IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-02611

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated,

CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation, and

CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

THOMAS E. PEREZ, Secretary of the United States Department of Labor,

UNITED STATES DEPARTMENT OF LABOR,

JACOB J. LEW, Secretary of the United States Department of the Treasury, and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs respectfully file this Reply in Support of their Motion for Injunction Pending Appeal and would show the Court as follows:

I. This Court has Jurisdiction to Enter an Injunction Pending Appeal

Federal Rule 62(c) specifically grants this Court authority to enter the requested injunction pending interlocutory appeal to the Tenth Circuit. While courts have used different formulas to articulate the legal standard under Rule 62(c),[1] courts in this district have held that the competing articulations "have much more in common than in conflict" and have expressly declined to resolve any purported conflict "between the subtly different formulas." *See U.S. v. Power Engineering Co.*, 10 F. Supp. 2d 1165, 1171 (D. Colo. 1998). Instead, the standard is that "any injunctive action taken pursuant to Rule 62(c) must be designed to aid the appeal and, accordingly, may not materially alter the status of the case on appeal." *Id*. (quotation omitted).

Plaintiffs ask the Court to do just that – maintain the status of the case prior to appeal. When Plaintiffs filed their notice of appeal on December 27, 2013, the Mandate had not gone into effect, Plaintiffs were not required to submit a self-certification form yet, and the Government had no ability to enforce the contraceptive coverage requirements by levying crushing fines against Plaintiffs.[2] Plaintiffs here simply request that the Court continue to preserve the status of the case at the time of filing of the appeal by delaying the requirement that Plaintiffs execute the self-certification forms and the running of fines and penalties pending appeal.

Such an order would also aid the appeal now pending before the Tenth Circuit. Concerns about appellate jurisdiction are implicated when a party seeks to dissolve or stay an injunction

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[1] Compare *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989), with *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 887 F.2d 460, 464 (3d Cir. 1989).

[2] The status of the parties at the time of appeal has not changed because of the temporary Order of Justice Sotomayor, dated December 31, 2013, which temporarily enjoined the Government from enforcing the contraceptive coverage requirement against Plaintiffs pending further review by Justice Sotomayor and/or the U.S. Supreme Court. However, Plaintiffs continue to seek injunctive relief from this court under Rule 62(c), which provides for injunctive relief under a separate standard of review.

during the pendency of an interlocutory appeal. In such cases, the dissolution of an injunction threatens to divest the appellate court of jurisdiction because the event sought to be enjoined could transpire before the appeal is heard, thus rendering the appeal moot. *See* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2904; *see also Coastal Corp.*, 869 F.2d at 820. That is not the situation in this case. Instead, Plaintiffs seek to enjoin application of a rule that would cause irreparable harm (the violation of religious liberties) while the appeal is heard. An injunction pending appeal is necessary to preserve the appeal when irreparable harm is threatened even if the injunction were to alter the status quo. *See Power Engineering*, 10 F. Supp. 2d at 1171 ("Under such circumstances, it may be necessary to alter the status quo to prevent the injury and preserve the appeal."). In this case, the requested injunction pending appeal would *both* preserve the appeal *and* the status quo. The injunction should therefore be granted.

The Government cites only one case from this Circuit where a motion for preliminary injunction was *denied*, and then appealed. *See Town of Superior v. United States Fish & Wildlife Serv.*, 2012 WL 6737183 (D. Colo. Dec. 28, 2012). But in *Town of Superior*, injunctive relief was denied as *moot* after the court ruled against the plaintiffs on the merits. The court reasoned that granting a preliminary injunction *after* a contrary merits determination would impermissibly alter the status quo. *Id*. at *2. Additionally, the plaintiffs in that case conceded that – having lost on the merits – they were not likely to establish a likelihood of success, which foreclosed injunctive relief. *Id*. at *1-2.

In contrast, there has been no contrary merits determination in this case, the matter is up on interlocutory appeal, the status of the case has been temporarily preserved by a Justice of the Supreme Court, and an overwhelming percentage of courts have reached contrary conclusions. All of these factors supports entry of the requested injunction to give the appellate court adequate

time to review this matter without Plaintiffs having to suffer irreparable injury by signing the self-certification form and taking steps that Plaintiffs believe violate their religious beliefs. These circumstances warrant the issuance of an injunction pending appeal to preserve the case status, aid the appeal, and prevent the irreparable harm threatened by the violation of religious liberties.

II. An Injunction Pending Appeal Is Justified Given The Significant Split In Judicial Authority Weighted Heavily In Favor Of Entry Of Injunctions For Church Plans and Religious Non-Profits Pending Appeal and Final Adjudication.

Since the Court entered its ruling on December 27, 2013 in this matter, a significant split in judicial authority has occurred weighing heavily in favor of entry of injunctions for church plans and religious non-profits pending appeal and final adjudication. In light of the conflicting court holdings that contradict the ruling in this case, Plaintiffs respectfully request that the Court enter an injunction pending appeal to allow the appellate court to weigh in on these issues before Plaintiffs are coerced to violate their consciences.

In the case at hand, Plaintiffs are substantially burdened by the Mandate's requirement that the Little Sisters and other non-exempt employers participating in the Trust must choose between: (a) violating their religious beliefs and faith by executing the Mandate's self-certification form, or (b) exposing their ministries to catastrophic and ministry ending IRS fines. In its briefing, the Government directed the Court's attention away from Plaintiffs' religious beliefs concerning the act of having to sign the Mandate's self-certification form. However, the sincere religious beliefs of the Little Sisters and Plaintiffs preclude Plaintiffs from executing that self-certification form, making it part of the Trust plan, and treating it as part of the Trust plan. To Plaintiffs, the Government's self-certification form is more than merely an "opt-out" and it has severe religious implications. Plaintiffs' religious beliefs prevent them from participating in

the contraceptive Mandate and from being seen by God and others as being complicit in that scheme and in sin.

Since this Court originally rendered its decision, the vast majority of courts that have ruled on this issue have ruled in favor of injunctive relief pending appeal and final adjudication, and the great weight of judicial authority is now against the Government and supports the entry of an injunction in favor of Plaintiffs. In cases involving religious non-profits, injunctive relief has ultimately been granted in eighteen out of the other nineteen cases—nearly 95% of decided cases.[3] Only the University of Notre Dame has been denied relief. *Univ. of Notre Dame v. Sebelius,* No. 13-3853 (7th Cir. Dec. 30, 2013) (emergency motion for injunction denied and expedited briefing schedule set). In the two other 10th Circuit cases addressing non-profit religious entities, the courts granted preliminary injunctions. *See S. Nazarene Univ. v. Sebelius,*

[3] *See Priests for Life, et al. v. Health and Human Services*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Roman Catholic Archbishop of Washington, et al. v. Sebelius,* No. 13-5371 (D.C. Cir. Dec. 31, 2013) (same); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same); *Michigan Catholic Conference, et al. v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *see also Ave Maria Found. v. Sebelius*, No. 13-cv-15198 (E.D. Mi. Jan. 13 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-00709-RC (E.D. Tex. Jan. 2, 2014) (granting permanent injunction in church plan case); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc. v. United States Dep't of Health & Human Srvs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *E. Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Schools* v. *Sebelius,* No. 3:12-cv-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva College v. Sebelius,* No. 2:12-cv-00207 (W.D. Pa. Dec. 23 2013); *Southern Nazarene University v. Sebelius,* No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Legatus* v. *Sebelius,* No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Reaching Souls Int'l, Inc. v. Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico v. Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *but see Univ. of Notre Dame v. Sebelius,* No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction denied and expedited briefing schedule set, Doc. 11, No. 13-3853 (7th Cir. Dec. 30, 2013).

No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013).

In the six cases involving self-insured church plans similar to Plaintiffs' plan, courts have granted injunctions in **all six** of them. *See Roman Catholic Archbishop of Washington, et al. v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (entering injunction pending appeal in church plan case); *Michigan Catholic Conference, et al. v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709 (E.D. Tex. Jan. 2, 2014) (granting permanent injunction in church plan case including two employers that are members of the Christian Brothers Employee Benefit Trust and the class in this matter); *see also Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (granting preliminary injunction in church plan case); *Reaching Souls Int'l, Inc.,* 2013 WL 6804259; *E. Texas Baptist Univ. v. Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (granting permanent injunction in case with a church plan plaintiff).

As these other courts have recognized, the Mandate establishes a regulatory scheme in which the self-certification form acts as a "permission slip" that authorizes and commands another organization to provide objectionable drugs and coverage to employees within the terms of Plaintiffs' health plan which is objectionable to these religious entities' beliefs. *See, e.g., S. Nazarene Univ.*, 2013 WL 6804265, at *8; *see also supra* n.1. The *Diocese of Beaumont*, a church plan case, put it this way:

> According to the Government [the Bishop] need only sign EBSA Form 700, which contains a true statement of his, and the Church's, objection to contraceptive services. But, the regulations provide that "the self-certification will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits . . . ." 78 FR 39879 (emphasis added). The rule drafters have chosen to be their own lexicographers, and the Government

> is bound by that choice. Like Humpty Dumpty, politicians may ascribe varied nuances of meaning and intent to their statements. Judicial interpretation of federal regulations requires a more consistent, plain meaning approach."

Catholic Diocese of Beaumont v. Sebelius, No. 1:13-cv-00709, at 13-14 (E.D. Tex. Jan. 2, 2014) (emphasis in original) (citing *U.S. v. Woods*, ___ U.S. ___, 134 S. Ct. 557, 566-67 (2013)). And as Judge Rosenthal explained in the *East Texas Baptist University* case:

> The act of self-certification does more than simply state the organization's religious objection to covering or paying for its employees to get emergency contraception. The self-certification act designates the organization's TPA as the TPA for contraception coverage. The act tells the TPA or issuer that it must provide the organization's employees coverage that gives those employees free access to emergency contractive devices and products. That act tells the TPA or issuer that it must notify the employees of that benefit . . . . But the self-certification form requires the organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent. The form designates the organization's chosen TPA as the administrator for such benefits and requires the organization's chosen issuer or TPA to pay for the religiously offensive contraceptive services. The purpose and effect of the form is to accomplish what the organization finds religiously forbidden and protests.

2013 WL 6838893 at *20.

The Government asks this Court to disregard the self-certification form's command that third party administrators obey regulations promulgated also under the Internal Revenue Code.[4] However, Treasury Regulations apply to employers in church plans as much as they apply to employers in any other plans, and the Treasury Regulations cited in the self-certification form state that third party administrators for a self-insured plan that receive a Form "shall provide or

[4] Dkt. 37-3, Self-Certification Form ("the provision of this certification to a third party administrator for the plan * * * constitutes notice to the third party administrator that * * * [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A [Treasury Regulations], 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.").

arrange payments for contraceptive services."[5] The plain language of the Treasury Regulations applies equally to all third party administrators for self-insured plans, regardless of whether the plans are church plans. The Government has no answer, and simply ignores its own regulations. The effect of the self-certification form does not end there. The Government admits that, once the administrators have the self-certification forms, they are *authorized* to provide the objectionable contraceptive services—and that the government will reimburse them and pay them a 10% additional fee if they do.[6] The Government freely admits that upon receiving the self-certification form, a TPA "could theoretically choose to provide contraceptive coverage in the manner set out in the regulations . . . ." *See* Brief of Respondents at 20, *Little Sisters of the Poor, et al. v. Sebelius*, No. 13A691 (S. Ct. Jan. 3, 2013). In fact, the Mandate is structured to provide a financial incentive for TPAs to do so by offering reimbursement plus at least ten percent *if the TPA gets the form*. 45 C.F.R. § 156.60.

Plaintiffs do not currently contractually offer this contraceptive coverage. But for Plaintiffs signing and submitting these self-certification forms, there would be no contractual or statutory basis for providing contraceptives and abortion-inducing drugs under Plaintiffs' plan. The Little Sisters and other Christian Brothers participants receive pharmacy benefits administered by Express Scripts, Inc. ("ESI"), a secular organization that has no religious

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[5] "If a third party administrator receives a copy of the self-certification * * * and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services[.]" 26 C.F.R. § 54.9815–2713A(b)(2).

[6] In a December 16, 2013 hearing in another church plan case, the Government admitted that the form can be used by the third party administrators of church plans to seek reimbursement plus 10% from the federal government, and that without the form, federal reimbursement is not available. Dkt. 51-1 at 10 (Dec. 16, 2013 Hrn'g Tr., *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092 (W.D. Okla.) (Counsel for the government: "I will concede that the TPA . . . if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible."), *id.* at 5 (district court noting that the TPA "not only gets to be reimbursed but [it] get[s] a 10-percent bump for their margin as well").

objection to providing the drugs. Dkt. 42-2 ¶ 2. Christian Brothers Services may be faithful enough to defy the Government's direct regulatory command and strong enough to resist the lure of federal reimbursement (though the Little Sisters should not be forced to subrogate their conscience to Christian Brothers Services' fortitude), but ESI may not be. And once Plaintiffs tender the self-certification form, Plaintiffs have no recourse as to those organizations, because the Government forbids them from directly or indirectly seeking to influence a third party administrator's decision to "provide or arrange" payments for contraceptive services. Dkt. 51-1 at 12-13 (Government's counsel noting that, after executing and delivering the form, nonprofit religious entities cannot take action "that would cause the TPA to -- to forgo providing this coverage when they otherwise would have" and cannot say or do "something like, Don't do this or we're going to fire you, from threatening them.").

Hence, by requiring Plaintiffs to sign and deliver these certification forms, Plaintiffs are forced to irrevocably initiate and facilitate the very thing which they religiously oppose, thereby becoming morally complicit in sin. Dkt. 15-1 ¶¶ 56, 58 (Mother Loraine Decl.); Dkt. 15-2 ¶¶ 44, 53 (Brother Quirk Decl.); Dkt. 37-1 ¶¶ 8-9 (Mother Loraine Suppl. Decl.); Dkt. 37-2 ¶¶ 5, 8-9 (Brother Quirk Suppl. Decl.).

Crucially, the Government admits it has no real reason to make Plaintiffs violate their faith by signing the form. The form exists to "require certain group health plans . . . to provide coverage, without cost sharing . . . , for . . . all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling[.]" Dkt. 29 at *1, Defs' Opp. to PI. But the Government concedes that—for now—it "lack[s] authority" to use the form to accomplish that purpose, *id.* at 2, and it has not offered any reason for needing Plaintiffs to execute the form *now*. Thus, the Government has no interest in demanding that Plaintiffs sign the form during the pendency of appeal.

In light of the conflicting court holdings that contradict the ruling in this case, Plaintiffs respectfully request that the Court enter the requested injunction against enforcement of the contraceptive Mandate to allow the appellate court to weigh in on these issues before Plaintiffs are coerced to violate their consciences. By contrast to the Government, which admits that its form is—to it—meaningless, Plaintiffs' chance to exercise their religion will be lost forever if an injunction is not maintained. Once compromised, it is irrevocable. It will be cold comfort to the Little Sisters and Plaintiffs to learn that they may be able to resume exercising their religion in the future, but not today or while the appeal is pending. Plaintiffs are willing to post a bond in an amount the Court deems appropriate.

Respectfully submitted this 14th day of January , 2014.

/s/ Carl C. Scherz

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the Court's ECF filing system on counsel for Defendants on January 14, 2014.

/s/ Carl C. Scherz
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