IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MEDIA RESEARCH CENTER, Plaintiff, v. KATHLEEN SEBELIUS, et al, Defendants.	)))))))))	Civil Action No. 1:14-cv-379 (GBL/IDD)

THE PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

The issue presented in this case is whether Plaintiff Media Research Center ("MRC"), a not-for-profit organization which is opposed on religious grounds to contraception and abortion, must assume the risk that it falls within a vague exception to the "Contraception Mandate" found within in the recently enacted Patient Protection and Affordable Care Act (the "ACA"). If MRC is correct in its interpretation of the law, it qualifies for the "eligible organization" exemption to the Contraception Mandate. This "safe harbor" would allow MRC to comply with the ACA's other provisions without violating its sincerely held religious beliefs. If, however, MRC's interpretation is determined to be wrong, then it faces potential fines of a magnitude that could financially crush it and drive it out of business.

The Constitution does not permit the Government to use a vague law to force such a Hobson's Choice.

> [T]he terms of a . . . statute . . . must be sufficiently explicit to inform those who are subject to it what

> conduct on their part will render them liable to its penalties . . . and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see also United States v. Williams*, 553 U.S. 285, 304 (2008) (a law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited").

MRC believes that it qualifies for the eligible organization exemption to the Contraception Mandate, but does not believe that it can be Constitutionally compelled to assume the risk that it may have misconstrued a vague statute. If the Court is unwilling, or unable because of that vagueness, to decide that MRC qualifies as an eligible organization, it should enjoin the Government from enforcing the Contraception Mandate against MRC until such time as a court or the Government provides sufficient guidance as to the scope of the eligible organization exemption.[1]

The Court can determine that MRC qualifies as an eligible organization based on the facts before it and we ask the Court to do so. By finding that MRC qualifies for the exemption, the Court can avoid wrestling with and determining larger Constitutional issues. *See Clark v. Martinez*, 543 U.S. 371 (2005). But, if the Court declines to make such a finding at this stage, for whatever reason, it should grant the injunction and enjoin enforcement of Contraception Mandate and its fines against MRC.

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[1] *See* Footnote 2 on pages 13-14 regarding pending cases that may provide such guidance.

FACTUAL BACKGROUND

I. The Plaintiff

MRC was founded in 1987 by devout Catholic and conservative activist L. Brent Bozell, III ("Bozell"). Compl., Ex. 2 at ¶¶ 1-8. Mr. Bozell comes from a prominent Catholic family (one of his uncles was William F. Buckley, Jr.) that has been involved in the public arena defending the Catholic faith and traditional Judeo-Christian religious beliefs, including pro-life views and conservative values, since the middle half of the last century. *Id.* at ¶¶ 2-4. Mr. Bozell founded MRC to expose and counter what he contends is the liberal bias against Judeo-Christian religious beliefs and conservative values in the media. *Id.* at ¶ 8.

MRC is a Virginia non-stock not-for-profit corporation that operates as a tax exempt organization under § 501(c)(3) of the Internal Revenue Code. Compl., Ex. 1 at ¶ 2; Ex. 1. It is governed by a Board of Directors and at present has sixty-five employees. Compl., Ex. 2 at ¶ 14; Ex. 2 at ¶ 4. Through the health insurance that it supplies to its employees and their families, MRC insures 125 "souls". Ex. 2 at ¶ 5.

MRC defends Judeo-Christian religious beliefs and conservative values through its Culture and Media Institute ("CMI"). Compl., Ex. 2 at ¶ 9. CMI fights against what it perceives as liberal media assaults on religious faith and social conservatism through a unique mix of activities, including the publicizing of timely factual rebuttals, analyses, publications, columns and articles. *Id.* at ¶¶ 9-10; Ex. 3.

MRC believes that it has a moral and ethical obligation to provide its employees with health insurance. Compl., Ex. 1 at ¶ 3. Its current plan is self-insured and claims are administered by a third-party administrator. *Id.* at ¶ 9; Ex. 2 at ¶ 3. Because MRC believes that abortion is morally wrong, and defends this religiously-based position publicly, it has specifically excluded coverage for contraception, abortifacient, and sterilization services from the health insurance plans it offers to its employees and their families. Compl., Ex. 2 at ¶¶ 12-13. The inclusion of such services in its plan would be anathema to the sincerely held religious views that MRC has long espoused and defended. Compl., Ex. 1 at ¶ 7; Compl., Ex. 2 at ¶ 16; Compl., Exs. 8-9.

MRC's Board of Directors issued a "Resolution on MRC Sincerely Held Beliefs" addressing this subject (the "Resolution"). Compl., Ex. 8. The Resolution reaffirms MRC's longstanding commitment to providing health care for its employees. It also expresses the corporation's and its board's belief that providing contraceptive, abortifacient, and sterilization services violates their "sincerely held religious, civil, ethical or moral standards." *Id.* The overwhelming majority of MRC's employees have signed a "Statement of Media Research Center Staff Regarding Mandated Forced Funding of Abortion" (the "Statement") voicing their opposition to providing the services. Compl., Ex. 9. The Statement recites:

> We the Staff of Media Research Center do affirm that we believe abortion to be abhorrent and immoral. We believe the Obamacare requirement that Media Research Center pay for abortion or abortifacient services to be equally immoral, and would require us and our employer to make an immoral choice between

> violating the law or violating our fundamental beliefs, faith and morals. We believe that the Media Research Center has espoused, and continues to espouse this position which is why we ask MRC leadership to ensure that it and its employees we [sic] will not be forced to pay for such immoral services.

Id.

II. The Statute

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"). Pub. L. 111–148, 124 Stat. 119 (2010). The ACA requires that employer group health insurance plans offer coverage for "preventive care and screenings" for women pursuant to "comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA Guidelines"). 42 U.S.C. § 300gg-13(a)(4). This coverage must be offered without "cost sharing." *Id.* The penalties for failing to provide the required coverage are stiff—$100 per day for each plan participant which includes MRC's employees and their families. 26 U.S.C. § 4980D(b)(1).

HRSA Guidelines require, *inter alia*, that employers provide "all Food and Drug Administration (FDA)-approved contraception methods, sterilization procedures, and patient education and counseling for women with reproductive capacity". 78 Fed. Reg. 39,870 (July 2, 2013). The FDA-approved contraception methods include the following abortifacients: (1) "Plan B" (Levonorgestrel), (2) "Ella" (ulipristal acetate), and (3) intrauterine devices ("IUDs"). www.fda.gov/ForConsumers/ByAudience/ForWomen/ FreePublications/ucm313215.htm (last accessed April 24, 2014). The FDA-

approved contraception methods also include surgical sterilization. *Id.* This is the Contraception Mandate.

The patient education and counseling aspect of this law would require MRC, a prominent defender of pro-life religious beliefs, to pay for programs and counseling (speech) that is wholly inconsistent with its long-held public position. Contrast the ACA's required pro-abortion and contraceptive counseling with the small representative sample, attached to this motion in four binders as Exhibit 3, of MRC's public pronouncements and activities defending pro-life views and Judeo-Christian values. The two positions could not be more antithetical to one another.

On August 3, 2011, the Department of Health and Human Services approved an "Interim Final Rule" that exempted certain "religious employers" from the Contraception Mandate. 76 Fed. Reg. 46,621. To be eligible for this exemption, an organization needed to satisfy four requirements:

(1) that the inculcation of religious values is the purpose of the organization;

(2) that the organization primarily employs persons who share the religious tenets of the organization:

(3) that the organization serves primarily persons who share the religious tenets of the organization, and

(4) that the organization is a nonprofit organization as described in §§ 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 76 Fed. Reg. 46,621.

Sections 6033(a)(1) and 6033(a)(3)(A)(i) describes "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A). Responding to public outcry, the Defendants "clarified" the "religious employer" requirements and also created a new exception to the Contraception Mandate for other "eligible organizations." 78 Fed. Reg. 39,870 (July 2, 2013).

To be an "eligible organization," an entity must: (1) oppose on religious grounds the provision of some or all of the services required by the Contraception Mandate; (2) operate as a nonprofit; (3) *hold itself out as a religious organization*; and (4) self-certify that it meets the first three conditions. 45 C.F.R. § 147.131(b). Commenting on the final rules, the regulations indicate the definition of "eligible organization" was "intended to allow health coverage established or maintained or arranged by various types of nonprofit religious organizations with religious objections to contraceptive coverage to qualify for an accommodation." 78 Fed. Reg. 39,875. The regulations also declined to extend the exemption to for-profit organizations. *Id.*

The regulations, however, do not clarify or discuss what it means "to hold itself out as a religious organization." *Id.* MRC is a nonprofit organization that has opposed abortion and defended Judeo-Christian religious beliefs and conservative values since its founding. Ex. 1; Compl., Ex. 1 at ¶ 2; Ex. 4 at ¶ 3. MRC is an organization where sincerely held religious beliefs drive its mission. Without guidance from the statute, regulations or the Government,

MRC believes that it qualifies as an "eligible organization" but runs the risk of monumental potential fines if it is wrong.

The Department of Labor's Employee Benefits Security Administration ("EBSA") has published EBSA Form 700 for entities to self-certify as "eligible organizations." Compl., Ex. 7. MRC has self-certified as an "eligible organization" by completing and executing EBSA Form 700. Compl., Ex. 10.

III. Impact of the Contraceptive Mandate on MRC

Up until now, MRC has been operating under a "temporary enforcement safe harbor" that delayed implementation of the Mandate to qualifying organizations until the first plan year after January 1, 2014. *See* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last accessed March 26, 2014). The plan year for MRC's next employee health plan begins on May 1, 2014. Ex. 2 at ¶ 2. As of that date, MRC becomes subject to the Contraception Mandate's coverage requirements, unless it is found to be an "eligible organization" under 45 C.F.R. § 145.131(b). MRC has asked the Defendants to acknowledge MRC's status as an "eligible organization," but they have refused to provide the requested acknowledgement. Compl., Ex. 11. Without such acknowledgement, the exorbitant fines for noncompliance with the Contraception Mandate continue to linger over MRC. With 125 souls (employees plus family members) covered under its insurance plan, MRC's potential statutory penalties are $12,500 per day (125 souls x $100 per/day penalty) or $4,562,500 per year. Ex. 2 at ¶¶ 5-7.

ARGUMENT

I. Jurisdiction

There are three essential requirements that must be satisfied before a federal court exercises jurisdiction over a declaratory judgment action: (1) the complaint must allege an "actual controversy" between the parties "of sufficient immediacy and reality to warrant issuance of a declaratory judgment;" (2) the court must have an independent basis for jurisdiction over the parties (*e.g.*, federal question or diversity jurisdiction); and (3) it is not an abuse of discretion for the court to exercise jurisdiction. *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004). MRC satisfies each of these requirements.

"An actual controversy exists when the dispute is 'definite and concrete, touching the legal relations of the parties having adverse legal interests.'" *Norfolk Dredging Co. v. Phelps*, 433 F. Supp. 2d 718, 721 (E.D. Va. 2006) (citing *White v. Nat'l Union Fire Ins. Co.*, 913 F.2d 165, 167 (4th Cir. 1990)). "Even when no lawsuit has been filed, a dispute can be sufficiently concrete to create a justiciable controversy." *Shore Bank v. Harvard*, 934 F. Supp. 2d 827, 837 (E.D. Va. 2013); *see also Standard Fire Ins. Co. v. Armstrong*, No. 3:12-cv-181, 2012 WL 3730644, at *3 (E.D. Va. Aug. 28, 2012) (finding actual controversy existed where party sought declaration of rights under marine insurance policy); *Volvo Constr. Equip.*, 386 F.3d at 593 n. 12 (recognizing that in certain circumstances, the threat of future litigation may give rise to an actual controversy). MRC asserts that it is an "eligible organization" within the

provisions of 45 C.F.R. § 147.131(b), but the Defendants, however, refuse to acknowledge MRC's status. Without resolution of this issue, MRC may be subject to exorbitant fines for noncompliance with the Contraception Mandate should the Defendants later determine that MRC is not an "eligible organization." Thus, an "actual controversy" exists.

Likewise, this Court has federal question jurisdiction. "Federal district courts possess federal question jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Campbell v. Hampton Rds. Bankshares, Inc.*, 925 F. Supp. 2d 800, 803 (E.D. Va. 2013) (citing 28 U.S.C. § 1331). MRC's claim involves the construction of a federal regulation—whether MRC is an "eligible organization" within the meaning of 45 C.F.R. § 149.131(b).

Finally, the Court needs to decide whether to exercise its discretion to render a declaratory judgment. "The Declaratory Judgment Act is an enabling statute that grants discretion to the district courts, not an absolute right to the litigant." *Norfolk Dredging Co*, 433 F. Supp. 2d at 721. "The district court's discretion should be liberally exercised, and the district court must articulate a good reason if it declines to exercise review." *Id.* (internal citations omitted). This is a case that involves issues of statutory interpretation well-suited for the Court. Absent resolution of this issue, MRC will either labor under the threat of rapidly accruing fines or choose an alternative option that effectively will diminish or extinguish its ability to defend the religious beliefs it has long

defended. In short, there is no good reason for the Court to decline to exercise its powers of review.

II. The Government's Ability to Assess Any Fines or Penalties Against MRC Must Be Enjoined Until Such Time as the Government Clarifies the Scope of the Eligible Organization Exemption or a Court Construes the Exemption Sufficiently for MRC to Know Whether it Qualifies

A. Standard

A plaintiff seeking a preliminary injunction must establish: (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009). MRC satisfies each of these four elements.

B. MRC is likely to succeed on the merits

MRC seeks to enjoin the assessment and enforcement of any penalties against it until such time as the Government or a court provides effective guidance whether organizations such as MRC qualify as "eligible organizations." In order to determine this, the only real question at issue is: What does it mean for an organization to "hold itself out as a religious organization"?

1. A Vague Statute, With Severe Penalties, Should Not Be Enforced Until It Is Clarified

A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or is "so standardless that it authorizes or encourages seriously discriminatory enforcement."

Williams, 553 U.S. at 304. Judicial scrutiny under the void-for-vagueness doctrine is most rigorous when the law in question impinges on First Amendment freedoms. *Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."); *Lytle v. Doyle*, 197 F. Supp. 2d 481, 489 (E.D. Va. 2001).

The "free exercise" of religion and freedom of speech protections of the First Amendment are both implicated in this case. Therefore, rigorous examination of the "eligible organization" requirement of the ACA is required.

As described above, there has already been considerable confusion and political uproar concerning the definition of "religious employer." That outcry prompted the Government to "clarify" the "religious employer" requirements. The clarification created a new exception to the Contraception Mandate for other "eligible organizations." 78 Fed. Reg. 39,870 (July 2, 2013). To be an "eligible organization," an entity must, among other things, *hold itself out as a religious organization*. 45 C.F.R. § 147.131(b). The Government, however, has not yet clarified what that amorphous term means other than that it does not apply to for-profit organizations.

The line, if any, between a religious organization involved in issues of public concern and debate and an organization whose mission is inspired by sincerely held religious beliefs is, at best, fluid. The boundary, in many cases, can be so uncertain that it does not make any logical or constitutional sense to

distinguish between them. The First Amendment expressly forbids special treatment of "established" religions; rather, what is protected is the free exercise of religion by individuals, groups or organizations—rights that are at issue here. U.S. Const. amend. I.

The ACA is an unprecedented attempt to regulate one-sixth of the national economy and it impacts the lives of every American. It was such a massive undertaking that many "kinks" in the statutory and regulatory scheme still need to be worked out. This is one of them. MRC, however, should not be required to navigate between the Scylla of its sincerely held religious convictions about abortion and contraception and the Charybdis of financial extinction through regulatory penalties if it guesses wrong about how the eligible organization exemption will be interpreted.

In the interest of judicial economy, the most expeditious resolution of this matter would be for the Court to stay the enforcement of any fines or penalties against MRC until such date as a court or the Government clarifies the scope of the eligible organization exemption to the Contraception Mandate.[2]

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[2] Currently pending before the Supreme Court of the United States are *Sebelius v. Hobby Lobby Stores, Inc.*, Docket No. 13-354 and *Conestoga Wood Specialties Corp. v. Sebelius*, Docket No. 13-356, which were argued on March 25, 2014. Decisions are expected before the end of June. The issue in *Hobby Lobby* and *Conestoga* is whether the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, which provides that the Government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest, allows a for-profit corporation to deny its employees access to health insurance for contraceptives based on the sincerely held religious objections of the corporation's owners.

The Supreme Court's decisions in *Hobby Lobby* and *Conestoga* are coming soon and, even though the eligible organization statute at issue here is not at issue in those cases, those decisions, regardless of how they are decided, may have potentially wide-ranging implications on the questions presented here. Thus, at the very least, it may be prudent for this Court to grant MRC the preliminary injunction that it seeks, pending the soon-to-be-decided Supreme Court cases on the horizon. After the Supreme Court issues its decisions, this Court may

That maintains the *status quo* and hurts no one. It also avoids, at least for now, forcing this Court to develop a full factual record and construe the exemption and the related issue of whether the ACA is constitutional as applied against MRC. It is a well-known principle of jurisprudence that courts should avoid resolving thorny constitutional questions if a matter can be resolved on narrower grounds. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936); *MediaOne Grp., Inc. v. Cnty. of Henrico*, 257 F.3d 356, 366 (4th Cir. 2001).

If the Court disagrees with MRC's suggestion for a stay pending further regulatory and judicial interpretation, the issue of whether MRC is likely to prevail and the other injunction factors are addressed below.

2. MRC is an Eligible Organization

To be an "eligible organization" an entity must (1) oppose on religious grounds the provision of some or all of these services; (2) operate as a nonprofit; (3) hold itself out as a religious organization; and (4) self-certify that it meets the first three conditions. 45 C.F.R. § 147.131(b).

MRC unquestionably satisfies the first, second and fourth factors. MRC's Board and its Employees have stated their opposition to providing the offending services on religious grounds and its opposition is consistent with its history as a defender of Judeo-Christian religious beliefs. Compl., Exs. 8-9. It is also unquestionable that MRC is a nonprofit organization operating under

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require the parties here to submit briefs on any of the relevant issues decided in the *Hobby Lobby* and *Conestoga* cases. Granting the injunction and enjoining the imposition of fines for the injunction period is a prudent and just exercise of this Court's power.

§ 501(c)(3) of the Internal Revenue Code. Compl., Ex. 1 at ¶ 2. MRC has also self-certified as an "eligible organization" by executing EBSA Form 700. Compl., Ex. 10.

3. MRC Holds Itself Out as a Religious Organization, Thereby Satisfying the Third Factor

MRC succeeds on the third factor as well. As its long public history evidences, MRC is the nation's premier public defender of Judeo-Christian religious beliefs and conservative values against what it perceives is the continuous onslaught of anti-religious and anti-conservative distortions present in the media. *See* Ex. 3.

Unfortunately there is no precedential help, nor is there any agency guidance, as to what it means for an organization to "hold[] itself out as a religious organization." 45 C.F.R. § 147.131. The government has refused to provide such guidance when asked and the ACA offers no procedure or process for any such determination. In the comments on final rule making, the Government declined to adopt proposed suggestions to the definition of "eligible organization"; instead the Government focused on declining to extend the exemption to for-profit organizations and referenced those in search of a definition of a religious organization to Title VII of the Civil Rights Act which, as explained below, is different from the statute at issue here. 78 Fed. Reg. 39,875.

In a case of statutory construction, "[w]hen a word is not defined by statute, [courts] normally construe it in accord with its ordinary or natural meaning." *Genetics & IVG Inst. v. Kappos*, 801 F. Supp. 2d 497, 504 (E.D. Va.

2011) (internal quotation marks omitted) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)). For an organization to hold itself out as religious, it is the public statements of what it does, as well as the actions it undertakes, that determine if it is holding itself out as a religious organization. *See Brennan v. Schwerman Trucking Co. of Virginia, Inc.*, 540 F.2d 1200, 1204 (4th Cir. 1976) (holding that a trucking company was a common carrier by statutory definition because, under the **holding itself out** standard, the trucking company stated publicly that it was available for "interstate cartage, solicited interstate business and handled any interstate shipments received.");[3] *see also Fike v. United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983).

In *Fike*, this Court held that a Methodist children's home was a secular institution, and not exempt from Title VII of the Civil Rights Act pursuant to § 702, because it had deviated from its original religious mission and was religious in name only. 547 F. Supp. at 290. The Court noted that the Methodist home had abandoned or removed religious services, symbols, and messages and was essentially devoid of religious content that was in any way related to its mission to house orphans and other children. *Id.* at 289-90. This was a different atmosphere from when the Methodist home was first opened. *Id.* In its analysis, the Court contrasted the current nature of the Methodist

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[3] 49 U.S.C. § 304 obligates the Secretary of Transportation to regulate common carriers by motor vehicle. Section 303(a)(14) of that title defines a "common carrier" as "any person (corporation) which **holds itself out** to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property . . .." This was the statute at issue in *Brennan*.

children's home with the Salvation Army (citing *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971) (internal citations omitted)), and noted that the mission of the Salvation Army had not changed significantly since its founding. *Id.* Here, MRC has been consistent, just like the Salvation Army, in both words and deeds for its entire existence—it is a defender of Judeo-Christian religious beliefs against attacks on those beliefs in the media.

The Government's suggestion to look to Title VII Section 702 litigation is not particularly useful in trying to define the meaning of this statute because the language of the religious exemption in Section 702 is fundamentally different from the language here, *i.e.* Section 702 applies to a "religious corporation, association, educational institution, or society" whereas the ACA's language is much broader in that it applies to organizations that *hold themselves out as a religious organization.* Section 702 is only helpful in that it illustrates that courts must look to what an organization says and does to determine whether an organization should be entitled to a religious based exemption to a statute.

It is clear that the "holding out" standard applicable to this exemption does not mean an organization must declare that it is Catholic, Methodist, or some other denomination, or that it is a church or a particular form of religious institution—indeed, the statute provides an exemption for churches and other more traditional religious institutions. 45 C.F.R. § 147.131. Rather the holding out standard means that a court must look to what the organization says and does to determine if it is religious in nature. But in undertaking this

analysis, the court may not inquire as to whether the organization is "sufficiently" or "primarily" religious. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (holding that the Establishment Clause of the First Amendment prohibits inquiry into whether organization is "sectarian" or "pervasively sectarian."). Thus it is somewhat understandable that the Government is reluctant to define what it means for an organization to "hold[] itself out as religious" because that inquiry may necessarily lead to an impermissible interference with an organization's religious beliefs. But that reluctance leaves MRC at the mercy of some later bureaucratic whim, from which MRC now seeks protection from this Court.

Simply stated, MRC is an organization that defends, *inter-alia*, Judeo-Christian religious beliefs, including religious based pro-life views, from attacks in the mainstream media. Compl., Ex. 2 at ¶ 8; Ex. 4 at ¶ 2. It has publically performed this role for nearly three decades. *Id.* It was founded to serve as a bulwark against those attacks on Judeo-Christian religious beliefs and conservative values and has done so for twenty-seven years. *Compl., Ex. 2* at ¶¶ 7-8. Evidence of MRC's public defense of these religious beliefs is attached as Exhibit 3. As the Court can easily see from the articles, columns, special reports, and commentaries, MRC publically stands as a defender of Judeo-Christian religious beliefs in general and religious based pro-life beliefs in particular. *See generally* Ex. 3. The blunt implementation of the Contraception Mandate threatens to silence that defense.

Given its mission and public track record of defending religious based pro-life beliefs, it is particularly offensive that the law would require MRC to provide services that so blatantly offend those beliefs. The "eligible organization" exemption was intended to prevent such offenses from occurring. Judged by its deeds and public posture, MRC is a religious organization entitled to exemption from the ACA's Contraception Mandate. It would be absurd and unjust for the law to require otherwise.

C. MRC will Suffer Irreparable Harm in the Absence of Injunctive Relief

Without resolution of this issue, MRC faces the bleak choice of either complying with the law, or violating its sincerely held religious beliefs. If it has wrongly certified, MRC faces severe fines for noncompliance that will continue to linger over it until it either complies with the law and violates its religious beliefs, or takes some other drastic action that chills its First Amendment freedoms. The Supreme Court has held that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Courts have recognized that this "Catch-22" dilemma of compliance or penalty weighs in favor of injunctive relief. *See Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 686 (W.D. Penn. 2013) ("[P]laintiffs will be irreparably harmed if they are forced either to forgo providing coverage or to violate their sincerely held religious beliefs by contracting for and including the objected to services in the health care insurance that they provide . . ."); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius,* No. 1:12-cv-159, 2013 WL 6843012, at *5 (N.D. Ind. Dec. 27, 2013)

("[P]laintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the merits of the plaintiffs' claims without the relief of a preliminary injunction."). In addition to the chilling effect on MRC's First Amendment freedoms, fines that could total $4,562,500 per year are fiscally crippling to an organization of MRC's size. The irreparable harm to MRC is clear and unquestionable.

It is difficult to imagine what, if any, harm the Defendants would suffer from a preliminary injunction. A preliminary injunction simply preserves the *status quo* between the parties. Moreover, the Government has agreed to preliminary injunctions in several cases.[4] At least one court has noted that this consent weighs against any claim by the Government that it suffers irreparable harm. *Geneva Coll.*, 941 F. Supp. 2d at 687 ("[i]t strikes the court that [the government] cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases."). Therefore, this factor weighs in favor of granting a preliminary injunction.

D. The Balance of Equities Tips in MRC's Favor

Granting preliminary injunctive relief preserves the *status quo* between the parties. Imposition of the Contraception Mandate has already been delayed through countless extensions, grandfathering exceptions and safe harbors.

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[4] *Sharpe Holding, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, ECF No. 41 (E.D. Mo. Mar. 11, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036, ECF No. 9 (W.D. Mo. Feb. 28, 2013); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462, ECF No. 18 (E.D. Mo. Apr. 1, 2013).

Additionally, the Defendants have agreed to preliminary injunctions in several other cases. Any potential harm that the Defendants may suffer from a short delay in imposing the Contraception Mandate (or fines) on MRC is *de minimus* when compared with exorbitant fines amounting to $4,562,500 per year or performing actions in conflict with its religious beliefs. Thus, the balance of equities tips in the favor of MRC.

E. A Preliminary Injunction is in the Public Interest

A preliminary injunction will serve the public interest by protecting MRC's First Amendment rights. Many courts have found this factor to weigh in favor similarly situated plaintiffs because of the public interest in securing First Amendment freedoms. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) (noting public interest in ensuring freedoms under First Amendment protected and there was no little public interest in "uniform application" of regulations where the regulations excluded a large number of people and no compelling interest furthered by enforcement of the regulations to the plaintiff in the case); *Diocese of Fort Wayne-S. Bend*, 2013 WL 6843012, at *19 (finding preliminary injunction in public interest because public best served by plaintiff continuing to provide community services without threat of substantial fines and that "injunctions protecting First Amendment freedoms are always in the public interest."); *Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772, at *18 (N.D. Ind. Dec. 27, 2013) (finding preliminary injunction in public interest because public best served by plaintiff continuing to provide community services without threat of substantial

fines and that "injunctions protecting First Amendment freedoms are always in the public interest."); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 808-09 (E.D. Mich. 2013) (finding that because plaintiff's constitutional right to exercise religion at issue in case, "[i]t is in the best interest of the public that [the plaintiff] not be compelled to act in conflict with his religious beliefs"). This factor also weighs in MRC's favor.

CONCLUSION

For the above reasons MRC believes that it is an "eligible organization" exempt from the ACA's Contraception Mandate and asks the Court to make such a finding based on the evidence before it. Absent such a ruling, MRC requests that its motion for preliminary injunction be granted. MRC also requests that the bond requirement be set at a sum at which the Court deems proper. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999).

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Respectfully Submitted,

Media Research Center

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2014, the foregoing was served via electronic mail and overnight mail (with exhibit binders to follow under separate cover) upon the following:

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