ORAL ARGUMENT REQUESTED

No. 13-1540

In the United States Court of Appeals for the Tenth Circuit

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, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS 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,

Appellees.

On Appeal from the United States District Court for the District of Colorado
Judge William J. Martinez
Civil Action No. 1:13-cv-02611-WJM-BNB

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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Appellants' motion and application for an injunction pending appeal may be found here:

Little Sisters of the Poor v. Sebelius, No. 13-1540 (10th Cir.);

Little Sisters of the Poor v. Sebelius, No. 13A691 (U.S.).

The following appeal is a class action brought by a church plan and church plan employers raising similar claims against the same defendants:

Reaching Souls Int'l v. Sebelius, No. 14-6028 (10th Cir.).

The following appeals involve church plan employers raising similar claims against the same defendants:

Southern Nazarene Univ. v. Sebelius, No. 14-6026 (10th Cir.);

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Michigan Catholic Conference v. Sebelius, No. 13-2723 (6th Cir.).

The following appeals involve religious non-profits raising similar claims against the same defendants:

Priests for Life v. Health and Human Services, No. 13-5368 (D.C. Cir.), *consolidated with* Nos. 13-5371, 14-5021;

Catholic Diocese of Nashville v. Sebelius, No. 13-6640 (6th Cir.);

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Univ. of Notre Dame v. Sebelius, No. 13-3853 (7th Cir.).

A list of appeals involving for-profit corporations raising similar claims against the same defendants is available at HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/.

JURISDICTIONAL STATEMENT

Appellants filed their complaint on September 24, 2013, challenging a federal regulatory mandate under the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and the Administrative Procedure Act. JA11a. On October 24, 2013, they filed a motion for preliminary injunction. JA127a. The district court had jurisdiction over Appellants' lawsuit under 28 U.S.C. §§ 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb, *et seq*.

The district court denied Appellants' motion for a preliminary injunction on December 27, 2013, and Appellants timely filed their notice of appeal to the Tenth Circuit later that day. JA683a, 717a. This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

Appellants are Catholic non-profit employers and the Catholic benefits providers through which they provide employee health benefits that are consistent with their shared Catholic faith. A federal regulation ("the Mandate") requires employer-provided health coverage to include free access to all FDA-approved contraceptives and sterilization treatments. Appellants can only comply with that requirement by either (1) providing the required coverage in their health plans, or (2) signing and incorporating into their health plans a form authorizing, directing, and creating legal obligations and incentives for third party administrators of their health care plan to provide the coverage. As a matter of religious exercise, Appellants cannot take either action and are therefore subject to severe penalties. The district court denied a preliminary injunction sought under the Religious Freedom Restoration Act ("RFRA") and the First Amendment.

The issues presented are:

(1) *RFRA.* Did the district court correctly conclude that the Mandate does not "substantially burden" Appellants' religious exercise of refusing to provide the coverage or sign the form?

(2) *First Amendment—Religion Clauses.* Does the Mandate impermissibly discriminate among religious organizations by making eligibility for the "religious employer" exemption dependant on the structure of the religious organization and the government's assumptions about the organization's religious beliefs?

(3) *First Amendment—Speech Clause*. Do the Mandate's requirements that Appellants (a) must sign and deliver the form, and (b) "must not, directly or indirectly, seek to influence the third party administrator's decision" to provide the coverage at issue, violate the First Amendment?

(4) *Preliminary Injunction.* Did the district court correctly deny Appellants' motion for preliminary injunction?

STATEMENT OF THE CASE

INTRODUCTION

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. They provide care for the elderly of every race and religion, love and respect them as if each elderly person were Jesus Christ himself, and treat them with dignity and compassion until they die. The Little Sisters perform this ministry in homes throughout the world, including almost thirty in the United States. Although they have operated their homes in this country for over a century in the highly regulated sector of elder care, federal law has never before put them to the impossible choice of either violating their faith or violating the law.

Yet because the district court denied preliminary injunctive relief, the Little Sisters were within hours of having to make that choice on New Year's Eve 2013. Only the Supreme Court's extraordinary grant of injunctive relief pending appeal has thus far spared the Little Sisters from having to decide whether to violate their religion or to incur massive federal fines that could cripple their ministry.

The government seeks to compel the Little Sisters to comply with a federal mandate requiring their employee health plans to include free coverage for contraceptives, sterilizations, and abortion-inducing drugs. But it is undisputed that the Little Sisters cannot comply with the Mandate without violating their religion, and that the government will impose massive penalties if they do not comply. That

is a textbook substantial burden under RFRA. *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."). Because the government concedes strict scrutiny, this straightforward burden analysis should dispose of the case.

Undeterred, the government claims that it should *still* be able to force the Little Sisters to violate their religion by making them execute and deliver a government form—EBSA Form 700—that designates, authorizes, incentivizes, and obligates the provision of contraceptive coverage. The government's argument for requiring this specific act hinges on the fact that the Little Sisters have associated with religious benefits providers to provide employee benefits consistent with their shared Catholic faith. Congress has excluded this type of arrangement (known as a "church plan") from the Employee Retirement Income Security Act of 1974 (ERISA). The government argues that because ERISA enforcement of the Mandate is not available, filling out EBSA Form 700 is a meaningless exercise, to which the Little Sisters should have no objection.

This argument—which the government also made to the Supreme Court—fails for three key reasons. First, even without ERISA enforcement, EBSA Form 700 designates, authorizes, incentivizes, and obligates third parties to provide or arrange contraceptive coverage in connection with the plan. Once the Little Sisters

execute and deliver the Form, the Mandate purports to make it *irrevocably* part of the plan by forbidding the Little Sisters to even talk to the outside companies that administer their health plan, "directly or indirectly," to ask them not to provide the coverage. The government has admitted in a parallel church plan case that signing the form enables such companies to provide contraceptives and seek federal reimbursement.

The contraceptive coverage form obviously matters to the government and to the Little Sisters. Indeed, if the government actually believed EBSA Form 700 to be legally meaningless, it would make no sense at all for the government to have contested the issue all the way to the Supreme Court, and to still be contesting the issue here. Nor would it make sense to threaten the Little Sisters with *millions* of dollars in fines to get them to sign a supposedly meaningless form. Actions speak louder than briefs, and the government's actions demonstrate that they view their Form as very important.

Second, regardless of whether the *government* sincerely believes EBSA Form 700 is morally meaningful, the relevant legal question is whether the Little Sisters do. And on that point, there is no dispute: the Little Sisters cannot execute and deliver the contraceptive coverage form without violating their religious conscience. The government may think the Little Sisters *should* reason differently about law and morality, but their actual religious beliefs—the beliefs that matter in

this case—have led them to conclude that they cannot sign or send the government's Form.

Third, the government's scheme violates the First Amendment. Although the government is not allowed to discriminate among religious groups, it has exempted a large class of religious organizations based on unfounded guesswork about the likely religious characteristics of different religious organizations. The government has no power to discriminate in this fashion, allowing some religious organizations to survive while crushing others with fines for the identical religious exercise. This violation of the Free Exercise and Establishment Clauses is compounded by a clear violation of the Free Speech Clause: the Mandate both compels the Little Sisters to engage in government-required speech against their will, and prohibits them from engaging in speech they wish to make. These First Amendment violations—coupled with the government's concession that the Mandate fails strict scrutiny—also require an injunction.

The Little Sisters are joined as appellants by the Catholic health benefits provider with whom they work to provide employee benefits consistent with their shared Catholic faith, Christian Brothers Employee Benefits Trust (the "Trust"), and the Catholic organization that administers the Trust, Christian Brothers Services. The motion for preliminary injunction also sought relief on behalf of a class of the other non-exempt employers who provide benefits through the Trust,

all of which are Catholic non-profit organizations. The government has agreed that any preliminary relief entered for the named plaintiffs can protect the class.[1] Accordingly, Appellants respectfully request that this Court reverse the district court's denial of preliminary injunctive relief and order Defendants not to enforce the Mandate against the Little Sisters of the Poor, the Trust, Christian Brothers Services, and the other organizations that provide benefits through the Trust.

BACKGROUND

I. THE LITTLE SISTERS, CHRISTIAN BROTHERS, AND THEIR SHARED RELIGIOUS EXERCISE.

The Little Sisters of the Poor Home for the Aged, Denver, Colorado, and Little Sisters of the Poor, Baltimore (collectively the "Little Sisters"), are part of an international order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. JA148a. Each Little Sister takes a vow of obedience to God, and a vow of hospitality "through which she promises to care for the aged as if they were Christ himself." JA149a, 151a. The Little Sisters strive to treat each elderly "individual with the dignity they are due as a person loved and created by God," and also to "convey a public witness of respect for life, in the hope that we can build a Culture of Life in our society." JA152a.

[1] Because the government made this agreement, the named plaintiffs agreed to postpone their motion to certify the class until after the preliminary injunction proceedings. Def's Unopposed Mot. for Extension, Dkt. 35 at 2-3; JA296a.

The Little Sisters provide employee health benefits through the Trust. The Trust is a self-insured non-ERISA "church plan,"[2] open only to non-profit organizations operated under the auspices of the Roman Catholic Church, in good standing thereof, and listed or approved for listing in The Official Catholic Directory. JA165a. The Trust is administered by Christian Brothers Services, a Catholic organization designed to serve Catholic organizations by helping them to "remain faithful to [their] mission and the universal mission of the Catholic Church." JA166a.

The Little Sisters, the Trust, and Christian Brothers Services (collectively, "Appellants"), along with hundreds of other Catholic non-profit organizations that also provide employee benefits through the Trust, have deliberately come together to provide benefits in accordance with their shared Catholic religious beliefs. JA151a, 172a-73a. As a matter of religious exercise, these organizations have always excluded coverage of sterilization, contraceptives, and abortifacients from the health benefits plan they offer through participation in the Trust. JA151a, 156a, 172a. Appellants adhere to well-established Catholic teaching that prohibits

[2] A "church plan" is a benefit plan established by a church or a convention or association of churches covering employees of the church or convention of churches (or organizations controlled by or associated with the church or convention or association of churches). *See* 29 U.S.C. § 1002(33); 29 U.S.C. § 414(e). Unless they choose otherwise, church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2).

encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion. JA153a-56a, 166a-68a (citing *Catechism of the Catholic Church* §§ 2270-2271, 2274, 2284, 2286, & 2370; *Compendium of the Social Doctrine of the Church* § 234; *Evangelium Vitae* § 91; and U.S. Conference of Catholic Bishops, *Directives for Catholic Health Care Services* Nos. 3, 45, 52-53, 67-72). Following this teaching, they believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services. JA156a-57a, 169a-70a. Appellants' religious beliefs require them to avoid participating in a system requiring the provision of such things. *Id.* Appellants cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme. JA157a-58a, 166a-70a. This is religiously necessary not only to avoid complicity in wrongdoing, but also to avoid appearing to condone wrongdoing, which would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public. JA154a-155a, 157a-58a, 169a-70a, 344a-45a, 352a-53a. These religious beliefs are deeply held, sincere, and well-documented parts of Appellants' Catholic faith. *See, e.g.*, JA153a-155a, 166a-170a. The sincerity of these religious objections is not in dispute. JA699a, 702a.

II. THE MANDATE

The Affordable Care Act ("ACA") mandates that any "group health plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed the Health Resources and Services Administration ("HRSA"), a division of Appellee Department of Health and Human Services ("HHS"), to define the term. 42 U.S.C. § 300gg-13(a)(4). HRSA's definition includes all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). JA79a-80a, 91a-92a. The FDA's Birth Control Guide notes that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. JA91a-92a.

Failure to provide this coverage triggers a variety of penalties, including crippling daily and annual penalties. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ("$100 for each day in the noncompliance period with respect to each person to whom such failure relates" if coverage is provided that does not comply with the Mandate); 26 U.S.C. § 4980H(c)(1) ($2000 annually for each full-time employee if no coverage is provided beginning in 2015 (2016 for certain employers with 50 to 99 average full-time employees)).

A. "Exempt" Employers

Many employers are exempt from the Mandate and need not provide the objectionable coverage. Nor are they required to sign and deliver forms designating, authorizing, incentivizing, or obligating anyone else to provide the coverage. (As discussed *infra*, the government insists that the Little Sisters sign such a form, EBSA Form 700, or pay large penalties.)

Employers who provide "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate. *See* 42 U.S.C. § 18011 (2010); JA120a; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013) ("Grandfathered plans may remain so indefinitely."). These employers must state that their healthcare plan is grandfathered, 26 C.F.R. 54.9815-1251T(a)(2), but they are not required to sign EBSA Form 700, to make it part of their healthcare plan, or to deliver it to anyone. Grandfathered employers are not required to designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage to claim their exemption.

Employers with fewer than fifty employees, covering an estimated 31 million Americans, also may avoid fines under the Mandate by not offering insurance at all. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); JA126a.

"Religious employers" are also exempt from the Mandate. HHS granted HRSA "discretion" to create an exemption for "certain religious employers." 76 Fed. Reg.

46621 (Aug. 3, 2011); 45 C.F.R. 147.130(a)(1)(iv)(A)-(B). On June 28, 2013, HHS and the Departments of the Treasury and of Labor issued their final rules regarding religious exemptions. 78 Fed. Reg. 39870 (July 2, 2013). The rule exempts only a very narrow subset of "religious employers"—namely, institutional churches, their integrated auxiliaries and the exclusively religious activities of a religious order—that are "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a).[3] These government-designated "religious employers" are not required to sign EBSA Form 700, to make it part of their plan, or to deliver it to anyone. "Religious employers" are automatically exempt; they are not required to certify their religious beliefs to anyone, or to designate, authorize, incentivize, or obligate anyone else to provide the objectionable services.

B. "Non-Exempt" Employers and EBSA Form 700

Despite widespread concerns about the scope of the religious employer exemption, the government announced in February 2012 that it would not expand the exemption, but would instead develop an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501. Unlike the grandfathering and

[3] Whether an entity is an "integrated auxiliary" of a church turns primarily on the degree of the church's control over and funding of the entity. *See* 26 C.F.R. 1.6033-2(h)(2) & (3) (affiliation); *id.* at 1.6033-2(h)(4) (internal support). The definition was for tax considerations, not religious conscience concerns, and thus can arbitrarily turn on whether a religious non-profit receives 49% or 50% of financial support from a formal church in a given year. *Id.*

religious employer exemptions, the government said that its planned accommodation for "non-exempt" employers would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." *Id.* at 16503.

The accommodation in the resulting final rule is available if a non-exempt religious organization (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(b). But objecting entities can only self-certify in one government-designated way: by executing EBSA Form 700 and delivering it to their insurer or third party administrators ("TPAs"). 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A.

The government imposed the requirement to sign and deliver EBSA Form 700 as part of its effort to ensure that beneficiaries of plans of non-exempt employers "will still benefit from separate payments for contraceptive services without cost sharing or other charges." 78 Fed. Reg. at 39874. Non-exempt employers with self-insured plans are required to use the Form to expressly designate their TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id.* at 39879; 26 C.F.R. 54.9815–2713A. Receipt of an executed EBSA Form 700

triggers a TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. 147.131(c)(2)(i)(B); 26 C.F.R. 54.9815–2713A(b)(2). According to the government, forcing the non-exempt employer to designate the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of employers with religious objections receive these drugs "so long as [they remain] enrolled in [the] group health plan." *See* 26 C.F.R. 54.9815–2713A(d); 29 C.F.R. 2590.715–2713A(d); *see also* 45 C.F.R. 147.131(c)(2)(i)(B).

EBSA Form 700—a complete copy of which is reproduced at Addendum 1—includes the following legally operative language:

> The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

See also JA357a. By means of this language, the Form (a) directs the TPA to portions of the Mandate that require that the TPA "shall provide" payments for

contraceptive services, (b) instructs the TPA that these regulations set forth the TPA's "obligations," and (c) purports to make the Form, including the Notice section thereof, "an instrument under which the plan is operated."

These "obligations"—both for the non-exempt employer to execute the Form and the TPA to provide the coverage upon receiving the Form—are replicated in two sections of the Code of Federal Regulations, giving enforcement authority both to the Department of Treasury via the Internal Revenue Code (26 C.F.R. 54.9815–2713A), and also to the Department of Labor via its ERISA enforcement authority (as described in 29 C.F.R. 2590.715–2713A).

Furthermore, to induce TPAs to provide the coverage, the regulations also offer a "carrot": an extra government payment to make the scheme profitable. In particular, a separate, non-ERISA-based regulation provides that, if a TPA obtains EBSA Form 700 from a non-exempt employer, the TPA becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead.[4] 45 C.F.R. 156.50. The government has acknowledged in parallel litigation that this bonus payment is dependent on receipt of the Form. JA672a-73a, 677a.

[4] HHS has issued a proposed rule setting this payment rate at 15% for 2014. *See* 78 Fed. Reg. 72322, 72364 (Dec. 2, 2013).

Finally, the regulations command non-exempt religious organizations that they "must not, directly or indirectly seek to influence the third party administrator's decision" whether to provide the coverage. *See* 26 C.F.R. 54.9815–2713A(b)(iii). The government has acknowledged in parallel litigation that this provision prohibits a religious organization from discouraging a TPA from using the form to distribute contraceptives to collect reimbursement from the government. *See* JA677, 679a-80a.

III. APPELLANTS' RELIGIOUS OBJECTIONS TO THE MANDATE

The Little Sisters do not qualify for any exemption from the Mandate. The Trust is not a grandfathered plan, JA41a, which would be exempt from the preventative services requirement entirely. 42 U.S.C. § 18011; 75 Fed. Reg. 41726, 41731 (July 19, 2010). And although they share the same religious beliefs as exempt Catholic "religious employers," the Little Sisters do not fall within the Mandate's exemption for "religious employers" because they are not formal churches (or integrated auxiliaries) and in the eyes of the IRS, their care for the elderly poor of all faiths is not an "exclusively religious activity." *See* 26 U.S.C. § 6033(a)(3)(A)(iii).

Because they are non-exempt, there are only two ways the Little Sisters could comply with the Mandate. First, they could provide the required coverage through the Trust or another plan. Since this would violate their beliefs as Catholics, the

Little Sisters cannot comply with the Mandate in this manner. JA154a-55a, 169a-170a, 343a-45a, 352a-53a. Alternatively, the Little Sisters could "comply" with the Mandate by signing and sending EBSA Form 700. But this too would violate their religious beliefs. JA153a-55a, 166a-70a, 343a-45a, 352a-53a. The Little Sisters believe that executing and delivering the form would make them morally complicit in sin, would contradict their public witness to the value of life, and would immorally run the risk of misleading others. JA155a-158a, 324a. The Little Sisters object on religious grounds to designating, authorizing, incentivizing, and obligating a third party to perform the very act that they refuse to do themselves. JA160a. Thus, each of the two ways through which the Little Sisters could comply—distributing the drugs and signing the form—would require them to do something they understand to be forbidden by their religion.

The Mandate's burden on Appellants' religious exercise is severe. To assist in their religious mission of caring for the elderly poor of any race, sex, or religion, each of the two Little Sisters homes employs more than 50 lay employees and provides health benefits via the Trust. JA148a, 150a. Little Sisters of Denver, which currently has approximately 67 full time employees, could incur penalties of approximately $6,700 per day and nearly $2.5 million per year—which constitutes over a third of its annual $6 million budget—unless it gives up its religious exercise and complies with the Mandate. JA 159a. Likewise, non-exempt class

members of the Trust face estimated penalties of $402,741,000 per year, while Christian Brothers Services and the Trust face losses of approximately $130,000,000 in medical plan contributions and $10,400,000 in net revenue per year if the class members are effectively forbidden from participating in the Trust because of their religious exercise. JA173a, 175a.

IV. PROCEDURAL HISTORY

In response to Appellants' motion for a preliminary injunction, the government argued for the first time that a portion of the enforcement mechanism for the Mandate was not yet fully functional.[5] The government explained that the Department of Labor's ERISA enforcement authority does not apply to self-insured church plans. For this reason, the government claimed that it could not force the TPA of a church plan to comply with the obligations imposed by the Little Sisters' Form.

[5] This was a new position. Before Appellants filed their lawsuit, the government publicly asserted that it *could* make its scheme work against church plan participants, such as Houston Baptist University. *See* Def's Mot. to Dismiss, Dkt. 79, *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex. Sept. 20, 2013). As another court observed, "[i]t is unclear how citizens like plaintiffs and their [TPAs] are supposed to know what the law requires of them if the Government itself is unsure. After almost 18 months of litigation, the Departments now effectively concede that the regulatory tale told by the Government was a *non-sequitur*." *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764, *6 (E.D.N.Y. Dec. 16, 2013).

The government explained that its claimed inability to enforce compelled use of the Little Sisters' Form was (a) temporary, and (b) something that it is actively trying to work around:

> While *defendants continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans*, they acknowledge that, *at this time*, they lack authority to require the TPAs …to make the separate payments for contraceptive services….

JA283a (emphasis supplied). While the government emphasized limitations on its ERISA authority, JA288a, it claimed no similar gap in the Department of Treasury's authority, despite the fact that the same regulatory language has been issued by Treasury in the tax regulations independent of ERISA. 26 C.F.R. 54.9815–2713A (listing Code section 7805 (26 U.S.C. § 7805) as the statutory basis for its authority, but not ERISA). Nor did it argue that the Form would not still trigger the government's generous program to incentivize TPAs by qualifying the TPA for cost and bonus payments. 45 C.F.R. 156.50.[6] Nor did the government provide any reason why, if its form is meaningless, it continued to insist on forcing the Little Sisters execute the form or pay severe penalties. Instead, it simply argued that the Little Sisters' religious refusal to sign and deliver the form is akin to

[6] In another church plan case in this Circuit, the government acknowledged that reimbursement depends on whether the religious organization submits the form. JA677a (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.").

"fighting an invisible dragon," JA622a, and that the government should therefore be able to force the Little Sisters to sign the form. JA635a.

The government's new position did not change Appellants' conclusion that they cannot comply with the Mandate without violating their religious beliefs. JA343a-45a, 352a-54a. Thus, Appellants remain unable to comply by providing the coverage at issue. And the Little Sisters remain unable to execute and deliver EBSA Form 700 to any TPA, because even if the government's enforcement scheme is (temporarily) nonfunctional, they would still be publicly and integrally participating in a scheme that violates their faith and their public witness. JA155a-58a, 160a, 315a-16a.

Further, by delivering Form 700, the Little Sisters would still designate, authorize, incentivize, and obligate recipient TPAs to use their health care plan to deliver contraceptive and abortifacient drugs to their employees. The Little Sisters believe that this is wrong. They believe it is wrong to contract out their conscience to another, and simply hope that the other is strong enough to withstand the pressure and temptation they created (a hope made all the more tenuous by the gag rule placed on the Little Sisters after delivering the form). JA34a, 155a, 342a-47a. They believe it is wrong to issue a designation, authorization, and obligation which the government may later enforce against the recipients. JA157-58a, 342a-47a. And even if the TPAs stood strong and the drugs, devices, and procedures never

flowed out under their plan, the Little Sisters believe that it is wrong for them to create such obligations in the first place. JA 34a, 157a-158a, 176a, 342a-47a.

This is all true even when the recipient TPA shares their religious beliefs. JA 155a, 157a-58a, 343a-45a. It is doubly true where, as here, a recipient TPA may not. In addition to Christian Brothers Services, the Trust uses Express Scripts, Inc. ("ESI"), a large public company, to provide pharmaceutical claim administrative services under the Trust. JA495a. Appellants have received no assurance that ESI would not use an executed Form to make payments and seek reimbursement and bonus payments from the government. *Id*. In short, Appellants' religious objections remain unchanged, and they cannot participate in the government's scheme without violating their sincere and undisputed religious beliefs. JA342a-47a, 352a-54a.

On December 27th, however, the district court denied Appellants' motion for a preliminary injunction. The court found that the Little Sisters' religious belief that they cannot execute and deliver EBSA Form 700 "reads too much into the language of the Form." JA710a. The district court also dismissed religious beliefs about delivering or accepting the contraceptive coverage form as "pure conjecture, one that ignores the factual and legal realities of this case." JA713a. Ultimately, the district court found Appellants faced no substantial burden because they should

just sign and send the form and trust that it would have no practical effect. JA708a, 713a-14a.

Appellants filed their notice of appeal that same day, and filed their Motion for Injunction Pending Appeal on December 28, 2013. A motions panel denied Appellants' Motion for Injunction Pending Appeal on December 31, 2013. Early that evening, Appellants filed an emergency injunction application with Circuit Justice Sotomayor. That same night, Justice Sotomayor entered an order temporarily enjoining the government from enforcing the Mandate against Appellants. On January 24, 2014, the full Court ruled that:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, [Appellants] need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

JA725a. Appellants provided the required notice to the Secretary and are currently protected by the Supreme Court's injunction pending the outcome of this appeal.

SUMMARY OF THE ARGUMENT

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. As part of their religious mission, the Little Sisters join with the Trust, Christian Brothers Services, and a class of other Catholic non-profit organizations to provide employee benefits that are consistent with their shared Catholic faith. That faith prohibits these organizations from participating in the government's program to distribute, subsidize, and promote the use of contraceptives, sterilization, or abortion-inducing drugs and devices.

This appeal arises from the government's determined and persistent effort to force the Little Sisters and their fellow appellants to give up that shared religious exercise. The government has fought all the way to the Supreme Court, and continues to fight in this Court, to force the Little Sisters to execute and deliver its mandatory contraceptive coverage form, EBSA Form 700. If the Little Sisters refuse, the government promises to impose severe financial penalties.

The government claims it has not burdened the Little Sisters at all, because it cannot use ERISA to force third parties—namely the administrators of the church plan through which the Little Sisters provide benefits— to act on the Little Sisters' EBSA Form 700. As the government sees it, this absence of ERISA enforcement authority against others should fully resolve the Little Sisters' religious concerns.

The district court denied preliminary injunctive relief, essentially agreeing with the government that the Little Sisters should not object to the form in the absence of ERISA enforcement authority. That approach was error, both because it overstates the importance of ERISA—even apart from ERISA enforcement, the Little Sisters' form would designate, authorize, incentivize, and obligate administrators to provide coverage—and because it essentially re-writes the Little Sisters' religious beliefs for them. Standard moral reasoning underpins the Little Sisters' refusal to designate, authorize, incentivize, and obligate a third party to do that which the Little Sisters may not do directly. And regardless of what the trial court and the government think the Little Sisters *should* believe, the undisputed fact is that they *do* believe their religion forbids them from signing EBSA Form 700. It was not for the district court to disagree with the line drawn by the Little Sisters. *See Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. Jan. 23, 2014) ("Even if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, even if some may find it illogical, that doesn't take it outside the law's protection.").

Under this Court's RFRA precedents, this state of affairs easily qualifies as a "substantial burden" on the Little Sisters. *See Yellowbear*, 741 F.3d at 55; *Hobby Lobby*, 723 F.3d at 1137-45; *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). The required analysis is straightforward: "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." *Hobby Lobby*, 723 F.3d at 1137. Here, the mandate's severe financial penalties impose enormous pressure on the Little Sisters to give up their religious exercise and sign and send. *Id.* at 1140 ("[I]t is difficult to characterize the pressure as anything but substantial."). And because the government has conceded strict scrutiny, JA290a-91a, the Appellants are likely to succeed under RFRA. Indeed, in every single other church plan case in the nation, and in 19 of the 20 non-profit challenges to the Mandate and its accommodation system, federal courts have entered the type of relief sought here. *See infra* n.8.

The government has also violated the Appellants' rights under the Religion Clauses and the Free Speech Clause of the First Amendment. As to the former, the government is unconstitutionally discriminating among religious organizations. As to the latter, the government is unconstitutionally compelling the Little Sisters both to say things that they do not want to say and *not* to say things that they *do* want to say. The First Amendment does not permit any of these violations.

LEGAL STANDARDS

This Court reviews the denial of a preliminary injunction for abuse of discretion. *See Hobby Lobby*, 723 F.3d at 1128. "A district court abuses its discretion by denying a preliminary injunction based on an error of law." *Id.*

Legal conclusions are reviewed *de novo*. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Thus, this Court "review[s] the meaning of the RFRA *de novo*, including the definitions as to what constitutes substantial burden and what constitutes religious belief, and the ultimate determination as to whether the RFRA has been violated." *United States v. Myers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (citation omitted). Both RFRA and the First Amendment require this Court to make an "independent examination of the whole record" to avoid impermissible intrusions on religious expression. *United States v. Wilgus*, 638 F.3d 1274, 1284 (10th Cir. 2011); *United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008).

Finally, this Court may determine for itself whether the Appellants deserve a preliminary injunction. *See Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). An injunction is appropriate if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby*, 723 F.3d at 1128.

ARGUMENT

I. THE LITTLE SISTERS AND CHRISTIAN BROTHERS ARE LIKELY TO SUCCEED ON THEIR RFRA CLAIMS.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the

person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[7] 42 U.S.C. § 2000bb-1(b).

When applying RFRA, this Court engages in a four-step process. First, the Court must "identify the religious belief" at issue. *Hobby Lobby*, 723 F.3d at 1140. Second, it must "determine whether this belief is sincere." *Id*. Third, the Court must determine "whether the government places substantial pressure on the religious believer." *Id*. Finally, if there is substantial pressure, the government action must survive strict scrutiny—*i.e.*, the government must prove that forcing the religious believer to violate her own conscience is "'the least restrictive means of advancing a compelling interest.'" *Id*. at 1143 (citation omitted); 42 U.S.C. § 2000bb-1(b).

The government has not challenged the sincerity or religiosity of the Little Sisters' and Christian Brothers' religious belief that they cannot comply with the Mandate by providing coverage or executing EBSA Form 700. JA697a. And it has conceded that its strict scrutiny argument is foreclosed by this Court's precedent. JA290a-91a. Thus, the only remaining question is whether the Mandate "places substantial pressure" on the Little Sisters and Christian Brothers to make them

[7] This claim was raised at JA56a-57a and ruled on at JA714a-16a.

comply with the Mandate by providing coverage or executing the form. *Hobby Lobby*, 723 F.3d at 1140.

The government argues that there is no substantial pressure on the Appellants to sign the Form because Christian Brothers Services has said that it would not voluntarily take advantage of the authorization and incentives provided by the Form, and the government cannot use ERISA to force them to do so "at this time." JA 283a. But despite this claimed inability to make other parts of its system work, the government is plainly exerting "substantial pressure" on the Little Sisters to make them sign and send the Form. Indeed, the government fought the Little Sisters and Christian Brothers all the way to the Supreme Court to force them to execute and deliver the Form, and it continues to fight here. If Appellants refuse to comply with the Mandate in this way, the government seeks to punish them with massive penalties. For the same reasons those penalties constituted substantial pressure in *Hobby Lobby*, they constitute substantial pressure here. 723 F.3d at 1140 ("It is difficult to characterize the pressure as anything but substantial.").

A. It is undisputed that the Little Sisters and Christian Brothers sincerely exercise religion by excluding certain drugs and devices from their health benefits plan and by refusing to sign EBSA Form 700.

The Little Sisters and Christian Brothers exercise religion by joining together to offer health benefits consistent with their shared Catholic faith. It is undisputed that the Little Sisters and Christian Brothers both exercise religion by excluding certain

types of drugs and devices from their health plan. And it is undisputed that, despite the government's claim that parts of the accommodation system do not work "at this time," the Little Sisters and Christian Brothers have a sincere religious objection to complying with the proposed "accommodation" based on EBSA Form 700.

The Little Sisters and Christian Brothers engage in these religious exercises because of their Catholic religious beliefs based on longstanding and well-documented Catholic doctrine concerning both contraception and the value of all human life, even when that life is small and vulnerable. JA154a (affirming that, under Catholic teaching, "life begins at conception," "directly intending to take innocent human life is gravely immoral," and "contraception and sterilization are intrinsic evils."); JA168a (affirming papal teaching that "Catholics may never 'encourage' the use of 'contraception, sterilization, and abortion.'"). As a religious matter, it is not enough for Appellants to simply exclude these services from their health plan—they must also refrain from authorizing, directing, incentivizing, or obligating others to provide these services. JA 160a-61a, 170a. And they may not take any action that would make it appear that they had either provided these services or authorized someone else to provide them. *Id.* For these reasons, the Little Sisters and Christian Brothers provided sworn and undisputed affidavit testimony that they cannot comply with the Mandate either by providing the

coverage at issue, or by participating in the government's "accommodation" system based on EBSA Form 700 (even after the government's claim that part of that system is not yet functional "at this time.") JA342a-47a, 352a-54a.

RFRA plainly protects religious exercises of this nature. As this Court recently explained, "Congress has directed courts to protect '*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Yellowbear*, 741 F.3d at 54 (quoting 42 U.S.C. § 2000cc-5(7)(A)). Religious exercise involves "not only belief and profession but the performance of (*or abstention from*) physical acts." *Id.* (quoting *Employment Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)) (emphasis added). Indeed, this Court recently recognized RFRA protection for the religious exercise of abstaining from participation in the Mandate in *Hobby Lobby*. 723 F.3d at 1140.

In sum, as an exercise of their religion, the Little Sisters and Christian Brothers cannot participate in the Mandate by either providing coverage, or by complying with the "accommodation" using EBSA Form 700.

B. The Mandate substantially burdens Appellants' religious exercise.

The Mandate substantially burdens the Appellants' religious exercise by requiring them to give up their religious exercise or pay massive penalties. To date, twenty decided cases have raised similar claims of substantial burden by non-profit religious organizations. In virtually all of those cases—nineteen out of twenty non-

profit cases, including each of the seven other cases involving church plans—courts have granted preliminary relief so that the religious organization would be able to litigate the case to conclusion without accruing massive penalties for its religious exercise.[8]

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[8] **Church Plan Cases:** Order, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (S. Ct. Jan. 24, 2014) (injunction pending appeal); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (same); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (permanent injunction in case involving two participants in the Christian Brothers' plan); *E. Tex. Baptist Univ. v. Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013) (permanent injunction); *Southern Nazarene Univ. v. Sebelius*, No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (preliminary injunction); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv- 1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (preliminary injunction in class action involving church plan and its participants); *Archdiocese of New York*, 2013 WL 6579764 (preliminary injunction).

Other Non-Profit Cases: *Priests for Life v. Health & Human Services*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (preliminary injunction); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (same); *Sharpe Holdings, Inc. v. United States Dep't of Health & Human Srvs.*, No. 2:12-cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Grace Schools v. Sebelius*, No. 3:12-CV-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23 2013) (same); *Legatus v. Sebelius*, No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Persico v. Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same). *But see Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 22, 2013) (denying injunction).

A law imposes a "substantial burden" on religious exercise when it:

> (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, [or]
>
> (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or
>
> (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.

Yellowbear, 741 F.3d at 55 (citing *Abdulhaseeb*, 600 F.3d at 1315); *see also Hobby Lobby*, 723 F.3d at 1138 (same). The Mandate substantially burdens the Appellants' religious exercise in all three ways.

First, the Mandate requires the Little Sisters to choose between participating in one religiously forbidden activity (covering sterilization and contraceptives in their health plan) or another (executing and delivering EBSA Form 700). *Yellowbear*, 741 F.3d at 55. Either way, the Little Sisters are being "require[d] . . . to participate in an activity prohibited by a sincerely held religious belief." *Id.* The same is true of Christian Brothers which, if it receives the Form as a TPA, faces an express legal requirement that it "shall provide" the coverage its religion prohibits. 26 C.F.R. 54.9815–2713A(b)(2).

Second, the Mandate prevents the Little Sisters and Christian Brothers "from participating in an activity motivated by a sincerely held religious belief," namely providing benefits consistent with their shared Catholic faith, and without

authorizing, directing, obligating, or incentivizing anyone else to provide the drugs and devices at issue in their place. *Yellowbear*, 741 F.3d at 55.

Third, the Mandate "places substantial pressure on [the Little Sisters and Christian Brothers] . . . to engage in conduct contrary to a sincerely held religious belief," by imposing crippling penalties or loss of business unless the Little Sisters and Christian Brothers comply with the Mandate by providing the services or participating in the "accommodation" scheme. *Abdulhaseeb*, 600 F.3d at 1315. The price for exercising their faith will be steep: the Mandate threatens the Little Sisters and Christian Brothers with crippling financial losses. *See, e.g.*, JA159a (daily penalties of $6,700 and annual penalties of nearly $2.5 million for one Little Sisters home out of almost thirty); JA172a (non-exempt religious entities in the Trust could sustain penalties exceeding $400 million over the course of a year)); JA175a-76a (estimated loss of $130 million in plan contributions to Christian Brothers' Trust)). In each of the three ways recognized by this Circuit, the Appellants have shown a substantial burden.

The district court reached a contrary conclusion based on three key errors. First, the court disregarded the substantial burden that these penalties impose on the Appellants' religious exercise. Second, the court misinterpreted federal regulations and ignored important aspects of the Departments' accommodation scheme. Third,

the court substituted its own judgment about the level of moral complicity for the Little Sisters and Christian Brothers. These legal errors require reversal.

1. *The district court erroneously disregarded the substantial burden created by the penalties.*

The district court's first error was failing to recognize that Appellants will be penalized millions of dollars for persisting in their chosen religious exercise, which is a classic substantial burden. The district court acknowledged that these penalties created a "Hobson's choice" for the for-profit businesses and their owners in *Hobby Lobby*, but it reasoned that the Little Sisters and Christian Brothers could "avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form." JA699a.

This reasoning is circular. The Little Sisters' undisputed religious exercise consists precisely in *not* "signing the self-certification form." It is cold comfort for the Little Sisters to be told that they can avoid penalties for one religious exercise (not providing coverage) so long as they give up another religious exercise (not executing and delivering the contraceptives coverage Form). A proper substantial burden analysis would have asked—as this Court did in both *Yellowbear* and *Hobby Lobby*—whether the government is imposing substantial pressure on the believer to give up a religious exercise. *Yellowbear*, 741 F.3d at 55; *Hobby Lobby*, 723 F.3d at 1141. Had the district court conducted that straightforward inquiry, the answer would have been obvious: the Mandate's massive penalties, and the

government's vigorous and rigid insistence that the Little Sisters and other non-exempt members of the Trust sign and send EBSA Form 700, obviously impose (and are obviously designed to impose) substantial pressure on them to give up their religious exercise.

2. The district court erred when it misinterpreted the government's accommodation scheme.

The district court compounded its errors by wrongly interpreting the government's regulations. First, although the court claimed to defer to the government's regulatory interpretation, it ignored the government's binding admissions—made in the parallel church plan case *Reaching Souls International*—that the Form *does* authorize church plan TPAs to provide the religiously-objectionable services. JA677a. Second, the district court also ignored the regulatory requirement to deliver the Form to *all* TPAs, not just those who agree with the Little Sisters' religious objections. And third, it ignored the fact that, under the government's own regulations, the purpose of EBSA Form 700 is to trigger and provide legal designation, legal authorization, financial incentive, and legal obligation for recipients of the Little Sisters' executed form to provide or arrange the very services that the Little Sisters object to providing or arranging themselves.

Religious beliefs do not need to be logical or coherent to merit protection. But the plain text of the regulations at issue, and the government's statements about its

own system, make it entirely logical and coherent for the Little Sisters and Christian Brothers to refrain from participating in the government's scheme.

a. EBSA Form 700 designates, authorizes, incentivizes, and obligates church plan TPAs to provide religiously objectionable services.

The district court asserted that "Little Sisters' execution of the Form does not authorize any organization to deliver contraceptive coverage to Little Sisters' employees," because "[t]he regulations cited in the notice direct the third party administrator to ERISA regulations outlining the obligations of a plan administrator under ERISA." JA711a. That is incorrect.

First, the Form directs TPAs to *two* sets of regulations—one set issued under ERISA and codified at Title 29 of the Code of Federal Regulations, and a second set issued under the Internal Revenue Code and codified at Title 26. *See* AD2 ("Obligations of the third party administrator are set forth in 29 C.F.R. 2510.3–16 and 26 C.F.R. 54.9815–2713A."). Unlike regulations issued under ERISA, Treasury Regulations such as 26 C.F.R. 54.9815–2713A—which do not purport to be based on ERISA—are fully binding on church plans and their participating employers. And the cited Treasury regulation mandates that a TPA who receives an executed EBSA Form 700 "shall provide or arrange payments for contraceptive services." 26 C.F.R. 54.9815-2713A(b)(2).

Second, the Departments themselves admit that the contraceptive coverage form designates and authorizes church plan TPAs to provide these services if they wish to do so and renders them eligible for the financial incentive of a guaranteed minimum ten percent additional payment for doing so. In the parallel case *Reaching Souls International*, counsel for the government stated that if church plan TPAs "receive the certification, they are eligible for reimbursement" for providing religiously objectionable services to church plan beneficiaries. JA677a. He also admitted that, without the Form, "[t]hey would not otherwise be eligible" to receive federal reimbursement. *Id.* Indeed, the Form is central to the government's scheme: TPAs intending to seek federal reimbursement through a "participating issuer" must notify HHS within 60 days of receiving the Form, 45 C.F.R. 156.50 (d)(2)(ii), and the Form itself is part of the documentation that TPAs must maintain for ten years after seeking reimbursement. *Id.* at 156.50(d)(7)(i). This reimbursement carries with it the financial incentive of a minimum payment of ten percent of costs. *See id.* at 156.60(d)(3)(ii). No form, no payment (and no bonus).

Third, immediately after directing TPAs to their "obligations" under the regulations, the contraceptive coverage form states that it is "an instrument under which the plan is operated." AD2. In this manner, EBSA Form 700 overrides existing plan documents that exclude religiously objectionable services. Thus the Mandate would force the Little Sisters to amend their plan documents to authorize,

incentivize, and obligate recipient TPAs to begin providing coverage that has been deliberately excluded for religious reasons. Without this Form, there is no statutory, regulatory, or contractual basis for providing this coverage against Appellants' wishes.[9]

Altering the plan documents in this way could have consequences that the government may not have foreseen or intended. Although church plan beneficiaries do not have a private right of action under ERISA, they may be able to use state contract law to enforce the terms of the plan documents. *See, e.g., Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1131 (D. Minn. 2011) (allowing church plan beneficiaries to go forward with breach of contract claims against a church plan on the basis of "written statements that they would receive pension benefits when they retired"). Thus, once the Forms are signed and delivered, a plan beneficiary might sue under state contract law and argue that the plan documents now created a right to sterilization and contraceptive services.

[9] *Notre Dame* held otherwise (Slip Op. 14), but this was error: the regulations acknowledge that the Form is necessary to "ensure" TPAs have "legal authority" to provide contraceptives that are otherwise excluded from a self-insured plan. 78 Fed. Reg. at 39880.

b. The Little Sisters must deliver the Form to all TPAs, not just those that share their religious objections.

The district court asserted that the "accommodation" scheme does not burden the Little Sisters because they are "not required to deliver the Form to any organization other than [their] current third party administrator, Christian Brothers Services." JA712a. This, too, is a legal error. Under the government's "accommodation" scheme, the Little Sisters must provide the Form "to *all* third party administrators with which it or its plan has contracted." 78 Fed. Reg. at 39879 (emphasis added); 26 C.F.R. 549815-2713A. And under the government's "gag rule," if a TPA voluntarily decides to rely on the Form and provide contraceptive services against the Little Sisters' wishes, the Little Sisters may not try to persuade a TPA to stop providing the services or threaten to leave that TPA. 78 Fed. Reg. at 39880; 26 C.F.R. 54.9815–2713A(b)(1)(iii).

The government has explained that "one plan may contract with a pharmacy benefit manager (PBM) to handle claims administration for prescription drugs and another third party administrator to handle claims for inpatient and outpatient medical/surgical benefits." *Id.* at 39879 n.40. Under the terms of the "accommodation," each of these TPAs must receive a copy of the Form. *Id.* at 39879. Here, Christian Brothers Services has contracted with pharmacy benefit manager ESI, a Fortune 100 company that is already providing contraceptive coverage to other religious non-profits that have chosen to comply with the

accommodation scheme.[10] It is not clear whether the government will take the position that ESI is a TPA for the Christian Brothers health plan. *See e.g.*, JA599a. If ESI is a TPA, then the Little Sisters must deliver the Form not just to Christian Brothers but also to ESI as well.[11]

The government's "gag rule"—which the district court also ignored—raises the stakes even higher. Once the Form has been delivered to a TPA, there is no way for the Little Sisters to prevent it from providing religiously objectionable drugs to its employees. That is because the government's regulations prohibit the Little Sisters from "directly or indirectly seeking to influence a third party administrator's decision to provide or arrange such payments." 78 Fed. Reg. at 39879-80. In *Reaching Souls*, the government admitted that these regulations prohibit a church plan employer from threatening to walk away from a TPA that uses its Form to provide coverage and collect bonus payments from the government. *See* JA679a-80a. Tellingly, the Mandate makes no provision for an employer to revoke EBSA

[10] Fortune 500 (2013), http://money.cnn.com/magazines/fortune/fortune500/2013/full_list/index.html?iid=F500_sp_full; KentuckyOne Online, Benefits Update (Jan. 16, 2014), http://kentuckyoneemployees.org/News-Article/ID/2264/Benefits-Update-Delay-in-Coverage-for-Contraceptive-Services-Prescriptions#.UwUePIWfb8a (noting that ESI is providing contraceptive coverage for employees of a Jewish-Catholic medical system).

[11] Regardless, as noted above, the Little Sisters object to providing the Form to any TPA, including one who shares their religious beliefs such as Christian Brothers Services, and further object to being forced to trigger a legal requirement under which their TPA "shall provide" the coverage at issue. 26 C.F.R. 54.9815–2713A(b)(2); JA155a, 157a-58a, 343a-45a.

Form 700 once executed and delivered. So signing and sending the Form is a one-way street: once the Little Sisters have delivered the Form authorizing their TPAs to provide religiously objectionable drugs, they have no way to go back and prevent them from acting on that authorization. The district court erred when it ignored these aspects of the government's scheme.

c. The purpose of the Form is to authorize the provision of contraceptive services to the Little Sisters' employees.

The district court concluded that the "accommodation" scheme did not burden Appellants' religious exercise because "the 'sole purpose' of the execution and delivery of the Form is to comply with the Mandate and avoid the substantial penalties for non-compliance." JA 714a. This, too, was legal error, because the district court both re-wrote the Appellants' religious objection and mischaracterized the Form.

In particular, according to federal law, EBSA Form 700:

- Authorizes the Little Sisters' third-party administrators to offer contraceptives to "participants and beneficiaries" in the Little Sisters' health plan, "so long as they remain enrolled in the plan." 78 Fed. Reg. at 39893; *see* 26 C.F.R. 54.9815–2713A(d); 45 C.F.R. 147.131(c)(2)(i)(B).
- Notifies each TPA of its legal "obligations" to offer contraceptive coverage by citing regulations issued under both ERISA and the Internal Revenue

Code. *See* AD2 (citing 26 C.F.R. 54.9815-2713A)); *see also* 78 Fed. Reg. at 39879.

- Incorporates these new instructions into the Little Sisters' existing health plan. AD2 ("This certification is an instrument under which the plan is operated.").
- Enables any TPA who receives the Form to use it to seek federal reimbursement and bonus payments for voluntarily providing contraceptive services to participants in the Little Sisters' health plan. 45 C.F.R. 156.50 (d)(2)(ii).

Without the Form, TPAs have no authority, incentive, or obligation to provide the objectionable drugs and devices. Indeed, the Departments adopted this Form-dependent scheme because they believed that it "best ensure[d] that plan participants and beneficiaries receive contraceptive coverage without cost sharing." 78 Fed. Reg. at 39880. *That* is the "purpose" of the Form.

Finally, the district court erred by ignoring the fact that the government's alleged inability to force TPAs to act on the Little Sisters' contraceptive coverage form is only temporary. While the government claims it lacks authority "at this time" to force TPAs to act on the Little Sisters' Form, it avowed that it would "*continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans*."

JA283a. This two-step approach—"sign the form now, Sister, and we will tell you how we will use it later"—only reinforces Appellants' religious objections to complying with the Mandate. JA343a-45a, 351a-53a.

3. The district court erroneously reinterpreted the Appellants' religious exercise.

The district court's third error is related to its first: instead of accepting the line that Appellants drew, it reinterpreted their objection to explain why the Little Sisters and Christian Brothers *should* feel no religious qualms in signing the papers. To be sure, the district court acknowledged that it was not allowed to "question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief." JA703a. Yet it went on to explain at length why the "particular act" the Little Sisters object to—participating in the government's accommodation scheme by signing and delivering the Form—does not violate their religion after all. *See, e.g.*, JA710a (finding that religious refusal to sign "reads too much into the language of the Form"). The district court concluded that, because the government claimed a lack of authority under ERISA to compel Christian Brothers Services to obey the "shall provide" part of the accommodation scheme, the Little Sisters' objection to signing and delivering the Form is based on "pure conjecture, one that ignores the factual and legal realities of this case." JA713a.

This was error. As this Court has repeatedly held, "it isn't for judges to decide whether a claimant who seeks to pursue a particular religious exercise has correctly perceived the commands of his faith or to become 'arbiters of scriptural interpretation.'" *Yellowbear*, 741 F.3d at 54-55 (citation omitted). It is up to the Little Sisters, not the courts, to decide whether *this level* of participation in the accommodation scheme—executing and delivering the Form—violates their faith.

Other federal courts agree, and have granted injunctions in all seven decided cases involving church plan employers like the Little Sisters. *See supra* n.8. Thus, in *Reaching Souls International*, the Western District of Oklahoma held that the government's accommodation scheme imposed a substantial burden on a church plan and its participating employers because "[r]egardless whether the self-certification form actually results in the provision of . . . contraceptive coverage or services, Plaintiffs believe that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out ACA's contraceptive mandate." 2013 WL 6804259, at *7. And in *East Texas Baptist University*, the district court held that the government's accommodation scheme burdened a church plan employer because "[t]he mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and

providing to their issuer or TPA the self-certification forms." 2013 WL 6838893, at *20. In *Roman Catholic Archdiocese of New York*, the court explained that:

> [P]laintiffs' alleged injury is that the [accommodation] renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. *This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage.* It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. . . . Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, *regardless of the effect on plaintiffs' TPAs*, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

2013 WL 6579764, at *7 (emphasis added) (rejecting the government's argument that its inability to enforce part of its accommodation scheme deprived the religious non-profit organizations of standing).[12]

These courts correctly accepted the religious organizations' *religious* judgment that signing and delivering the Form made them morally and spiritually "complicit" in the government's scheme. The court below erred when it substituted its own judgment for the Little Sisters' and Christian Brothers' to conclude otherwise.

[12] The government made a similar standing argument below, which the district court properly rejected. JA696a-97a.

* * *

"[R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit" legal protection. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). And the Little Sisters and Christian Brothers should prevail on their RFRA claims even if their sincere religious exercise concerning EBSA Form 700 were illogical and unreasonable, because the government is obviously exerting substantial pressure to make them stop. But in light of the Form's status as a grant of legal authority, an instrument of Appellants' plan, an incentive to TPAs, a trigger of obligations under Treasury regulations, and the trigger for the government's gag rule, the religious objection here is entirely reasonable.

II. THE MANDATE VIOLATES THE FIRST AMENDMENT'S RELIGION CLAUSES.

The government's dogged insistence that the Little Sisters and other non-exempt employers in the Trust sign the Form or pay the penalties is also illegal under the Free Exercise and Establishment Clauses of the First Amendment.[13]

[13] These claims were raised at JA60a-62a. The district court denied Appellants' First Amendment claims because it found that "the only argument [Appellants] ma[d]e is that a RFRA violation is always irreparable harm," citing to a portion of Appellants' brief that cited *Hobby Lobby*. JA714a, 716a. The cited analysis in *Hobby Lobby*, however, expressly based the RFRA irreparable injury finding on the undisputed legal principle that the deprivation of First Amendment rights, even for a short period, constitutes irreparable harm. *Hobby Lobby*, 723 F.3d at 1146. Indeed, the court explained that "our case law analogizes RFRA to a constitutional

While the government has exempted other religious objectors from the Mandate (primarily churches and their "integrated auxiliaries"), it has refused to exempt the Little Sisters and similar members of the Trust, even though they are engaged in the exact same religious exercise, seek the exact same relief, *and in some cases use the exact same Trust*[14] as the exempted religious organizations. To put the matter bluntly: if the Little Sisters simply handed their homes over to Catholic bishops, to be funded and controlled directly by their local dioceses, the government would exempt them entirely as "integrated auxiliary[ies]," without requiring them to sign, deliver, or file any form of any kind. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). But because the Little Sisters instead fund, operate, and control their ministry themselves, they face millions of dollars in penalties.

This type of discrimination among religious organizations is impermissible under the Free Exercise and Establishment Clauses, which prohibit the government from making such "explicit and deliberate distinctions between different religious

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right." *Id.* In light of these well-established principles, and in light of the fact that both parties fully briefed the First Amendment claims below, this Court should reach them here.

Appellants raised additional claims under the Free Exercise Clause (and other laws) that were not part of the preliminary injunction motion, and are not part of this appeal.

[14] *See* JA173a ("The Christian Brothers Trust encompasses both exempt religious non-profit entities and non-exempt religious non-profit entities.").

organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012), namely whether a religious mission is best achieved by ceding control to centralized church authorities. Doing so also requires "discrimination… [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Such discrimination is forbidden by the Religion Clauses.

The government does not deny that it has engaged in this type of discrimination. Instead, the final regulations explicitly depend on the government's assumptions about the likely religious beliefs of people who work for religious organizations like the Little Sisters:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people to

> use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). The government cites no factual authority for these assumptions. The employees of the Appellants all work for openly Catholic institutions that are listed or approved for listing in The Official Catholic Directory and that use a religious benefits provider that does not cover contraceptives. There is no reason to believe Little Sisters' employees are less likely to share their religious beliefs than a Catholic bishop's employees. And the government cites no legal authority for the proposition that it is permitted to discriminate among different religious institutions, giving religious liberty to some and not to others, based on government guesswork about the likely religious beliefs of individuals who work for various ministries. The government has no power to do so. *See Weaver*, 534 F.3d at 1259 (stating that distinguishing religious organizations based on their internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*" and that government cannot engage in such "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]").

The government's discrimination among religious institutions favors those that exercise their beliefs primarily through "houses of worship," "integrated auxiliaries," or "the exclusively religious activities of any religious orders," 78

Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavors denominations that, like the Catholic Church, *also* exercise their religion via other ministries such as health care services. *See, e.g.*, JA241a. But just as a law may not privilege a denomination with "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminat[e] between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), a law cannot prefer denominations that exercise religion principally through "houses of worship[] and religious orders," 78 Fed. Reg. at 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F.3d at 1259. Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (rejecting "the government's argument [that] . . . [r]eligious exercise is protected in . . . the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way").

None of this is permissible. The government is prohibited by the First Amendment from selectively handing out religious exemptions based on the government's views of which organizations are "religious enough" to deserve them.

III. THE MANDATE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

The First Amendment protects Appellants' rights to be free from governmentally compelled speech or silence. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). The Mandate violates both rights.[15]

A. The Mandate compels the Little Sisters to speak against their will, and in a way that contradicts their beliefs.

The Mandate's proposed accommodation requires the Little Sisters to make statements designed to trigger payments for the use of contraceptive and abortion-inducing drugs and devices, and for "education and counseling" about using such products. JA80a, 157a, 161a, 342a-47a; 26 C.F.R. 54.9815-2713A(b)(2). This compels the Little Sisters to engage in speech they wish to avoid: speech furthering a message and activities that contradict their public witness to their religious faith. JA152a, 155a, 158a. And the government cannot "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view" that is "repugnant to [her] moral [and] religious . . . beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707-08, 715 (1977).

[15] These claims were raised at JA63a-64a and denied by the district court at JA 714a, 716a.

It is irrelevant that the government assumes that, since Christian Brothers will not act on the speech and the government cannot (currently) use its ERISA enforcement authority to force them to, there will be no practical effect of the compelled speech. Being compelled to "utter what is not in [one's] mind" is itself the harm, regardless of whether that utterance triggers other actions. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943). When West Virginia forced a school boy to salute the flag, that salute did not trigger any legal authorization, financial incentive, or legal obligation. *Id.* at 627-29. When New Hampshire forced its citizens to bear its message on their license plates, nothing "practical" happened as result. *Wooley*, 430 U.S. at 715; *accord Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013). Yet the Court still rejected the states' "inva[sion of] the sphere of intellect and spirit" as violating "the purpose of the First Amendment." *Barnette*, 319 U.S. at 642; *accord Frudden v. Pilling*, __F.3d__, 2014 WL 575957 (9th Cir. Feb. 14, 2014) (protecting school children from being compelled to wear a public school's "Tomorrow's Leaders" message).

Further, the government bears the burden of demonstrating why it may massively penalize the Little Sisters for declining to speak through the government's contraceptives coverage form, EBSA Form 700. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality

of its actions."). If the government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike [it]," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000), it certainly cannot compel speech *for no purpose at all*. Yet the gravamen of the government's argument is that the speech it is compelling Appellants to utter is essentially meaningless. Surely the government has no interest (and certainly no *compelling* interest) in requiring the Little Sisters to engage in meaningless speech.

Nor does it matter that the Little Sisters can tell their fellow Catholics that the words the government forces them to utter are "words without belief" or are a "gesture barren of meaning." *Barnette*, 319 U.S. at 633. It was no answer in *Wooley* that "plaintiffs could have 'place[d] on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess [the state message they were forced to speak] and that they violently disagree with the connotations of that'" message. *Frudden*, 2014 WL 575957, at *5 (quoting *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting)). Government may not force citizens to lie or to speak out of both sides of their mouths. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement, even for recipients of government funds, because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy").

This is particularly true where, as here, the Little Sisters' faith and pro-life witness instructs them not to mislead others by taking public action that apparently condones abortion or contraception. JA155a, 344a-46a.

Finally, it is likewise irrelevant that the government might believe that the speech it compels here is "non-ideological." The Little Sisters strongly disagree with that, but even if it were true, "[t]he right against compelled speech is not, and cannot be, restricted to ideological messages." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013); *accord Cressman*, 719 F.3d at 1152 ("[I]deological speech is not the only form of forbidden compelled speech.").

B. The Mandate compels the Little Sisters to be silent on specific topics to specific audiences.

The Mandate also expressly prohibits the Little Sisters from engaging in speech with a particular content and viewpoint: they are barred by federal law from talking to their TPAs and instructing them not to provide contraceptive and abortion-inducing drugs and devices, or from saying they will terminate their relationship with them and find a different TPA. *See* JA346a, 26 C.F.R. 54.9815-2713A(b)(iii) (the Little Sisters "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"); JA679a-80a (Counsel for the government stating, in a church plan case, that church plan employers cannot take action "that would cause the TPA to . . . forgo providing this coverage when they otherwise would have," and cannot say "something like, Don't do this

or we're going to fire you," or otherwise "threaten[] them" with ending their contract).

It is no answer to say, as the government did below, that the Little Sisters may tell everyone *but* their TPAs that they do not want their TPA to provide the coverage. A ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech").

Each violation—compelled speech and compelled silence—triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994), which the Mandate fails for the reasons discussed above.[16]

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS

Irreparable Harm. A potential violation of Appellants' rights under RFRA and the First Amendment constitutes irreparable harm. *See Hobby Lobby*, 723 F.3d at 1146; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Without relief, that harm will occur as soon as the Supreme Court's injunction lifts.

[16] Further, even if the Mandate's speech requirements were "unrelated to the content of speech," they would still be "subject to an intermediate level of scrutiny," which they would fail due to the same infirmities that cause them to fail strict scrutiny. *TBS*, 512 U.S. at 642. Having repeatedly argued that its Form has no effect, the government cannot possibly have substantial interest, or even a rational interest, in compelling the Little Sisters to sign it.

The Balance of Harms. The Tenth Circuit has recognized the considerable importance of an entity's religious liberty interests, the substantial burden that the Mandate places on those interests, and the government's lack of a compelling interest in enforcing the Mandate. *See Hobby Lobby*, 723 F.3d at 1141, 1143-44, 1145-46. Thus, it has upheld determinations that the balance of harms favors religious claimants. *See Newland v. Sebelius*, __F. App'x__, 2013 WL 5481997, at *3 (10th Cir. Oct. 3, 2013). First Amendment speech interests are equally important. Granting preliminary injunctive relief will merely preserve the status quo and extend to Appellants what the government has already categorically given numerous other employers, *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), and has acquiesced to in many related cases. *See*, *e.g.*, Order, *Tyndale House Publishers v. Sebelius*, No. 13-5018 (D.C. Cir. May 3, 2013); Order, *Bick Holdings Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. April 1, 2013). Further, the government's litigation position makes this factor particularly easy: the government asserts that forcing the Appellants to sign and deliver the form would have no effect of advancing the government's objectives.

Public Interest. As courts have recognized when granting injunctions against the Mandate for similar religious objectors, "there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]." *Newland*, 881 F. Supp. 2d at 1295 (quoting *O Centro v.*

Ashcroft, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd*, *Gonzales v. O Centro*, 546 U.S. 418 (2006). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights," including those protected by RFRA. *Hobby Lobby*, 723 F.3d at 1147. In any case, the government's arguments about the effect of EBSA Form 700 foreclose it from arguing there is any serious public interest in forcing the Little Sisters to sign it.

V. SCOPE OF RELIEF

This Court should enter an injunction protecting all non-exempt Catholic ministries that receive health benefits through the Trust. This case was filed as a class action on behalf of all non-exempt Trust participants, JA16a, and the government did not object to a classwide injunction below. JA296a ("[D]efendants do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint."). In fact, the government asked the district court to delay briefing of Appellants' motion for class certification based on its agreement to class-wide relief at the preliminary injunction stage. Def's Mot. for Extension, Dkt. 35 at 2-3.

Even without the government's express agreement, classwide relief would be appropriate here in light of the scope of the harm to be prevented during the pendency of the matter. *See O Centro*, 389 F.3d at 977 (explaining that "[t]he underlying purpose of the preliminary injunction is to 'preserve the relative

positions of the parties until a trial on the merits can be held'" (citation omitted)). In this case, preservation of the *status quo* is to prevent the impermissible government pressure to give up the religious exercise of providing, administering, and offering a health benefits plan consistent with Appellants' faith. For the Little Sisters, an injunction is required that permits them to continue participation in the Trust without application of the Mandate. For the Trust and Christian Brothers Services, preserving the status quo requires an injunction permitting them to continue offering the Trust to all class members without facilitating access to the products and services at issue, and without risk of penalty to participants of the Trust. A preliminary injunction allowing the Trust to continue offering its plan—and allowing employers to continue using it without facing penalties—is necessary to spare the Trust from the illegal coercion imposed by the Mandate and described above.[17] *See Kansas Health Care Assoc. v. Kansas Dept. of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994); *see e.g. O Centro*, 546 U.S. 418 (affirming preliminary injunctive relief that protected not only the plaintiff church and its

[17] *See* 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1785.2 (1986 & Supp. 1994); *Washington v. Reno*, 35 F.3d 1093, 1103-04 (6th Cir. 1994); *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1304-05, 1308-09 (4th Cir. 1992); *Bresgal v. Brock*, 843 F.2d 1163, 1165, 1169-71 (9th Cir. 1987); *see also Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 283 F. Supp. 2d 1151, 1158, 1171 (D. Colo. 2003) (permanently enjoining the FTC from enforcing regulation against anyone, nationwide), *rev'd on other grounds*, 358 F.3d 1228 (10th Cir. 2004).

members, but also separately protected any other "bona fide participants in [church] ceremonies for religious use of hoasca."); JA227a-37a.

CONCLUSION

Appellants respectfully ask the Court to enter an injunction against Appellees during the pendency of this matter through the entry of judgment in the district court enjoining Appellees and their agents and representatives from enforcing the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and from assessing penalties, fines, or taking any other enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d against Appellants, all non-exempt employer participants in the Trust, and all third party administrators as their conduct relates to the Trust.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument in order to clarify the issues in this appeal and respond to questions presented by this appeal. Appellants submit that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

Respectfully submitted this 24th day of February 2014,

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CERTIFICATE OF SERVICE

I certify that on February 24, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,774** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Office Word 2007** in **Times New Roman 14-point font**.

3. Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

b. the hard copies that have been submitted to the Clerk's Office are *exact* copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (last updated February 24, 2014) and, according to the program, is free of viruses.

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Dated: February 24, 2014

ADDENDUM

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EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

2013 WL 6839900
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

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, along with 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 of 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.

Civil Action No. 13–cv–2611–WJM–BNB | Filed December 27, 2013

Synopsis

Background: Self-insured nonprofit Catholic religious organizations and Catholic third-party administrator for organizations' church plan brought constitutional and statutory claims against federal officials, challenging contraceptives mandate in the Patient Protection and Affordable Care Act (ACA or PPACA) and the Health Care and Education Reconciliation Act. Plaintiffs filed motion for preliminary injunction, and defendants filed motion for dismissal or summary judgment.

Holdings: The District Court, William J. Martínez, United States District Judge held that:

[1] plaintiffs sufficiently alleged an injury in fact, as element for Article III standing; but

[2] plaintiffs did not show probable irreparable harm from enforcement of contraceptives mandate;

[3] organizations did not show probable irreparable harm from being required to designate an administrator; and

[4] organizations did not show probable irreparable harm from being required to complete a self-certification form for "eligible organizations" accommodation.

Plaintiffs' motion denied; defendants' motion denied in part.

Temporary stay allowed, ___ S.Ct. ____, 2013 WL 6869391.

Injunction granted pending appeal, ___ S.Ct. ____, 2014 WL 272207.

Attorneys and Law Firms

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Bradley Philip Humphreys, Michelle Renee Bennett, U.S. Department of Justice, Washington, DC, for Defendants.

Opinion

ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

William J. Martínez, United States District Judge

***1** In this case, Catholic religious organizations challenge the regulations implementing the Patient Protection and Affordable Care Act, Pub.L. 111–148, specifically the requirement that group health care plans provide all women coverage for certain preventative contraception services without a co-payment or deductible.

Before the Court are the following: (1) Plaintiffs' Motion for Preliminary Injunction (ECF No. 15); and (2) Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (ECF No. 30). For the reasons set forth below, the Court finds that Plaintiffs have standing to bring this action and, therefore, the standing portion of the Motion to Dismiss is denied. The remainder of the issues raised in the Motion to Dismiss remain pending and will be ruled on by way of subsequent order. The Court also denies Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

A. History of the Challenged Regulations

The Patient Protection and Affordable Care Act (the "ACA") requires that group health insurance plans cover certain preventative medical services without cost-sharing, *i.e.*, a co-payment or a deductible. Among the preventative services that must be covered are contraception, sterilization, and related counseling (the "Mandate"). As set forth in more detail below, the Mandate results from extensive and complex Congressional legislation and agency rulemaking by the Department of Labor ("DOL"), the Department of the Treasury ("DOT"), and the Department of Health and Human Services ("HHS") (collectively, the "Departments").

In March 2010, Congress enacted the ACA along with the Health Care and Education Reconciliation Act. These acts placed a variety of new requirements on "group health plans," a term which encompasses both insured and self-insured employer plans that provide health care coverage to employees. *See* 42 U.S.C. § 300gg–91(a)(1) (defining "group health plan"); Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 75 Fed.Reg. 41,726, 41,727 (July 19, 2010) ("Interim Final Rules") ("The term 'group health plan' includes both insured and self-insured group health plans."). The portion of these acts that is relevant to this action is the requirement that group health plans provide coverage —at no charge to the patient—for women's "preventative care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration[.]" *See* 42 U.S.C. § 300gg–13(a)(4).

Because there were no existing guidelines concerning preventative care and screenings for women at the time of the Interim Final Rules, the Health Resources and Services Administration ("HRSA") commissioned the Institute of Medicine ("IOM"), a Congressionally-funded body, to conduct a study on preventive services necessary to women's health. The IOM, in a report entitled "Clinical Preventive Services for Women: Closing the Gaps," recommended that "preventative care and screenings" include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Women's Preventive Services: Required Health Plan Coverage Guidelines, health resources and services administration, http:// www.hrsa.gov/womensguidelines/ (last visited December 19, 2013). Among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices.

***2** HRSA adopted the IOM's recommendations on August 1, 2011. Two days later, the Interim Final Rules were amended to "provide HRSA additional discretion to exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned." Group Health Plan and Health Insurance Issuers Relating to Coverage of Preventative Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,623 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A). The amended Interim Final Rules permitted HRSA to exempt a religious organization that: "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." *Id.*

The Departments received over 200,000 comments on the amended Interim Final Rules, including many submitted by religiously-affiliated institutions asserting that the religious employer exemption was too narrow, and that the limited scope of the exemption raised religious liberty concerns. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed.Reg. 8,725, 8,726–27 (Feb. 15, 2012). Despite these comments, the Departments adopted the definition of religious employer set forth in the Interim Final Rules. *Id.* at 8,727. However, the Departments created a "temporary enforcement safe harbor" of one year during which they intended to "develop and propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempt, non-profit organizations' religious objections to covering contraceptive services[.]" *Id.*

On March 21, 2012, the Departments published an advance notice of proposed rule-making ("Advance Notice") outlining alternative plans to accommodate religious organizations' objections to the Mandate. *See* Certain Preventative Services under the Affordable Care Act, 77 Fed.Reg. 16,501 (Mar. 21, 2012). The Departments received over 400,000 comments in response to the proposals set forth in the Advance Notice

and, in July 2013, issued rules finalizing the Mandate. *See* Coverage of Certain Services under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (the "Final Rules").

The Final Rules provide that they accommodate for employers with religious objections to the Mandate in two ways. First, the Final Rules revise the definition of "religious employer" by eliminating the first three requirements contained in the Interim Final Rules. The Final Rules define "religious employer" as simply any non-profit referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), which includes churches, their integrated auxiliaries, associations of churches, and the exclusively religious activities of religious orders. *See* 78 Fed. Reg. at 39,874.

Second, the Final Rules provide for an accommodation for "eligible organizations" that do not meet the definition of "religious employer". An "eligible organization" is one that meets 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.
>
> ***3** (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 ["ERISA"].

45 C.F.R. § 147.131(b). The Final Rules state that an eligible organization is not required to "contract, arrange, pay, or refer for contraceptive coverage" to which it has a religious objection. 78 Fed. Reg. at 39,874. Instead, the eligible organization must complete a self-certification form stating that it is an eligible organization, and provide a copy of that form to its issuer (if the employer participates in an insured group health plan) or to its third party administrator (if the employer participates in a self-insured health plan). *Id.*

Upon receipt of the self-certification form, a third party administrator for a self-insured group health plan is required to provide or arrange for payments for contraceptive services, a requirement imposed through the Department of Labor's ERISA enforcement authority. *See id.* at 39,879–80. The Final Rules state that an eligible organization's self-certification "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879.

B. The Parties and the Procedural History of this Case

Plaintiff Little Sisters of the Poor Home for Aged, Denver, Colorado is a Colorado non-profit corporation that was founded in 1916. (Compl. (ECF No. 1) ¶ 11.) Plaintiff Little Sisters of the Poor, Baltimore, Inc. is a Maryland non-profit corporation that was founded in 1869. (*Id.* ¶ 12.) Both homes are controlled by and associated with the Little Sisters of the Poor, an international Congregation of Catholic Sisters who serve needy elderly people. (*Id.* ¶ 13.) The Court will refer to these Plaintiffs together as "Little Sisters".

Little Sisters has adopted the Christian Brothers Employee Benefit Trust ("Trust") to provide medical coverage to their employees. (*Id.* ¶ 15.) Each Little Sisters home employs more than fifty employees who are covered, along with their dependents, under the Trust. (*Id.* ¶ 16.)

The Trust is a "church plan" within the meaning of section 414(e) of the Internal Revenue Code. (*Id.* ¶ 21.) The Trust is not subject to ERISA because it has not made an election under section 410(d) of the Internal Revenue Code. (*Id.* ¶ 22.) The Trust is a self-insured health plan and, therefore, does not contract with an insurance company to provide health benefits to its beneficiaries. (*Id.* ¶ 23.) Consistent with Catholic teachings, the Trust does not provide, and has never provided coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling. (*Id.* ¶ 25.) The Trust is administered by Plaintiff Christian Brothers Services, a New Mexico non-profit corporation affiliated with The Brothers of The Christian Schools, a male religious order of the Catholic Church. (*Id.* ¶ 28.) Christian Brothers Services is a third party administrator for the Trust. (ECF No. 37–1 ¶ 5.)

Defendants are all appointed officials of the United States government and its agencies charged with issuing and enforcing the regulations implementing the ACA. (Compl. ¶ 31.) Defendant Kathleen Sebelius is the Secretary of HHS; Defendant Thomas E. Perez is Secretary of the DOL; and Defendant Jacob J. Lew is Secretary of the DOT. (*Id.* ¶¶ 32–36.)

***4** On September 24, 2013, Plaintiffs filed the instant action, which brings the following causes of action: (1) Violation of the Religious Freedom Restoration Act; (2) Violation of the First Amendment—Free Exercise Clause, Substantial Burden; (3) Violation of the First Amendment—Free Exercise Clause, Intentional Discrimination; (4) Violation of the First Amendment—Free Exercise and Establishments Clauses, Discrimination Among Religions; (5) Violation of the First Amendment—Establishment Clause, Selective Burden/Denominational Preference (*Larson v. Valente*); (6) Interference in Matters of Internal Religious Governance —Free Exercise and Establishment Clauses; (7) Violation of the First and Fifth Amendments—Establishment Clause and Due Process, Religious Discrimination; (8) Violation of the Fifth Amendment—Due Process and Equal Protection; (9) Violation of the First Amendment—Freedom of Speech; (10) Violation of the First Amendment—Freedom of Speech, Expressive Association; (11) Violation of the First Amendment—Free Exercise Clause and Freedom of Speech, Unbridled Discretion; (12) Violation of the Administrative Procedure Act—Lack of Good Cause and Improper Delegation; (13) Administrative Procedure Act —Arbitrary and Capricious Action; (14) Administrative Procedure Act—Agency Action without Statutory Authority; (15) Administrative Procedure Act—Agency Action Not in Accordance with the Law, Weldon Amendment/Religious Freedom Restoration Act/First Amendment to the United States Constitution; and (16) Administrative Procedure Act—Agency Action Not in Accordance with the Affordable Care Act. (Compl. pp. 46–61.)

As preliminary relief, Plaintiffs request a preliminary injunction "prohibiting Defendants while this lawsuit is pending from enforcing the Final Mandate against the Plaintiffs ... and prohibiting Defendants from charging or assessing penalties against the ... Plaintiffs for failure to offer or facilitate access to contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling." (*Id.* p. 61.) As final relief, Plaintiffs seek a declaration that the Final Mandate violates the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and the Administrative Procedures Act, and therefore no penalties can be assessed against Plaintiffs for failure to offer or facilitate access to contraceptives, sterilization, or abortifacients. (*Id.* p. 63–4.)

On October 24, 2013, Plaintiffs filed a Motion for Preliminary Injunction asking the Court to grant the preliminary relief sought in their Complaint. (ECF No. 15.) The Court set an abbreviated briefing schedule on the Motion for Preliminary Injunction to permit the Court the opportunity to address the issues by January 1, 2014, the date by which Plaintiffs must comply with the Mandate. (ECF No. 18.) Defendants filed their response on November 8, 2013 (ECF No. 29), and Plaintiffs filed their reply on November 15, 2013 (ECF No. 37). Thus, Plaintiff's Motion for Preliminary Injunction is ripe for review. No party requested a hearing on the Motion for Preliminary Injunction [1], and the Court finds that a hearing is not necessary to resolve the issues raised therein.

1 Plaintiffs' Complaint states that they "respectfully request that the Court set a hearing on this request for a preliminary injunction at the earliest possible time and, after hearing, grant Plaintiffs' request for preliminary injunction." (Compl. ¶ 336.) However, this request, buried in the middle of a sixty-five page Complaint violates WJM Revised Practice Standard III.B., which requires that "[a]ll requests for the Court to take any action, make any type of ruling, or provide any type of relief must be contained in a separate, written motion. A request of this nature contained within a brief, notice, status report or other written filing does not fulfill this Practice Standard." Plaintiffs' actual Motion for Preliminary Injunction (ECF No. 15) does not request a hearing.

Contemporaneous with their Response to the Motion for Preliminary Injunction, Defendants filed a Motion to Dismiss or, in the alternative, for Summary Judgment. (ECF No. 30.) The Motion to Dismiss contends that Plaintiffs lack standing to bring this action, and also moves to dismiss or for summary judgment on all of the substantive claims. (*Id.*) Because the Court must ordinarily address issues such as standing before ruling on the merits of an action, the Court ordered an abbreviated briefing scheduled on the Motion to Dismiss. (ECF No. 33.) Plaintiffs filed their response on November 22, 2013 (ECF No. 42), and Defendants filed their reply on November 27, 2013 (ECF No. 44.) Thus, Defendants' Motion to Dismiss is ripe for review. [2]

2 Plaintiffs have filed a Rule 56(d) Motion arguing that, if the Court construes Defendants' Motion as one for summary judgment, Plaintiffs should be permitted to conduct discovery before the Court makes any substantive ruling. (ECF No. 41.) Because the Court only considers the standing argument in this Order, and rules in Plaintiffs' favor, the Court need not address Plaintiffs' Rule 56(d) Motion at this time.

II. STANDING

***5** Defendants move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the Court lacks subject matter jurisdiction because Plaintiffs have failed to demonstrate that they will suffer an injury in fact. [3]

3 In the interest of addressing Plaintiffs' Motion for Preliminary Injunction before the regulations take effect on January 1, 2014, this standing argument is the only portion of Defendants' Motion to Dismiss that will be addressed in this Order.

A. Legal Standard

[1] **[2]** **[3]** Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir.1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *See* id.

[4] **[5]** **[6]** A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir.1971). When considering a Rule 12(b)(1) motion, however, the court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir.1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations ... [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

B. Analysis

[7] Article III of the United States Constitution limits the jurisdiction of federal courts to "[c]ases" and "[c]ontrovers[ies]." U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

[8] **[9]** "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (holding that standing "is perhaps the most important of the [Article III] doctrines"). "The gist of the question of standing" is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

***6** **[10]** "[T]he irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered a "concrete and particularized" injury that is "actual or imminent" (*i.e.*, an "injury in fact"); (2) there must be "a causal connection between the injury and the conduct complained of,"; and (3) it must be "likely ... that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130 (quotation marks omitted); *see also Allen*, 468 U.S. at 751, 104 S.Ct. 3315 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

[11] **[12]** In evaluating a plaintiff's standing at the motion to dismiss stage, a court may consider not only the allegations in the complaint, but also factual averments made by declaration or affidavit. In *Warth v. Seldin*, the United States Supreme Court stated,

> [In] ruling on a motion to dismiss for want of standing, [courts] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint *or by affidavits*, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from *all materials of record*, the complaint must be dismissed.

422 U.S. at 501–02, 95 S.Ct. 2197 (emphasis added). Subsequent decisions by the Supreme Court and lower courts have reinforced this rule. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*, 484 U.S. 49, 65, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) ("[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact —not proof—in the complaint *or supporting affidavits.*") (emphasis added) (internal quotations omitted); *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir.2000) ("The Tribes' uncontroverted affidavits, albeit conclusory, support their allegations of injury.... [A] plaintiff may submit affidavits to particularize allegations of fact in support of its standing.").

[13] **[14]** In this case, Defendants argue that Plaintiffs have failed to meet their burden on the "injury in fact" prong of the standing analysis. (ECF No. 30 at 11–12.) Plaintiffs contend that they have standing "based on the simple fact that compliance with the rules will require an expenditure of time and money." (ECF No. 42 at 27.) The Tenth Circuit has held that "out-of-pocket cost to a business of obeying a new rule of government" is sufficient to constitute an injury in fact. *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir.1980); *see also Hydro Res. Inc. v. EPA*, 608 F.3d 1131, 1144–45 (10th Cir.2010) (business costs of undertaking permitting process are injury in fact). The cost need not be large; all that is required is some concrete and particularized injury. *See, e.g., Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir.2013) (cost of $16.50 for specialized license plate was a "concrete, actual monetary injury" which established an injury in fact).

The self-certification form created by Defendants in accordance with the Final Rules states that it will take an average of fifty minutes for an employer to fill out the required information. (ECF No. 37–3.) The basis for this statement comes from the Administrative Record, which provides that "an organization will need approximately 50 minutes (30 minutes of clerical labor at a cost of $30.64 per hour, 10 minutes for a manager at a cost of $55.22 per hour, 5 minutes for legal counsel at a cost of $83.10 per hour, and 5 minutes for a senior executive at a cost of $112.43 per hour) to execute the self-certification." 78 Fed.Reg. 39,890. "[T]he total annual burden for preparing and providing the information in the self-certification is estimated to be approximately $41 for each eligible organization." *Id.*

***7** Additionally, with regard to the burden imposed on any third party administrator that receives a self-certification form, the Administrative Record states that: "It is estimated that each issuer or third party administrator will need approximately 1 hour of clerical labor (at $31.64 per hour) and 15 minutes of management review (at $55.22 per hour) to prepare the notices for a total cost of approximately $44." 78 Fed.Reg. 39,890. As the third party administrator for the Little Sisters and the Trust, Christian Brothers Services is likely to incur this cost upon receipt of these entities' self-certification forms.

Defendants insist that, to avoid incurring substantial fines, Little Sisters and the Trust will be required to complete the self-certification forms and deliver these forms to Christian Brothers Services. (ECF No. 44 at 10–11.) In fact, the Defendants base the standing portion of their Motion to Dismiss on the fact that execution of the form is *all* that is required of Plaintiffs, and that this is not sufficient injury for purposes of standing. (*Id.*) However, Defendants utterly fail to address the real, actual costs that Plaintiffs will incur by completing and processing the self-certification forms. (*Id.*) The Court finds that Plaintiffs will incur the costs set forth above, and that these costs constitute an injury in fact for purposes of standing. *See Califano*, 622 F.2d at 1386. Therefore, Defendants' Motion to Dismiss is denied to the extent that it seeks dismissal of this action based on lack of standing.

III. INJUNCTIVE RELIEF

Plaintiffs ask the Court to enter an injunction that "prohibit[s] Defendants from enforcing the Mandate against Plaintiffs and

class members, including their third party administrators, and from charging or assessing penalties against them for failure to offer or facilitate access to contraceptives." (ECF No. 15 at 16.)

[15] **[16]** "A party seeking a preliminary injunction must prove that *all four* of the equitable factors weigh in its favor: specifically, prove that '(1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.' " *Sierra Club v. Bostick*, —— Fed.Appx. ——, 2013 WL 5539633, *2 (10th Cir. Oct. 9, 2013) (emphasis in original) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir.2009)). "[C]ourts have consistently noted that 'because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for issuance of an injunction will be considered.' " *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir.2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990)). Because, as set forth below, the Court finds that Plaintiffs have failed to show that they will suffer an irreparable injury if the proposed injunction is not granted, the Court's analysis begins and ends with this prong.

Plaintiffs contend that they have satisfied the irreparable harm prong because they have shown that the Final Rules likely violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–1(a). (ECF No. 15 at 13.) The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir.2013). Thus, to determine whether Plaintiffs have shown an irreparable harm sufficient to warrant injunctive relief, the Court must examine whether Plaintiffs have shown that they are likely to suffer a RFRA violation in the absence of an injunction.

***8** **[17]** RFRA provides that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb–1(a). To prevail on their RFRA claim, Plaintiffs must show that they wish "to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) is subject to a substantial burden imposed by the government." *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1312–13 (10th Cir.2010). Thus, in evaluating Plaintiffs' RFRA claim, the Court must first identify the religious belief, then determine whether such belief is sincere, and finally decide whether the government has placed "substantial pressure on the religious believer." *Hobby Lobby*, 723 F.3d at 1140.

4 The Court recognizes that *Abdulhaseeb* involved the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc–1(a) ("RLUIPA"), which is a different statute than RFRA. However, the Tenth Circuit has applied the same legal standard to both RFRA and RLUIPA, and *Abdulhaseeb* was heavily relied upon by the Tenth Circuit in *Hobby Lobby*, which is a RFRA case. *See Hobby Lobby*, 723 F.3d at 1140.

As set forth below, the parties here do not dispute Plaintiffs' sincere religious beliefs and, therefore, only the third prong of the RFRA claim merits significant discussion. Plaintiffs contend that the Court's analysis of whether the Final Rules "substantially burden" their religious beliefs is governed by the Tenth Circuit's recent decision in *Hobby Lobby*. (ECF No. 37 at 6.) The Court agrees that Plaintiffs in this case share many of the same religious beliefs with the *Hobby Lobby* plaintiffs, at least the beliefs of the individual plaintiffs in that case. However, as Defendants point out, Hobby Lobby operates on a "for-profit" basis, and is therefore neither a religious employer nor an eligible organization under the Final Rules. *See Hobby Lobby*, 723 F.3d at 1140. Thus, the Mandate required the *Hobby Lobby* plaintiffs to either provide contraceptive coverage for their employees, or face fines ranging between $26 million and $475 million dollars. *Id.* This "Hobson's choice" was sufficient to establish a substantial burden on their religious beliefs. *Id.*

In this case, it is undisputed that Plaintiffs qualify as "eligible organizations" under the Final Rules. Plaintiffs are not similarly situated to the *Hobby Lobby* plaintiffs because Little Sisters and the Trust can avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form and providing it to Christian Brothers Services, their third party administrator. The *Hobby Lobby* court had no occasion to consider the accommodation for "eligible organizations" in the Final Rules or to decide whether such accommodation violates RFRA. Thus, while *Hobby Lobby* is instructive on a number of issues in this case, it is not dispositive of the issue of whether, under the specific facts of this case, the Final Rules substantially burden these Plaintiffs' religious beliefs. The Court must therefore look at this issue anew.

In support of the Motion, Little Sisters has submitted multiple affidavits from Mother Loraine Marie Claire Maguire, the Provincial Superior of the Province of Baltimore for the Little Sisters of the Poor ("Mother Maguire") (ECF Nos. 15–1 & 37–1) and Brother Michael Quirk, President of Plaintiff Christian Brothers Services ("Brother Quirk") (ECF Nos. 15–2 & 37–2). Mother Maguire attests that Little Sisters follows Catholic religious teachings which affirm that life begins at conception, and that abortion and post-conception contraception are "gravely contrary to moral law". (Maguire Decl. (ECF No. 15–1) ¶¶ 29–32 (quoting Sections 2270 and 2271 of the Catechism of the Catholic Church (1994)).) She states that church doctrine teaches that contraception and sterilization are "intrinsic evils", and that "programs of 'economic assistance aimed at financing campaigns of sterilization and contraception' are 'affronts to the dignity of the person and the family.' " (*Id.* ¶¶ 33–34 (quoting Section 234 of the Compendium of the Social Doctrine of the Church (2004).) Citing Section 91 of the *Evangulium Vitae*, Mother Maguire attests that "Catholics may never 'encourage' the use of 'contraception, sterilization, and abortion.' " (*Id.* ¶ 35.) She relates that directives issued by the United States Conference of Catholic Bishops "prohibit providing, promoting, or condoning abortions, abortion-inducing drugs, contraceptives, and sterilization", and specifically warn against partnering with other entities in a manner that would involve the provision of such "intrinsically immoral" services. (*Id.* ¶ 36.) Brother Quirk's declarations echo these beliefs. (Quirk Decl. (ECF No. 15–2) ¶¶ 15–26.)

***9** Little Sisters and the Trust contend that the Final Rules burden their religious beliefs by requiring that they:

- "participate in the provision of insurance coverage" or "provide health benefits to [their] employees" that include access to contraception, abortion, and sterilization; (Maguire Decl. ¶¶ 45–47; *see also* Quirk Decl. ¶ 31.)
- "designate any third party" or "make" or "facilitate" the "government-required certifications to a third party" that require the third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and device; (Maguire Decl. ¶¶ 48–49; *see also* Quirk Decl. ¶¶ 32–33.)
- "authorize anyone to arrange or make payments for contraceptives, sterilization, and abortifacients; take action that triggers the provision of contraceptive, sterilization, and abortifacients; or is the but-for cause of the provision of contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. (ECF No. 37–1) ¶ 9; *see also* Quirk Supp. Decl. (ECF No. 37–2) ¶ 8.)
- "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries now." (Maguire Supp. Decl. ¶ 9(A); *see also* Quirk Supp. Decl. ¶ 8.)
- "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver those contraceptives, sterilization, and abortifacients to the Little Sisters' employees and beneficiaries, now or in the future." (Maguire Supp. Decl. ¶ 9(B); *see also* Quirk Supp. Decl. ¶ 8.)
- "[c]reate a provider-insured relationship (between the Little Sisters and Christian Brothers Services or any other third-party administrator), the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. ¶ 9(D); *see also* Quirk Supp. Decl. ¶ 8.)
- "[p]articipate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees and other beneficiaries." (Maguire Suppl. Decl. ¶ 9(E); *see also* Quirk Supp. Decl. ¶ 8.)

Additionally, Christian Brothers Services contends that its religious beliefs are violated if it is required to "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. ¶ 8.)

Defendants do not dispute that Plaintiffs hold the religious beliefs set forth above and that such beliefs are sincere. (ECF No. 29 at 8–9.) Rather, Defendants take issue with Plaintiffs' interpretation of how these religious beliefs will be impacted by the Mandate and the Final Rules. (*Id.*) Specifically, Defendants contend that "[t]he Little Sisters Plaintiffs are eligible for the accommodation, and thus, they need not contract, arrange, pay, or refer for contraceptive coverage." (*Id.* at 8.) Additionally, Defendants argue that, because Little Sisters participates in a self-funded "church plan", execution of the self-certification form does not

trigger, facilitate, or provide access to care that would violate Plaintiffs' religious beliefs. (*Id.* at 8–9.)

***10 [18]** In response, Plaintiffs argue that the Court cannot question Mother Maguire's and Brother Quirk's affirmations regarding the impact that compliance with the Final Rules would have on their religious beliefs. (ECF No. 37 at 6.) It is well-settled that "it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct." *Hobby Lobby,* 723 F.3d at 1153–54; *see also Korte v. Sebelius,* 735 F.3d 654, 685 (7th Cir.2013) (holding "[n]o civil authority can decide" whether providing contraceptive coverage impermissibly assists the commission of a wrongful act under the moral doctrines of the Catholic Church).

[19] Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations. Statutory and regulatory interpretation is a question of law, and is a joint effort of the courts and the government agency charged with administering a law. *See Negusie v. Holder,* 555 U.S. 511, 531, 129 S.Ct. 1159, 173 L.Ed.2d 20 (2009). Thus, it is true that this Court cannot question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief. This Court can, however, most certainly analyze the challenged regulations to determine whether their implementation will cause the allegedly harmful act to in fact occur. *See O'Brien v. Health and Human Servs.,* 894 F.Supp.2d 1149, 1159 (E.D.Mo.2012) (looking past plaintiff's contentions about how their religious beliefs would be affected by the challenged regulations and interpreting the regulations to discern what demands were placed on plaintiff). Accordingly, in the discussion below, the Court will examine each of the ways in which Plaintiffs contend their religious beliefs are substantially burdened by the Final Rules.

A. Direct Provision of Coverage for Contraceptive Care

[20] Mother Maguire states that, based on Little Sisters' religious beliefs, they cannot not participate in the provision of insurance coverage for contraception, abortion and sterilization, and cannot provide health benefits that will include access to these services. (ECF No. 15–1 ¶¶ 45–47.) Brother Quirk echoes this statement on behalf of the Trust. (ECF No. 15–2 ¶ 31.) The Court accepts these religious beliefs as sincere, but does not find that the challenged regulatory scheme will substantially burden these beliefs.

Under the "eligible organizations" accommodation in the Final Rules, once Little Sisters and the Trust complete the self-certification form and deliver it to their third party administrator, they have satisfied the Mandate's requirements, and have no further obligations under the Mandate. 26 C.F.R. § 54.9815–2713A (stating that a self-insured group health plan complies with Mandate by contracting with a third party administrator and providing the third party administrator with the self-certification form). Thus, by their very terms, the regulations do not require Little Sisters or the Trust to participate in the provision of contraceptive coverage or provide health benefits that include contraceptive coverage.

Christian Brothers Services contends that it cannot "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. ¶ 8.) However, Defendants' purported basis for the requirement that third party administrators for eligible organizations provide separate payments for contraceptive services arises from ERISA. *See* 78 Fed.Reg. 39,879–80. It is undisputed that the Trust is a self-insured "church" plan under 26 U.S.C. § 414(e), and as a consequence is not subject to ERISA, because it has not made an election under 26 U.S.C. § 410(d). (ECF No. 15–2 ¶¶ 8–10.) Because the Trust is not subject to ERISA, Defendants candidly admit that they lack the regulatory authority to require Christian Brothers Services, as the third party administrator for Little Sisters and the Trust, to administer or pay for contraceptive care. (ECF No. 40 at 10–12 (citing 29 U.S.C. § 1003(b)(2) (exempting "church plans" from ERISA).) Thus, the Final Rules do not in fact require Christian Brothers Services to contract, arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients.

***11** Because the Final Rules do not require any of the Plaintiffs to provide, participate in, contract or arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients, the Court concludes that the Final Rules do not substantially burden Plaintiffs' religious beliefs which forbid such actions.

B. Authorization of Third–Party to Provide Coverage

[21] Mother Maguire also states that it would violate Little Sisters' religious beliefs to designate or authorize any third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services. (ECF No. 15–1 ¶ 48; 37–1 ¶ 9.) She avers that Little Sisters cannot "[c]reate a provider-insured relationship ... the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients." (ECF No. 37–1 ¶ 9(D).) Brother Quirk makes the same statements on behalf of the Trust. (ECF No. 15–2 ¶ 33; ECF No. 37–2 ¶ 8.) Again, the Court does not question the sincerity of these religious beliefs. However, as set forth below, the Court finds that the Final Rules do not substantially burden such beliefs on this separate basis as well.

To comply with the Mandate (and avoid the significant penalties that come with non-compliance), an "eligible organization" must contract with a third party administrator and provide that third party administrator with the completed self-certification form. *See* 26 C.F.R. § 54.9815–2713A. These are the only two acts required for an eligible organization to comply with the Mandate. *Id.* Under Defendants' interpretation of the regulations, whether this third party administrator is subject to ERISA is irrelevant to whether an eligible organization has complied with the Mandate. (*See* ECF No. 44 at 10–12.)

It is undisputed that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37–1 ¶ 5.) Christian Brothers Services does not currently provide the Trust's beneficiaries with access to sterilization, contraception, and abortion-inducing drugs and services, and it does not intend to do so in the future. (ECF No. 15–2 ¶ 27.) Defendants concede that they have no regulatory authority to require Little Sisters or the Trust to contract with a different third party administrator. (ECF No. 44 at 11.) Thus, the Final Rules do not require Little Sisters or the Trust to designate, authorize, or create a provider-insured relationship with any third party that will provide their employees with access to contraception, sterilization, or abortifacients.

The Court notes that the Final Rules could be construed to require an eligible organization to contract with a third party administrator that is willing to act as an ERISA plan administrator and claim administrator and take on all of the obligations set forth in 29 C.F.R. § 2510.3–16 and 26 C.F.R. § 54.9815–2713A. The Final Rules state that an eligible organization must: (1) "contract[ ] with one or more third party administrator" and (2) "provide each third party administrator that will process claims for any contraceptive services required to be covered under [the Mandate] with a copy of the self-certification" form. *See* 26 C.F.R. § 54.9815–2713A(b)(i) & (ii). The self-certification form must provide notice that: (1) the eligible organization "will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services"; and (2) the "[o]bligations of the third party administrator are set forth in 29 C.F.R. § 2510.3–16 and 26 C.F.R. § 54.9815–2713A." *Id.* at § 54.9815–2713A(b)(ii)(A) & (B). Reading these provisions together, an eligible organization could conclude that, to comply with the Mandate, it is required to contract with a third party administrator who is willing to take on the obligations set forth in 29 C.F.R. § 2510.3–16 and 26 C.F.R. § 54.9815–2713A.

***12** **[22]** However, in this litigation, Defendants have plainly taken the position that, under 26 C.F.R. § 54.9815–2713A, an eligible organization satisfies the Mandate by providing the self-certification form to their third party administrator, irrespective of whether that third party administrator is governed by ERISA, will act as a plan and claims administrator for contraceptive care, or will provide payments for contraceptive services. (ECF No. 44 at 10–12.) As Defendants are the governmental authorities tasked with issuing and enforcing the regulations implementing the ACA (ECF No. 1 ¶ 31), the Court must defer to their reasonable interpretation of such regulations.[5] *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 395, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Defendants' position that an eligible organization satisfies the Mandate by providing the self-certification form to its third party administrator, even if that third party administrator is not governed by ERISA, is a reasonable construction of the Final Rules. As such, the Court is bound by this interpretation.

5 Plaintiffs' contention that this interpretation is not entitled to deference because it is just Defendants' litigation position finds no support in the record. Defendants are offering their interpretation of a regulation that has yet to come into effect and, therefore, such interpretation is not a *post hoc* rationalization. Defendants' interpretation is also their first interpretation of these regulations, and does not appear to simply be a convenient litigation position. Therefore, the Court sees no reason that such interpretation should not be

entitled to an appropriate level of deference. *See Chase Bank USA, N.A. v. McCoy,* —— U.S. ——, 131 S.Ct. 871, 880, 178 L.Ed.2d 716 (2011) (stating that the courts must defer to an agency's interpretation of its own regulation even when "advanced in a legal brief"); *see also Christopher v. SmithKline Beecham Corp.,* —— U.S. ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (listing examples of when an agency's interpretation brought forth during litigation would not be entitled to deference).

Thus, under Defendants' interpretation of the regulations, to satisfy the Mandate and avoid fines, Little Sisters and the Trust are required only to complete the self-certification form and provide it to their third party administrator. Whether this third party administrator is subject to ERISA or willing to provide their employees with access to contraceptive care is irrelevant to whether they have complied with the Mandate. Accordingly, the Court finds that the challenged regulations do not require Little Sisters or the Trust to designate, authorize, or contract with a third party administrator that will provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services.

C. Completion and Distribution of the Self–Certification Form

[23] Plaintiffs next contend that the requirement that they complete the self-certification form and deliver it to their third party administrator violates their religious beliefs. (ECF No. 37 at 6.)

The self-certification form ("Form") provides that it is "to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 C.F.R. 54.9815–2713A[6], 29 C.F.R. 2590.715–2713A[7], and 45 C.F.R. 147.131[8]." (ECF No. 37–3 at 1.) An organization completing the Form must list its name, the name and title of the person authorized to make the certification on behalf of the organization, and provide identifying information for the person completing the certification. (*Id.*) The person who signs the Form must "certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a non-profit entity; and the organization holds itself out as a religious organization." (*Id.*) This person must also attest to the fact that all representations made on the Form are true, correct, and complete, to the best of her knowledge and belief. (*Id.*)

6 Part 54 of Title 26 contains regulations related to pension excises taxes implemented by the Internal Revenue Service. As discussed in detail above, 26 C.F.R. 54.9815–2713A defines the entities that qualify as "eligible organizations" and outlines what eligible organizations must do to comply with the Mandate. This regulation does not specifically state that it applies to church plans, but also does not specifically exempt church plans.

7 This provision is identical to 26 C.F.R. 54.9815–2713A but appears in part 54 of Title 29, which contains regulations related to group health plans implemented by the Employee Benefits Security Administration within the Department of Labor.

8 This provision defines an "eligible organization" (using the same definition contained in both 26 C.F.R. 54.9815–2713A and 29 C.F.R. 2590.715–2713A) and sets forth how an eligible organization who is insured under a group health plan complies with the Mandate. It does not mention self-insured group health plans or church plans.

***13** On the back of the Form, there is a notice to third party administrators which states:

> In the case of a group health plan that provides benefits on a self-insured basis, the provision this certification to a third-party administrator for the plan that will process claims for contraceptive coverage required under 26 C.F.R. 54.9815–2713(a)(1)(iv) or 29 CFR 2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 C.F.R. 54.9815–2713A, 29 C.F.R. 2510.3–16, and 29 C.F.R. 2590.715–2713A.
>
> This certification is an instrument under which the plan is operated.

(ECF No. 37–3 at 2.)

In her Supplemental Declaration, Mother Maguire states that, because of their religious beliefs, Little Sisters cannot "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries". (ECF No. 37–1 ¶ 9(A).) The Court finds that this contention reads too much into the language of the Form, which requires only that the individual signing it certify that her organization opposes providing contraceptive coverage and otherwise qualifies as an eligible organization. (ECF No. 37–3 at 1.) The Form contains a notice outlining the duties of third party administrators that receive the Form, but nothing on the face of the Form expressly authorizes the provision of contraceptive care, particularly with regard to church plans.

Additionally, as applied to the facts of this case, Little Sisters' execution of the Form does not authorize any organization to deliver contraceptive coverage to Little Sisters' employees. The regulations cited in the notice direct the third party administrator to ERISA regulations outlining the obligations of a plan administrator under ERISA. *See* 26 C.F.R. § 54.9815–2713A(b)(ii)(B) ("Obligations of the third party administrator are set forth in 29 C.F.R. 2510.3–16 and 26 C.F.R. 54.9815–2713A."); 29 C.F.R. § 2510.3–16 (an ERISA regulation which states that a third party administrator that receives a copy of a self-certification form from an eligible organization becomes "the plan administrator under section 3(16) of ERISA for any contraceptive services.").

Plaintiffs contend that, on its face, the Form does not make clear that only third party administrators governed by ERISA are responsible for making payments for contraceptive care. (ECF No. 42 at 27–28.) Plaintiffs also contend that the regulations make no exception for third party administrators of church plans. (ECF No. 37–2 ¶ 12.) However, as Plaintiffs also acknowledge, church plans are categorically exempt from ERISA altogether. (ECF No. 15–2 ¶ 9.) Given this blanket exemption, it would be unreasonable to require Defendants to specifically exempt church plans each time they promulgate a new regulation under their ERISA authority. Clearly, therefore, given this regulatory framework, the fact that church plans are not specifically exempted from the requirements levied on third party administrators by the Final Rules does not mean that church plan third party administrators are bound to comply with these regulations.

***14** Mother Maguire and Brother Quirk are aware that the Trust is a self-funded church plan, and that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37–1 ¶ 5; ECF No. 15–2 ¶¶ 4, 8.) Because a church plan and its third party administrator are not subject to ERISA, if these individuals complete the Form on behalf of their respective organizations, they know that they are not "authoriz[ing] another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries".

Mother Maguire also states that Little Sisters also cannot "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver these contraceptives, sterilization, and abortifacients to the Little Sisters' employees". (*Id.* ¶ 9(B).) However, as discussed above, Little Sisters is not required to deliver the Form to any organization other than its current third party administrator, Christian Brothers Services. The record is clear that Christian Brothers Services has no intention of delivering contraceptive, sterilization, and abortifacients to Little Sisters' employees, and no intention of contracting with another entity that will provide such services. (ECF No. 15–2 ¶¶ 27 & 32.) Defendants have explicitly stated that they have no authority to require that Little Sisters and/or Christian Brothers Services contract with a third party provider who is subject to ERISA, or who is willing to provide contraceptive coverage to Little Sisters' employees. (ECF No. 44 at 10–12.) Thus, Plaintiffs' contention that their religious beliefs are substantially burdened because the Form executed by the Little Sisters' could be relied on by another organization to provide contraceptive services to Little Sisters' employees is pure conjecture, one that ignores the factual and legal realities of this case. [9]

9 Were Little Sisters required to deliver the completed Form to a major health insurance company, such as Blue Cross Blue Shield or Kaiser Permanente, then the situation would be vastly different, as these insurance companies could rely on the Form as authorization to deliver contraceptive care to Little Sisters' employees. More likely, because these entities are subject to ERISA, they would be required to rely on the Form and act as plan and claims administrator for purposes of contraceptive care. But, because the Trust is a church plan and Defendants lack the authority to require it to contract with an entity subject to ERISA, the Court need not consider these hypotheticals, as they relate to facts not before the Court in this case.

Finally, Mother Maguire contends that it would violate Little Sisters' religious beliefs if they are required to "[p]articipate

in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries." (ECF No. 37–1 ¶ 9(E).) Brother Quirk echoes these thoughts exactly. (ECF No. 37–2 ¶ 8.) Again, this statement ignores the realities of this case. Christian Brothers Services has plainly stated that it has not and does not intend to facilitate the provision of contraceptives, sterilization, or abortifacients. (ECF No. 37–2 ¶ 8.) Therefore, if Mother Maguire executes the Form and delivers it to Christian Brothers Services—the only acts required of her under the "scheme" set forth in the Final Rules—Little Sisters' employees will not be provided contraceptives, sterilization, or abortifacients through their employer-sponsored health plan. Similarly, if Brother Quirk executes the Form on behalf of the Trust and delivers it to Christian Brothers Services, as he is required to do, no beneficiary of health care through the Trust will be provided contraceptives, sterilization or abortifacients through the employer-sponsored health plan.

***15** The purpose of Little Sisters and the Trust executing and delivering the Form to their third party administrator is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries. It is clear that these services will not be offered to the employees regardless of whether the Form is executed and delivered to Christian Brothers Services. Instead, on the facts of this case, the "sole purpose" of the execution and delivery of the Form is to comply with the Mandate and avoid the substantial penalties for non-compliance.

Accordingly, on the facts of this case, the Court finds it will not substantially burden Plaintiffs' religious beliefs for an authorized representative of these organizations to execute the self-certification form and deliver it to their third party administrator. Nor are Plaintiffs being required to buy into a scheme that substantially burdens their religious beliefs.

D. Irreparable Harm Conclusion

To satisfy their burden of showing irreparable harm, the only argument Plaintiffs make is that a RFRA violation is always irreparable harm. (ECF No. 15 at 16.) As set forth in detail above, the Court finds that Plaintiffs have not demonstrated a likely RFRA violation. While the Court does not question the sincerity of Plaintiffs' beliefs, the Court finds that the Final Rules will not function in a manner that substantially burden these beliefs. Because Little Sisters' employees receive their health care coverage through the Trust, which is a self-insured church plan with a Catholic third party administrator, these employees will not be provided access to contraception, sterilization, or abortifacients through this health plan. Defendants have freely admitted that they lack the regulatory authority at this time to force a different result.

Plaintiffs repeatedly emphasize that the Defendants have only conceded that they lack the authority "at this time" to require third party administrators of church plans to administer claims for contraceptive services. (*See* ECF No. 15–2 ¶ 4.) The Court acknowledges that the regulations implementing the ACA are in flux, and that Congress may, at some point in the future, grant Defendants some authority outside of ERISA to enforce the Mandate, and/or promulgate new regulations that apply to church plans. Indeed, there is a story on the news almost daily about changes being made to the ACA regulations. However, the Court cannot and will not hypothesize or speculate about how such future changes may impact Plaintiffs.

[24] **[25]** "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.' " *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir.2003) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985)); *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674, 51 S.Ct. 286, 75 L.Ed. 602 (1931) ("Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir.2001). *Id.*

The Court finds that Plaintiffs have failed to meet this burden. Plaintiffs ignore the fact that, as participants in a church plan, they fall outside of Defendants' current enforcement authority. Plaintiffs would have the Court surmise that their self-certification form could be relied on by a hypothetical third party administrator to facilitate the provision of contraception, sterilization, and abortifacients to their employees at some point in the future. However, the Court is tasked with determining only whether the regulations, as they currently stand, substantially burden Plaintiffs' religious beliefs. Given the current version of the regulations, as applied to the facts of and parties to this case, the Court finds that Plaintiffs have failed to show that any injunction is necessary to prevent an imminent harm.

IV. CONCLUSION

***16 [26]** It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is "clear and unequivocal." *Kikumura v. Hurley,* 242 F.3d 950, 955 (10th Cir.2001). For the reasons set forth above, the Court finds that Plaintiffs have failed to show a clear and unequivocal right to injunctive relief. As such, the Court ORDERS as follows:

1. Plaintiffs' Motion for Preliminary Injunction (ECF No. 15) is DENIED;

2. Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment (ECF No. 30) is DENIED to the extent it seeks dismissal of this case for lack of standing. The Court RESERVES RULING on the remainder of the issues raised in the Motion to Dismiss.

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Religious Freedom Restoration Act

42 U.S.C. § 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

26 C.F.R. § 54.9815–2713A

Accommodations in connection with coverage of preventive health services.

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(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 Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(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 (b) or (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 ERISA.

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate

payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, 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 using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

[...]

45 C.F.R. § 156.50

Financial support.

(a) Definitions. The following definitions apply for the purposes of this section:

Participating issuer means any issuer offering a plan that participates in the specific function that is funded by user fees. This term may include: health insurance issuers, QHP issuers, issuers of multi–State plans (as defined in § 155.1000(a) of this subchapter), issuers of stand-alone dental plans (as described in § 155.1065 of this subtitle), or other issuers identified by an Exchange.

(b) Requirement for State-based Exchange user fees. A participating issuer must remit user fee payments, or any other payments, charges, or fees, if assessed by a State-based Exchange under § 155.160 of this subchapter.

(c) Requirement for Federally-facilitated Exchange user fee. To support the functions of Federally-facilitated Exchanges, a participating issuer offering a plan through a Federally-facilitated Exchange must remit a user fee to HHS each month, in the timeframe and manner established by HHS, equal to the product of the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year and the monthly premium charged by the issuer for each policy under the plan where enrollment is through a Federally-facilitated Exchange.

(d) Adjustment of Federally-facilitated Exchange user fee--

(1) A participating issuer offering a plan through a Federally-facilitated Exchange may qualify for an adjustment in the Federally-facilitated Exchange user fee specified in paragraph (c) of this section to the extent that the participating issuer--

(i) Made payments for contraceptive services on behalf of a third party administrator pursuant to 26 CFR 54.9815–2713A(b)(2)(ii) or 29 CFR 2590.715–2713A(b)(2)(ii); or

(ii) Seeks an adjustment in the Federally-facilitated Exchange user fee with respect to a third party administrator that, following receipt of a copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4), made or arranged for payments for contraceptive services pursuant to 26 CFR 54.9815–2713A(b)(2)(i) or (ii) or 29 CFR 2590.715–2713A(b)(2)(i) or (ii).

(2) For a participating issuer described in paragraph (d)(1) of this section to receive the Federally-facilitated Exchange user fee adjustment--

(i) The participating issuer must submit to HHS, in the manner and timeframe specified by HHS, in the year following the calendar year in which the contraceptive services for which payments were made pursuant to 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2) were provided --

(A) Identifying information for the participating issuer and each third party administrator that received a copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4) with respect to which the participating issuer seeks an adjustment in the Federally-facilitated Exchange user fee, whether or not the participating issuer was the entity that made the payments for contraceptive services;

(B) Identifying information for each self-insured group health plan with respect to which a copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4) was received by a third party administrator and with respect to which the participating issuer seeks an adjustment in the Federally-facilitated Exchange user fee; and

(C) For each such self-insured group health plan, the total dollar amount of the payments that were made pursuant to 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2) for contraceptive services that were provided during the applicable calendar year. If such payments were made by the participating issuer directly as described in paragraph (d)(1)(i) of this section, the total dollar amount should reflect the amount of the payments made by the participating issuer; if the third party administrator made or arranged for such payments, as described in paragraph (d)(1)(ii) of this section, the total dollar amount should reflect the amount reported to the participating issuer by the third party administrator.

(ii) Each third party administrator that intends for a participating issuer to seek an adjustment in the Federally-facilitated Exchange user fee with respect to the third party administrator for payments for contraceptive services must submit to HHS a notification of such intent, in a manner specified by HHS, by the later of January 1, 2014, or the 60th calendar day following the date on which the third party administrator receives the applicable copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4).

(iii) Each third party administrator identified in paragraph (d)(2)(i)(A) of this section must submit to HHS, in the manner and timeframe specified by HHS, in the year following the calendar year in which the contraceptive services for which payments were made pursuant to 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2) were provided--

(A) Identifying information for the third party administrator and the participating issuer;

(B) Identifying information for each self-insured group health plan with respect to which a copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4) was received by the third party administrator and with respect to which the participating issuer seeks an adjustment in the Federally-facilitated Exchange user fee;

(C) The total number of participants and beneficiaries in each such self-insured group health plan during the applicable calendar year;

(D) For each such self-insured group health plan with respect to which the third party administrator made payments pursuant to 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2) for contraceptive services, the total dollar amount of such payments that were provided during the applicable calendar year. If such payments were made by the participating issuer directly as described in paragraph (d)(1)(i) of this section, the total dollar amount should reflect the amount reported to the third party administrator by the participating issuer; if the third party administrator made or arranged for such payments, as described in paragraph (d)(1)(ii) of this section, the total dollar amount should reflect the amount of the payments made by or on behalf of the third party administrator; and

(E) An attestation that the payments for contraceptive services were made in compliance with 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2).

(3) If the requirements set forth in paragraph (d)(2) of this section are met, and as long as an authorizing exception under OMB Circular No. A–25R is in effect, the participating issuer will be provided a reduction in its obligation to pay the Federally-facilitated Exchange user fee specified in paragraph (c) of this section equal in value to the sum of the following:

(i) The total dollar amount of the payments for contraceptive services submitted by the applicable third party administrators, as described in paragraph (d)(2)(iii)(D) of this section.

(ii) An allowance for administrative costs and margin. The allowance will be no less than 10 percent of the total dollar amount of the payments for contraceptive services specified in paragraph (d)(3)(i) of this section. HHS will specify the allowance for a particular calendar year in the annual HHS notice of benefit and payment parameters.

(4) As long as an exception under OMB Circular No. A–25R is in effect, if the amount of the adjustment under paragraph (d)(3) of this section is greater than the amount of the participating issuer's obligation to pay the Federally-facilitated Exchange user fee in a particular month, the participating issuer will be provided a credit in succeeding months in the amount of the excess.

(5) Within 60 days of receipt of any adjustment in the Federally-facilitated Exchange user fee under this section, a participating issuer must pay each third party administrator with respect to which it received any portion of such adjustment an amount no less than the portion of the adjustment attributable to the total dollar amount of the payments for contraceptive services submitted by the third party administrator, as described in paragraph (d)(2)(iii)(D) of this section. No such payment is required with respect to the allowance for administrative costs and margin described in paragraph (d)(3)(ii) of this section. This paragraph does not apply if the participating issuer made the payments for contraceptive services on behalf of the third party administrator, as described in paragraph (d)(1)(i) of this section, or is in the same issuer group as the third party administrator.

(6) A participating issuer receiving an adjustment in the Federally-facilitated Exchange user fee under this section for a particular calendar year must maintain for 10 years following that year, and make available upon request to HHS, the Office of the Inspector General, the Comptroller General, and their designees, documentation demonstrating that it timely paid each third party administrator with respect to which it received any such adjustment any amount required to be paid to the third party administrator under paragraph (d)(5) of this section.

(7) A third party administrator with respect to which an adjustment in the Federally-facilitated Exchange user fee is received under this section for a particular calendar year must maintain for 10 years following that year, and make available upon request to HHS, the Office of the Inspector General, the Comptroller General, and their designees, all of the following documentation:

(i) A copy of the self-certification referenced in 26 CFR 54.9815–2713A(a)(4) or 29 CFR 2590.715–2713A(a)(4) for each self-insured plan with respect to which an adjustment is received.

(ii) Documentation demonstrating that the payments for contraceptive services were made in compliance with 26 CFR 54.9815–2713A(b)(2) or 29 CFR 2590.715–2713A(b)(2).

(iii) Documentation supporting the total dollar amount of the payments for contraceptive services submitted by the third party administrator, as described in paragraph (d)(2)(iii)(D) of this section.