IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, *et al.*, ***Appellants*,** **v.** **KATHLEEN SEBELIUS, *et al.*,** ***Appellees.***	**Case No. 13-2723**

APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case: Michigan Catholic Conference; Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo.

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this Court: Jones Day; Bodman LLP; Cooper Martin Chojnowski PC.

3. Neither appellant has a parent corporation. No publicly held company owns 10% or more of either of Appellants' stock.

Respectfully submitted, this the 29th day of December, 2013.

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Appellants, Michigan Catholic Conference ("MCC") and Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo ("Catholic Charities"), submit this emergency motion for injunction pending appeal pursuant to Fed. R. App. P. 8. Appellants seek an injunction against regulations set to take effect on January 1, 2014, which force Appellants to violate their religious beliefs by requiring them to participate in a regulatory scheme to provide their employees with insurance coverage for contraception, sterilization, abortion-inducing products, and related services (the "objectionable products and services"). ("The Mandate"). The Mandate violates the Religious Freedom Restoration Act ("RFRA"), which prohibits the Government from imposing a "substantial burden" on any exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. § 2000bb-1.

The decision below ignored Appellants' description of their own religious beliefs and held that the Mandate does not substantially burden their exercise of religion. That decision flies in the face of RFRA, and contradicts the reasoning of every court of appeals to analyze the Mandate under the substantial-burden test. As each of those courts has held, "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[1] *Gilardi v.*

[1] The opinion below is also at odds with an increasing number of district court opinions. *See, e.g.*, *Grace Schools v. Sebelius*, 3:12-cv-459, slip op. at *20 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-South Bend v. Sebelius*, 1:12-cv-

Sebelius, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013) (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)); *Korte v. Sebelius*, 735 F.3d 654, 682–85 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc).[2] Following the standard established by the Supreme Court, these courts have uniformly held that when assessing whether a plaintiffs' exercise of religion has been substantially burdened, a court's "only task is to determine whether" "the government has applied substantial pressure on the claimant to violate [his] belief[s]." *Hobby Lobby*, 723 F.3d at 1137. Indeed, they have held that any understanding of substantial burden that looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs," *Korte*, 735 F.3d at 683, is "fundamentally flawed." *Hobby Lobby*, 723 F.3d at 1137; *see also Gilardi*, 733 F.3d at 1216; *Living Water*, 258 F. App'x at 737

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159 slip op. at *28 (N.D. Ind. Dec. 27, 2013); *East Tex. Baptist Univ. v. Sebelius*, 4:12-cv-3009, slip op. at *33 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, 5:13-cv-01015, 2013 BL 353807 slip op. at *17–19 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, 2:12-cv-00207, slip op. at *27 (W.D. Pa. Dec. 23, 2013); *Legatus v. Sebelius*, 2:12-cv-12061, slip op. at *17 (E.D. Mich. Dec. 20, 2013); *Reaching Souls Int'l v. Sebelius*, 5:13-cv-01092, slip op. at *13–15 (W.D. Okla. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, 12-cv-2542, 2013 WL 6579764, at *16–19 (E.D.N.Y. Dec. 16, 2013) ("*RCNY*"); *Zubik v. Sebelius*, 13-cv-1459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013).

[2] Significantly, this is the same standard articulated by this Court in several unpublished opinions. *Hayes v. Tennessee*, 424 F. App'x 546, 555 (6th Cir. 2011); *Coleman v. Governor of Mich*, 413 F. App'x 866, 875 (6th Cir. 2011); *Barhite v. Caruso*, 377 F. App'x 508, 511 (6th Cir. 2010); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729 (6th Cir. 2007).

(looking to whether "government action place[s] substantial pressure on a religious institution to violate its religious beliefs"). [3]

Here, neither the Government nor the court dispute that Appellants believe that taking the actions required by the Mandate violates their religious beliefs. Dist. Ct. at 13. If Appellants refuse to take those actions, they suffer crippling penalties. That should end the inquiry. After all, coercing believers to act contrary to their sincerely held beliefs is the very definition of a "substantial burden" on religious exercise. *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1218; *Hobby Lobby*, 723 F.3d at 1137; *Living Water*, 258 F. App'x at 737.

The district court reached a contrary conclusion only by "look[ing] beyond" Appellants' undisputed assertion that the actions required of them by the Mandate constitute impermissible facilitation of objectionable services in violation of the Catholic doctrines of material cooperation with immoral conduct and "scandal." Dist. Ct. at 13. Instead, it concluded—despite sworn affidavits to the contrary—that "it does just the opposite" and that Appellants' real objection is to the conduct of third parties, not to the actions they themselves are required to take. *Id.*

[3] This Court's prior ruling in *Autocam* has no bearing on this dispute, as that case turned on whether for-profit corporations can exercise religious beliefs. *See Autocam, Inc. v. Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013). There is no dispute that Appellants, all nonprofit corporations, can exercise religion.

The district court's foray into "the theology behind Catholic precepts on contraception" was not only inappropriate; it is manifestly wrong. *Gilardi*, 733 F.3d at 1216. As established by Appellants' undisputed affidavits, the Mandate requires *Appellants* to undertake specific actions that, under their beliefs, constitute impermissible facilitation of immoral conduct and give rise to "scandal." *See infra* Part I.A.1. In concluding otherwise, the district court effectively informed Appellants that they "misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). This approach is irreconcilable with Supreme Court precedent, which squarely holds that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982); *Colvin v. Caruso*, 605 F.3d 282, 298 (6th Cir. 2010) (criticizing officials for "'judging for themselves the congruence between plaintiff's beliefs and Judaism, as [they] understand it'" (citation omitted)).

In short, Appellants believe compliance with the Mandate violates their religious beliefs. The district court said it does not. Such determinations are for individual believers, not courts, and because the Mandate cannot survive strict scrutiny, Appellants are likely to succeed on the merits of their RFRA claim. Because Appellants satisfy the other factors for injunctive relief, they are entitled to an injunction pending appeal.

BACKGROUND[4]

The Government promulgated the Mandate pursuant to its statutory authority to require group health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the category of "preventive care" to include all "FDA-approved contraception," the Mandate requires group health plans to cover the objectionable products and services.[5]

The Mandate contains a so-called "accommodation" for non-profit religious organizations that object to providing coverage for the objectionable products and services. In reality, however, the "accommodation" is anything but. Under the "accommodation," organizations like Appellants with self-insured health plans are forced to provide a "self-certification" to the third party administrator for their health plan (the "MCC Plan"). That self-certification, in turn, has the perverse effect of requiring the third party administrator to provide or arrange "payments for contraceptive services" for their employees. *See* 26 C.F.R. § 54.9815-2713A(a)-(c)). These mandated "payments" are directly tied to the MCC Plan, and they last

[4] Appellants conferred with the Government prior to filing this motion. The Government did not consent. Appellants moved for an injunction pending appeal in the district court, Fed. R. App. P. 8(a)(1)(C), but have received no ruling. In any event, given the enforcement deadline and the court's prior ruling, obtaining relief from the district court is "impracticable." Fed. R. App. P. 8(a)(2)(A)(i); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

[5] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited Dec. 22, 2013).

only as long as the employees remain on the MCC Plan. 29 C.F.R. § 54.9815–2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). For self-insured entities, the "self-certification" actually "designat[es] . . . the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. 39,870, 39,879 (July 2, 2013).

Absent a self-certification, Appellants' third party administrator has no authority to provide the objectionable products or services. As explained by the District Court for the Western District of Oklahoma, "[t]he self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *S. Nazarene*, 2013 BL 353807, at *9–10. "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* at *10. "If the institution does sign the permission slip, and only if the institution signs the permission slip, the institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

Appellants filed this suit on November 14, 2013. *See Mich. Catholic Conference, et al., v. Sebelius, et al.*, No. 1:13-cv-1247, W.D. Mich., Compl. (Doc. No. 1) (Exhibit B). Given the impending January 1 enforcement deadline, Appellants sought a preliminary injunction, *id.* (Doc. No. 9), oral argument took

place on December 19, and the district court denied the motion on December 27, 2013 (Doc. No. 40) (Exhibit A), five days before the Mandate is scheduled to go into effect. Appellants are thus forced to seek emergency relief from this court.[6]

ARGUMENT

Appellants are entitled to an injunction pending appeal because (1) they have a strong likelihood of success on the merits; (2) they will suffer irreparable harm without relief; (3) a preliminary injunction will not cause substantial harm to others; and (4) granting an injunction would serve the public interest. *Blankenship v. Blackwell*, No. 04-4259, 2004 WL 2390113, at *1 (6th Cir. Oct. 18, 2004) (unpublished).[7] Given the similarity of this case to *Korte*, *Gilardi*, *Hobby Lobby*, and the numerous district court decisions that have granted injunctive relief to non-profit religious organizations around the country on indistinguishable facts, *see supra* note 1, an injunction pending appeal is necessary to prevent the Government from inflicting irreparable harm on Appellants before this Court has a full and fair opportunity to review this case on the merits.

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[6] Another set of religious nonprofit plaintiffs have moved for an injunction pending appeal in a similar case arising out of the Middle District of Tennessee. That motion is fully briefed and ripe for disposition. *See The Catholic Diocese of Nashville, et al. v. Sebelius, et al.*, No. 13-6640, Appellants' emergency motion for injunction pending appeal (6th Cir. Dec. 27, 2013).

[7] Appellants also challenged the Mandate under the First Amendment and the Administrative Procedure Act. Appellants do not abandon these arguments; to the contrary, they intend to pursue them on appeal. The present motion for preliminary relief, however, is limited to Appellants' RFRA claim.

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM

Under RFRA, the Government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006).

Here, the Mandate "substantially burden[s]" Appellants' exercise of religion because it forces them to violate their sincerely held religious beliefs by taking actions they believe to be immoral facilitation of the objectionable products and services. Moreover, the Mandate cannot possibly survive strict scrutiny because numerous exemptions reveal that providing the objectionable products and services for free is not a "compelling" interest, and in any event there are many "le[ss] restrictive means" of providing the objectionable coverage.

A. The Mandate Imposes a Substantial Burden on Appellants' Exercise of Religion

Where sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial

pressure" on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140 (*en banc*); *see also Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216. The first step "does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 735 F.3d at 685. After all, it is not "'within the judicial function'" to determine whether a belief or practice is in accord with a particular faith. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Courts must therefore accept Appellants' description of their religious exercise. *Id.* at 714–15. Under the second step, the court must determine whether the Government has substantially burdened that exercise by compelling an individual to "perform acts undeniably at odds" with his beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717–18; *Korte*, 735 F.3d at 682–84; *Living Water*, 258 F. App'x at 737.

Here, it is clear that the Mandate substantially burdens Appellants' exercise of religion. The "exercise of religion" includes "the performance of (or abstention from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "'*any* exercise of religion . . . *whether or not compelled by, or central to, a system of religious belief*." *Korte*, 735 F.3d at 682 (quoting 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)) (emphasis added). Appellants exercise their religion by refusing to take certain actions that materially

cooperate with or facilitate coverage for the objectionable products and services, giving rise to scandal. In accordance with their religious beliefs, seven bishops in the State of Michigan created Appellant MCC, which has arranged to provide the MCC Plan—which covers the employees of 827 Catholic entities in the State of Michigan—through third parties that are not authorized to provide coverage for the objectionable products and services. The Mandate, however, disallows that arrangement and instead requires Appellants to arrange insurance through a third party that *is* authorized to provide these products and services to Appellants' employees and the employees of numerous Catholic entities throughout the State of Michigan. That is a substantial burden on Appellants' religious exercise.

1. The Mandate Requires Appellants to Act in Violation of Their Sincere Religious Beliefs

The Government does not dispute the critical question whether compliance with the Mandate would force Appellants to act in a way contrary to their sincerely held religious beliefs. As stated in undisputed affidavits, Appellants sincerely believe that taking the actions required by the Mandate, even under the "accommodation," would be contrary to their Catholic beliefs. In accordance with these beliefs, Appellants may not provide the objectionable coverage directly, nor may they authorize or "designate" others to provide the coverage, nor may they maintain an arrangement with a third party that will provide the coverage to Appellants' employees. *Mich. Catholic Conference, et al., v. Sebelius, et al.*, No.

1:13-cv-1247, W.D. Mich., Declaration of Paul A. Long ("Long Decl.") at ¶¶ 18, 30 (Doc. No. 11-3) (Exhibit D); Declaration of Frances Denny ("Denny Decl.") at ¶ 19 (Doc. No. 11-4) (Exhibit E).

For example, in order to comply with the Mandate, Appellants would be required to undertake the following actions, each of which, alone and in combination, is contrary to their Catholic beliefs:

- Execute a "self-certification" that would authorize a third party to provide coverage for the objectionable products and services.
- Pay premiums to a third party that is authorized to provide their employees with the objectionable products and services.
- Offer enrollment paperwork for employees to enroll in the MCC Plan overseen by a third party authorized to provide the objectionable products and services.
- Send health-plan-enrollment paperwork (or tell employees where to send it) if the MCC Plan is overseen by a third party that is authorized to provide the objectionable products and services.
- Identify for a third party which of their employees will participate in the MCC Plan, if the third party is authorized to provide the objectionable products and services o those participating employees.
- Refrain from canceling their insurance arrangement if they become aware that their third party is authorized to provide the objectionable products and services to their employees.

Appellants sincerely believe that taking these actions makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218. But if Appellants fail to take these actions, they will not be able to comply with the Mandate. Accordingly, the

Mandate requires Appellants to take specific actions that their religious beliefs forbid. The only question, therefore, is whether Appellants face "substantial pressure" to comply.

2. The Mandate "Substantially Pressures" Appellants to Violate their Religious Beliefs

As held by this Court and every appellate court to analyze the Mandate under RFRA's substantial-burden prong, a substantial burden is "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Korte*, 735 F.3d at 682; *Gilardi*, 733 F.3d at 1216 ; *Hobby Lobby*, 723 F.3d at 1141; *Living Water*, 258 F. App'x at 737 (asking whether "government action place[s] substantial pressure on a religious institution to violate its religious beliefs").

Here, the Mandate imposes "substantial pressure" on Appellants because it threatens them with substantial penalties if they do not comply. Failure to take the actions required under the Mandate will subject Appellants to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Appellants seek to drop health coverage altogether, they will be subject to an annual fine of $2,000 per full-time employee after the first thirty employees, *see* 26 U.S.C. § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer a crucial healthcare benefit to employees and students. *See* Long Decl. ¶¶ 28-30 (Exhibit D); Denny Decl. ¶ 32 (Exhibit E).

The threat of these severe costs and penalties clearly imposes "substantial pressure" on Appellants to comply with the Mandate. As explained by the Seventh Circuit, "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines, essentially forcing [plaintiffs] to choose between saving their companies and following the moral teachings of their faith." *Korte*, 735 F.3d at 683–84. In short, the Mandate forces Appellants "to choose between (1) "abid[ing] by the sacred tenets of their faith, pay[ing] a [massive] penalty . . . and crippl[ing] [their ministries]," or else (2) "becom[ing] complicit in a grave moral wrong. *Gilardi*, 733 F.3d at 128. As noted by the D.C. Circuit, "If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id.* (quoting *Thomas*, 450 U.S. at 718); *Hobby Lobby*, 723 F.3d at 1141 (same).[8]

* * *

Ultimately, RFRA protects "*any* exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), and any attempt to distinguish *Gilardi*, *Korte*, and *Hobby Lobby* from the present case on the ground that the "accommodation" was not available to the plaintiffs in those cases is wholly unavailing. As those cases show,

[8] This straightforward logic explains why nine courts have held that the Mandate imposes a "substantial burden" on the religious exercise of non-profit entities, notwithstanding the "accommodation." *See supra* note 1.

the precise nature of the religious exercise is irrelevant to the substantial burden analysis. A court's *only* task is to determine whether the asserted exercise—whatever it may be—is sincere and religious and then to assess whether the Mandate imposes "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Gilardi*, 733 F.3d at 1216 (quoting *Kaemmerling*, 553 F.3d at 678). Thus, it is immaterial that the plaintiffs in those cases exercised their religion by refusing to "purchase the required contraception coverage," *Korte*, 735 F.3d at 668, while Appellants exercise their religion by, *inter alia*, refusing to authorize a third party to provide the objectionable products and services through self-certification. Rather, what matters here, as in those cases, is that the Mandate forces Appellants "to choose between (1) "abid[ing] by the sacred tenets of their faith, pay[ing] a [massive] penalty …, and crippl[ing] [their ministries]," or else (2) "becom[ing] complicit in a grave moral wrong." *Id.* at 1218. In short: "The contraception mandate forces [Appellants] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685; *Living Water*, 258 F. App'x at 737 (same).

3. The District Court's Decision Was Erroneous

The district court, however, ignored this straightforward analysis. Rather than assessing whether the Mandate "place[s] substantial pressure on [Appellants] to violate [their] religious beliefs, " *Living Water*, 258 F. App'x at 737, it

impermissibly arrogated unto itself the authority to determine whether compliance with the Mandate actually violated Appellants' beliefs, ultimately concluding that Appellants are not themselves required to act in a manner that constitutes impermissible cooperation with immoral conduct or gives rise to scandal, Dist. Ct. at 11–13. This analysis was flawed. Appellants' undisputed affidavits establish that they sincerely believe participation in the accommodation would violate their religious beliefs. *See supra* Part I.A.1. Under the established law described above, the district court was required to accept Appellants' description of their own beliefs. As in *Thomas*, Appellants "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable," 450 U.S. at 715, 718; if Appellants interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, as they do, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez v. C.I.R.*, 490 U.S. 680, 669 (1989); *Colvin*, 605 F.3d at 298.[9]

But instead of accepting the line Appellants drew, the district court decided to "look beyond" their representations, concluding that any burden was too

[9] To be clear, Appellants are not suggesting (as the district court seemed to believe) that this Court must accept Appellants' claim that the Mandate imposes a substantial burden on their religious exercise. Dist. Ct. at 9. Under *Thomas*, a court need only accept Appellants' description of their religious beliefs—i.e., that taking the actions required of them by the Mandate violates Catholic doctrine—it must still proceed to determine whether the Mandate substantially pressures Appellants to violate those beliefs. *See supra* Part I.A.

"attenuated" to merit relief and the self-certification was nothing more than an "opt out." Dist. Ct. at 12–13. Both claims involved impermissible assessments of Appellants' religious beliefs. As explained by the Seventh Circuit, any contention that the burden in is too attenuated "focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraceptive coverage and an employee's decision to use it." *Korte*, 735 F.3d at 684. To argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to "purport[] to resolve the religious question underlying [this] case[]." *Id.* But "[n]o civil authority can decide that question," rather, "that's a question of religious conscience for [Plaintiffs] to decide." *Id.*; *Gilardi*, 733 F.3d at 1217 (rejecting attenuation argument); *Hobby Lobby*, 723 F.3d at 1137 (same).[10]

[10] Likewise, Supreme Court precedent confirms that the district court's attenuation analysis was improper. For example, in holding that denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his religious exercise, the Court did not question whether working in the factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of his pacifist convictions as a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the line the plaintiff drew. *Id.* at 715. And in *Lee*, the Court rejected the Government's contention that payment of social security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. 252, 255, 257 (1982). Instead, it readily accepted the Amish

Similarly, while the court describes the self-certification as nothing more than an "opt out,'" Dist. Ct. at 13, Appellants attach far more serious consequences to the act. The Court might believe "'it's just a form,'" *RCNY*, 2013 WL 6579764, at *13, but for Appellants, submitting that form makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1217–18. "It is not for [a] Court to say otherwise." *RCNY*, 2013 WL 6579764, at *14; *id.* at *13 ("There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection."). By concluding that the submission of the form was insignificant or irrelevant, the district court impermissibly "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. The district court's answer was ultimately "no," but again, "[n]o civil authority can decide that question." *Id.* [11]

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plaintiffs' own representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257. "As the Supreme Court accepted the religious belief in *Lee* [and *Thomas*,] so [too] must [this Court] accept [Appellants'] beliefs." *Hobby Lobby*, 723 F.3d at 1141.

[11] The district court's description of the self-certification as an "opt-out" is also factually inaccurate. As described above, Appellants play an undeniable role and are required to take specific actions that result in the provision of products and services against their faith. *See supra* Part I.A.1. Appellants *want* to "opt out", but the Government has stubbornly refused to allow them to do so.

The district court's heavy reliance on *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), was also misplaced. *Kaemmerling* stands for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Id.* at 679 (emphasis added). In *Kaemmerling*, the plaintiff did not state a religious objection to any action he was forced to take, but only "to the government extracting DNA information from . . . specimen[s]" *it already had*. *Id.* at 679. The Court thus concluded that Kaemmerling failed to state a RFRA claim because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.*

Here, in contrast, the provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Appellants] play no role." *Id.* Whereas Kaemmerling "did not object to what the government forced him to do," Appellants "vigorously object on religious grounds to the act[s] the government requires them to perform, not merely to later acts by third parties." *E. Tex. Baptist Univ.*, No. H-12-3009, slip op. at 33.[12] For example, as set forth in their undisputed affidavits, Appellants object on religious grounds to signing and submitting the "self-certification," which will authorize or "designate" a third party to provide contraceptive benefits to their employees and students. They likewise object to offering insurance to

[12] *See also S. Nazarene Univ.*, 2013 BL 353807, at *8; *Geneva Coll.*, No. 2:12-cv-00207, slip op. at 25 n.12; *RCNY*, 2013 WL 6579764, at *14.

their employees through a third-party administrator authorized to provide contraceptive benefits solely by virtue of the employees' enrollment on Appellants' health plan, paying fees to third-party administrator authorized to provide the objectionable benefits, and to all of the other administrative responsibilities that go along with maintaining the insurance relationship. *See supra* Part I.A.1. Far from objecting only to the conduct of third parties, Appellants object to the requirements the Mandate imposes *on them* to act in violation of their religious beliefs.[13]

Finally, the district court erred in claiming that the Mandate does not require Appellants to modify their behavior. Dist. Ct. at 12. This misunderstands the substantial burden test. The touchstone of the substantial burden analysis is whether a plaintiff is compelled to act in violation of its religious beliefs.[14] Here, Appellants' undisputed affidavits establish that is exactly what is taking place

[13] For similar reasons, the decisions in *Priests for Life v. HHS*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013), *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS-CAN (N.D. Ind. Dec. 20, 2013), and *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 1:13-cv-01441-ABJ (D.D.C. Dec. 20, 2013) ("*RCAW*"), which likewise relied heavily on *Kaemmerling*, were wrongly decided.

[14] *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry "begin[s]" with an assessment of whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 398 (same); *Korte*, 735 F.3d at 682 ("At a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.'" (quoting *Yoder*, 406 U.S. at 21); *see also E.Tex. Baptist Univ.*, slip op. at *33 (explaining that the question is "whether a *burden* is insubstantial, that is, the compelling or coercive mechanism itself; not whether the modification is substantial").

regardless of whether Appellants actions may bear a superficial resemblance to actions they have taken in the past. As noted by other courts, the Government has "transform[ed] a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden." *RCNY*, 2013 WL 6579764, at *14; *Zubik*, 2013 WL 6118696, at *25 (analogizing to "a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day."). Ultimately, the question is not whether the believer must modify his behavior compared to actions he has taken in the past, but whether he must modify his behavior compared to what he would do if free to follow his religious conscience.[15]

B. The Mandate Cannot Survive Strict Scrutiny

As Appellants have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–

[15] Even under the district court's flawed understanding of the substantial burden test, Appellants are required to "modify" their behavior. Appellants have never offered insurance to students and employees through a third party administrator authorized to provide contraceptive benefits. Appellants never paid fees to a third party administrator that would provide students and employees with contraceptive benefits. Now, Appellants must do so. These new requirements are deeply objectionable to Appellants in light of their sincerely held Catholic beliefs.

31. As every court to have considered the question in the context of the Mandate has concluded, the Government cannot meet this demanding standard.[16]

1. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 212. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must demonstrate a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. "In other words, under RFRA's version of strict scrutiny, the Government must establish a compelling and

[16] *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v.HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); see supra note 1.

specific justification for burdening these claimants." *Korte*, 735 F.3d at 685. This, it has not begun to do.

Here, the Government has proffered two generalized interests: (i) the "promotion of public health" and (ii) "assuring that woman have equal access to health care services." *See MCC, et al., v. Sebelius, et al.*, No. 1:13-cv-1247, W.D. Mich., Def. Opp. (Doc. No. 25) at 21-22. "[B]oth interests . . . are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "highest order" because the Mandate already exempts millions of employees—through a combination of "grandfathering" provisions, the narrow exemption for "religious

employers," and the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1144; *see also Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222–23.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* p. 17. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health

consequences for women and newborn children." 78 Fed. Reg. at 39,887. In the first place, as the D.C. Circuit stated, "the science [behind that claim] is debatable and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Appellants' employees or that the Mandate would significantly increase contraception use among these employees.[17] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

2. The Mandate Is Not the Least Restrictive Means to Achieve the Government's Asserted Interests

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[a] statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). The government, moreover, cannot meet its burden "unless it demonstrates that it has

[17] In fact, recent scholarship suggests otherwise. Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013); Affidavit of Prof. Scott E. Harrington, Ex. 1 to Comments of the Diocese of Pittsburgh (Apr. 8, 2013) (*MCC*, 13-cv-1276, Doc. No. 11-02).

actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal).

Once again, every circuit court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[18] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing non-profit religious organizations to provide access to free contraception in violation of their sincere religious beliefs. *Korte*, 735 F.3d at 686. These include many of the alternatives Appellants proposed here: "The Government could provide the contraceptives services or insurance coverage directly to plaintiffs employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 2013 WL 6579764, at *18–19; *see also Korte*, 735 F.3d at 686 (same); *Gilardi*, 733 F.3d at

[18] *RCNY*, 2013 WL 6579764, at *18–19; *Zubik*, 2013 WL 6118696, at *30–32; *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

1222 (same). While Appellants oppose many of these alternatives as a matter of policy, the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement.

II. THE OTHER FACTORS SUPPORT INJUNCTIVE RELIEF

A. An Injunction is Necessary to Prevent Irreparable Harm

It is well settled that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale*, 904 F .Supp. 2d at 129; *see also Korte*, 735 F.3d at 666 ("Although the claim is statutory, RFRA protects First Amendment free exercise," and thus "the likelihood of success on the merits will often be the determinative factor.").

Here, in less than three days, Appellants will be put to the painful choice of adhering to their religious conscience or subjecting themselves to serious legal penalties. Once that harm is imposed, it cannot be undone. Indeed, coercing Appellants violate their religious beliefs is the epitome of irreparable injury.

B. The Balance of Equities Tips in Favor of Injunctive Relief

The balance of the equities favors an injunction because the Government has no valid interest in enforcing an unlawful Mandate that violates Appellants' religious freedom. An injunction would have a trivial impact on the Government's

regulatory scheme because, as noted by the D.C. Circuit, "small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers are [already] exempt." *Gilardi*, 733 F.3d at 1222. Moreover, any claim of harm to the Government is undermined by the fact that it consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *Geneva Coll. v. Sebelius*, No. 2:12-cv-207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013), *injunction granted* (W.D. Pa. Dec. 23, 2013). In short, especially when balanced against the injury being inflicted on Appellants, any harm the Government might claim from a preliminary injunction is *de minimis*.

C. Injunctive Relief Would Serve the Public Interest

"[T]he public interest is best served by having federal agencies comply with the requirements of federal law." *Patriot, Inc. v.HUD*, 963 F. Supp. 1, 6 (D.D.C. 1997). In particular, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010; *see also Hobby Lobby*, 723 F.3d at 1145 (stating that "it is always in the public interest to prevent the violation of a party's constitutional [or RFRA] rights.") (citation omitted).

CONCLUSION

In three days, Appellants will be forced to choose between incurring onerous penalties and violating their religious beliefs. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18

U.S.C. § 2, so too may a Catholic violate the moral law if in certain circumstances he facilitates or becomes otherwise entangled in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

723 F.3d at 1152 (Gorsuch, J., concurring). Appellants' faith has led them to the conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible material cooperation with and facilitation of wrongful conduct giving rise to scandal. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably Appellants' to draw, and it is not for the lower court, this Court, or the Government to question. *Id.* By placing substantial pressure on Appellants to cross this line, the Government has substantially burdened Appellants' exercise of religion. As the Mandate cannot satisfy strict scrutiny, Appellants are entitled to injunctive relief.

Respectfully submitted, this the 29th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 29th, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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