**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**

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Regulations**

## INTRODUCTION

The Little Sisters of the Poor are nuns who devote their lives to caring for the elderly poor. As an undisputed matter of sincere religious faith, they cannot participate in the government's Mandate scheme either by providing contraceptive coverage or executing and delivering EBSA Form 700. If the Little Sisters continue that religious exercise, the government will impose massive penalties.

This is a textbook "substantial burden" on religion. *See Yellowbear v. Lambert*, 741 F.3d 48, 55 (10th Cir. 2014) (identifying this Circuit's "substantial burden" test); *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013) (same); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (same). Such burdens are forbidden unless the Mandate survives strict scrutiny, which the government conceded below it cannot do. JA290a-91a.

It is no surprise that virtually every religious ministry challenging the Mandate has received an injunction. Of twenty-one decided cases, only a single plaintiff has been denied one. That lone exception—the Seventh Circuit's *Notre Dame* decision—has been specifically distinguished from this case by both the government and the courts.

In trying to avoid an injunction in this case, the government told the Supreme Court that the purpose of its Form was simply to provide a "regularized, orderly

means" for the government to know that a party was a religious objector. Brief of Respondents at 33, *Little Sisters of the Poor v. Sebelius*, No. 13A691, 2014 WL 108374 (U.S. Jan. 3, 2014). In response, the Court issued an injunction that should have satisfied the government completely, because it required the Little Sisters to notify the government that they are religious objectors (a requirement they have since met). JA725a.[1]

Nonetheless, the government now argues that it can punish the Little Sisters for refusing to sign EBSA Form 700 and do so without imposing a substantial burden on their religion. It barely acknowledges the Supreme Court's solution, nowhere explaining how that sensible solution is inadequate or why it should be upended by this Court. Further, the government can only make its argument by completely ignoring controlling precedent on how to apply the "substantial burden" test. The government similarly ignores the vast majority of courts that have applied that test to grant injunctions, focusing instead on the outlier *Notre Dame* decisions (which the government itself told the Seventh Circuit was "not similar" to this case and, indeed, provided a "sharp contrast" to it).

Thus, the government devotes most of its brief to arguing either that the Little Sisters misunderstand the Mandate and should not object to signing the Form (Opp.15-21); that RFRA does not protect religious objections that relate to the

[1] Unless otherwise stated, the Appellants will be collectively referred to as the "Little Sisters."

actions of third parties (Opp.22-26); and that RFRA does not protect religious exercises that "impose burdens on third parties" (Opp.26-28). These arguments are all squarely foreclosed. *See, e.g.*, *Yellowbear*, 741 F.3d 54-55 ("When a sincere religious claimant draws a line ruling in or out a particular religious exercise, 'it is not for us to say that the line he drew was an unreasonable one.'") (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)); *Hobby Lobby*, 723 F.3d at 1144-45 (finding a substantial burden under RFRA despite government claims of third party harm); *id.* at 1137 (rejecting government's argument that RFRA does not reach a claim that "somehow depends on the independent actions of third parties"); *see also* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (RFRA broadly applies to "any exercise of religion").

The government's arguments also contradict themselves, the facts, and the law. The government claims that the Little Sisters should not object to signing the Form because it will have no impact (Opp.18, 21), but then argues that the Little Sisters somehow impose a "burden on third parties" by not signing (Opp.26). The government claims the Department of Treasury's version of the Mandate is only enforceable under ERISA (Opp.19), but ignores the fact that Treasury stated the opposite *in the text of the regulation itself*, which cites the Internal Revenue Code, not ERISA, as the "authority" for its rule. 78 Fed. Reg. 39870, 39892 (July 2, 2013) (citing "sections 7805 and 9833 of the [Internal Revenue] Code."). The

government denies that its Form would authorize, direct, incentivize, or obligate others to provide contraceptive coverage (Opp.20), but said the opposite in the Federal Register and to other courts.

The government also makes only meager efforts to defend the Mandate's religious discrimination and its control of the Little Sisters' speech. For the former, it does not deny that it has discriminated among religious organizations, but simply ignores this Court's holding in *Colorado Christian University v. Weaver* that such discrimination is impermissible. 534 F.3d 1245 (10th Cir. 2008). For the latter, it argues that what it forces the Little Sisters to say (or not say) is so meaningless as to be unprotected. But the government cannot even compel speech it claims is meaningful (like a flag salute), so it certainly cannot compel speech it says is meaningless.

Ultimately, the government is forced to tie itself in knots because the simple and undisputed facts, analyzed under the controlling case law, confirm the obvious: federal law prohibits this attempt to force the Little Sisters to violate their religious beliefs. For that reason, this Court should reject the government's attempt to expose the Little Sisters to crushing penalties and instead extend injunctive relief for the duration of the litigation.[2]

[2] Notably, the government's brief focused solely on the likelihood of success prong of the injunction analysis. It did not engage—and thus conceded—the Little Sisters' arguments about irreparable harm, the balance of harms, and the public interest. Nor did

## ARGUMENT

### I. The Mandate Imposes a Substantial Burden on the Little Sisters' Religious Exercise in Violation of RFRA.

The Mandate threatens the Little Sisters with enormous penalties unless they cease their religious exercise. Under controlling precedent, that is a textbook substantial burden, because the government is using the threat of punishment to force the Little Sisters to give up their religious exercise of offering a health benefit plan to their employees while refusing to either pay for contraceptives or sign the government's Form. And because the government appropriately conceded strict scrutiny below, JA290a-91a, this straightforward burden analysis should dispose of the case.

The government devotes most of its brief to a strained argument that its threat of massive penalties is somehow not a substantial burden. But the government can only deny a substantial burden by ignoring the controlling legal standard. There is a test for determining whether a law imposes a substantial burden on a religious exercise, which this Court has explained on at least three recent occasions. *See Yellowbear*, 741 F.3d at 55; *Hobby Lobby*, 723 F.3d at 1138; *Abdulhaseeb*, 600 F.3d at 1315. Each time, the Court described the test in fewer than 100 words:

> [A] burden on a religious exercise rises to the level of being "substantial" when (at the very least) the government (1) requires the

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it defend the district court's inappropriate rejection of the Little Sisters' First Amendment claims without addressing their merits.

> plaintiff to participate in an activity prohibited by a sincerely held religious belief, (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). Yet rather than apply these controlling precedents—under which the Mandate easily qualifies as a substantial burden—the government instead offers a 16-page, five-part discourse on substantial burden that does not mention the controlling test, propose any alternative, or even rely on a single case from this Circuit. Opp.15-31. That lengthy obfuscation is both irrelevant and wrong on its own terms.

### A. The Mandate Imposes a Substantial Burden Because It Forces the Little Sisters to Violate Their Religious Beliefs or Face Massive Penalties.

The Little Sisters and Christian Brothers have deliberately joined together to exercise their religion by providing health benefits consistent with their shared Catholic faith. JA151a, 172a-73a. That religious exercise includes the religious belief that they can neither provide contraceptive coverage nor execute and deliver the government's required Form. JA151a, 156a-57a, 166a-72a.

Because the sincerity of this religious exercise is undisputed, JA699a, 702a, the only question for this Court is whether the threat of massive penalties for

continuing the exercise constitutes a "substantial burden." There can be no serious question that it does, because the Mandate:

(1) "requires [the Little Sisters and Christian Brothers] to participate in an activity prohibited by a sincerely held religious belief" (i.e., triggering and providing contraceptive coverage either directly or indirectly by signing and delivering the Form, JA153a-55a, 166a-70a, 343a-45a, 352a-53a);

(2) "prevents [the Little Sisters and Christian Brothers] from participating in an activity motivated by a sincerely held religious belief" (i.e., continuing their shared religious exercise of providing a health plan and benefits consistent with their Catholic faith that do not include access to contraceptives, JA151a, 156a, 172a-73a); and

(3) "places considerable pressure on [the Little Sisters and Christian Brothers] to violate a sincerely held religious belief" (here, by exposing the Little Sisters and Christian Brothers to massive financial consequences unless they cease their religious exercise, JA159a, 173-75a).

*Yellowbear*, 741 F.3d at 55 (citing *Abdulhaseeb*, 600 F.3d at 1315); LSP Br. 31-34.

Nor can there be any serious doubt about whether the fines are of sufficient magnitude to constitute a substantial burden. The substantial burden test requires that the Court focus on "the *intensity of the coercion* applied by the government to act contrary to [religious] beliefs." *Hobby Lobby*, 723 F.3d at 1137 (emphasis in original). The Court's "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." *Id.* As a matter of both logic and precedent, millions of dollars in penalties as the price for continuing a religious exercise constitutes a substantial burden. *Hobby Lobby*, 723 F.3d at 1140 (holding, as to

the same penalty provisions, that "it is difficult to characterize the pressure as anything but substantial").

The government also suggests that the Mandate is not a burden on the Little Sisters because they could avoid it by just terminating their health plan and its benefits for their employees. Opp.21 n.4. But while the government may be fine with that, the Little Sisters are not: they believe they have a religious obligation to care for the employees who join in their ministry, and they cannot throw those people off their insurance policies without violating that obligation and harming their ministry. JA156a, 159a-60a, 170a-71a, 174a-76a.[3] And terminating coverage would obviously burden the exercise of Christian Brothers' religious ministry. JA175a-76a. This argument *does* show, though, that the government has no compelling interest in forcing the Little Sisters to execute the Form—apparently the government would be fine if people obtained contraceptive coverage on the exchanges instead of through the nuns.

[3] The government's novel similar suggestion that the Little Sisters should just give up their religious exercise of associating with Christian Brothers and contract with a third party insurer, Opp.26 n.6, is equally wrong. Seeking out and contracting with an insurer to provide contraceptive coverage would violate the Little Sisters' religious beliefs. JA35a-41a, 157a, 177a-76a. And even if they find such an insurer, they would still have to execute the Form, which violates their religious beliefs. JA344a-345a, 352a-53a. Further, this suggestion creates yet another burden, for the prospect of government pressure forcing employers to drop the Christian Brothers plan imposes enormous pressure *on Christian Brothers* to comply with the Mandate in violation of its religious beliefs. JA175a-76a.

### B. The Government's Characterization of the "Accommodation" is Contrary to Federal Law and Irrelevant to Substantial Burden Analysis.

The government claims that the Little Sisters wrongly "collapse the provision of contraceptive coverage by third parties with their own decision not to provide such coverage." Opp.20. If any contraceptives are provided, the government claims they will be provided "independently" by third parties "due to an obligation imposed by the government or the availability of reimbursement by the government." *Id*. Since the Little Sisters "need only complete a form" and give it to their TPAs, *id*. at 16, the government claims the Little Sisters are not substantially burdened by the government forcing them to violate their religious beliefs.

But the government's characterization of the accommodation is wrong. As the government conceded before other courts and in the Federal Register, executing EBSA Form 700 is *the* trigger to obligate, authorize, direct, and incentivize others to provide contraceptives. And even if the government were right about the Form, the Mandate still imposes a substantial burden because the Little Sisters have an undisputed religious objection to signing, and the government promises massive punishment unless they give up that religious exercise.

#### *1. EBSA Form 700 Obligates, Authorizes, Directs, and Incentivizes Others to Provide Contraceptive Coverage.*

The government repeatedly describes the relationship between the Form's execution and the provision of contraceptive coverage as if it were a mere matter

of timing—the drugs flow "after" execution and delivery of the Form. *See, e.g.*, Opp.17 (third parties may provide contraceptive coverage "[a]fter the employer plaintiffs" sign the Form); *id.* at 20. This careful phrasing cannot hide that signing and delivering the Form are essential steps in the government's scheme because they create legal authority, obligations, and incentives for others to provide contraceptive coverage. Simply put, without those steps, there could be no coverage.

If the Form were not central to delivering contraceptive coverage, it is difficult to fathom why the government would still be litigating this case. Why fight to make the Little Sisters sign a meaningless form? The government's actions are particularly telling in light of the injunction fashioned by the Supreme Court, in which the Little Sisters simply informed the government of their religious objection, but without signing EBSA Form 700. JA725a. If the government merely needed the Little Sisters to "certify that they are entitled to the religious exception," Opp.32, surely it would accept the notification it received when this lawsuit was filed, or on the subsequent notification it received after the Supreme Court's injunction.[4]

[4] There are innumerable ways that the government can, and does, distribute contraceptives without the coerced involvement of nuns. *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (listing some alternatives). Nothing stops it from choosing to "pursue its policy objectives in another way," Opp.32, so long as it does not coerce religious objectors.

The government's failure to accept such alternative means both undermines its claimed compelling interest and confirms that the Form actually does function to authorize, direct, obligate, and incentivize others to provide coverage. LSP Br. 37-39. The government has repeatedly acknowledged those effects in the Federal Register. For example, employers are required to sign the Form to designate their TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879; 26 C.F.R. 54.9815-2713A. Receipt of the Form triggers the 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). The government explains that the purpose of forcing an employer to designate the TPA in this manner is that it "ensures that there is a party with legal authority" to make contraceptive payments. 78 Fed. Reg. at 39880.

The government has also conceded the role of its Form in parallel proceedings in other courts. For example, the government has acknowledged that signing the Form creates the TPA's legal duty to deliver the drugs, stating that the TPA's "duty" to "become a plan administrator" and provide the mandated coverage "only arises…by virtue of the fact that they receive the self-certification form from the employer." *See* Tr. of Hr'g at 13, Dkt. 54, *Roman Catholic Archbishop of Wash. v.*

*Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). Likewise, the government has candidly admitted that it is the signing and delivery of the Form that triggers the TPA's eligibility for federal incentive payments.[5] These admissions by the government eviscerate any claim that the government simply wants some way to know who is claiming an exemption.

*2. Without EBSA Form 700's Execution and Delivery, There is No Coverage.*

The government continues to advance the false claim that, after the Little Sisters execute and deliver the Form, federal law "independently" requires the provision of coverage. *See*, *e.g.*, Opp.20-26. Any third-party provision of contraceptive coverage via the Little Sisters' plan directly depends on the Little Sisters signing and delivering this very particular authorization Form. Far from being "independent" of the Little Sisters' plan, the coverage would flow *only* to beneficiaries of that plan, *only* so long as they remain on the plan, and would be the legal obligation of the TPA *only* because it provides services in connection with the Little Sisters' plan—and all this is true *only* because the Little Sisters were forced to execute and deliver the Form. As the government disclosed elsewhere, the contraceptive coverage is actually part of the Little Sisters' plan. *See* Tr. of Hr'g at 18, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441

[5] *See* JA 677a (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*.") (emphasis added).

(D.D.C. Nov. 22, 2013) (admitting that "technically, the contraceptive coverage is part of [the religious objector's] plan"); *see also id*. at 16-17 (admitting that, upon execution, contraceptive "services become available to the employees by virtue of their participation in the religious [objector's] plan"). Thus, by executing the Form, the Little Sisters would be giving the government and their TPAs authority that neither had before: *authority to use the Little Sisters' health plan to provide contraceptives*. And this authority comes with obligations and incentives that would not otherwise exist.[6]

Forcing the Little Sisters to give such authorization also makes a mockery of the government's mantra that they need not "contract, arrange, pay, or refer" for contraceptive coverage. *See, e.g.*, Opp.17. The Form itself announces that it "is an instrument under which the plan is operated," AD2, thereby amending the terms of the parties' agreement to include products they have always excluded. Being forced by the government (a) to amend the Little Sisters' plan to provide for the coverage of contraceptives, (b) to create what the government calls "legal

[6] This is why the government's conscientious objector analogy, Opp.21-22, is not just wrong, but proves the Little Sisters' point. A conscientious objector only opts himself out. While the government may then *choose* to draft someone else, or someone else may *choose* to enlist, both were always able to do so regardless of the objector's opt-out. For the government's analogy to even approach accuracy, a conscientious objector would be forced to personally designate a specific person to take his place (someone otherwise unable to enlist and the government otherwise unable to draft), authorize both the government to draft the person *and* the person to enlist, create obligations for the person to enlist, and trigger financial incentives for the person to enlist.

authority" to provide the coverage in connection with that plan, and (c) then to deliver the Form to and coordinate with the party who is supposed to provide the coverage so it *can* provide that coverage is surely an obligation to "contract," "arrange," and "refer" for coverage.

Finally, even if the government were actually right that the contraceptive coverage would only be provided based on "independent" actions of third parties, this Court has already held that this cannot justify pressuring a religious objector to take actions violating his faith. *See Hobby Lobby*, 723 F.3d at 1137 (rejecting the government's argument that "one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties" as "fundamentally flawed" because it improperly focuses on the "theological merit of the belief in question rather than the *intensity of the coercion* applied by the government").

*3. The Trust's Status as a Church Plan Does Not Eliminate the Burden.*

The government next argues that the Little Sisters should execute and deliver EBSA Form 700 because they have associated with Christian Brothers, a religious benefits provider who "is not required to provide coverage and has made clear that it will not do so." Opp.21. According to the government, it lacks ERISA enforcement authority to force Christian Brothers to comply with the legal obligations set forth in 29 C.F.R. 2510.3–16 and 26 C.F.R. 54.9815–2713A, and,

therefore, it can coerce the Little Sisters to sign the Forms creating those obligations.

This argument is flawed for several reasons. First, the government cites no authority for the novel proposition that it can force the Little Sisters to act contrary to their religious beliefs because they should just rely on their co-religionists to act in accordance with their shared religious beliefs. The Little Sisters cannot be forced to outsource their religious principles to Christian Brothers or anyone else (and indeed the Little Sisters specifically objected to even placing Christian Brothers in such a position, JA34a, 157a,-58a, 176a, 342a-47a).

Second, although the government claims that the Internal Revenue Code "confers no authority separately to regulate third party administrators," Opp.19, that claim is directly contradicted by the regulations at issue in this case, under which the Department of Treasury purports to regulate third party administrators using its authority under the Internal Revenue Code. 26 C.F.R. 54.9815–2713A(b)(1)(ii)(B) & (2); 78 Fed. Reg. at 39892 ("The Department of Treasury regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.").

Third, the government's claimed inability to make the Form actionable is something the government deems *temporary*—a limitation on what the government can do with the Form "at this time," with the express statement that the

government is still working on a solution. JA283a. The government nowhere backs away from this characterization. Nor does it address the concern that the Form may provide the Little Sisters' employees with a contractual right to receive contraceptives under the plan. LSP Br. 39.

Fourth, the government offers no substantive response to the Little Sisters' refusal to sign and deliver the Form to Express Scripts, Inc. ("ESI"), a secular company and a potential TPA under the plan. While ESI was not described in the initial motion for a preliminary injunction, that omission is unsurprising—the government had not yet taken the position that the church plan context mattered at all.[7] The relevant fact is that, even as of this date, the government has not stated whether an entity such as ESI is, for purposes of an arrangement like the Little Sisters', a TPA that must receive the Form. Notably, the government *has* acknowledged that an entity such as ESI can use the Form to authorize the provision of contraceptives and then seek reimbursement. The government's

[7] Indeed, at the time the motion for a preliminary injunction was filed, the government was still insisting that it could enforce the Mandate against employers participating in self-insured church plans. LSP Br. 19 n.5. It was only after the motion that the government came forward with its new church plan theory. Even at that point, however, it was unclear whether ESI was a TPA who must receive the Form. Sister Loraine referred to this confusion in her supplemental declaration. JA345a ("While I understand Christian Brothers Services to be a third party administrator for the plan, I also understand that the government has not yet taken a clear position as to whether it expects us to give the form to Christian Brothers Services or some other entity."). Brother Quirk described the ESI issue in more detail in the briefing on the motion for summary judgment, JA495a, which was pending concurrently with the preliminary injunction, and part of which was resolved in the same opinion. JA683a-84a.

argument that the Little Sisters should simply sign the Form and trust their administrator(s) is even weaker if the Form must be given to ESI.

*4. The Little Sisters' Religious Objections Are Undisputed.*

Despite the parties' disagreements over legal significance of the Form, the most important fact is undisputed: the Little Sisters sincerely believe, as a religious matter, that they cannot participate in the accommodation. While religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit" legal protection, *Thomas*, 450 U.S. at 714, the religious objection here is manifestly reasonable in light of the government's statements both in the Federal Register and in open court. But ultimately this Court's "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; *see also id.* at 1142 (the question is not "whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity"). Thus the government's argument about the effect of the Form is not only incorrect but irrelevant to the substantial burden analysis.

### C. The Government's Third-Party-Harm Argument is Both Unpersuasive and Foreclosed by RFRA and *Hobby Lobby*.

Unwilling and unable to address this Court's substantial burden case law, the government argues that RFRA should not be read to protect a religious exercise that would impose a "burden on third parties." Opp.26.

This is a strained argument. The Little Sisters' employees remain free to obtain contraceptives. The only question in this case is whether the Little Sisters must participate in providing those contraceptives. And if, as the government asserts, signing the Form will not result in the provision of contraceptive coverage, it is unclear how *not* signing the Form will deprive anyone of anything.

In any case, both Congress and this Court have clearly rejected the government's attempt to limit RFRA to some religious exercises and not others. In RFRA, Congress did not limit its protection only to those religious exercises that do not impose burdens on others. To the contrary, RFRA broadly protects "any exercise of religion."[8] The statute itself cites cases in which the religious exercise arguably *did* impose burdens on third parties. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 229-31 (1972). Furthermore, even if

[8] The government is correct that RFRA's *original* 1993 text at least arguably tied the exercise of religion to First Amendment case law. But the government nowhere addresses the fact that Congress deliberately *broadened* the definition of religious exercise in 1999, excising the reference to the First Amendment, and instead substituting the inclusive term "any religious exercise." *Hobby Lobby*, 723 F.3d at 1129 n.6; *see also Amicus Brief* of the Christian Legal Society at 31, *Sebelius v. Hobby Lobby*, No. 13-354, 2014 WL 411294 (U.S. Jan. 28, 2014),.

Congress had left any daylight on this issue, *Hobby Lobby* resolves the question because the Court there applied RFRA in the context of the contraceptive mandate, despite the government's claims of third party burden on employees. 723 F.3d at 1144-45. Having lost that argument in *Hobby Lobby*, the government cannot resuscitate it here.

The government cannot bolster this argument by its repeated reliance on *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). *Notre Dame* is different from this case because, there, the religious objector had already executed and delivered EBSA Form 700 to its administrator, who in turn had begun providing contraceptive coverage. Indeed, the government told the Seventh Circuit that these facts made the *Notre Dame* case "not similar" to this case, and that the fact that coverage was already being provided as a result of the Form having been signed made for a "sharp contrast" with this case. Brief of Gov't at 5, *Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 4, 2014).[9] The government's repeated reliance on that out-of-circuit precedent, in a "not similar" case, can neither overcome this Court's binding precedents, nor outweigh that *all* of the twenty other non-profit Mandate cases—in other words, 100% of the decisions

[9] The Seventh Circuit also distinguished *Notre Dame* from this case on the ground that Notre Dame, unlike the Little Sisters, had already complied. *See* 743 F.3d at 553. And the Seventh Circuit cautioned that its entire ruling was not even predictive of the ultimate result in the Notre Dame litigation itself. *Id.* at 552 ("everything we say in this opinion about the merits of Notre Dame's claim . . . is necessarily tentative, and should not be considered a forecast of the ultimate resolution of this still so young litigation.").

involving plaintiffs who, like the Little Sisters, have not submitted the Form—have resulted in injunctions.

### D. The Government Does Not Need the Little Sisters' Form to Know They Object.

Finally, the government argues that its ability to accommodate religious objectors "depends on its ability to ask that religious objectors who do not belong to a pre-defined class (such as exempt organizations under the Internal Revenue Code) certify that they are entitled to the religious exception." Opp.32. For this reason, the government claims that forcing the Little Sisters to sign the Form satisfies strict scrutiny.

First, the government has already conceded strict scrutiny below, based on the *Hobby Lobby* decision. JA290a-91a. The government's new arguments on appeal cannot begin to meet the heavy evidentiary burden necessary prove a compelling interest and use of least restrictive means. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 821 (2000) (noting the government must provide proof to pass strict scrutiny); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011) (emphasizing that "ambiguous proof will not suffice").

Second, the government's claim that it needs the Form because the Little Sisters "do not belong to a pre-defined class" is simply incorrect. The Little Sisters *are* members of a "pre-defined class"—they are tax exempt organizations under 26 U.S.C. § 501(c)(3). JA150a. They are also participating employers in a church

plan—a categorical distinction that Congress has used repeatedly for exemptions of various kinds.[10]

Third, the government's claim that it needs a way to know who is exempt is belied by the fact that (a) no similar form is required of grandfathered plans, which are also exempt from the Mandate, (b) no similar form is required of "religious employers," which are also exempt from the Mandate, and (c) the Form is not even designed to be submitted to the government, but to be given to the third parties. LSP Br. 36-39.

Finally, to the extent the government merely needs a way to know who has a religious objection, the Supreme Court fashioned relief that would be perfectly adequate for that purpose. The government's continued and adamant insistence that the Little Sisters execute EBSA Form 700 or pay massive fines confirms that the government's goals extend beyond simply knowing that the Little Sisters object.

## II. The Mandate Violates the Religion Clauses.

The Mandate unconstitutionally discriminates among religious organizations due to their institutional, structural, doctrinal, and financial affiliation, and does so based on the government's admitted speculation about the religiosity of the organization and the pervasiveness of its beliefs among its employees. LSP Br. 47-

[10] *See, e.g.*, 26 U.S.C. §§ 79(d)(7), 4980B(d)(3), 4980F(f)(2), 9802(f); 15 U.S.C. §§ 78c(g), 80a-3(c)(14), 80b-3(b)(5); 29 U.S.C. § 1144a; *see also* JA500a (April 8, 2013 Church Alliance Letter to HHS urging extension of exemption to all participants in church plans).

50 (citing 78 Fed. Reg. at 39874). The government responds that only *intentional* governmental discrimination against particular religious *denominations* is impermissible, not discrimination among religious *institutions*. Opp.33-34. But *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)—which the government does not even cite, much less distinguish—rejects that argument.

Under *Weaver*, "when the [government] passes laws that facially regulate religious issues"—as the Mandate unabashedly does—"it must treat individual religions and religious institutions without discrimination or preference." *Id.* at 1257. Thus, a Colorado law banning "pervasively sectarian" colleges from accessing state scholarship funds but allowing "sectarian" colleges access unconstitutionally discriminated among religious institutions. *Id.* at 1258. There, as here, the government argued that its law was permissible because it "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259. *Weaver* rejected that distinction as "puzzling and wholly artificial," concluding that, regardless of denomination, the law may not "discriminate[] among religious institutions on the basis of the pervasiveness or intensity of their belief." *Id.*; *accord Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (rejecting that a law's "disparate impact among religious organizations is constitutionally permissible" even when "such distinctions result from application of secular criteria"). *Weaver* also directly rejected the government's assertion that the Religion Clauses only

protect against *intentional* governmental discrimination. 534 F.3d at 1260; *accord Shrum v. City of Coweta, Okla.*, 449 F.3d 1132 (10th Cir. 2006) ("Proof of . . . discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus."). *Weaver* is dispositive.

The government argues that its guesswork about the religious beliefs of the Little Sisters' employees is permissible because its guesses relate to categories used by the IRS for certain tax-related disclosures under I.R.C. § 6033. Opp.33. Whatever the IRS's reason for the distinction in reporting rules under § 6033, surely it has nothing to do with either (a) which organizations are permitted to engage in religious exercises, or (b) concededly baseless government speculation about the religious beliefs of a ministry's employees.[11] The government's limitation of religious exercise rights here is an even more offensive variation of the "intrusive governmental judgments regarding matters of religious belief and practice" declared flatly impermissible in *Weaver*. 534 F.3d at 1256; *see also id.* at 1259 (banning "discrimination . . . expressly based on the degree of religiosity of [an] institution").

[11] *See* Dkt. 51-1, Deposition Transcript of Gary M. Cohen, Defendants' Rule 30(b)(6) Designee, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.) (admitting there is "no evidence" that employees of religious organizations like the Little Sisters "are more likely not to object to the use of contraceptives.").

*Gillette v. United States*, 401 U.S. 437 (1971), also cuts against the Mandate. *Gillette* upheld military conscientious-objector status because it was based on the nature of the conscientious objection: the exemption was available to all sincere objectors who asserted the same objection and sought to engage in the same practice. *Id.* at 442 n.5, 450-51. But the Mandate discriminates among institutions that engage in the *exact same* activity and have the *exact same* religious objections. That is impermissible.

## III. The Mandate Violates the Free Speech Clause By Compelling Speech and Forcing Silence.

The Mandate controls the Little Sisters' speech. JA80a, 157a, 161a, 342a-47a; 26 C.F.R. 54.9815-2713A(b)(2). The government failed to meet its "burden of proving the constitutionality of [that control]," *Playboy Entm't Grp.*, 529 U.S. at 816, and so the Mandate's speech restrictions must fall. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988).

### A. The Mandate compels the Little Sisters to say what they do not want to say.

The Mandate requires the Little Sisters to make statements designed to trigger coverage of contraceptive and abortion-inducing products. JA152a-58a, 344a-46a. The government offers two reasons for why this is permissible: the Mandate only compels the Little Sisters to "refus[e] to provide coverage," and that this refusal is not "protected speech." Opp.35. Both are wrong.

An executed and delivered EBSA Form 700 says two things: (1) the Little Sisters object to providing the coverage, and (2) they deputize their TPAs to do so in their stead. While the government professes to read only the first message in the Form, the Little Sisters, their TPAs (and other major TPAs, *see Reaching Souls Int'l v. Sebelius*, 2013 WL 6804259, at *7 & n.8 (W.D. Okla. Dec. 20, 2013)), their religious community, and decisions in 19 out of 20 similar lawsuits see both messages. *See* LSP Br. at 31-32; *Amicus* Br. of the USCCB at 2-3. To the extent the first message is necessary—which is unlikely, *supra* at Section I(D)—the Supreme Court already allowed the Little Sisters to say as much without the Form. And since the government insists that only this first message is communicated, it does not defend—and thus concedes—the second message's unconstitutionality.

Not that any defense would be effective. The government says it cannot enforce the provision of contraceptives and abortifacients authorized by the Form second message. Thus, it cannot possibly have even a rational interest, much less a substantial or compelling one, to justify forcing the Little Sisters to parrot that message. *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The government also insists it can compel this speech because adopting and communicating the Form's messages is "'plainly incidental to the . . . regulation of conduct,' and is not itself protected speech." Opp.35 (quoting *Rumsfeld v. FAIR Inc.*, 547 U.S. 47, 61-63 (2006). But *FAIR* concerned a regulation that determined

what parties "must *do* . . . not what they may or may not *say*." 547 U.S. at 60 (emphases in original). The exact opposite is true here—the forced speech is *the* essential act. Such "direct regulation of speech . . . plainly violate[s] the First Amendment." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013).

Nor does it matter that the compelled speech here comes in "[c]ompletion of the simple self-certification form." Opp.35. Even disclosure of "purely factual non-ideological information" violates the First Amendment when a speaker is "compelled" to make "statements of fact [she] would rather avoid." *National Ass'n of Mfrs. v. SEC*, __F.3d__, 2014 WL 1408274, at *9 (D.C. Cir. April 14, 2014) (internal citations and quotation marks omitted). That is all the more true here, where the statements trigger religiously offensive legal duties for others.

### B. The Mandate compels the Little Sisters to be silent when they want to speak.

The Mandate also expressly prohibits the Little Sisters from instructing their TPAs not to provide contraceptive and abortion-inducing drugs and devices. *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"). This "sweeping ban" is a "presumptively invalid, content-based restriction on [the Little Sisters] right to speak." *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 12-cv-3489, 2014 WL 1256373, at *29

(N.D. Ga. March 26, 2014); *accord Roman Catholic Archbishop of Wash. v. Sebelius*, __F. Supp. 2d__, 2013 WL 6729515, at *37 (D.D.C. Dec. 20, 2013) (the ban "imposes a content-based limit on [ministries] that directly burdens, chills, and inhibits their free speech.").

Sensing its vulnerability, the government constructs a new "interpretation" to "avoid[] [the] constitutional issue" which the Mandate's plain text creates. Opp.37. The government now argues that ban does not apply to church plan participants since it only prevents pressuring a TPA "into not fulfilling its legal obligation to provide contraceptive coverage," and church plans have no such obligation. Opp.36-37. To undersigned counsel's knowledge, this is the first time the government has taken that position in any of the nine ongoing church plan cases, and it directly conflicts with the government's representations to other courts. JA679a-80a; *accord* Tr. of Hr'g at 40-41, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013). Even if this Court were willing to countenance such appellate gamesmanship, the regulation itself speaks only of a TPA's "decision," not its "legal obligation." Assuming *arguendo* the dubious premise that accepting EBSA Form 700 does not place obligations on a TPA, the government admits that a church-plan TPA which has received the Form *may decide* to provide the coverage. The Little Sisters don't want their TPAs to

make that choice, and the ban prevents the Little Sisters from saying anything to influence this "decision."

Deference to agencies does not require adopting "[a]fter-the-fact rationalization by counsel" that directly conflicts with the express requirements of a regulation. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). And if the Court were inclined to accept the government's position that the gag rule does not apply to the Little Sisters, the appropriate relief is an injunction against applying the gag rule against the Little Sisters.[12] Indeed, that is true of the government's entire "church plan" dodge: the government nowhere offers any authority for the bizarre proposition that the proper judicial response to a civil rights challenge to an invalid law is to leave the law in place. If the government has no authority to enforce the Mandate (or the gag rule) in the church plan context, this Court should enter an order barring the government from enforcing the Mandate (and the gag rule) in the church plan context. There is no reason that the Little Sisters should be forced to become lawbreakers where the government claims it lacks authority to require what the law, on its face, purports to require.

[12] The government also relies on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), to argue that speech prohibited by the ban is "unprotected." But *Gissel Packing* concerned "threat[s] of reprisal or force" made by a business "to its employees." *Id.* at 618. The Little Sisters seek only to persuade their TPAs, not "threaten" their employees. Until the ban's prohibition on "direct or indirect" attempts that "seek to influence" contraceptive coverage, such speech was entirely lawful.

## CONCLUSION

Appellants respectfully ask the Court to enter the injunction requested in the conclusion of their opening brief.

Respectfully submitted,

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Dated: April 17, 2014

## CERTIFICATE OF SERVICE

I certify that on April 17, 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 **6,996** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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