive purposes), sterilization, and related education and counseling from its multi-employer health plan. *Id*. at ¶ 11. The contraception mandate and its accommodation does not resolve Specialty Physicians' religious objection to the provision or facilitating access to objectionable contraceptive services. *Id*. at ¶¶ 12-17.

Saint Francis University

The president of Saint Francis University, Sister Elise Kriss, O.S.F., provided an affidavit indicating that the University is a Catholic, Franciscan-sponsored co-educational, liberal arts college that bears responsibility to witness the Church's teachings [DE 81 at ¶¶ 2, 5, 28, 32]. Faith is at the heart of the University's efforts, and the apostolic constitution *Ex Corde Ecclesiae*, which governs and defines the role of Catholic colleges and universities, provides that "the objective of a Catholic University is to assure . . . [f]idelity to the Christian message as it comes to us through the Church." *Id*. at ¶ 20.

Saint Francis University has approximately 413 total faculty and staff members, of which approximately 346 full-time employees are eligible for health care benefits. *Id*. at ¶ 24. The University's employees (but not its students) are offered a self-insured health care plan, which is administered by a TPA and is not grandfathered, thus it must comply with the contraception mandate on January 1. *Id*. at ¶¶ 23, 25-27. The current Saint Francis employee health plan complies with Catholic teachings, which means abortion and sterilization are not covered, and contraceptives are not covered when prescribed for contraceptive purposes. *Id*. at ¶ 29. In fact, Sister Kriss indicates that the University will never provide objectionable services to its employees because such services violate Catholic teachings, Franciscan Values and the moral conscience of the Sisters of Saint Francis. *Id*. at ¶ 28. Further, the accommodation still forces the University to initiate the provision of objectionable contraceptive benefits to its employees in a manner contrary to Saint Francis' beliefs. *Id*. at 31-33.

Our Sunday Visitor

Gregory Erlandson, President of Our Sunday Visitor, established by way of affidavit that

Our Sunday Visitor is a nonprofit Catholic publishing company located in Huntington, Indiana which publishes religious periodicals and other parish materials [DE 82 at ¶¶ 2, 4, 5, 15]. Our Sunday Visitor is organized under the Indiana Nonprofit Corporation Act of 1991, it is organized and operated exclusively for the benefit of, and to carry out the purposes of, the Roman Catholic Church, and it is operated in connection with the Diocese. *Id*. at ¶ 20. Between its publishing and offertory solutions divisions, Our Sunday Visitor employs approximately 317 benefits-eligible employees who are offered a self-insured health care plan that is administered by a TPA. *Id*. at ¶¶ 11, 12. The plan is not grandfathered and will need to comply with the contraception mandate when its new plan begins on October 1, 2014. *Id*. at ¶¶ 13, 14.

Because Our Sunday Visitor is a Catholic entity which bears witness to the Church's teachings in its words and deeds, Our Sunday Visitor's current employee health plan does not cover abortion and sterilization, or contraceptives that are prescribed for contraceptive purposes (although hormone therapies for non-contraceptive purposes are covered) [DE 82 at ¶¶ 15, 16, 19]. The accommodation does not resolve Our Sunday Visitor's religious objections to the contraception mandate because it would still require Our Sunday Visitor to facilitate access to products and services antithetical to the Catholic faith or face significant fines. *Id*. at ¶¶ 18, 22.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also

considers the public interest. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Ezell*, 651 F.3d at 694. This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.[7] *See Planned Parenthood*, 699 F.3d at 972. The aim is to minimize the costs of a wrong decision. *See Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012).

The appropriateness of a preliminary injunction in this case rests on plaintiffs' RFRA claim and presents the following issues: does the contraception mandate and accommodation substantially burden the religious exercise rights of the plaintiffs, and if so, has the government discharged its burden of justifying its regulations under strict scrutiny. Here, plaintiffs have shown some likelihood of success on the merits of their RFRA claim, that no adequate remedy at law exists, and that they will suffer irreparable harm without an injunction. And, a weighing of the injunction equities and consideration of the public interest also strongly supports issuance of an injunction at this stage of the litigation.

III. Analysis

To begin, for purposes of determining whether a preliminary injunction is appropriate in the instant case, no one questions that the issues presented based on the 2013 final rules are ripe

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[7]As an aside, the government noted an objection to applying the sliding scale approach, arguing that the approach is inconsistent with the Supreme Court's holding in *Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008) requiring a plaintiff to show all of the preliminary injunction factors. But the government also recognized that the undersigned is nonetheless bound to apply the Seventh Circuit's sliding scale approach to an injunction. In fact, the Seventh Circuit has recently determined that its sliding scale approach is "a variant of, though consistent with, the Supreme Court's recent formulations of the standard . . ." *Planned Parenthood of Wisc., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596 (7th Cir. Dec. 20, 2013) (citing *Winter*, 555 U.S. at 20).

for ruling, that the threat of financial penalty and other enforcement action is sufficient to establish the plaintiffs' standing to challenge the accommodation, and that plaintiffs—nonprofit religious organizations—exercise religion in the sense that their activities are religiously motivated. The Court will thus consider the appropriateness of injunctive relief in the instant case.

Success on the Merits of the RFRA Claim

The RFRA prohibits the federal government from placing substantial burdens on "a person's exercise of religion," 42 U.S.C. § 2000bb–1(a), unless it can demonstrate that applying the burden is "in furtherance of a compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest," *id*. § 2000bb–1(b). RFRA creates a broad statutory right to case-specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test. *Korte*, 735 F.3d at 671-72 (reasoning that with RFRA, Congress expressly required accommodation rather than neutrality) (citation and quotation marks omitted). RFRA is structured as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Id*. at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)).

Once a RFRA claimant makes a *prima facie* case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny. *Id.* (citing *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006)). "Congress's express decision to legislate the compelling interest test indicates that

RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . .". *Id*. (citing *O Centro Espirita*, 546 U.S. at 430). Thus, in RFRA litigation, as in First Amendment litigation, "the burdens at the preliminary injunction stage track the burdens at trial." *Id*. (citing *O Centro Espirita*, 546 U.S. at 429).

1. Substantial Burden

While neither the United States Supreme Court nor any Circuit Courts have had the opportunity to consider whether the contraception mandate creates a substantial burden on a non-secular, nonprofit organization's religious exercise rights given the "accommodation" created for eligible organizations,[8] the Seventh Circuit recently discussed in *Korte* the substantial burden analysis in the context of RFRA:

> Recall that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisc. v. Yoder*, 406 U.S.

[8]In fact, not many district courts have had the opportunity to consider this question relative to nonprofit religious organizations, and their conclusions vary. Three courts have upheld the accommodation. *See Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) (Simon, C.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013). While the other courts have found the accommodation to pose a substantial burden. *See East Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009 (S.D. Tex. Dec. 27, 2013); *Geneva College v. Sebelius*, No. 12-0207 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *see also Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (drawing a distinction between self insured and group insured plans and granting a preliminary injunction only with respect to a self insured plaintiff despite the fact that all eligible organizations are confronted with the self certification process created by the accommodation).

> 205, 218, 92 S.Ct. 1526 (1972). But a burden on religious exercise also arises when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 (1981); *see also Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Construing the parallel provision in RLUIPA, we have held that a law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The same understanding applies to RFRA claims.
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> Importantly, the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. *See United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982); *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. 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.*; *see also id.* at 715, 101 S.Ct. 1425 ("Thomas drew a [religious] line, and it is not for us to say that the line he drew was an unreasonable one.").
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> Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. *Cf. United States v. Seeger*, 380 U.S. 163, 184–86, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (military-conscription exemption applies only to objections based on sincerely held religious beliefs as opposed to philosophical views or a personal moral code). These are factual inquiries within the court's authority and competence. But 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 [religious] beliefs." *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 114, 1137 (10th Cir. 2013). 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.

Korte, 735 F.3d at 682-83. With these principles in mind, the Seventh Circuit determined, in relevant part, that it was a substantial burden on the for profit company plaintiffs and their

owners to require them to *purchase or provide* the required contraception coverage (or self-insure for these services). *Korte*, 735 F.3d at 668.

In the instant case, the government defendants posit that *Korte* and other similar for profit plaintiff cases, *see, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), are distinguishable because the burden on plaintiffs in the instant litigation to comply with the accommodation[9] is merely de minimus where they would barely have to modify their behavior by complying with the purely administrative self certification requirement which should take a matter of minutes. Moreover, the government believes that any burden cast upon plaintiffs is too attenuated to constitute a substantial burden.

The Court acknowledges that the burden on plaintiffs to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs. Simply put, these plaintiffs are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections, 78 Fed. Reg. 39,874. Rather the non-exempted plaintiffs must complete a self certification form stating that each is an eligible organization which objects to providing the contraceptive coverage on religious grounds and provide a copy of that self certification to its issuer or TPA, so that the payment for the services can then be provided or arranged for by the issuer or TPA at no cost to plaintiffs. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39,874-75. But even so, the Court cannot agree with the government that the plaintiffs have not

[9]Admittedly, the Diocese does not have to submit a self certification on its own behalf because it is considered a religious employer exempted from the contraception mandate. However, the government does not contest the fact that the Diocesan Health Plan currently insures employees of the non-exempt Catholic Charities. The burden placed on the Diocese as a result of these facts, although mostly overlooked by the government, is discussed *infra*.

shown at least some reasonable likelihood of success on the merits relative to the showing of a substantial burden as defined in *Korte.*

According to the Seventh Circuit, the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice. *Korte,* 735 F.3d at 683; *see Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *Gilardi*, 733 F.3d at 1217-18 (" . . . the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong."). And in this case, the government defendants concede that plaintiffs' religious beliefs are sincerely held. In fact, the plaintiffs' undisputed affirmations concerning their religious views indicate that their beliefs are indeed sincere and religious in nature. Therefore, the government rests its argument on its belief that plaintiffs cannot establish a substantial burden on plaintiffs' religious exercise rights where the regulations do not, according to the government, require the plaintiffs to modify their religious behavior.

The plaintiffs have established that the accommodation compels them to facilitate and serve as the conduit through which objectionable contraceptive products and services are ultimately provided to their employees, in violation of their unquestionably sincerely held religious beliefs. While it is true that prior to the ACA's enactment, plaintiffs had notified their

insurers/TPAs that objectionable contraceptive services were to be excluded from their health plans, never before had that notification triggered the provision of the services, nor were plaintiffs designating another to provide the services. In other words, the government's argument relative to the de minimus nature of any burden created by the accommodation is too narrow of a focus. The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees (to comply with their own religious tenants and to avoid the ACA's fines for failing to meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs). Thus, although plaintiffs avoid paying for the services, the compulsion to offer group health insurance results in their direct facilitation of insurance coverage and the potential use of contraceptive services by their employees, services which plaintiffs morally oppose. That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs. Ultimately, the plaintiffs would be forced to modify their behavior *and* violate their religious beliefs by either giving up their health insurance plans or by providing insurance but taking critical steps to facilitate another's extension of the objectionable coverage. *See Korte*, 735 F.3d at 682-83; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (citing *Thomas*, 450 U.S. at 718). And,

their failure to comply with insurance requirements or provide contraceptive services results in enormous penalties that would be financially detrimental to their operations likely resulting in the reduction of necessary community services and even layoffs. In short, the government's accommodation results in the plaintiffs violating their sincerely held religious beliefs, as well as the choice between conformity with the ACA's requirements or face substantial fines. *See Korte*, 735 F.3d at 683; *see also Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (DE 45 at 16) ("The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary.").

Thus, given the nature of the analysis utilized, the undersigned believes that *Korte* may logically be extended to conclude that the completion and submission of the self certification is an alteration in plaintiffs' behavior such that it constitutes a substantial burden under RFRA. *See University of Notre Dame*, No. 3:13-cv-1276-PPS-CAN ("Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA"); *see also Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013) ("although the 'accommodation' legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products,

services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs."). Given *Korte's* guidance, the lack of mandatory authority on the precise issue at hand, and the divergence of case holdings demonstrating the difficulty of the issue and the uncertainty of the ultimate decision on the merits, the Court believes that plaintiffs have shown at least some reasonable likelihood of success on the merits relative to the substantial burden analysis. And even if that likelihood was just more than slight, the balance of harms could support injunctive relief.[10]

The government's alternative argument is that any burden on plaintiffs' religious exercise is too attenuated to render it substantial. In summary, the government believes that because plaintiffs are not required to actually contract or pay for contraceptive coverage, any burden is too attenuated to be substantial because plaintiffs are separated by a series of events that must occur before the objectionable contraceptive services would be utilized. Specifically, after receiving the certification from plaintiffs, the TPA or issuer would actually pay for or arrange payment for the contraceptive services should employees independently decide to even use those services.

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[10]*See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) ("Once the district court determined that [plaintiff's] likelihood of success on the merits of its claim was slight, it required [plaintiff] to make a proportionately stronger showing that the balance of harms was in its favor.") (citing *Accord Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

Similarly, in *Korte*, the government argued that the contraception mandate's burden was insubstantial because any use of contraceptive services could not be attributed to the corporate plaintiffs or their owners since the provision of the contraceptive coverage was several steps removed from an employee's independent determination to use contraception. *See Korte*, 735 F.3d at 684. However, the Seventh Circuit's majority opinion reasoned that the government's attenuation argument is equivalent to improperly asking whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' religion]." *Id*. at 685.[11] But, "[n]o civil authority can decide that question". *Id.*; *see Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14 ("The Government feels that the accommodation sufficiently insulates the plaintiffs from the objectionable services, . . . [but] it is not the Court's role to say that plaintiffs are wrong about their religious beliefs."); *see also Hobby Lobby*, 723 F.3d at 1142 (the 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).

Here, no one questions that among the plaintiffs' religious tenets is that life begins at conception and that providing all FDA approved contraceptive service violates those tenets. And so it follows that plaintiffs object to deliberately providing health insurance that will trigger access to objectionable contraceptive services and related education and counseling. By completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees will eventually secure access

[11]Judge Rovner understood the majority to be rejecting any assessment on how direct or attenuated the burden imposed on the plaintiff's religious practices may be. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting).

to free contraceptive services. In their minds, this makes them complicit in the provision and use of such services. Again, the government does not contest the sincerity of these beliefs. Because plaintiffs hold these honest religious convictions and because failing to comply with the law will result in heavy financial penalties and the risk of enforcement actions (which will significantly impact their ability to provide religiously based services), *id*. at 683, plaintiffs have shown that the contraception mandate and accommodation constitute a substantial burden on their religious exercise.

And while the government gives short shrift to any burden imposed specifically on the Diocese simply because it is exempted from the mandate, the Court would note the uncontested fact that the Diocese has foregone almost $200,000 annually in order to maintain its grandfathered status in an effort to protect Catholic Charities from having to comply with the contraceptive mandate and its religiously objectionable self certification requirement. Thus, despite being exempted as a religious employer, the Diocese is forced to modify its behavior and incur substantial costs to stay grandfathered under the ACA, or else it will be compelled to violate its religious beliefs by having Catholic Charities' employees provided with a plan that covers objectionable contraceptive services or access to the same. Essentially, absent forgoing the annual increased premiums, the Diocese would be prevented from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings.

The application of the two regulations—the exemption and the accommodation—has the ultimate effect of dividing the Catholic Church into two separate entities, despite overlapping membership and leadership. *See Zubik*, 2013 WL 6118696, at *26-27. The regulations protect those who work inside a church's walls, but not those engaging in the fulfillment of the religious

and charitable missions of the Diocese and Catholic Church—despite the fact that all of the plaintiffs claim the same burden is imposed on their religious exercise rights by the mandate and its accommodation. The Court concludes that this divide and its resulting consequences has similarly created a substantial burden on the Diocese and Catholic Charities, and as a result, the government must justify its regulations under the compelling interest test.

2. Least Restrictive Means and Compelling Government Interest

RFRA requires the government to demonstrate that applying the contraception mandate and its accommodation are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Again, the Court follows the precedent set forth in *Korte*, in applying the appropriate test in this context. In fact, the government has since conceded that the recent decision in *Korte* forecloses its arguments that the regulations satisfy strict scrutiny, even in this context [DE 105 at 2, fn. 1]. Regardless, the Court will conduct an analysis for completeness of the record.

Consistent with *Korte*, the Supreme Court has instructed 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." *Korte*, 735 F.3d at 685 (citing *O Centro Espirita*, 546 U.S. at 431). In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening these claimants. *Id*.

The compelling-interest test generally requires a "high degree of necessity." *Id*. (citing *Brown v. Entm't Merchs. Ass'n*, — U.S. — , 131 S.Ct. 2729, 2741 (2011)). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be

actually necessary to the solution." *Id*. (citing *Brown*, 131 S.Ct. at 2738). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. (citing *Yoder*, 406 U.S. at 215). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .". *Id.* (citing *Sherbert*, 374 U.S. at 406). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Korte*, 735 F.3d at 686 (citing *Sherbert*, 374 U.S. at 403). Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (7th Cir. 1993)).

Similar to the interests claimed by the government in *Korte*, the government identified two legitimate public interests in the instant case, improving the public health and providing equal access to health care services for women. The government (prior to the issuance of *Korte*) had argued that the contraception mandate and the accommodation furthers these interests in a narrowly tailored fashion by not requiring nonprofit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The Court agrees that the government's stated interests are indeed important, and for the sake of argument (and a thorough analysis) will assume they are even compelling. However, the government has not shown that the contraception mandate employs the least restrictive means of furthering the government's interests, because strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest.

Korte, 735 F.3d at 686.

As discussed, the regulatory scheme exempts or excludes certain employers from the contraception mandate and does not apply the ACA's requirements to employers with grandfathered plans or those with less than 50 employees. Since the government grants so many exceptions already, it cannot legitimately argue that its regulations are narrowly tailored, nor can they argue against exempting these plaintiffs—by the government's estimate, approximately 20,000 employees (not including the already exempted Diocese). *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222 ("underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation"). Also, there is nothing to suggest the ACA would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement. *See Gilardi*, 733 F.3d at 1223-24.

Further, the government's reason for creating the religious employer exemption in particular was that houses of worship and their integrated auxiliaries are more likely than other employers to employ people of the same faith who share the same objection to contraceptive coverage, and who would be less likely than others to use contraceptive services even if such services were covered. *See* 78 Fed. Reg. 39,874. This may in fact be true, however, the government amended the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified "because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). So even though these plaintiffs provide religiously based community services outside the confines of the church and employ people of

different faiths, these plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as "religious employers." And despite the religiously affiliated nature of the plaintiffs and their longstanding religious stance (and public pronouncement) against abortion and contraception, *these* plaintiffs have not received the same exemption as "religious employers" from having to facilitate or initiate the provision of objectionable contraceptive services, merely because they are not organized and operated as a nonprofit entity referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986—a basis which has nothing to do with the government's stated interests for imposing the requirements of the contraception mandate. *See Zubik*, 2013 WL 6118696 at *29 (noting that the religious employer exemption was not predicated on the government's stated interests). And so again, even assuming the government's interests are compelling, there is no basis indicating the government would be unable to enforce its legislation simply because these plaintiffs could avoid compliance with the contraception mandate.

Finally, there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights. Pre-*Korte*, the government maintained that the accommodation provides the least restrictive means because the self certification requires the plaintiffs to act just as they would without the mandate—by informing their TPAs or insurers that coverage should not include certain contraceptive services. But the argument falls short. First, the government has made exemptions from the coverage requirements for other employers, like the Diocese, without requiring the same form of self certification (and resulting consequences), despite the fact that plaintiffs share

the same legitimate claim to the free exercise of religion as those exempted as religious employers. And second, the self certification process created in the accommodation (and being avoided by the Diocese and Catholic Charities at great expense) essentially transforms a voluntary act that plaintiffs may have utilized to ensure that the objectionable services are not provided, consistent with their religious beliefs, into a compelled act that they sincerely believe provides and promotes conduct that is forbidden by their religious beliefs. *See Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14. And so the nature of the act itself has changed, not merely the consequences of that act.

And as identified in *Korte* and as offered by plaintiffs in the instant action, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. For instance, the government can provide a "public option" for contraception insurance; it can give tax incentives or grants to contraception suppliers to provide these medications and services at no cost to consumers; and it can give tax incentives to consumers of contraception and sterilization services—all without requiring plaintiffs to self certify their religious objections to the contraception mandate and thereby directly facilitate access to objectionable contraceptive services to be arranged or paid for by third parties. Simply because these options may make it more difficult for the government to administer the regulations in a manner that would achieve the government's stated interests, greater efficacy does not equate to the least restrictive means. *See Zubik*, 2013 WL 6118696 at *23. And as the government has conceded in the instant case, *Korte* has recently made clear that its regulations fail the strict scrutiny analysis.

Bearing in mind that at this stage the court need not be certain about the outcome of the

case to grant a preliminary injunction, the Court concludes the plaintiffs have shown some reasonable likelihood of success on the merits relative to their RFRA claim. *See S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) ("The case is before us on an appeal from the grant of a preliminary injunction, and as is too familiar to require citation such a grant is proper even if the district judge is uncertain about the defendant's liability.").

Adequate Remedy at Law and Irreparable Harm

Although 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*, 735 F.3d at 666 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Village of Washington Park, Ill*., 378 F.3d 613, 620 (7th Cir. 2004))). "This is because the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury . . .'. " *Korte*, 735 F.3d at 666 (citing *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). Furthermore, injunctions are especially appropriate in the context of first amendment violations because the "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (citing *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)).

In the instant case, the non-exempt plaintiffs must decide by December 31, 2013 whether or not to provide insurance coverage and sign the self certification with respect to its employee health plan, with the exception of Our Sunday Visitor, who must also make the same decisions in October. Relative to the Diocese, by December 31, 2013, it will have to decide whether to continue to forgo increased premiums in order to maintain its grandfathered status, or permit Catholic Charities to be faced with the same decisions that need be made by the non-exempt

plaintiffs. Ultimately, should plaintiffs fail to comply with the insurance coverage requirements of the ACA and its contraception mandate, the plaintiffs face financially devastating fines and enforcement actions. Thus, plaintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the merits of the plaintiffs' claims without the relief of a preliminary injunction. Given that plaintiffs' religious exercise rights are at stake in the immediate future, that a loss of these freedoms for even a minimal period of time unquestionably constitutes irreparable injury which cannot be prevented or fully rectified by waiting for a final judgment, *see Elrod*, 427 U.S. at 373; *Anderson v. U.S.F. Logistics (IMS), Inc.*, 274 F.3d 470, 478 (7th Cir. 2011), and that injunctions are designed to offer relief when legal remedies are inadequate to protect the parties' rights, *see Roland Machinery Co. v. Dresser Indus., Inc*., 749 F.2d 380, 397 (7th Cir. 1984) (Swygert, J., dissenting), the Court concludes that these factors weigh strongly in favor of granting the requested relief.

Weighing the Equities and Public Interest

In weighing the equities, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc*., 549 F.3d 1079, 1100 (7th Cir. 2008). To do so, the court compares the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted. *Id*. (citing *Ty, Inc. v. Jones Group, Inc*., 237 F.3d 891, 895 (7th Cir. 2001)). We evaluate these harms using a sliding scale approach. *Id*. (citing *Ty, Inc.*, 237 F.3d at 895). The more likely it is that plaintiffs will win their case on the merits, the less the balance

of harms need weigh in their favor. *Id*. (citations omitted). Conversely, if it is very unlikely that plaintiffs will win on the merits, the balance of harms need weigh much more in plaintiffs' favor. *Id*. (citations omitted). When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation. *Id*. (other citations omitted). This analysis is "'subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100 (citations omitted).

As the Court has previously detailed herein, the harm likely to be caused the plaintiffs without an injunction is imminent and irreparable, whereas the government likely faces no risk of harm, let alone irreparable harm, if the preliminary injunction is granted. The Court agrees with the district court's comments in *Zubik*, in that the combined nationwide total of the millions of Americans whose employers fall within some type of exclusion, exemption, or plan grandfathered from the ACA and contraception mandate's requirements demonstrates that the government will not be harmed in any significant way by the exclusion of these plaintiffs. *Zubik*, 2013 WL 6118696 at *34; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, *10 (W.D. Pa. June 18, 2013) ("tens of millions of individuals . . . remain unaffected by the mandate's requirements"). Moreover, the government has itself delayed the enforcement of the contraception mandate by initially granting a safe harbor from its enforcement and agreeing to injunctions in other cases involving challenges to the mandate.

Additionally, granting the preliminary injunction furthers the public interest. While it is true that employees and dependents of the plaintiffs will face an economic burden not shared by

employees and dependants of organizations that cover all of the contraceptive methods imposed by the mandate, plaintiffs' long-standing and publically made religious stance regarding contraception and abortion, have kept them from offering procuring, participating in, facilitating, or paying for objectionable contraceptive services up until this point. And while not all employees of the plaintiffs share in the plaintiffs' religious objections to certain contraceptive services, the plaintiffs' employees and the public are best served if the plaintiffs can continue to provide needed (and expected) religiously based community services, and the needed (and expected) insurance coverage to its employees, without the threat of substantial fines and the risk of layoffs for noncompliance with the contraception mandate and its accommodation. Moreover, injunctions protecting First Amendment freedoms are always in the public interest, *see Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and the Court sees no reason to make an exception here.

The Court would also note that plaintiffs quickly filed an amended complaint and sought an injunction after the 2013 final rules were passed. Thus, there has been no delay in their pursuit of a preliminary inunction. *See Ty, Inc.*, 237 F.3d at 903 (a delay in pursuing a preliminary injunction may raise questions regarding irreparable harm). And, it cannot be said that there was any expectation that the plaintiffs would ever facilitate access to all FDA approved contraceptive services for its employees. Undoubtedly, the balance of harms in this case weighs heavily in plaintiffs' favor, enough so that any weakness in the merits of their case is overcome, thereby making injunctive relief appropriate to maintain the status quo until a decision on the merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 783 (7th Cir. 2011) ("The

preliminary injunction, after all, is often seen as a way to maintain the status quo until merits issues can be resolved at trial. By moving too quickly to the underlying merits, the district court required too much of the plaintiffs . . .").

IV. Conclusion

Accordingly, it is hereby ORDERED that plaintiffs' motion for a preliminary injunction [DE 74] is GRANTED, and as a result, defendants, their agents, servants, officers, employees, representatives, and all persons in active concert or participation with them are hereby ENJOINED from:

> Applying or enforcing against plaintiffs, 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., Specialized Physicians of Illinois, LLC, University of Saint Francis, and Our Sunday Visitor, Inc., or their employee health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling.

It is further ORDERED that plaintiffs shall not be required to post bond; however, should circumstances change prior to the Court's making a determination on the merits of the case, including new developments in the law, which may make the preliminary injunction or its terms no longer appropriate, then counsel are free to file a motion seeking a modification or vacatur of

the injunction.

SO ORDERED.

ENTERED: December 27, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GRACE SCHOOLS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:12-CV-459 JD
	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

Memorandum Opinion and Order

Plaintiffs Grace Schools (hereinafter, "Grace") and Biola University, Inc. (hereinafter, "Biola") have filed their first amended verified complaint [DE 54] seeking declaratory and injunctive relief claiming that the government defendants have violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq*., the First Amendment of the Constitution of the United States, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*., by enacting the "contraception mandate" which requires certain employers to provide coverage for contraception and sterilization procedures in their employee health care plans on a no-cost-sharing basis, or face stiff financial penalties and the risk of enforcement actions for the failure to do so. Although the defendants have since moved to dismiss the amended complaint and the parties have sought summary judgment on the various claims presented [DE 60; DE 69], the Court focuses only on plaintiffs' request for injunctive relief and defendants' objection thereto,[1] in an effort to prevent the possibility of any unjust enforcement of

[1]The Court previously advised the parties as to how this complex litigation would proceed [DE 57] and the parties have filed their briefs consistent with the Court's scheduling order [DE 52]. The Court has also carefully considered the supplemental notices of authority

the contraception mandate against plaintiffs come the first of the year.[2]

For the reasons that follow, plaintiffs have shown that their RFRA claim stands a reasonable likelihood of success on the merits, that irreparable harm will result without adequate remedy absent an injunction, and that the balance of harms favor protecting the religious-liberty rights of the plaintiffs. As such, the Court enters a preliminary injunction barring enforcement of the contraception mandate against Grace and Biola.

I. Background

The Contraception Mandate

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg–13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg–13(a)(4). The HRSA, an agency of the U.S. Department of Health and Human Services (HHS), then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to provide the government with independent expert advice on matters of public health. After

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and responses filed by counsel, along with the amicus curiae briefs filed by counsel for the Liberty, Life and Law Foundation, the American Civil Liberties Union, the American Center for Law & Justice, and Regent University.

[2]Grace's employee health care plan begins on January 1, 2014, while Biola's employee health care plan begins shortly thereafter on April 1, 2014 [DE 54 at ¶ 179], and their student plans begin in the Summer of 2014. *Id*. at ¶ 181.

reviewing the type of preventive services necessary for women's health and well-being, the IOM recommended that the following preventive services be required for coverage: annual well-woman visits; screening for gestational diabetes and breast-feeding support, supplies, and counseling; human papillomavirus screening; screening and counseling for sexually transmitted infections and human immune-deficiency virus; screening and counseling for interpersonal and domestic violence; and contraceptive education, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 9, 2013). Based on the IOM's recommendations, the HRSA issued comprehensive guidelines requiring coverage of (among other things) "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling[3] for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well–Being, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 9, 2013). These include hormonal methods such as oral contraceptives (the pill), implants and injections, barrier methods, intrauterine devices, and emergency oral contraceptives (Plan B and Ella).[4] *See* FDA, Birth

[3]The defendants clarify that this requirement does not indicate that such education and counseling need necessarily be 'in support of' certain contraception services or contraception in general.

[4]As the government points out, the list of FDA approved contraceptive methods does not include abortion, however, the terms "abortifacients" or "abortion inducing drugs" as used throughout this opinion refers to plaintiffs' characterization of contraception that artificially interferes with life and conception in violation of their religious beliefs.

Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (lasted visited Dec. 9, 2013). On February 15, 2012, HHS published final regulations incorporating the HRSA guidelines. 77 Fed. Reg. 8725 (Feb. 15, 2012). The agency made the mandate effective in the first plan year on or after August 1, 2012, *see* 45 C.F.R. § 147.130(b)(1), however, a temporary enforcement safe harbor for nonexempt nonprofit religious organizations that objected to covering contraceptive services was also created, making the mandate effective in the first plan year on or after August 1, 2013 for those qualifying organizations who did not meet the religious employer exemption. 77 Fed. Reg. 8728-29. The government then undertook new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered[5] nonprofit religious organizations with religious objections to covering contraceptive services. *Id*.

On March 21, 2012, the government issued an Advance Notice of Proposed Rulemaking that stated it was part of the government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). On February 1, 2013, the government issued a Notice of Proposed Rulemaking (NPRM), setting forth a proposal that stated it was to "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified

[5]"Grandfathered" plans are those health plans that do not need to comply with the ACA's coverage requirements because they were in existence when the ACA was adopted and did not make certain changes to the terms of the plan. 42 U.S.C. § 18011. The purpose of grandfathering plans was to allow individuals to maintain their current health insurance plan, to reduce short term disruptions in the market, and to ease the transition to market reforms that phase in over time. *See* 75 Fed. Reg.. 34,546 (June 17, 2010). The number of grandfathered plans is expected to decline over time.

because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). On June 28, 2013, the government issued final rules adopting and/or modifying the proposals in the NPRM. *See* 78 Fed. Reg. 39,870. The regulations challenged here (the "final rules") include the new regulations issued by the government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering contraceptive services. *See* 78 Fed. Reg. 39,870.

The final rules state that they "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed. Reg. 39,871. Under the new definition, an exempt "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 78 Fed. Reg. 39,874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. 39,874 (citing 78 Fed. Reg. 8461). The 2013 final rules' amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after

August 1, 2013. *See id.* at 39,871.

The 2013 final rules also included an "accommodation" regarding the contraceptive coverage requirement for group health plans, as well as student health plans, established or maintained by "eligible organizations." 78 Fed. Reg. 39,874–80; 45 C.F.R. § 147.131(b)-(f). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,874. To be relieved of the obligations that otherwise apply to non-grandfathered, nonexempt employers, the 2013 final rules require that an eligible organization complete a self certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id.* at 39,878–79. In the case of an organization with an insured group health insurance issuer, upon receipt of the self certification, the organization's health insurance issuer must provide separate payments to plan participants and beneficiaries for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or

beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,875–77. The government expects that its insurers will have options to achieve cost neutrality, including by way of cost savings from improvements in women's health and fewer pregnancies, and by including the cost of contraceptive services as an administrative cost that is spread across the issuer's entire risk pool (excluding plans established or maintained by eligible organizations). *Id*. at 39,877-78. In the case of an organization with a self-insured group health plan, upon receipt of the self certification, the organization's TPA is designated as plan administrator and claims administrator for purposes of providing or arranging separate payments for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,879–80. Under the 2013 final rules, costs incurred by TPAs relating to the coverage of contraception services for employees and students of eligible organizations can be reimbursed through an adjustment to Federally-Facilitated Exchange user fees. *See* 78 Fed. Reg. 39,880. The contraceptive services provided are directly tied to the employer's insurance policy, and are available only so long as the employees/students are enrolled in the organization's health plan. 45 C.F.R. § 147.131(c). The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. 39,872.

Ultimately, several exemptions from the ACA's coverage requirements have survived the law's revisions, including exemptions for smaller employers—those with fewer than fifty full time employees, 26 U.S.C. § 4980H, and employer health plans that are grandfathered, 42 U.S.C. § 18011. In addition, religious employers meeting the narrow definition of religious employer are exempted from the contraceptive coverage requirement. 45 C.F.R. § 147.131(a). A

noncomplying employer who does not meet an exemption will face large fines, specifically, $2,000 per year per full time employee (less 30 employees) for not providing insurance meeting the coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the coverage required by the contraception mandate, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

As detailed below, Grace and Biola do not meet any of these exemptions; rather, they meet the "accommodation" created for nonprofit religiously affiliated employers, which the Seventh Circuit has characterized as "an attempted workaround whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (Rovner, J., dissenting). The plaintiffs argue that compliance with the contraception mandate, even via the accommodation, violates their religious exercise rights.

The Plaintiffs

The presidents of Grace Schools and Biola University, Inc. have verified the facts applicable to their claims and request for injunctive relief [DE 54][6]. Both Grace and Biola are not for profit Christ-centered institutions of higher learning. *Id*. at ¶¶ 2, 10-11. To fulfill their religious commitments and duties in a Christ-centered educational context, plaintiffs promote the spiritual and physical well-being and health of their employees and students, which includes the provision of health insurance to their employees and students. *Id*. at ¶¶ 43, 68.

[6]The verified complaint serves as the equivalent of an affidavit and, unless specifically noted herein, the defendants do not contest these facts, which are admitted for preliminary injunction purposes. *See IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 542 (7th Cir. 1998). In addition, no hearing was necessary given the controversy was controlled by the undisputed facts detailed in this order.

Grace College and Seminary, located in Winona Lake, Indiana, was founded in 1937 and has a mission to be "an evangelical Christian community of higher education which applies biblical values in strengthening character, sharpening competence, and preparing for service" and pursues its mission through biblically-based programs and services founded in the historic Fellowship of Grace Brethren Churches [DE 54 at ¶¶ 21, 24, 26]. Grace embraces Christian core values, its students, administration, faculty, and staff aim together to make Christ preeminent in all things, *id*. at ¶¶ 22-23, and Grace has a "Covenant of Faith" that is consistent with the beliefs of the Fellowship of Grace Brethren Churches which affirms biblical truth and God's grace. *Id*. at ¶¶ 25, 27. Members of Grace's Board of Trustees, which governs the College, must subscribe annually to the Covenant of Faith, and Grace draws its faculty, staff, and administration from among those who profess the Covenant of Faith. *Id*. at ¶¶ 27-28. Although Grace does not require student membership in the Grace Brethren denomination, it does require a profession of faith as a prerequisite for student admission and students are expected to adhere to the standards set forth in the Grace community and lifestyle statement. *Id*. at ¶ 29. Through its Fall 2013 "Statement on Community Expectations for Faculty and Staff," members of the Grace community agree to uphold the standards of the community, which in pertinent part states:

> Grace Schools values the worth and dignity of human life as expressed through the fruit of the Spirit. Having been made in the image of God, those who live and work at the institution express like faith and are expected to respect and uphold life-affirming practices that distinguish our faith community from other institutions of higher education, particularly for those who are vulnerable members of society. Consistent with the views of the Fellowship of Grace Brethren Churches, Grace Schools believes that human life is worthy of respect and protection at all stages from the time of conception. The sanctity of human life is established by creation (Genesis 1:26-27), social protection (Genesis 9:6) and redemption (John 3:16).

[DE 54 at ¶¶ 36-37]. Further, the Fellowship of Grace Brethren Churches believes that human

life is worthy of protection and respect at all stages from the time of conception (or fertilization), and Grace has the religious view that the procurement, participation in, facilitation of, or payment for abortion (including abortion-causing drugs) violates the Sixth Commandment and is inconsistent with the dignity conferred by God on creatures made in His image. *Id*. at ¶¶ 32-35.

Consistent with its religious commitments, Grace provides a self-insured group plan for its employees, acting as its own insurer but working with a third-party claims administrator [DE 54 at ¶ 44]. Under the terms of Grace's plan for its employees, coverage excludes abortifacient drugs, however, the employee plan does include a variety of contraceptive methods that Grace does not consider to be morally objectionable. *Id*. at ¶¶ 46-47. In addition, Grace requires all registered residential students to have health insurance, and if a student does not submit proof of coverage, Grace will enroll the student in a health insurance plan issued by Gallagher Koster and bill enrolled students for the cost of the coverage. *Id*. at ¶ 50. Grace's student plan does not include coverage for abortifacient drugs and related counseling to which it morally objects. *Id*.

Grace currently has approximately 457 employees and 3,100 students [DE 54 at ¶¶ 30-31]. Approximately 168 employees are enrolled in Grace's group health plan, along with approximately 307 dependents. *Id*. at ¶ 45. In the 2013-2014 school year, approximately 60 students enrolled in the student insurance plan facilitated by Grace. *Id*. at ¶ 50.

Biola University, located in La Mirada, California, was founded in 1908 as the Bible Institute of Los Angeles and has a mission to provide biblically or Christ-centered education, scholarship and service—equipping men and women in mind and character to impact the world for the Lord Jesus Christ [DE 54 at ¶¶ 51-52, 55, 57-60]. Biola's vision is to be an exemplary Christian university and believes that all it does should be Christ-centered. *Id*. at ¶¶ 53, 55.

Biola also believes that God uses its faculty, staff, students, and alumni to accomplish God's plans, and draws its faculty, staff, and students from among those who profess faith in Christ. *Id*. at ¶¶ 56, 61.

Biola's "Doctrinal Statement" declares that "[t]he Bible is clear in its teaching on the sanctity of life. Life begins at conception. We reject the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia because it is unbiblical and contrary to God's will. Life is precious and in God's hands." [DE 54 at ¶ 65]. The Biola Employee Handbook, in a section entitled "Standard of Conduct," states in part as follows: "Consistent with the example and command of Jesus Christ, we believe that life within a Christian community must be lived to the glory of God, with love for God and for our neighbors . . .[t]o this end, members of the Biola community are not to engage in activities that Scripture forbids. Such activities include . . . the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia." *Id*. at ¶ 66. In addition, Biola's undergraduate Student Handbook provides in relevant part: "The University wants to assist those involved in unplanned pregnancy while at Biola to consider the options available to them within the Christian moral framework. These include marriage of the parents, single parenthood, or offering the child for adoption. Because the Bible is clear in its teaching on the sanctity of human life, life begins at conception; we abhor the destruction of innocent life through abortion on demand. Student Development stands ready to help those involved to cope effectively with the complexity of needs that a crisis pregnancy presents." *Id*. at ¶ 67.

Biola offers two medical insurance plans to regular employees who work at least 30

hours per week, for at least ten months of the year—one plan is through Kaiser, while the other is through Blue Shield [DE 54 at ¶¶ 69-70]. Biola has approximately 856 full time, benefit-eligible employees, and approximately 1,835 individuals are covered under its two employee health insurance plans. *Id*. at ¶ 71.

Prior to April 1, 2012, the former Anthem Blue Cross plan and the Kaiser plan did cover all FDA-approved contraceptives, but the inclusion of abortion-inducing drugs was neither knowing nor intentional on Biola's part. *Id*. at ¶¶ 73, 75. Since April 1, 2012, the Blue Shield plan has not covered abortion-inducing drugs, but it does provide coverage of other drugs characterized by the FDA as "contraceptives." *Id*. at ¶ 74. Also since April 1, 2012, the Kaiser plan has not covered any contraceptives, but employees can receive coverage of non-abortifacient prescription contraceptive drugs through Script Care, a pharmacy benefits manager. *Id*. at ¶ 75.

Biola requires its students to have health insurance coverage and facilitates health insurance through United Health Care for its students who are not otherwise covered by health insurance [DE 54 at ¶ 76]. While Biola does not indicate the number of students enrolled in its health plan, it currently has approximately 6,323 students. Biola University, Five Year Enrollment Summary 2009-2013 Summary, http://www.biola.edu/registrar/research_ reporting/5_year_enrollment/5_Year_Enrollment_Summary.pdf (last visited Dec. 15, 2013). Students who enroll in the plan pay the premium to Biola and then Biola remits payment to the carrier on behalf of the students [DE 54 at ¶ 76]. Ella and Plan B are excluded from this plan. *Id*.

Although Grace and Biola were protected by the safe harbor which was extended through the end of 2013, their employee and student health plans must comply with the contraception

mandate thereafter, *id.* at ¶¶ 48, 116-18, 150, 179, 181, 275, because plaintiffs do not meet the religious employer exemption and their health plans are not grandfathered. *Id*. at ¶¶ 3, 49, 72, 143-144. Specifically, Grace's employee and student health plans are subject to the contraception mandate on January 1, 2014 and July 25, 2014, respectively, and Biola's employee and student health plans are subject to the mandate on April 1, 2014 and August 1, 2014, respectively. *Id*. at ¶¶ 48, 179, 181. However, the plaintiffs are eligible for the accommodation. *Id*. at ¶ 148.

As plaintiffs profess their religious beliefs, compliance with the accommodation violates their free exercise rights because it forces the plaintiffs to obtain insurance and certify a form that specifically requires an issuer or TPA to provide coverage for the objectionable contraceptive services as a direct consequence of the health benefits provided by the plaintiffs [DE 54 at ¶¶ 5, 133] (claiming that the accommodation forces plaintiffs to deliberately provide health insurance that will trigger[7] access to abortion inducing drugs and related education and counseling). In other words, by invoking the accommodation and executing the self certification, plaintiffs would initiate the insurance coverage of morally objectionable contraceptive services [DE 54 at ¶¶ 152-55]. And by issuing the self certification, the plaintiffs would be identifying their participating employees and students to the TPA/issuer for the distinct purpose of enabling the government's scheme to facilitate free access to abortifacient services, to which plaintiffs would have to continue to play a central role in facilitating. *Id*. at ¶¶ 156-63.

[7]Defendants dispute that the regulations require plaintiffs to "trigger" or "facilitate" the provision of contraceptive services to which plaintiffs object; however, defendants acknowledge that this is plaintiffs' characterization of what the mandate requires of them were the plaintiffs to complete the self-certification form and provide a copy of it to their issuer/TPA.

The government contends that even prior to the ACA's passage, Grace and Biola would have had to provide notice to their issuers/TPAs indicating that their insurance plans should exclude coverage for objectionable contraceptive services. However, the government makes the contention without providing any evidence of what type of notice was previously given by plaintiffs to their insurers/TPAs, if any, for the *exclusion* of particular services.

Plaintiffs contend that they strongly believe that God has condemned the intentional destruction of innocent human life and, as a matter of religious conviction, it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion or the use of drugs that can (and do) destroy human life in the womb—which the accommodation permits. *Id*. at ¶¶ 2, 175-78. On the other hand, refusing to offer insurance (which plaintiffs allege transgresses their religious duty to provide for the well-being of their employees and students) or refusing to comply with the contraception mandate, would cause them to face enormous fines that would financially devastate their operations and undermine their mission. *Id*. at ¶¶ 7, 179-81.

Plaintiffs also represent that rather than imposing the burden of the accommodation upon them, there are alternative mechanisms through which the government could provide access to the objectionable contraceptive services [DE 54 at ¶¶ 189-92]. For instance, plaintiffs argue that the government could provide contraceptive services through direct government payments, or through tax deductions, refunds or credits. *Id*. at ¶¶ 191-93. Moreover, plaintiffs argue that the government's interests in pursuing the mandate can hardly be compelling or pursued by the least restrictive means where it has excluded millions of employers from the ACA's requirements, including those employers who are grandfathered, 42 U.S.C. § 18011, or have fewer than 50

employees, 26 U.S.C. § 4980H; and where the government has included an exemption from the contraception mandate for those deemed religious employers, 45 C.F.R. § 147.131(a). *Id*. at ¶¶ 194-202. Plaintiffs argue that these broad exemptions further demonstrate that they could also be exempted from the requirements of the contraception mandate without measurably undermining any sufficiently important governmental interest served by the mandate. *Id*. at ¶ 195.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Ezell*, 651 F.3d at 694. This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.[8] *See Planned Parenthood*, 699 F.3d at 972. The aim is to minimize the costs of a wrong decision. *See Stuller*,

[8]As an aside, the government noted an objection to applying the sliding scale approach, arguing that the approach is inconsistent with the Supreme Court's holding in *Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008) requiring a plaintiff to show all of the preliminary injunction factors. But the government also recognized that the undersigned is nonetheless bound to apply the Seventh Circuit's sliding scale approach to an injunction. In fact, the Seventh Circuit has recently determined that its sliding scale approach is "a variant of, though consistent with, the Supreme Court's recent formulations of the standard . . ." *Planned Parenthood of Wisc., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596 (7th Cir. Dec. 20, 2013) (citing *Winter*, 555 U.S. at 20).

Inc. v. Steak N Shake Enters., Inc., 695 F.3d 676, 678 (7th Cir. 2012).

The appropriateness of a preliminary injunction in this case rests on plaintiffs' RFRA claim and presents the following issues: does the contraception mandate and accommodation provided substantially burden the religious exercise rights of the plaintiffs, and if so, has the government discharged its burden of justifying its regulations under strict scrutiny. Here, plaintiffs have shown some likelihood of success on the merits of their RFRA claim, that no adequate remedy at law exists, and that they will suffer irreparable harm without an injunction. And, a weighing of the injunction equities and consideration of the public interest also strongly supports issuance of an injunction at this stage of the litigation.

III. Analysis

To begin, for purposes of determining whether a preliminary injunction is appropriate in the instant case, no one questions that the issues presented based on the 2013 final rules are ripe for ruling, that the threat of financial penalty and other enforcement action is sufficient to establish the plaintiffs' standing to challenge the accommodation, and that plaintiffs—nonprofit religious organizations—exercise religion in the sense that their activities are religiously motivated. The Court will thus consider the appropriateness of injunctive relief in the instant case.

Success on the Merits of the RFRA Claim

The RFRA prohibits the federal government from placing substantial burdens on "a person's exercise of religion," 42 U.S.C. § 2000bb–1(a), unless it can demonstrate that applying the burden is "in furtherance of a compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest," *id*. § 2000bb–1(b). RFRA creates a

broad statutory right to case-specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test. *Korte*, 735 F.3d at 671-72 (reasoning that with RFRA, Congress expressly required accommodation rather than neutrality) (citation and quotation marks omitted). RFRA is structured as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Id*. at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)).

Once a RFRA claimant makes a *prima facie* case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny. *Id.* (citing *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006)). "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . .". *Id*. (citing *O Centro Espirita*, 546 U.S. at 430). Thus, in RFRA litigation, as in First Amendment litigation, "the burdens at the preliminary injunction stage track the burdens at trial." *Id*. (citing *O Centro Espirita*, 546 U.S. at 429).

1. Substantial Burden

While neither the United States Supreme Court nor any Circuit Courts have had the opportunity to consider whether the contraception mandate creates a substantial burden on a non-secular, nonprofit organization's religious exercise rights given the "accommodation" created for

eligible organizations,[9] the Seventh Circuit recently discussed in *Korte* the substantial burden analysis in the context of RFRA:

> Recall that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisc. v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526 (1972). But a burden on religious exercise also arises when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 (1981); *see also Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Construing the parallel provision in RLUIPA, we have held that a law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The same understanding applies to RFRA claims.
>
> Importantly, the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious

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[9]In fact, not many district courts have had the opportunity to consider this question relative to nonprofit religious organizations, and their conclusions vary. Three courts have upheld the accommodation. *See Catholic Diocese of Nashville v. Sebelius,* No. 3:13-01303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) (Simon, C.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013). While the other courts have found the accommodation to pose a substantial burden. *See Geneva College v. Sebelius,* No. 12-0207 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *see also Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (drawing a distinction between self insured and group insured plans and granting a preliminary injunction only with respect to a self insured plaintiff despite the fact that all eligible organizations are confronted with the self certification process created by the accommodation).

> obligations. *See United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982); *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. 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.*; *see also id.* at 715, 101 S.Ct. 1425 ("Thomas drew a [religious] line, and it is not for us to say that the line he drew was an unreasonable one.").
>
> Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. *Cf. United States v. Seeger*, 380 U.S. 163, 184–86, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (military-conscription exemption applies only to objections based on sincerely held religious beliefs as opposed to philosophical views or a personal moral code). These are factual inquiries within the court's authority and competence. But 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 [religious] beliefs." *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 114, 1137 (10th Cir. 2013). 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.

Korte, 735 F.3d at 682-83. With these principles in mind, the Seventh Circuit determined, in relevant part, that it was a substantial burden on the for profit company plaintiffs and their owners to require them to *purchase or provide* the required contraception coverage (or self-insure for these services). *Korte*, 735 F.3d at 668.

In the instant case, the government defendants posit that *Korte* and other similar for profit plaintiff cases, *see, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), are distinguishable because the burden on Grace and Biola to comply with the accommodation is merely de minimus where plaintiffs would barely have to modify their behavior by complying with the purely administrative self certification requirement which should take a matter of

minutes. Moreover, the government believes that any burden cast upon Grace and Biola is too attenuated to constitute a substantial burden.

The Court acknowledges that the burden on Grace and Biola to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs. Simply put, Grace and Biola are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections, 78 Fed. Reg. 39,874. Rather the plaintiffs must complete a self certification form stating that each is an eligible organization which objects to providing the contraceptive coverage on religious grounds and provide a copy of that self certification to its issuer or TPA, so that the payment for the services can then be provided or arranged for by the issuer or TPA at no cost to Grace or Biola. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39,874-75. But even so, the Court cannot agree with the government that Biola and Grace have not shown at least some reasonable likelihood of success on the merits relative to the showing of a substantial burden as defined in *Korte.*

According to the Seventh Circuit, the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice. *Korte*, 735 F.3d at 683; *see Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *Gilardi*, 733 F.3d at 1217-18 (" . . . the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a

penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong."). And in this case, the government defendants concede that plaintiffs' religious beliefs are sincerely held. In fact, the only evidence before the Court—plaintiffs' undisputed affirmations—indicate that their beliefs are indeed sincere and religious in nature. Therefore, the government rests its argument on its belief that plaintiffs cannot establish a substantial burden on plaintiffs' religious exercise rights where the regulations do not, according to the government, require the plaintiffs to modify their religious behavior.

Grace and Biola have established that the accommodation compels them to facilitate and serve as the conduit through which objectionable contraceptive products and services are ultimately provided to their employees and students, in violation of their unquestionably sincerely held religious beliefs. And prior to the ACA's enactment, no evidence establishes that Grace and Biola previously discussed or provided a similar notice to their insurers/TPAs indicating that contraceptive services (specifically) were to be excluded from their health plans. In fact, given the religiously affiliated nature of the plaintiffs and their public stance on abortion and contraception, it is just as likely that those services would not have required any discussion, let alone a self certification, prior to their purchasing insurance coverage. *Cf. University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) ("In sum, the certification merely denotes Notre Dame's refusal to provide contraceptive care—a statement that is entirely consistent with what Notre Dame has told its TPA in the past . . . [and so, the holding] isn't that a compelled action is de minimis. It's that no action is being compelled at all because the action would be taken [by Notre Dame] even if no contraception requirement applied.").

But even if the plaintiffs previously informed their insurers/TPAs not to provide coverage for objectionable contraceptive services, the government's argument relative to the de minimus nature of any burden created by the accommodation is too narrow of a focus. The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees and students (to comply with their own religious tenants and to avoid the ACA's fines for failing to meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs). Thus, although plaintiffs avoid paying for the services, the compulsion to offer group health insurance results in their direct facilitation of insurance coverage and the potential use of contraceptive services by their employees and students, services which plaintiffs morally oppose. That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs. Ultimately, the plaintiffs would be forced to modify their behavior *and* violate their religious beliefs by either giving up their health insurance plans or by providing insurance but taking critical steps to facilitate another's extension of the objectionable coverage. *See Korte*, 735 F.3d at 682-83; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (citing *Thomas*, 450 U.S. at 718). And, their failure to comply with insurance requirements or provide contraceptive services results in

enormous penalties that would be financially detrimental to their operations. In short, the government's accommodation results in the plaintiffs violating their sincerely held religious beliefs, as well as the choice between conformity with the ACA's requirements or face substantial fines. *See Korte*, 735 F.3d at 683; *see also Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (DE 45 at 16) ("The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary."). Thus, given the nature of the analysis utilized, the undersigned believes that *Korte* may logically be extended to conclude that the completion and submission of the self certification is an alteration in plaintiffs' behavior such that it constitutes a substantial burden under RFRA. *See University of Notre Dame*, No. 3:13-cv-1276-PPS-CAN ("Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA"); *see also Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013) ("although the 'accommodation' legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and

counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs."). Given *Korte's* guidance, the lack of mandatory authority on the precise issue at hand, and the divergence of case holdings demonstrating the difficulty of the issue and the uncertainty of the ultimate decision on the merits, the Court believes that plaintiffs have shown at least some reasonable likelihood of success on the merits relative to the substantial burden analysis. And even if that likelihood was just more than slight, the balance of harms could support injunctive relief.[10]

Before concluding the substantial burden analysis, the undersigned would be remiss if it didn't acknowledge the government's alternative argument, that any burden on plaintiffs' religious exercise is too attenuated to render it substantial. In summary, the government believes that because plaintiffs are not required to actually contract or pay for contraceptive coverage any burden is too attenuated to be substantial because plaintiffs are separated by a series of events that must occur before the objectionable contraceptive services would be utilized. Specifically, after receiving the certification from plaintiffs, the TPA or issuer would actually pay for or arrange payment for the contraceptive services should employees and students independently decide to even use those services.

Similarly, in *Korte*, the government argued that the contraception mandate's burden was

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[10]*See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) ("Once the district court determined that [plaintiff's] likelihood of success on the merits of its claim was slight, it required [plaintiff] to make a proportionately stronger showing that the balance of harms was in its favor.") (citing *Accord Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

insubstantial because any use of contraceptive services could not be attributed to the corporate plaintiffs or their owners since the provision of the contraceptive coverage was several steps removed from an employee's independent determination to use contraception. *See Korte*, 735 F.3d at 684. However, the Seventh Circuit's majority opinion reasoned that the government's attenuation argument is equivalent to improperly asking whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' religion]." *Id*. at 685.[11] But, "[n]o civil authority can decide that question". *Id.*; *see Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14 ("The Government feels that the accommodation sufficiently insulates the plaintiffs from the objectionable services, . . . [but] it is not the Court's role to say that plaintiffs are wrong about their religious beliefs."); *see also Hobby Lobby*, 723 F.3d at 1142 (the 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).

Here, no one questions that among the plaintiffs' religious tenets is that life begins at conception and that providing all FDA approved contraceptive service violates those tenets. And so it follows that plaintiffs object to deliberately providing health insurance that will trigger access to objectionable contraceptive services and related education and counseling. By completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees and students will eventually secure access to free contraceptive services. In their minds, this makes them complicit in the

[11]Judge Rovner understood the majority to be rejecting any assessment on how direct or attenuated the burden imposed on the plaintiff's religious practices may be. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting).

provision and use of such services. Again, the government does not contest the sincerity of these beliefs. Because Grace and Biola hold these honest religious convictions and because failing to comply with the law will result in heavy financial penalties and the risk of enforcement actions (which will significantly impact their ability to provide religious services), *id*. at 683, plaintiffs have shown that the contraception mandate and accommodation constitute a substantial burden on their religious exercise. As a result, the government must justify its regulations under the compelling interest test.

2. Least Restrictive Means and Compelling Government Interest

RFRA requires the government to demonstrate that applying the contraception mandate and its accommodation are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Again, the Court follows the precedent set forth in *Korte*, in applying the appropriate test in this context. In fact, the government has since conceded that the recent decision in *Korte* forecloses its arguments that the regulations satisfy strict scrutiny, even in this context [DE 81 at 2, fn. 1]. Regardless, the Court will conduct an analysis for completeness of the record.

Consistent with *Korte*, the Supreme Court has instructed 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." *Korte*, 735 F.3d at 685 (citing *O Centro Espirita*, 546 U.S. at 431). In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening these claimants. *Id*.

The compelling-interest test generally requires a "high degree of necessity." *Id*. (citing

Brown v. Entm't Merchs. Ass'n, — U.S. — , 131 S.Ct. 2729, 2741 (2011)). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Id*. (citing *Brown*, 131 S.Ct. at 2738). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. (citing *Yoder*, 406 U.S. at 215). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .". *Id.* (citing *Sherbert*, 374 U.S. at 406). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Korte*, 735 F.3d at 686 (citing *Sherbert*, 374 U.S. at 403). Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (7th Cir. 1993)).

Similar to the interests claimed by the government in *Korte*, the government identified two legitimate public interests in the instant case, improving the health of women and newborn children and equalizing the provision of preventive care for women and men so that women can participate in the workforce and society on an "equal playing field with men." The government (prior to the issuance of *Korte*) had argued that the contraception mandate and the accommodation furthers these interests in a narrowly tailored fashion by not requiring nonprofit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The Court agrees that the government's stated interests are indeed important, and for the sake of argument (and a thorough analysis) will assume they are even compelling. However, the

government has not shown that the contraception mandate employs the least restrictive means of furthering the government's interests, because strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest. *Korte*, 735 F.3d at 686.

As discussed, the regulatory scheme exempts or excludes certain employers from the contraception mandate and does not apply the ACA's requirements to employers with grandfathered plans or those with less than 50 employees. Since the government grants so many exceptions already, it cannot legitimately argue that its regulations are narrowly tailored, nor can they argue against exempting these plaintiffs, amounting to less than 2,000 covered people (or 1,500 eligible employees and a combined student population of less than 10,000). *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222 ("underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation"). Also, there is nothing to suggest the ACA would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement. *See Gilardi*, 733 F.3d at 1223-24.

Further, the government's reason for creating the religious employer exemption in particular was that houses of worship and their integrated auxiliaries are more likely than other employers to employ people of the same faith who share the same objection to contraceptive coverage, and who would be less likely than others to use contraceptive services even if such services were covered. *See* 78 Fed. Reg. 39,874. However, *these* plaintiffs have indicated that their employees and students are expected to uphold the universities' standards in treating human life as worthy of respect and protection at all stages from the time of conception and are

expected to avoid a Sixth Commandment violation by procuring, participating in, facilitating, or paying for objectionable contraceptive services. Thus, *these* plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as "religious employers." And yet, *these* plaintiffs have not received the same exemption as "religious employers" from having to facilitate or initiate the provision of objectionable contraceptive services, merely because they are not organized and operated as a nonprofit entity referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986—a basis which has nothing to do with the government's stated interests for imposing the requirements of the contraception mandate. *See Zubik*, 2013 WL 6118696 at *29 (noting that the religious employer exemption was not predicated on the government's stated interests). And so again, even assuming the government's interests are compelling, there is no basis indicating the government would be unable to enforce its legislation simply because these plaintiffs could avoid compliance with the contraception mandate.

Finally, there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights. Pre-*Korte*, the government maintained that the accommodation provides the least restrictive means because the self certification requires the plaintiffs to act just as they would without the mandate—by informing their TPAs or insurers that coverage should not include certain contraceptive services. But the argument falls short. First, there is no evidence that plaintiffs so informed their TPA/insurers to exclude such services prior to the ACA. Second, the government has made exemptions from the coverage requirements for other employers without requiring the same form of self certification (and resulting consequences), despite the fact that plaintiffs share

the same legitimate claim to the free exercise of religion as those exempted as religious employers. Third, the self certification process created in the accommodation essentially transforms a voluntary act that plaintiffs may have utilized to ensure that the objectionable services are not provided, consistent with their religious beliefs, into a compelled act that they sincerely believe provides and promotes conduct that is forbidden by their religious beliefs. *See Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14. And so the nature of the act itself has changed, not merely the consequences of that act.

And as identified in *Korte* and as offered by plaintiffs in the instant action, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. For instance, the government can provide a "public option" for contraception insurance; it can give tax incentives or grants to contraception suppliers to provide these medications and services at no cost to consumers; and it can give tax incentives to consumers of contraception and sterilization services—all without requiring plaintiffs to self certify their religious objections to the contraception mandate and thereby directly facilitate access to objectionable contraceptive services to be arranged or paid for by third parties. Simply because these options may make it more difficult for the government to administer the regulations in a manner that would achieve the government's stated interests, greater efficacy does not equate to the least restrictive means. *See Zubik*, 2013 WL 6118696 at *23. And as the government has conceded in the instant case, *Korte* has recently made clear that its regulations fail the strict scrutiny analysis.

Bearing in mind that at this stage the court need not be certain about the outcome of the case to grant a preliminary injunction, the Court concludes the plaintiffs have shown some

reasonable likelihood of success on the merits relative to their RFRA claim. *See S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) ("The case is before us on an appeal from the grant of a preliminary injunction, and as is too familiar to require citation such a grant is proper even if the district judge is uncertain about the defendant's liability.").

Adequate Remedy at Law and Irreparable Harm

Although 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*, 735 F.3d at 666 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Village of Washington Park, Ill*., 378 F.3d 613, 620 (7th Cir. 2004))). "This is because the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury . . .'. " *Korte*, 735 F.3d at 666 (citing *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). Furthermore, injunctions are especially appropriate in the context of first amendment violations because the "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (citing *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)).

In the instant case, Grace must decide by December 31, 2013 whether or not to provide insurance coverage and sign the self certification with respect to its employee health plan, and less than three months later Biola must also make the same decisions. Should plaintiffs fail to comply with the insurance coverage requirements of the ACA and its contraception mandate, the plaintiffs face financially devastating fines and enforcement actions. Thus, plaintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the

merits of the plaintiffs' claims without the relief of a preliminary injunction. Given that plaintiffs' religious exercise rights are at stake in the immediate future, that a loss of these freedoms for even a minimal period of time unquestionably constitutes irreparable injury which cannot be prevented or fully rectified by waiting for a final judgment, *see Elrod*, 427 U.S. at 373; *Anderson v. U.S.F. Logistics (IMS), Inc.*, 274 F.3d 470, 478 (7th Cir. 2011), and that injunctions are designed to offer relief when legal remedies are inadequate to protect the parties' rights, *see Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 397 (7th Cir. 1984) (Swygert, J., dissenting), the Court concludes that these factors weigh strongly in favor of granting the requested relief.

Weighing the Equities and Public Interest

In weighing the equities, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). To do so, the court compares the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted. *Id*. (citing *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). We evaluate these harms using a sliding scale approach. *Id*. (citing *Ty, Inc.*, 237 F.3d at 895). The more likely it is that plaintiffs will win their case on the merits, the less the balance of harms need weigh in their favor. *Id*. (citations omitted). Conversely, if it is very unlikely that plaintiffs will win on the merits, the balance of harms need weigh much more in plaintiffs' favor. *Id*. (citations omitted). When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the

preliminary injunction on nonparties to the litigation. *Id*. (other citations omitted). This analysis is "'subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100 (citations omitted).

As the Court has previously detailed herein, the harm likely to be caused the plaintiffs without an injunction is imminent and irreparable, whereas the government likely faces no risk of harm, let alone irreparable harm, if the preliminary injunction is granted. The Court agrees with the district court's comments in *Zubik*, in that the combined nationwide total of the millions of Americans whose employers fall within some type of exclusion, exemption, or plan grandfathered from the ACA and contraception mandate's requirements demonstrates that the government will not be harmed in any significant way by the exclusion of these few plaintiffs. *Zubik*, 2013 WL 6118696 at *34; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, *10 (W.D. Pa. June 18, 2013) ("tens of millions of individuals . . . remain unaffected by the mandate's requirements"). Moreover, the government has itself delayed the enforcement of the contraception mandate by initially granting a safe harbor from its enforcement and agreeing to injunctions in other cases involving challenges to the mandate.

Additionally, granting the preliminary injunction furthers the public interest. While it is true that employees and students of the plaintiffs will face an economic burden not shared by employees and students of organizations that cover all of the contraceptive methods imposed by the mandate, plaintiffs have already established that their employees and students were not only informed of the universities' religious stance regarding contraception and abortion, but they were on notice of the universities' expectation that its employees and students would promote the

universities' religious views and community standards by refraining from the procurement, participation in, facilitation of, or payment for objectionable contraceptive services. [12] With that said, the plaintiffs' employees/students and the public is best served if the plaintiffs can continue to provide needed (and expected) educational services, and the needed (and expected) insurance coverage to its employees and students, without the threat of substantial fines for noncompliance with the contraception mandate and its accommodation. Moreover, injunctions protecting First Amendment freedoms are always in the public interest, *see Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and the Court sees no reason to make an exception here.

The Court would also note that Grace and Biola quickly filed an amended complaint and sought an injunction after the 2013 final rules were passed. Thus, there has been no delay in their pursuit of a preliminary inunction. *See Ty, Inc.*, 237 F.3d at 903 (a delay in pursuing a preliminary injunction may raise questions regarding irreparable harm.) Additionally, Grace and Biola have established that their employees and students were made aware of the universities' expectation that they were to promote the universities' religious views and community standards by refraining from the procurement of, participation in, facilitation of, or payment for objectionable contraceptive services. Thus, it cannot be said that there was any expectation that the universities would ever facilitate access to all FDA approved contraceptive services for its employees and students. Undoubtedly, the balance of harms in this case weighs heavily in plaintiffs' favor, enough so that any weakness in the merits of their case is overcome, thereby making injunctive relief appropriate to maintain the status quo until a decision on the

[12]The government contends that not every employee and student of the plaintiffs share the plaintiffs' religious objections to certain contraceptive services. And while this *may* very well be true, it does not negate the fact that said employees and students were aware of the universities' expectations with respect to their use of contraceptive services.

merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 783 (7th Cir. 2011) ("The preliminary injunction, after all, is often seen as a way to maintain the status quo until merits issues can be resolved at trial. By moving too quickly to the underlying merits, the district court required too much of the plaintiffs . . .").

IV. Conclusion

Accordingly, it is hereby ORDERED that plaintiffs Grace Schools and Biola University, Inc.'s motion for a preliminary injunction [DE 55] based upon the uncontested and verified allegations of their first amended complaint [DE 54] is GRANTED, and as a result, defendants, their agents, servants, officers, employees, representatives, and all persons in active concert or participation with them are hereby ENJOINED from:

> Applying or enforcing against Plaintiffs Grace Schools and Biola University, Inc. or their employee or student health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling.

It is further ORDERED that plaintiffs shall not be required to post bond; however, should circumstances change prior to the Court's making a determination on the merits of the case, including new developments in the law, which may make the preliminary injunction or its terms no longer appropriate, then counsel are free to file a motion seeking a modification or vacatur of

the injunction.

SO ORDERED.

ENTERED: December 27, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court