No. 13-03853

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME,
Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Indiana
District Court Case No. 3:13-CV-1276
The Honorable Philip P. Simon

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, UNIVERSITY OF NOTRE DAME

JONES DAY
Matthew A. Kairis (counsel of record)
325 John H. McConnell Blvd, Suite 600
Columbus, OH 43216
(614) 469-3939

ATTORNEY FOR PLAINTIFF-APPELLANT UNIVERSITY OF NOTRE DAME

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case:

University of Notre Dame du Lac

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

3. Appellant is a nonprofit corporation and does not have a parent corporation. No publicly held company owns 10% or more of Appellant's stock.

Respectfully submitted, this the 13th day of January, 2014.

By: *s/ Matthew A. Kairis*
Matthew A. Kairis (OH No. 55502)
(Counsel of record)
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939
makairis@jonesday.com

Counsel for Plaintiff-Appellant University of Notre Dame

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Plaintiff-Appellant the University of Notre Dame submits that oral argument would assist the Court in its adjudication of these issues. The statutory requirements of the Affordable Care Act are complex, and oral argument would assist the panel in its understanding of the effects of the contraceptive-coverage mandate on Notre Dame.

INTRODUCTION

The Government has promulgated a regulatory mandate that forces the University of Notre Dame to violate its religious beliefs by taking actions that entangle it in the provision of abortion-inducing products, contraceptives, and sterilization for its employees and students. 42 U.S.C. § 300gg-13(a)(4); 78 Fed. Reg. 39,870 (July 2, 2013) (collectively, the "Mandate"). Under the Mandate, Notre Dame must hire a third party that will provide its students and employees with coverage for these products and services, which Notre Dame finds deeply objectionable on religious grounds. Notre Dame must also sign and submit a form designating the third party as the provider of the objectionable coverage and then must take numerous additional steps to maintain its contractual relationship with that third party, thus keeping open the pipeline by which the products and services will flow to Notre Dame's students and employees. Notre Dame sincerely believes, and the Government does not dispute, that it cannot take those actions without violating its religious beliefs. The resolution of this case thus turns on the answer to a straightforward question: absent interests of the highest order, can the Government force religious organizations to take actions that violate their sincerely held religious beliefs?

Under the Religious Freedom Restoration Act ("RFRA"), the answer to that question is clearly no. That answer, moreover, is compelled by Circuit precedent. RFRA prohibits the Government from imposing a "substantial burden" on Notre Dame's exercise of religion without a showing that such a

burden is the least restrictive means of advancing a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), this Court held that the Mandate substantially burdened the religious exercise of for-profit corporations because "it force[d] [plaintiffs] to do what their religion tells them they must not do." *Id.* at 685. So too here. Though the particular religious exercise at issue differs, the Mandate still "forces [Notre Dame] to do what [its] religion [says it] must not do." *Id.* Just as in *Korte*, "[t]hat qualifies as a substantial burden on religious exercise, properly understood." *Id.* Because the Government concedes that *Korte* forecloses any argument that the Mandate can survive strict scrutiny,[1] Notre Dame is entitled to injunctive relief.

Indeed, that is exactly what courts have held in eighteen of the nineteen cases to consider application of the Mandate to nonprofit plaintiffs like Notre Dame.[2] In fact, this is the only case in the country where application of the

---

[1] Defs.' Resp. in Opp. to Pl.'s Mot. for Prelim. Inj. (Doc. 13), at 16.

[2] *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764

Mandate to a nonprofit plaintiff has not been enjoined. This extraordinary rate of unanimity among the federal courts, coupled with this Court's decision in *Korte*, counsels strongly in favor of reversal.

(E.D.N.Y. Dec. 16, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *temporary injunction granted*, No. 13A691, 2013 WL 6869391 (U.S. Dec. 31, 2013); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013), *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013).

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Notre Dame's claims challenging the Affordable Care Act's contraceptive-coverage requirement under RFRA, 42 U.S.C. § 2000bb, pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the interlocutory appeal of this dispute under 28 U.S.C. § 1292. The district court denied Notre Dame's motion for a preliminary injunction on December 20, 2013. (SA1.)[3] Notre Dame filed its notice of interlocutory appeal to the United States Court of Appeals for the Seventh Circuit on that same day. (Doc. 43.)

STATEMENT OF THE ISSUES

1. Whether the contraceptive-coverage Mandate of the Affordable Care Act violates the Religious Freedom Restoration Act by substantially burdening Notre Dame's exercise of religion.

2. Whether the Mandate violates the Free Exercise Clause of the First Amendment by targeting Notre Dame's refusal to facilitate access to contraceptive coverage.

3. Whether the Mandate violates the First Amendment protection against compelled speech by requiring Notre Dame to facilitate objectionable

[3] Citations to documents in the Short Appendix are "SA__." Citations to documents in the Supplemental Appendix are "AA__." Citations to the Records on Appeal are "Doc. __," referencing the Document Number in the CM/ECF system. Page citations are to the document's pagination, not the CM/ECF-assigned pagination.

counseling and requiring it to certify its opposition to the provision of objectionable products and services.

4. Whether the Mandate violates the First Amendment's guarantee of free speech by prohibiting Notre Dame from seeking to influence its third party administrator's decision to provide objectionable products and services.

5. Whether the Mandate violates the First Amendment's Establishment Clause by discriminating among religious groups and by excessively entangling the Government with religious groups' beliefs and practices.

STATEMENT OF THE CASE

This is an appeal from the district court's denial of Notre Dame's motion for a preliminary injunction against the Affordable Care Act's contraceptive-coverage Mandate, which forces Notre Dame to violate its religious beliefs by facilitating access to insurance coverage for abortion-inducing products, contraception, sterilization, and related education and counseling services (the "objectionable products and services").

Notre Dame filed its complaint on December 3, 2013 (Doc. 1), alleging that the Mandate substantially burdens its exercise of religion in violation of RFRA and the Free Exercise Clause, compels and prohibits speech in violation of the First Amendment, and excessively entangles the government with religion in violation of the Establishment Clause. (*Id.* at 29-35.) Facing an

enforcement date of January 1, 2014, Notre Dame moved for a preliminary injunction on December 9, 2013. (Doc. 9.)

The district court heard argument on Notre Dame's motion for preliminary injunction on December 19 (Doc. 36), and denied relief on December 20 (SA1). Notre Dame sought an injunction pending appeal the same day (Doc. 41), which the district court denied (Doc. 49). Notre Dame immediately filed its notice of interlocutory appeal to this Court on December 20 (Doc. 43), at which point the district court stayed its proceedings during the pendency of this appeal (Doc. 54).

On December 23, Notre Dame filed an emergency motion for an injunction pending appeal with this Court. On December 30, this Court denied that motion and ordered expedited briefing on Notre Dame's motion. (AA39.)

STATEMENT OF FACTS

A. The Mandate

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") requires "group health plan[s]" to include insurance coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). The Government has defined "preventive care and screenings" to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited Jan. 7, 2014). The category of FDA-approved contraceptive methods and

sterilization procedures, in turn, includes intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. (Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), AA98) If an employer's group health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping employee health coverage likewise subjects employers to penalties of $2,000 per year, per employee. *Id.* § 4980H(a), (c)(1). Student health plans must also include the objectionable coverage. *See* 76 Fed. Reg. 7767, 7772 (Feb. 11, 2011).

1. Exemptions from the Mandate

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Moreover, small employers—those with fewer than fifty employees—are exempt from the penalty for dropping coverage. 26 U.S.C. § 4980H(a). All told, by the Government's own estimates, over 90 million individuals participate in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

Moreover, in an apparent acknowledgment of the burden the Mandate places on religious exercise, the Government created an exemption for plans sponsored by so-called "religious employers." That exemption, however, is narrowly defined to protect only "the unique relationship between a house of

worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8727-28, 8730 (Feb. 15, 2012). For religious entities such as Notre Dame that do not qualify as a "house of worship," there is no exemption from the Mandate.

Despite sustained criticism from religious groups, the Government refused to expand the "religious employer" exemption from the Mandate. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (noting that the Government would continue to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders"). Instead, the Government devised what it inaptly termed an "accommodation" for non-exempt religious organizations.

2. The "Accommodation"

To be eligible for the "accommodation," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If an organization meets these criteria and wishes to partake of the "accommodation," it must provide the required "self-certification" to its insurance company or (if the organization has a self-insured health plan) to its third party administrator ("TPA"). *Id.*

When an "eligible organization" signs and submits the self-certification form, it triggers an obligation for its insurance company or TPA to provide or

arrange "payments for contraceptive services" for beneficiaries who are enrolled in the organization's health plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(c). According to the regulations, the insurance company or TPA may not "impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization," and "must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(c)(2)(ii). The "payments for contraceptive services," however, are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan. *See* 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).

For self-insured organizations, the self-certification form serves as the official "designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. In addition, the regulations provide that the self-certification form "shall be an instrument under which the plan is operated." 29 C.F.R. § 2510.3–16. In fact, the Government has conceded that "in the self-insured [context], technically, the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health] plan." Hr'g Tr., *Archbishop of Wash. v. Sebelius*, No. 1:13-cv-01441-ABJ, at 18 (D.D.C. Nov. 22, 2013) (relevant portion attached at AA122). Moreover, the "self-certification notifies the TPA or issuer of their obligations to provide contraceptive-coverage to employees otherwise covered by the plan and to notify the employees of their ability to obtain those benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. Once the organization signs

and submits the form, moreover, the religious organization is prohibited from "directly or indirectly, seek[ing] to influence [its] third party administrator's decision" to provide contraceptive coverage, 26 C.F.R. § 54.9815–2713A(b)(iii), nor can it "terminat[e] its [contractual] relationship [with the TPA] because of the TPA's coverage of contraception." (Dist. Ct. Op., SA36.) In addition, because TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880, the burden falls on the religious organization to find and contract with a TPA that is willing to provide the objectionable coverage. "[T]hese final regulations apply to group health plans . . . for plan years beginning on or after January 1, 2014." *Id.* at 39,870.

In short, under the accommodation, religious organizations must identify and designate a third party to provide the very coverage they find morally objectionable. "The 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 WL 6804265, at *8–9. "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* at *8. "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.*

Before the "accommodation" was finalized, Catholic religious authorities made clear that it would not actually accommodate Catholic organizations

because it would still require them to act in violation of their religious beliefs. As the U.S. Conference of Catholic Bishops pointed out, although the "accommodation" was designed to "create an appearance of moderation and compromise," in substance it failed to "offer any change in the Administration's earlier stated positions on mandated contraceptive coverage." (Comments of U.S. Conference of Catholic Bishops (May 15, 2012), AA75) That is because, at the end of the day, "non-exempt religious organizations [would] still be required to provide plans that serve as a conduit for contraceptives and sterilization procedures to their own employees." (*Id.*) While pointing out that it would be practically impossible to segregate fees and premiums from contraceptive payments given the fungible nature of money, the U.S. Conference of Catholic Bishops also made clear that the issue of payment for contraceptive services was ultimately irrelevant to the religious objection:

> [E]ven if premium dollars of an objecting employer did not actually pay for contraceptives, the plan itself would be functioning as a gateway to such payments. Thus . . . the self-insured plan would serve as a kind of "ticket" for "free" contraceptives. It would be morally objectionable for an employer to provide anyone such a "ticket," even if the ticket costs the employer nothing to provide.

(AA86.) Despite this clear statement that the "accommodation" would still require non-exempt Catholic organizations to violate their religious beliefs, the Government refused to reconsider an expansion of the "religious employer" exemption. Instead, the Government finalized the "accommodation" and began falsely proclaiming that it had reached a compromise that would satisfy religious objections to the Mandate.

B. The University of Notre Dame

Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university. (Affleck-Graves Aff., AA42 at ¶ 5.) Notre Dame provides a distinctive voice in higher education that is at once rigorously intellectual and unapologetically committed to the moral principles and ethics of the Catholic Church. (*Id.* ¶ 10.) In accordance with the apostolic constitution, *Ex Corde Ecclesiae*, Notre Dame believes and teaches that "besides the teaching, research and services common to all universities," it must "bring[] to its task the inspiration and light of the Christian message." (*Id.* ¶ 12.) "Catholic teaching and discipline are to influence all university activities," and "[a]ny official action or commitment of the University [must] be in accord with its Catholic identity." (*Id.*) To carry out its religious mission, Notre Dame instructs its students how to apply Catholic moral teachings both inside and beyond the church doors. This religious mission is the heart of the Church and cannot be severed from it. (*See id.* ¶¶ 21-24, 40; Compl., AA7 ¶ 29). Nonetheless, despite its avowedly religious mission, Notre Dame does not qualify for the "religious employer" exemption under the Mandate.

Notre Dame offers health insurance to eligible employees through a series of self-insured health plans. (Affleck-Graves Aff., AA46-47 at ¶¶ 25–31.) Under these self-insured plans, Notre Dame does not contract with a separate insurance company that pays for its employees' medical costs; instead, Notre Dame functions as the insurance company underwriting the medical expenses for participating beneficiaries. (*Id.* ¶ 26.) Notre Dame's self-insured health

plans are administered by a TPA, Meritain Health, Inc. ("Meritain"). (*Id.* ¶ 27.) These health plans cover approximately 4,600 employees and 11,000 total individuals, including dependents. (*Id.* ¶ 28.) Notre Dame also offers health insurance to its students through a fully insured student health plan provided by Aetna, Inc. (*Id.* ¶ 29.) The Notre Dame student health plan covers approximately 2,600 students and 2,700 total individuals, including dependents. (*Id.* ¶ 30.)

Notre Dame strives to provide health insurance for its students and employees in a manner consistent with its Catholic faith. In keeping with that faith, Notre Dame believes that life begins at the moment of conception, and that certain "preventive" services required by the Mandate that interfere with life and conception are immoral. (*See* Compl., AA7-8 ¶¶ 30-33; Affleck-Graves Aff., AA44 ¶¶ 14-18.) In addition, Notre Dame's religious beliefs require it to avoid "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. (Affleck-Graves Aff., AA45 ¶ 19.) Scandal is particularly grave when associated with those "who by nature or office are obligated to teach and educate others." (*Id.* ¶ 19) (quoting *Catechism of the Catholic Church* ¶ 2285). Accordingly, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled in the provision of coverage for abortion-inducing products, contraception, and sterilization, including by contracting with a third party authorized to provide or procure the objectionable coverage for Notre Dame's employees and students. (*See id.* ¶¶ 13-20, 41–59.)

The "accommodation" does not resolve Notre Dame's religious objections to the Mandate because it requires Notre Dame to take numerous actions in violation of its religious beliefs. (*See id.* ¶¶ 41–59.) Broadly stated, the "accommodation" requires Notre Dame to take the affirmative step of providing health insurance through an insurance company or TPA authorized to provide contraceptive coverage to employees and students enrolled in Notre Dame's health plans. 26 C.F.R. § 54.9815-2713A(a)-(c). Specifically, Notre Dame must identify and contract with a third party willing to provide the objectionable coverage to Notre Dame's students and employees. *Id.* § 54.9815-2713A(b)(2); 78 Fed. Reg. at 39,880. It must then sign and submit a "self-certification" that "designates" its TPA as the provider of contraceptive benefits for beneficiaries enrolled in Notre Dame's health plans, and notifies the TPA or insurance company of its obligations under the accommodation. 26 C.F.R. § 54.9815-2713A(a)-(c); 29 C.F.R. § 2510.3–16. Even after it has taken these steps, Notre Dame must take numerous additional steps to maintain the arrangement whereby the mandated coverage is provided to its students and employees. Among other things, Notre Dame must pay fees and premiums to the TPA and/or insurance company authorized to provide the objectionable coverage. And Notre Dame must identify for its TPA and insurance company which of its employees and students will participate in its health plans, thus identifying the beneficiaries that will then receive the objectionable coverage. These actions violate Notre Dame's sincerely held Catholic religious beliefs. (*See* Affleck-Graves Aff., AA44 ¶¶ 13-20, 41–59.) Among other things, in Notre Dame's

judgment, this process may lead others to believe that Notre Dame condones the objectionable products and services, thereby undermining Notre Dame's role in educating others on matters of religious and moral significance. (*See id.* ¶¶ 47–51.) Accordingly, Notre Dame believes that complying with the Mandate and its "accommodation" gives rise to scandal in a manner that violates its religious beliefs. (*See id.* ¶¶ 19-20, 41–59.)

As indicated above, the Government *knew* the "accommodation" would not relieve the pressure on Notre Dame to act contrary to its religious beliefs, because the U.S. Conference of Catholic Bishops repeatedly informed the Government that the now-codified "accommodation" was inadequate.[4] That concern, however, has been ignored. When both the district court and this Court denied Notre Dame's motions for injunction pending appeal, Notre Dame was forced to choose between potentially ruinous fines and compliance with the Mandate. On December 31, 2013, Notre Dame chose to comply by signing and submitting the self-certification, thereby violating its religious beliefs under duress.[5]

SUMMARY OF ARGUMENT

The district court's decision cannot be reconciled with the Religious Freedom Restoration Act, as interpreted by this Court in *Korte v. Sebelius*, 735

[4] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013) (AA94); Comments of U.S. Conference of Catholic Bishops (May 15, 2012) (AA75).

[5] *See Notre Dame Issues Statement on Contraceptive Care Injunction Denial*, WNDU.com (Dec. 31, 2013, 5:56 PM), http://www.wndu.com/home/headlines/Notre-Dame-issues-statement-on-contraceptive-care-injunction-denial-238301211.html.

F.3d 654 (7th Cir. 2013). RFRA 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, 2000bb-2(4), 2000cc-5(7). In *Korte*, this Court held that the Mandate as applied to for-profit corporations violated RFRA. 735 F.3d at 682–87. The Government concedes that, in light of *Korte*, the Mandate cannot survive strict scrutiny in this case. *Supra* note 1. Thus, as to Notre Dame's RFRA claim, the only issue before this Court is whether the Mandate imposes a "substantial burden" on Notre Dame's exercise of religion. But *Korte* answers that question too. Even under the so-called accommodation, Notre Dame faces substantial pressure to take actions that violate its religious beliefs.

As *Korte* held—along with every appellate court to reach the question—"the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" 735 F.3d at 683; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013) (same); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc) (same). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Korte*, 735 F.3d at 683. Thus, the exact "religious exercise" at issue is irrelevant to the substantial burden analysis. So long as the plaintiff has an "'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do, conflicts with his religion," *id.* (quoting

Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)), this Court's "only task is to determine whether" "the government has applied substantial pressure on the claimant" to act contrary to his faith. *Hobby Lobby*, 723 F.3d at 1137; *Korte*, 735 F.3d at 683–85 (same).

Here, the Government does not dispute that, like the plaintiffs in *Korte*, Notre Dame has an "honest conviction" that it cannot take the actions required under the accommodation without violating its religious beliefs. Among other things, Notre Dame must identify and contract with a third party willing to provide the mandated coverage, amend its plan documents to designate that party to provide the mandated coverage, notify the third party of its obligations, and then maintain a plan that will serve as the conduit for the delivery of the very products and services to which Notre Dame objects. Those actions are different than the actions at issue in *Korte*, but again, that difference is irrelevant to the substantial burden inquiry. What matters is that if Notre Dame refuses to take the actions it is indisputably required to take, it is subject to crippling fines. Because *Korte* forecloses any argument that the Mandate can survive strict scrutiny, that should end the inquiry. As this Court and the Supreme Court have repeatedly held, 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 685; *see also Thomas*, 450 U.S. at 717; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). That explains why in *every other case* to consider the regulatory

scheme at issue in this litigation, courts have enjoined application of the Mandate to nonprofit plaintiffs like Notre Dame. *See supra* note 2.

The district court reached a contrary conclusion only by rejecting Notre Dame's undisputed assertion that, even under the "accommodation," taking the actions necessary to comply with the Mandate would violate Notre Dame's sincerely held religious beliefs. (*See* Affleck-Graves Aff., AA44 ¶¶ 13-20, 41–59.) In short, just as in *Korte*, Notre Dame sincerely believes that taking the required actions would make it "complicit in a grave moral wrong" and "undermine [its] ability to give witness to the moral teachings of [the Catholic] church." 735 F.3d at 683. That is a religious judgment, based on Catholic moral principles regarding the permissible degree of entanglement with wrongdoing. Incredibly, however, the district court concluded that whether compliance with the Mandate "qualifies" as "encouraging, facilitating, or endorsing the use of contraception are questions of fact and law, not of faith." (Dist. Ct. Op., SA11.) It then concluded that "there's no compelled action that violates Notre Dame's religious beliefs," because the Mandate provides what the district court described as an "opt[] out" that ensures Notre Dame will not "condon[e] or support[]" contraceptive coverage. (*Id.* at SA16, SA25.) According to the court, Notre Dame does not really object to the actions the Mandate requires *of it*, but rather to the actions the Mandate requires *of third parties*. (*Id.* at SA16-18.)

This analysis was manifestly improper, as *Korte* makes clear. Far from deciding a "question[] of fact and law," (*id.* at SA11) in claiming to determine

whether Notre Dame's actions impermissibly facilitate or endorse the provision of contraceptive coverage, the district court "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 "[n]o civil authority can decide that question." *Id.* Indeed, in the face of Notre Dame's express representations that it could not, consistent with its religious beliefs, take the actions necessary to comply with the accommodation, the only way for the district court to conclude otherwise was to inform the University that it "misunderstand[s] [its] own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Such an approach is irreconcilable with the jurisprudence of both this Court and the Supreme Court, which 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); *Korte*, 735 F.3d at 683–85. Simply put, "federal courts are not empowered to decide . . . religious questions." *McCarthy v. Fuller*, 714 F.3d 971, 980 (7th Cir. 2013). While the Government, and the court below, may "feel[] that the accommodation sufficiently insulates [Notre Dame] from the objectionable services, . . . it is not the Court's role to say that plaintiffs are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. The "line" between religiously permissible and impermissible actions is for the church and the

individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that Notre Dame is entitled to relief under RFRA. In short, Notre Dame believes that, even under the "accommodation," compliance with the Mandate violates its religious beliefs (a fact the Government does not dispute). The district court disagreed. Because such determinations are for individual believers and religious institutions, not courts, Notre Dame is likely to succeed on the merits of its RFRA claim.

Likewise, the Mandate violates the First Amendment's Free Speech and Religion Clauses. The Mandate violates the Free Exercise Clause by targeting Notre Dame's religious practices, offering a multitude of exemptions to other employers for *non-religious* reasons, but denying any exemption that would relieve Notre Dame's *religious* hardship. It infringes on Notre Dame's freedom of speech by requiring it to issue a certification of its beliefs that, in turn, results in provision of the objectionable products and services to its employees and students. The Mandate also imposes a gag order that prohibits Notre Dame from speaking out in any way that might directly or indirectly "influence" the decision of its TPA to provide or procure the objectionable products and services. And, it violates the Establishment Clause by creating a state-favored category of "religious employers" based on intrusive judgments about their religious practices, beliefs, and organizational structure.

For these reasons, the district court's judgment should be reversed, and

Notre Dame should be granted injunctive relief.

ARGUMENT

Notre Dame is entitled to a preliminary injunction because (1) it is likely to succeed on the merits of its claims, (2) it is "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted," (3) "there is no adequate remedy at law," and (4) "an injunction would not harm the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The district court's legal conclusions are reviewed de novo, its factual findings for clear error, and its balancing of the injunction factors for an abuse of discretion. *Id.*

I. NOTRE DAME IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

A. The Mandate Violates RFRA

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). This Court's decision in *Korte* sets the analytical framework for applying RFRA to the facts of this case.

Korte makes clear that "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act

contrary to [religious] beliefs.'" 735 F.3d at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Following that approach, this Court held that it was bound to accept the representations of two for-profit corporations that the particular action required of them—which, in that case, was the inclusion of contraceptive coverage in their employee health plans—"would make them complicit in a grave moral wrong." *Id.* In light of that sincere religious belief, the only question for purposes of the substantial burden analysis was whether the Government had imposed "substantial pressure" on the plaintiffs to comply with the Mandate. *Id.* at 683–84. This Court found that an easy question, noting that the Mandate would impose fines of "$100 per day per employee" if the plaintiffs did not comply. *Id.* By threatening such "ruinous fines," the Mandate "placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate," thus imposing a "direct and substantial" burden on plaintiffs' religious exercise. *Id.* Because that burden was not the least restrictive means to further a compelling government interest, the Court enjoined application of the Mandate. *Id.* at 685–87.

Here, the Government concedes that *Korte* forecloses its argument that the Mandate satisfies strict scrutiny. *Supra* note 1. Thus, for purposes of RFRA, the only question before this Court is whether the Mandate imposes a substantial burden on Notre Dame's exercise of religion. That analysis, however, is likewise controlled by *Korte*, for the reasons detailed below.

1. The Mandate Imposes a Substantial Burden on Notre Dame's Exercise of Religion

The Mandate imposes a "substantial burden" on Notre Dame's exercise of religion because it coerces Notre Dame "'to act contrary to [its religious] beliefs.'" *Korte*, 735 F.3d at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137).

Where, as here, 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*); *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216; *see also Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute).

Under the first step, a court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996); *see Korte*, 735 F.3d at 682–83. This 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*, 450 U.S. at 716. Courts must therefore accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *Lee*, 455 U.S. at 257 (same). To that end, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring

him to do conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). In other words, it is left to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.[6]

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, 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; *Gilardi*, 733 F.3d at 1216–18.

Here, it is clear that the Mandate substantially burdens Notre Dame's exercise of religion. Notre Dame exercises its religion by, *inter alia*, refusing to take certain actions that, in Notre Dame's religious judgment, cause it to facilitate or become entangled in the provision of access to abortion-inducing products, contraceptives, sterilization, or related education and counseling in violation of the teachings of the Catholic Church. By threatening Notre Dame with onerous penalties unless it takes precisely those actions its religious

[6] Under step one, a court may "[c]heck[] for sincerity and religiosity" to weed out sham claims." *Korte*, 735 F.3d at 683. "These are factual inquires within the court's authority and competence." *Id.* Here, neither the Government nor the court below contend that Notre Dame's objection is anything but "sincere and religious in nature." *Id.*

beliefs forbid, the Mandate substantially pressures Notre Dame to act contrary to its religious beliefs.

(a) Notre Dame Exercises Its Religious Beliefs by Refusing to Comply with the Mandate

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 2000cc-5(7)(A)); *see also* 42 U.S.C. § 2000bb-2(4). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674. Here, Notre Dame exercises its religion by refusing to take actions in furtherance of a regulatory scheme to provide its employees and students with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling.

Most obviously, Notre Dame believes that submitting the required self-certification violates its religious beliefs, because doing so renders it "complicit in a grave moral wrong" and "undermine[s] [its] ability to give witness to the moral teachings" of the Catholic Church. *Korte*, 735 F.3d at 683; Affleck-Graves Aff., AA44 ¶¶ 13-20, 41–59. That form is far more than a simple statement of religious objection to the provision of contraceptive coverage. To the contrary, it "designat[es]" Notre Dame's "third party administrator[] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879, serves as "an instrument under which [Notre Dame's health] plan[s are] operated," 29 C.F.R. § 2510.3–16(b), and "notifies the TPA or issuer

of their obligations to provide contraceptive-coverage to [Notre Dame's] employees [and students and to inform them] of their ability to obtain those benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. In other words, under the accommodation, Notre Dame is required to amend the documents governing its health plans to designate a third party to provide the very coverage to which it objects.

Likewise, Notre Dame cannot, consistent with its religious beliefs, offer a health plan to its employees or students that serves as a conduit for the delivery of the objectionable products and services. (*See* Affleck-Graves Aff. AA50-51 ¶¶ 42, 46.) Yet upon issuance of the self-certification, that is exactly what Notre Dame's health plans become. Contraceptive coverage is available to Notre Dame's employees and students only by virtue of their enrollment in Notre Dame's plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, in related litigation, the Government has conceded that once a self-insured organization (such as Notre Dame) provides the certification, "technically, the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health] plan." (AA122.) In this regard, the Government's vaunted "accommodation" is materially indistinguishable from the regulation applicable to for-profit entities this Court enjoined in *Korte*. Both require employers to offer health plans that cover contraceptives. The only difference is that for Notre Dame, the coverage is written into its plans in invisible ink.

But even beyond these actions, once Notre Dame "turns on the tap" by offering a health plan and self-certifying, it is required to take numerous additional steps to ensure that the pipeline for abortion-inducing products, contraceptives, and sterilization continues to flow. Notre Dame thus also objects to taking actions necessary to maintain its health plans in compliance with the accommodation. Among other things, Notre Dame must:

- Contract with and pay premiums to an insurance company or TPA that is authorized to provide Notre Dame's students or employees with the objectionable coverage.
- Offer enrollment paperwork for students or employees to enroll in a health plan overseen by an insurance company or TPA that is authorized to provide the objectionable coverage.
- Send health-plan-enrollment paperwork (or tell students or employees where to send it) to an insurance company or TPA that is authorized to provide the objectionable coverage.
- Identify for its insurance company or TPA which students or employees will participate in Notre Dame's health plan, when the insurance company or TPA is authorized to provide objectionable coverage to those participating students or employees.
- Refrain from canceling its insurance arrangement with an insurance company or TPA authorized to provide objectionable coverage to its students or employees.

Each of the actions or forbearances detailed above constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because, again, Notre Dame sincerely believes that taking these actions would make the University "complicit in a grave moral wrong" and "undermine[s its] ability to give witness to the moral teachings" of the Catholic Church. *Korte*, 735 F.3d at 683. In other words, Notre Dame "has an 'honest conviction' that what the government

is requiring, prohibiting, or pressuring [it] to do conflicts with [its] religio[us beliefs]." *Id.* (quoting *Thomas*, 450 U.S. at 716).

While this religious exercise is different from the religious exercise at issue in *Korte*, any attempt to distinguish this case is wholly unavailing because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). As *Korte* makes clear, the precise nature of the religious exercise at issue *is irrelevant* to the substantial burden analysis. 735 F.3d at 682–84. The Court's only task at this stage is to determine whether the asserted exercise—whatever that may be—is sincere and religious before proceeding to assess the "coercive effect of the governmental pressure on the adherent's religious practice" at step two. *Id.* at 683. Thus, it is immaterial that the plaintiffs in *Korte* exercised their religion by refusing to "purchase the required contraception coverage," 735 F.3d at 668, while Notre Dame exercises its religion by refusing to take actions that entangle it in the process by which the objectionable products and services are provided to its employees and students. What matters is that in this case, as in *Korte*, "[t]he contraception mandate forces [plaintiffs] to do what their religion tells them they must not do." *Id.* at 685.

Critically, there is no dispute as to whether Notre Dame sincerely believes it may not take the specific actions necessary to comply with the "accommodation." Neither the religiosity nor the sincerity of Notre Dame's beliefs was questioned by the Government, or by the court below. *Cf. Korte*, 735 F.3d at 683 (noting that courts can inquire into religiosity and sincerity).

That being the case, to determine whether the Mandate imposes a substantial burden on Notre Dame's religious exercise, the only question for this Court is whether Notre Dame faces "substantial pressure" to act in violation of its religious beliefs, as detailed above.

(b) The Mandate Places "Substantial Pressure" on Notre Dame to Violate Its Religious Beliefs

Once Notre Dame's refusal to take the actions described above is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As this Court held in *Korte*, "[a] burden on religious exercise [] arises when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718). In *Yoder*, for example, the Supreme Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes a substantial burden on Notre Dame's religious exercise. Failure to take the actions required under the Mandate subjects Notre Dame to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Notre Dame seeks to drop health coverage altogether, it will be subject to a fine of $2,000 per year, per full-time employee after the first thirty employees, *see id.* § 4980H(a), (c)(1), and/or incur ruinous practical consequences due to its inability to offer a healthcare

benefit to employees and students. (Affleck-Graves Aff., AA55-56 ¶¶ 56, 59-61.) These penalties, which could involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

In short, the Government has put Notre Dame to a stark choice: violate its religious beliefs or pay crippling fines. This is the exact choice, and the exact penalties, that this Court found imposed a substantial burden in *Korte*. Just as in *Korte*, "the federal government has placed enormous pressure on [Notre Dame] to violate [its] religious beliefs and conform to [the Government's] regulatory mandate. Refusing to comply means ruinous fines, essentially forcing [Notre Dame] to choose between [onerous penalties] and following the moral teachings of [its] faith." 735 F.3d at 683–84. In such circumstances, "there can be little doubt that the contraception mandate imposes a substantial burden on [Notre Dame's] religious exercise. *Id.* at 683; *see also Gilardi*, 733 F.3d at 1218 ("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." (quoting *Thomas*, 450 U.S. at 718)); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic"). Thirteen district courts and two appellate courts have come to the same conclusion on facts indistinguishable from the case at hand. *See supra* note 2.

2. The District Court's Decision Was Erroneous

The district court, however, ignored the straightforward analysis laid out above. Instead, it impermissibly arrogated unto itself the authority to determine whether compliance with the Mandate actually violated Notre Dame's beliefs. Erroneously concluding that whether the accommodation requires Notre Dame to "encourag[e], facilitat[e], or endors[e] the use of contraception" is a "question[] of fact and law, not of faith," (Dist. Ct. Op., SA11), the district court proceeded to inform Notre Dame that it "misunderstand[s] [its] own religious beliefs." *Lyng*, 485 U.S. at 458. "[D]espite protestations to the contrary from the religious objector[] who brought the lawsuit (i.e., Notre Dame)," *id.* at 457, the district court concluded that, in reality, the University does not object to the actions it is required to take, but objects only to the actions of third parties. (Dist. Ct. Op., SA14.) According to the district court, Notre Dame's religious beliefs are safeguarded by the accommodation, which purportedly allows it to "opt out" of the Mandate. (*Id.*)

This conclusion runs directly contrary to Notre Dame's express representations regarding its religious beliefs. Notre Dame believes that taking the actions required by the "accommodation" cause it to facilitate and become impermissibly entangled in the provision of abortion-inducing products, contraception, sterilization procedures, and related education and counseling in violation of Catholic teachings. *See supra* Part I.A.1.a. Under the established law described above, the district court was required to accept that description of Notre Dame's beliefs. As in *Thomas*, Notre Dame "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 Notre Dame interprets the "creeds" of Catholicism to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [its] interpretation[]." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989).

But instead of accepting the line Notre Dame drew, the district court sought to determine whether Notre Dame's actions "encourage, facilitat[e], or endors[e] the use of contraception," ultimately concluding—despite Notre Dame's sworn affidavits to the contrary—that "there's no compelled action that violates Notre Dame's religious beliefs." (Dist. Ct. Op., SA11, SA25.) In short, rather than "steer[ing] well clear of deciding religious questions," *Korte*, 735 F.3d at 683, the district court "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 "no," but "[n]o civil authority can decide that question." *Id.*; *supra* Part I.A.

For this reason, the district court's conclusion that the accommodation allows Notre Dame to "opt out" of compliance with the Mandate rests on an impermissible assessment of Notre Dame's religious beliefs. While the district court may "feel[] that the accommodation sufficiently insulates [Notre Dame] from the objectionable services, . . . it is not the Court's role to say that plaintiffs are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. Whether the accommodation relieves Notre Dame of moral culpability for

its actions (i.e., allows it to "opt out") or makes it "complicit in a grave moral wrong" is "a question of religious conscience for [Notre Dame] to decide." *Korte*, 735 F.3d at 685; *see also Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here 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."). In other words, it is for Notre Dame, not a court, to decide whether the actions required by the accommodation "condon[e] or support[]" the coverage and use of contraceptives. (Dist. Ct. Op., SA16.) What the district court apparently views as mere paperwork—an "administrative tool," (*id.* at SA17)—has far more significant implications for Notre Dame. The district court might believe "it's just a form," *RCNY*, 2013 WL 6579764, at *13, but, for Notre Dame, submitting that form makes it "complicit in a grave moral wrong" and "undermine[s its] ability to give witness to the moral teachings of [the Catholic] church." *Korte*, 735 F.3d at 683. "It is not for [a] Court to say otherwise." *RCNY*, 2013 WL 6579764, at *14.

In any event, the district court grossly mischaracterizes the nature of the actions Notre Dame must take to comply with the accommodation, beginning with the self-certification. "Submitting the self-certification[] is not simply espousing a belief that [Notre Dame] hold[s]." *Beaumont*, 2014 WL 31652, at *8. What the district court deems an "administrative tool," (Dist. Ct. Op., SA17), constitutes an official "designation of [Notre Dame's] third party administrator(s) as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879, and serves as "an instrument

under which [Notre Dame's] plan is operated," 29 C.F.R. § 2510.3–16. It "tells the TPA or issuer that it must provide [Notre Dame's students and] employees . . . free access to contraceptive devices and products [and inform them] of that benefit." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20. Thus, submitting the self-certification does not merely "denote[] Notre Dame's refusal to provide contraceptive care," (Dist. Ct. Op., SA18), it amends the documents governing Notre Dame's health plans to enable a third party to provide the very coverage to which the University objects. *E.g.*, *Beaumont*, 2014 WL 31652, at *8; *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20; *Reaching Souls*, 2013 WL 6804259, at *7. The Government has effectively made "no" mean "yes," transforming the very act of objecting to the mandated coverage into the authorization to provide such coverage. This is to say nothing of the numerous additional actions Notre Dame must take, including identifying and contracting with a third party willing to provide the very services Notre Dame deems objectionable, and then maintaining that relationship to ensure contraceptive benefits continue to be offered to its employees and students. *See supra* Part I.A.1.a.

This analysis would of course be different if the accommodation truly required no action on the part Notre Dame. But that is not this case. The district court's heavy reliance on *Bowen v. Roy*, 476 U.S. 693 (1986) and *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), is thus misplaced. Those cases stand 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 *Bowen*, for example, the Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Court concluded that the Appellee could not establish that his religious exercise was substantially burdened because his objection was to the conduct of a third party, namely, to the government's use of a social security number to administer his daughter's public welfare benefits. *Id.* at 700.[7] Likewise, in *Kaemmerling*, the plaintiff did not object to any action he was forced to take, but only "to the government extracting DNA information from . . . specimen[s]" *it already had*. 553 F.3d at 679. The D.C. Circuit 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 [Notre Dame] play[s] no role." *Id.* Whereas Kaemmerling "did not object to what the government forced him to do," Notre Dame "vigorously object[s] on religious grounds to the act[s] the government requires [*it*] to perform, not merely to later acts by third parties." *E. Tex.*

---

[7] Indeed, if anything, *Bowen* supports Notre Dame's position. The Appellee in that case objected not only to the government's use of his daughter's social security number, but also to the *separate* requirement that *he provide* the government with his daughter's social security number in order for her to receive benefits. 476 U.S. at 701–12 (opinion of Burger, C.J.). Though it did not decide the question due to a dispute over mootness, a majority of the Court would have held that this requirement imposed a substantial burden on Roy's exercise of religion. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

Baptist Univ., 2013 WL 6838893, at *18; *RCNY*, 2013 WL 6579764, at *14–15 (distinguishing *Kaemmerling*); *supra* Part I.A.1.a. If this case truly involved the provision of abortion-inducing products, contraception, and sterilization through third parties without any action on the part of Notre Dame, there would be no lawsuit. Instead, the Government rejected outright such alternative means, deciding instead to require Notre Dame to participate in a scheme to provide these products and services to its students and employees.

For similar reasons, the district court was wrong to suggest that Notre Dame could not prevail because "it is not being required to modify its own behavior." (Dist. Ct. Op., SA18.) In the first place, it is simply wrong as a factual matter to claim that under the accommodation, "Notre Dame isn't modifying its behavior in the least" or that "the only thing that changes under the healthcare law is the actions of third parties." (*Id.* at SA1-2, SA14.) For example, in the past, Notre Dame has always entered a voluntary contractual arrangement barring its TPA or insurance company from providing contraception, sterilization, and abortifacients. Now, Notre Dame must submit a self-certification authorizing those entities to provide the objectionable products and services. Formerly, Notre Dame refused to remain in a contractual relationship with a TPA or insurer that would provide its employees with products and services that violated its beliefs; now, it must maintain such a relationship. And where before Notre Dame would not offer a health plan that served as a vehicle for the delivery of contraceptive coverage; now, it must offer just such a plan. All of these newly-required actions or forbearances are

deeply objectionable to Notre Dame in light of its sincerely held Catholic beliefs. *Supra* Part I.A.1.a.

But more importantly, the district court's "focus[]" on whether Notre Dame must "modify" its actions misunderstands the substantial burden test as articulated by *Korte*. (Dist. Ct. Op., SA6.) According to this Court, that test "focuses primarily on the intensity of the coercion applied by the government *to act contrary to [religious] beliefs*." 735 F.3d at 683 (citation omitted) (emphasis added). In other words, the touchstone of the substantial burden analysis is whether a law "forces [plaintiffs] to do what their religion tells them they must not do." *Id.* at 685; *see also Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *Yoder*, 406 U.S. at 218 (same). Here, Notre Dame's undisputed affidavits establish that is exactly what is taking place regardless of whether the University's actions bear a superficial resemblance to actions they have taken in the past. *Supra* Part I.A.1.a. Thus even assuming (wrongly) that the accommodation does not force Notre Dame to modify its actions, the Mandate still violates RFRA. Indeed, it would be a perverse standard that allowed the Government to compel a violation of conscience by "transform[ing] 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; *Geneva Coll.*, 2013 WL 6835094, at *13 ("The purpose for which the notification is provided . . . makes all the difference."). Ultimately, the question is not whether a 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.

The district court appears to base its flawed conclusion that Notre Dame need not modify its behavior on a further parsing of Notre Dame's religious beliefs. "[A]s I see it," the court held, Notre Dame objects only to the "consequence[s]" of its actions, not to the actions themselves. (Dist. Ct. Op., SA21.) This is both incorrect and irrelevant. In the first place, Notre Dame's undisputed affidavits state its religious objections to the actions themselves, not only their consequences. *Supra* Part I.A.1.a. The district court lacked competence to conclude otherwise. *Supra* Part I.A. And in any event, there is no authority for the bizarre notion that RFRA does not protect the religious exercise of plaintiffs who object to taking certain actions because of their consequences. After all, the consequences of an action, or the context in which the action takes place, can determine whether the action itself is morally acceptable. For example, giving a neighbor a ride to the bank may not, in and of itself, be morally objectionable, but it would be if one knows that the neighbor intends to rob the bank.

Indeed, the idea that objectors cannot consider the consequences of their actions when stating a religious objection runs flatly contrary to Supreme Court precedent. For example, in *Lee,* the Amish plaintiff had no inherent objection to the payment of taxes; rather, he objected to the payment of taxes when the "consequence" of that action was to "enable other Amish to shirk

their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139. And the pacifist plaintiff in *Thomas* had no inherent objection to the act of hammering steel into cylinders; he objected to hammering steel into cylinders when those cylinders would be placed atop military tanks and used to prosecute the war effort. *See Thomas*, 450 U.S. at 715; *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.").

Finally, Notre Dame wishes to briefly respond to the district court's assertion that this litigation is nothing more than an attempt to "stop anyone else" from providing the mandated coverage to its students and employees or "dictate what healthcare services third parties may provide." (Dist. Ct. Op., SA 1, SA14.) That is simply not true. In comment letters, in numerous filings, and in repeated public statements, Notre Dame's only request has been to be excluded from the process by which the objectionable products and services are delivered. As Fr. John Jenkins, President of Notre Dame, has explained: "Our abiding concern . . . has been Notre Dame's freedom—and indeed the freedom of many religious organizations in this country—to live out a religious mission . . . . We have sought neither to prevent women from having access to

services, nor even to prevent the government from providing them."[8] *Cf. Korte*, 735 F.3d at 684–85 ("[I]t goes without saying that [plaintiffs] may neither inquire about nor interfere with the private choices of their employees on this subject. They can and do, however, object to being forced to provide insurance coverage for these drugs and services in violation of their faith."). If the Government believes all women must be provided with free abortion-inducing products, contraceptives, and sterilization, Notre Dame asks only that the Government not force it to participate in that effort. Indeed, Notre Dame has suggested as a potential less restrictive means that the Government itself could provide contraceptive services to women. (Pl.'s Mot. for Prelim. Inj., at 31-35, Doc. 11-1.) The claim that Notre Dame seeks to use RFRA to "stop anyone else" from providing individuals with contraceptives is, therefore, a baseless distortion of Notre Dame's sincerely held religious beliefs.

B. The Mandate Violates the Free Exercise Clause

The Free Exercise Clause of the First Amendment embodies a "fundamental nonpersecution principle" that prevents the Government from "enact[ing] laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532.

---

[8] Press Release, Univ. of Notre Dame, Notre Dame, on Religious Liberty Grounds, Sues for Relief from Federal Mandate (Dec. 3, 2013), *available at* http://news.nd.edu/news/44709-notre-dame-on-religious-liberty-grounds-sues-for-relief-from-federal-mandate/.

While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that *disfavor* religion. *See Lukumi*, 508 U.S. at 532. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

In *Lukumi*, for example, the Supreme Court invalidated a municipal ordinance that imposed penalties on "[w]hoever . . . unnecessarily . . . kills any animal." *Id.* at 537. Although the ordinance was not facially discriminatory, the Court found that its practical effect was to disfavor religious practitioners of Santeria because it allowed exemptions for secular but not for religious reasons. Once the city began allowing exemptions, the Court held that the law was no longer "generally applicable," and the city could not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Id.* at 537 (internal citation omitted). Likewise, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.), the Third Circuit invalidated a police department policy that prohibited a Sikh police officer from wearing a beard because it contained an exemption for officers who were unable to shave for medical reasons but not for religious reasons. Relying on *Lukumi*, the court found that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* at 365.

The same reasoning applies here. The Mandate is not "generally

applicable" because it is riddled with exemptions and yet there is no such exemption for *religious* employers like Notre Dame. *See Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 435–37 (W.D. Pa. 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012). It makes no difference that the Mandate contains an exemption for a narrow subset of religious groups—namely, those that meet the Government's limited definition of a "religious employer." The Free Exercise Clause does not merely require equal treatment for *some* religious entities. The Government must give equal consideration to *all* religious organizations however they choose to exercise their faith. For that reason, the Mandate fails the test of general applicability, and the Government may not "refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason." *Lukumi,* 508 U.S. at 537-38.

In addition, the Mandate is not "neutral" because it is specifically targeted at Notre Dame's religious practice of refusing to facilitate access to or participate in the Government's scheme to provide objectionable products and services. When the Government promulgated the Mandate, it was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government itself concedes that 85% of health plans already cover contraception, and it asserts that adding contraception to the remaining 15% is cost-neutral. 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). If so, then the only reason why the latter plans would *not* include contraceptive coverage is a

religious or moral objection. But instead of pursuing a wide variety of options for increasing access to contraception without forcing religious entities like Notre Dame to participate in the effort, the Government deliberately chose to force religious entities like Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of contraception in violation of their sincerely held religious beliefs.

C. The Mandate Imposes a Gag Order that Violates the First Amendment Protection of Free Speech

The Mandate violates the First Amendment by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii). This sweeping gag order cannot withstand First Amendment scrutiny. Notre Dame believes that contraception is contrary to its faith, and speaks and acts accordingly. The Government has no authority to outlaw such expression. *See Roman Catholic Archbishop of Wash.*, 2013 WL 6729515 at *37.

At the very core of the First Amendment is the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Indeed, the imposition of "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon &*

Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment

> is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

The district court found that the gag order raises no First Amendment concerns because of another provision in the regulations, which explains that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. That general caveat, however, does not remedy the First Amendment problem inherent in prohibiting Notre Dame from "influenc[ing]" its TPA on a matter that Notre Dame regards as having great moral and religious significance. At the very least, the gag order is an overbroad content-based restriction on speech that chills Notre Dame from engaging in speech that it would otherwise engage in. Even the district court admits that Notre Dame is prohibited from "threatening the TPA with a termination of its [contractual] relationship because of the TPA's coverage of contraception." (Dist. Ct. Op., SA36.) Thus, under the district court's reading, Notre Dame may not publicly announce that "we refuse to contract or maintain a relationship with a TPA that will provide free contraception to our employees." Barring that type of

statement is plainly a violation of the First Amendment freedom of speech.

D. The Mandate Violates the First Amendment Protection Against Compelled Speech

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co., et al., v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001)). Protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Notre Dame to facilitate access to and become entangled in the provision of coverage for "counseling" related to abortion-inducing products, contraception, and sterilization for its employees. Because Notre Dame opposes abortion and contraception, it strongly objects to providing any support for "counseling" that encourages, promotes, or facilitates such practices. Indeed, opposition to abortion and contraception is an important part of the religious message that Notre Dame teaches, and it routinely counsels men and women against engaging in such practices.

Consequently, forcing Notre Dame to support "counseling" in favor of such practices, or even to give details about the availability of such practices, imposes a serious burden on its freedom of speech. In short, Notre Dame should not be forced to act as a mouthpiece in the Government's campaign to expand access to abortion and contraception. The protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

Second, to qualify for the so-called "accommodation," the Mandate requires Notre Dame to provide a "certification" stating its objection to the provision of abortion-inducing products, contraception, sterilization, and related counseling. This "certification" in turn triggers an obligation on the part of Notre Dame's TPA and its insurance provider to provide or procure the objectionable products and services for Notre Dame's employees and students. Notre Dame objects to this certification requirement both because it compels Notre Dame to engage in speech that triggers provision of the objectionable products and services, and because it deprives Notre Dame of the freedom to speak on the issue of abortion and contraception on its own terms, at a time and place of its own choosing, outside of the confines of the Government's regulatory scheme. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011) (striking down law requiring crisis pregnancy centers to issue disclaimers that they did not provide abortion-related services); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 462 n.6 (D. Md. 2011), *aff'd*

722 F.3d 184 (4th Cir. 2013) (en banc) (enjoining enforcement of law requiring crisis pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider").

E. The "Religious Employer" Exemption Violates the Establishment Clause

The "religious employer" exemption violates the Establishment Clause of the First Amendment in two ways. First, it creates an artificial, Government-favored category of "religious employers," which favors some types of religious organizations and denominations over others. Second, it creates an excessive entanglement between government and religion.

1. Discrimination Among Religious Groups

The principle of equal treatment among religious groups lies at the core of the Establishment Clause. Just as the Government cannot discriminate among sects or denominations, so too it cannot "discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Because religious liberty encompasses not only the freedom of religious belief, but also the freedom to adopt different practices and institutional structures, official favoritism for certain "types" of religious institutions is just as insidious as favoritism based on creed. This is particularly true where the regulation will disproportionately impact adherents of a particular faith tradition.

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements

on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated organizations." *Id.* at 231-32. The state defended the law on the ground that it was facially neutral and merely had a disparate impact on some religious groups. The Court disagreed, holding that the state's inspection of the content of a religious organization "is a relationship pregnant with dangers of excessive government direction of churches." *Id.* at 255 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

The district court held that *Larson* is inapplicable, because the law challenged there treated religious denominations differently from one another, while the Mandate discriminates among types of religious organization regardless of denomination. (Dist. Ct. Op., SA32-33.) But that is precisely the type of reasoning the Supreme Court rejected in *Larson*, finding that the law in question disadvantaged some forms of religious organization by privileging "well-established churches that have achieved strong but not total financial support from their members," while disadvantaging "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Larson*, 456 U.S. at 246 n.23 (internal quotation marks omitted). The D.C. Circuit has followed similar reasoning, stating that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between *kinds* of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (emphasis added).

Here, the Mandate violates the principle of religious neutrality by

establishing an official category of "religious employer," favoring some types of religious organization over others. The exemption is defined to include only "nonprofit organization[s] described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." As the Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. at 8461. This definition favors religious denominations that primarily rely on entities that fit more neatly into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that are more inclined to exercise their faith through alternative means—including through religious organizations, like Notre Dame, which express their faith through their educational missions.

2. Excessive Entanglement

"It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colo. Christian*, 534 F.3d at 1261 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious

beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits (as here)." *Id.*

In determining eligibility for a religious exemption, the Government may not ask intrusive questions designed to determine whether a group is "*sufficiently* religious," *Univ. of Great Falls*, 278 F.3d at 1343, or even whether the group has a "substantial religious character." *Id.* at 1344. Rather, any inquiry into a group's eligibility for a religious exemption must be limited to determining whether the group is a "bona fide religious institution[]." *Id.* at 1343–45 (approving of a religious exemption that would include any nonprofit group that "holds itself out" as religious, but reserving the question of whether groups could be required to show that they are "affiliated with . . . a recognized religious organization").

Here, the Government's criteria for the "religious employer" exemption go far beyond determining bona fide religious status. By its terms, the exemption applies to groups that are "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." This category includes (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." 78 Fed. Reg. at 8458. The IRS, however, has adopted an intrusive 14-factor test to determine whether a group meets these criteria. *See Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). The fourteen (14) criteria ask whether a religious group has

> (1) a distinct legal existence; (2) a recognized creed and

> form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for the religious instruction of the young; and (14) schools for the preparation of its ministers.

Id. (citing *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55, 64 (1983)).

Not only do these factors favor some religious groups over others, but they do so on the basis of intrusive judgments regarding religious beliefs, practices, and organizational structure. For example, probing into whether a group has "a recognized creed and form of worship" not only requires the Government to determine which belief systems will be deemed "recognized creed[s]," but also demands inquiry into which practices qualify as "forms of worship." In answering such questions, the Government cannot escape being "cast in the role of arbiter of [an] essentially religious dispute." *New York v. Cathedral Acad.*, 434 U.S. 125, 132-33 (1977). Similarly, in determining whether a religious group has "a distinct religious history," the exemption not only favors long-established religious groups, but also requires the Government to probe into potentially disputed matters of religious history. Any dispute as to whether a group's history is sufficiently "distinct" or "religious," should not be resolved by the Government. Indeed, "church and state litigating in court

about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.

The district court held that such an inquiry does not constitute impermissible entanglement with religion, but failed to say why. (Dist. Ct. Op., SA33-34.) Rather, the district court merely noted, without citation, that the Supreme Court has upheld federal tax laws applied neutrally to religious and secular entities alike. (*Id.*)

II. THE REMAINING EQUITABLE FACTORS SUPPORT AN INJUNCTION

In addition to demonstrating that it is (1) "reasonably likely to succeed on the merits," Notre Dame has also shown (2) that it is "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted"; (3) that "there is no adequate remedy at law"; and (4) that "an injunction would not harm the public interest." *Christian Legal Soc'y*, 453 F.3d at 859.

Whatever regulatory interests the Government may have, they pale in comparison to the serious harm being inflicted on Notre Dame's religious liberty and other First Amendment rights in the absence of injunctive relief. In *Korte*, the Government conceded that if the Mandate violated RFRA, then the equitable factors favored a preliminary injunction. *See* 735 F.3d at 666. That concession was inevitable because, as *Korte* explained, "RFRA protects First Amendment free-exercise rights," and "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," *id.*, even if borne for only "minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Indeed, *Korte* made clear that, under both RFRA and the First Amendment, "once the moving party establishes a likelihood of success on the merits, [(1)] the balance of harms normally favors granting preliminary injunctive relief [and (2)] injunctions protecting First Amendment freedoms are always in the public interest." *Korte*, 735 F.3d at 666 (quotation omitted). *See also Hobby Lobby*, 723 F.3d at 1145 ("it is always in the public interest to prevent the violation of a party's constitutional [or RFRA] rights"); *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) ("pursuant to RFRA, there is a strong public interest in the free exercise of religion"). Moreover, because an injunction is the only way to stop the Government from enforcing the Mandate, Notre Dame has no adequate remedy at law.

CONCLUSION

The Government has forced Notre Dame to choose between onerous penalties and violating its 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). Notre Dame's faith has led it to the conclusion that the actions required of it by the Mandate cross the "line" between permissible and impermissible entanglement in wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably the University's to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Notre Dame to cross this line, the Government has substantially burdened Notre Dame's exercise of religion. As the Mandate cannot satisfy strict scrutiny, the decision of the district court should be reversed, and Notre Dame should be granted injunctive relief.

Respectfully submitted, this the 13th day of January, 2014.

By: *s/ Matthew A. Kairis*
Matthew A. Kairis (OH No. 55502)
(Counsel of record)
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939
makairis@jonesday.com

Counsel for Plaintiff-Appellant University of Notre Dame

CIRCUIT RULE 30(d) STATEMENT

I hereby certify that the Required Short Appendix to the Principal Brief of Plaintiff-Appellant University of Notre Dame contains all the material required by 7th Circuit Rules 30(a) and (b).

By: *s/ Matthew A. Kairis*
Matthew A. Kairis (OH No. 55502)
(Counsel of record)
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939

Counsel for Plaintiff-Appellant University of Notre Dame

CERTIFICATE OF COMPLIANCE

I hereby certify that the Principal Brief of Plaintiff-Appellant University of Notre Dame complies with the type volume limitations set out for principal briefs in Federal Rule of Appellate Procedure 32(a)(7)(B). The brief, including headings, footnotes, and quotations, contains 13,961 words, as calculated by the Microsoft Word word count function.

By: *s/ Matthew A. Kairis*
Matthew A. Kairis (OH No. 55502)
(Counsel of record)
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939

Counsel for Plaintiff-Appellant University of Notre Dame

CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2014, 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.

By: *s/ Matthew A. Kairis*
Matthew A. Kairis (OH No. 55502)
(Counsel of record)
JONES DAY
325 John H. McConnell Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939

Counsel for Plaintiff-Appellant University of Notre Dame

No. 13-03853

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME,
Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Indiana
District Court Case No. 3:13-CV-1276
The Honorable Philip P. Simon

REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, UNIVERSITY OF NOTRE DAME

JONES DAY
Matthew A. Kairis (counsel of record)
325 John H. McConnell Blvd, Suite 600
Columbus, OH 43216
(614) 469-3939

ATTORNEY FOR PLAINTIFF-APPELLANT UNIVERSITY OF NOTRE DAME

APPENDIX TABLE OF CONTENTS

Required Short Appendix of Plaintiff-Appellant, University of Notre Dame

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**3:13-cv-01276-PPS**
	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

OPINION AND ORDER
DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Notre Dame seeks a preliminary injunction against enforcement of the part of the Affordable Care Act that requires employers to provide employees with health insurance that covers contraceptive services. Notre Dame objects to providing contraceptive care on religious grounds, and that of course is its prerogative. But the law provides religious employers like Notre Dame an out by allowing it to file a certification saying it refuses to provide such services. If Notre Dame takes that tack, someone else provides the coverage, and not on Notre Dame's dime. Notre Dame nonetheless claims that by formally opting out, it would trigger, or authorize, a third party's provision of contraception, and it objects to that.

Notre Dame wants to eat its cake, and have it still, at the expense of Congress, administrative agencies, and the employees who will be affected. Notre Dame is free to opt out of providing the coverage itself, but it can't stop anyone else from providing it. But that is essentially what Notre Dame is requesting. Notre Dame is not being asked to do or say anything it doesn't already do, and wouldn't do regardless of the outcome of this case; the only thing that

changes under the healthcare law is the actions of third parties. Notre Dame can't claim to be "pressured" to do something it has done, will do, and would do regardless of the contraception requirement. If Notre Dame opts out of providing contraceptive coverage, as it always has and likely would going forward, it is *the government* who will authorize the third party to pay for contraception. The government isn't violating Notre Dame's right to free exercise of religion by letting it opt out, or by arranging for third party contraception coverage.

For these reasons and as outlined more fully below, because I find that Notre Dame is not likely to succeed on the merits, a preliminary injunction is not warranted.

FACTUAL and LEGAL BACKGROUND

Notre Dame is a nonprofit Catholic university, and the largest employer in St. Joseph County, Indiana. Compl. ¶¶ 9, 21, 24. Notre Dame views its Catholic faith as integral to its educational mission. *Id.* ¶¶ 27-29. It adheres to the Catholic Church's document governing Catholic universities, known as *Ex Corde Ecclesiae*. Affidavit of John Affleck-Graves ¶ 12. It subscribes to the Catholic beliefs "that life begins at conception and that artificial interference with life and conception is immoral." And so it opposes any artificial impediment to conception. Memo. ISO Motion for Preliminary Injunction at 1; Compl. ¶¶ 32-33. Notre Dame is therefore opposed to "pay[ing] for, [facilitate[ing] access to, and/or becom[ing] entangled in the provision of products, services, practices and speech" that propound contraception. Memo. ISO Motion for Preliminary Injunction at 1. It also believes that it must avoid giving anyone the impression that it condones the use of contraception, which would constitute "scandal," defined as "encouraging by words or example other persons to engage in wrongdoing." Compl. ¶ 34.

Notre Dame's employee healthcare is self-insured, meaning that Notre Dame underwrites its employees' medical expenses itself. Although Notre Dame is financially responsible, it contracts with a third party administrator (a "TPA") to administer the health plan. *Id.* ¶¶ 36-37. Notre Dame offers its students the option of purchasing health insurance through Aetna. *Id.* ¶ 39. Neither plan covers contraceptive services due to Notre Dame's religious objections. *Id.* ¶ 41.

1. Background on the Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (the "ACA") in 2010, substantially overhauling the nation's healthcare legal and regulatory framework. The ACA requires health insurance to cover certain preventive services without cost to the insured. 42 U.S.C. § 300gg-13. Insurance plans that don't include the required coverage face stiff penalties: $100 per affected individual per day of noncompliance, 26 U.S.C. § 4980D(a), (b), or $2,000 per year per employee if an employer who is required to provide insurance decides not to, 26 U.S.C. § 4980H(a), (c)(1). But certain healthcare plans are grandfathered, which essentially means that if they remain as they were before the ACA was enacted, they don't have to comply with the preventive services requirements. *See* 42 U.S.C. § 18011(a)(2). It is undisputed that Notre Dame's plan isn't grandfathered. Compl. ¶ 42.

Initially, the preventive care coverage requirements did not include various services specific to women's needs. *See* 155 CONG. REC. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski). But the ACA was later amended to add preventive care specific to women. § 2713(a)(4), 124 Stat. at 131 (codified at 42 U.S.C. § 300gg-13(a)(4)). The law doesn't list the specifics, instead leaving that to "comprehensive guidelines supported by the Health Resources and Services Administration." *Id.*

The problem was that there weren't guidelines for preventive care and screening for women, so the Department of Health and Human Services asked the Institute of Medicine ("IOM") to make recommendations. Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, 2 (2011), available at http://www.nap.edu/catalog.php?record_id=13181. The IOM convened a committee of specialists that recommended that the guidelines include support and counseling addressing a battery of issues including, of primary relevance here, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10. (This is the requirement Notre Dame opposes, and for the sake of convenience I will refer to the requirement using the shorthand "contraception" or "contraceptive.") These approved methods include options that are prescription-only (oral contraceptives and intrauterine devices) and non-prescription (condoms, spermicides and emergency contraceptives). *Id.* at 105. The government adopted guidelines consistent with the IOM's recommendations on an interim basis in 2011, albeit subject to an exemption for religious employers. *See* 76 Fed. Reg. 46,621 (Dep'ts of Treas., Labor, Health & Human Svcs. Aug. 3, 2011).

2. Rulemaking Under the ACA

The adoption of guidelines with a narrow religious exemption was perhaps the moment that the contours of this controversy began to take shape. An organization qualified for exemption from the contraception requirement as a religious employer if: (1) its purpose was the inculcation of religious values; (2) it primarily employed people who shared its religious tenets; (3) it primarily served people who shares its religious tenets; *and* (4) it was a nonprofit under

sections 6033(a)(1) and 6033(a)(3)(A)(I) or (iii) of the Internal Revenue Code of 1986. 76 Fed. Reg. 46,621, 46,626. But the final (and current) regulations reduced the definition to just number (4) above; the first three requirements were discarded. *See* 45 C.F.R. § 147.131(a). What that means is that the exemption applies to "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)(i) and (iii). The upshot of all this was that, as originally drafted, employees covered under exempt organizations' health insurance as defined in the tax code – *i.e.* church employees – could not receive cost-free contraceptive services. But the "religious employer" exemption didn't apply to religious based non-profits like Notre Dame. That was the balance originally struck by the drafters of the regulations.

A tremendous outcry over this perceived disparity in the regulations ensued. Why would churches be exempt but not church affiliated entities? So in 2012 the government said that it would forego enforcement against non-profits with religious objections to contraception, like Notre Dame, for a year while it considered developing an accommodation that would apply to those entities. *See* 77 Fed. Reg. 8725, 8728-29 (Feb. 15, 2012).

At this point, in mid-2012, Notre Dame filed a case on similar grounds to its current one. But that case was dismissed without prejudice because Notre Dame lacked standing then, and the case wasn't yet ripe. *See Univ. of Notre Dame v. Sebelius*, 2012 U.S. Dist. LEXIS 183267 (N.D. Ind. Dec. 31, 2012).

In July 2013 the government published the final regulations, which now include accommodation for an "eligible organization," meaning an organization that "(1) [o]pposes providing coverage for some or all . . . contraceptive services . . . on account of religious

objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria." 78 Fed. Reg. 39,870, 39,874 (Jul. 2, 2013); *see also* 26 C.F.R. § 54.9815-2713A(a). When I refer to "the accommodation" in this Opinion, this is what I'm referring to. There is no dispute that this accommodation applies to Notre Dame. To take advantage of the accommodation, an organization need only complete an opt-out form (available at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf) with the name of the organization and certifying individual and contact information, then sign and date it. The form need only be completed once, with a copy provided to any health insurer or third party administrator ("TPA") of the insurance plan. *See* 78 Fed. Reg. 39,870, 39,875. The form lists the criteria for eligible organizations, and on the back it tells the TPA that the certifying eligible organization is opting out of covering contraceptive services and refers the TPA to relevant code sections outlining its obligations. *See* 78 Fed. Reg. 39,870, 39,879.

The explanation of the accommodation wouldn't be complete without discussing how contraceptive services are paid for. The employer and its health insurance plan don't pay a dime. Notre Dame self-insures its employee healthcare, Compl. ¶¶ 36-37, so I'll focus on the mechanics relevant to that setup. As far as Notre Dame's involvement, they fill out the form stating they are opposed to contraceptive services on religious grounds, and their work is done. At that point the ball is in the court of the TPA to pay for contraceptive services or arrange for payments through an insurer or other entity. Contraception costs are recouped by an insurance company that participates in a federally-run health insurance exchange – the insurer gets a fee adjustment. That money doesn't just cover the money paid out for contraception, but "include[s]

an allowance for administrative costs and margin." 78 Fed. Reg. 39,870, 39,880-81; *see also* 26 C.F.R. § 54.9815-2713A(b)(2); 45 C.F.R. § 156.50 (d). So to summarize: the TPA doesn't rely on the opted-out organization for any amount of money related to contraception – its contraception coverage, administrative costs, and even a profit margin are covered by the government-run healthcare marketplace.

The regulations say that eligible organizations may not interfere with the TPA's efforts to arrange contraception payments, nor seek to influence the TPA's decision to provide such payments. 78 Fed. Reg. 39,870, 39,879-80. However, the prohibited behavior evidently requires something more than expression of opinion, because its description is immediately followed by footnote 41: "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." *Id.* at 39,880 n.41.

The Seventh Circuit has not addressed the situation posed by this case. It addressed similar issues involving private employers' religious objections to the contraception requirements in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). However, that case, like many of the others making their way through courts around the country, *see, e.g.*, *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3328 (U.S. Nov. 26, 2013) (No. 13-354), has as its plaintiffs closely held corporations and their individual owners, so the accommodation doesn't apply to them. The Seventh Circuit must have thought that difference to be important because early on in its opinion it discussed the religious exemption and accommodation at length, even though they were not at issue in that case. I can only assume that they did it to show the contrast between how religious employers are treated under the regulations – they are given an accommodation – while for-profit employers with

conscientious religious objections are not. It is this distinction that *Korte* found to be "notabl[e]." *Korte*, 735 F.3d at 662. More on *Korte* in a moment, but suffice it to say that Notre Dame is in an entirely different position than the plaintiffs in *Korte.*

3. The Procedural Posture of this Case

Finally, before diving into the merits of the legal arguments, I would be remiss if I did not take a moment to discuss Notre Dame's litigation tactics in this case. The offending regulations were published in July 2013 and are set to go into effect on January 1, 2014. *See* 78 Fed. Reg. at 39,870 (Jul. 2, 2013). Yet Notre Dame chose to wait until December to file this lawsuit, although it certainly saw the case coming down the pike many months earlier. It then waited another six days – until December 9 – to ask for a preliminary injunction. The government promptly responded and then Notre Dame filed its oversized reply brief on December 16, and a hearing on the motion was set for December 19. Notre Dame told me they needed an answer on their request for an injunction within 24 hours of the hearing – meaning by today. All of which raises a question of Notre Dame's own view of the injury it faces under the accommodation. Notre Dame certainly knew about the proposed regulations long ago, as evidenced by its premature filing of a case on the same basis as the current matter. *See Univ. of Notre Dame v. Sebelius,* 2012 U.S. Dist. LEXIS 183267 (N.D. Ind. Dec. 31, 2012).

Notre Dame tells me that the urgency is due to the TPA's internal deadlines to prepare coverage and contact beneficiaries. Affleck-Graves Affidavit ¶ 64; Suppl. Affleck-Graves Affidavit ¶ 14. It filed a supplemental declaration explaining its tardiness three days before oral argument, and four days before what the TPA says is its final deadline. *See* Suppl. Affleck-Graves Affidavit; Meritain Affidavit. The affidavit detailing excuses for the late filing of this

lawsuit are frankly a little hard to swallow. It states that Notre Dame needed over five months to analyze the final regulations and the accommodation. Suppl. Affleck-Graves Affidavit ¶¶ 6-9. Yet Exhibit D attached to Notre Dame's motion is a letter from the Office of the General Counsel of the United States Conference of Catholic Bishops, and is dated March 20, 2013. The letter raises exactly the grounds of Notre Dame's complaint with respect to the accommodation for self-insured religious nonprofits, citing a description of the accommodation as proposed. *See* Plaintiff's Memo. ISO Preliminary Injunction, Ex. D. at 20-22. Notre Dame also claims that it didn't get details on how its TPA would handle contraceptive coverage until December. Suppl. Affleck-Graves Affidavit ¶ 11. But it seems clear to me that Notre Dame could have certainly pressed its TPA sooner if it needed information. In sum, Notre Dame has in many ways created its own emergency, and I am left to wonder why.

In any event, and despite the time crunch, I have given full consideration to Notre Dame's motion. In doing so I have reviewed extensive briefing and exhibits from the parties, statutes and legislative records, voluminous regulations, and opinions addressing related issues from courts around the country. As mentioned, I heard oral argument yesterday, December 19, 2013. Finally, I received and have considered a brief filed by the American Civil Liberties Union as *amicus curiae*.[1]

DISCUSSION

Notre Dame seeks a preliminary injunction claiming that its rights under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 *et seq* ("RFRA"), are being

[1] I also received late in the day yesterday a motion to intervene in this lawsuit filed by three Notre Dame students which largely supports the government's position but makes additional arguments as well. [Docket Entries ("DE") 33, 34]. Given the press of time, and since Notre Dame has not had an opportunity to respond to the arguments, I have not considered the motion to intervene.

violated. To prevail it must show "a likelihood of success on the merits, that it has no adequate remedy at law, and that it will suffer irreparable harm if preliminary relief is denied." *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000) (citations omitted). If it meets that burden, I must then analyze the balance of equities, taking into account irreparable harm that would result to the nonmoving party and the consequences to nonparties. As the Seventh Circuit has stated: "These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted." *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). This is the "sliding scale" approach as some Seventh Circuit cases refer to it. *See e.g. Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001).

The first element, the likelihood of success on the merits, is the key inquiry in this case and is dispositive here on both the RFRA claim and the constitutional claims.[2]

I. Notre Dame is not likely to succeed on the merits

The sincerity of Notre Dame's religious beliefs is of course essential to its religious freedom claims. While I am not permitted to question the centrality of a belief to a plaintiff's religion, I am permitted to consider the issue of sincerity. *Nelson v. Miller*, 570 F.3d 868, 878 n.7 (7th Cir. 2009) (citing *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005))). Notre Dame opposes contraception, and also opposes the funding, encouragement or facilitation of its use, or

[2] My jurisdiction to decide this matter is not in question. The contraception coverage requirement, the opt-out accommodation, and the penalties Notre Dame faces for noncompliance are an imminent potential injury which confers Article III standing. *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Nor does the government challenge Notre Dame's standing to assert rights of speech and religious freedom, although Notre Dame is not a natural person. *Korte* forecloses those arguments, *see Korte*, 735 F.3d at 682, as well as any argument under the Anti-Injunction Act. *Id.* at 669.

being perceived as doing so. But whether opting out via the ACA accommodation constitutes a modification of behavior or qualifies as funding, encouraging, facilitating or endorsing the use of contraception are questions of fact and law, not of faith. With this thought in mind, I turn to the individual claims being pressed here by Notre Dame.

A. Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA") is Congress's response to the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-90, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), "that the religious freedom guaranteed by the Free Exercise Clause of the First Amendment does not require religious exemptions from facially neutral laws of general applicability." *Korte*, 735 F.3d at 671. Under RFRA, the government may not substantially burden a person's exercise of religion, even if the rule in question is one of general applicability, unless the government shows that the rule "is in furtherance of a compelling governmental interest" and "is the least restrictive means of" doing so. *Id.* at 672 (quoting 42 U.S.C. § 2000bb-1). In RFRA claims, as in First Amendment claims, the preliminary injunction burdens track those borne at trial. *Id.* at 673. So the plaintiff must first show that his religious exercise is burdened substantially, then the burden shifts to the government to justify its actions under strict scrutiny. *See id.* at 673; *Daly v. Davis*, 2009 U.S. App. LEXIS 6222, at *5-6 (7th Cir. Mar. 25, 2009).

1. Substantial Burden Inquiry

In any RFRA case, the starting point is the plaintiff offering proof that the government action in question actually substantially burdens religious exercise. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003) [hereinafter "*CLUB*"]. What this

means is that the burden must really be *substantial*; a minimal burden won't suffice. *CLUB*, 342 F.3d at 761. To read RFRA otherwise would be to read the term "substantial" out of the statute. To do so would mean that even the "slightest obstacle to religious exercise . . . —however minor the burden it were to impose—could then constitute a burden sufficient to trigger" strict scrutiny. *Id*.

The Seventh Circuit recently reiterated that the term "substantial burden" as used in RFRA means to exert "substantial pressure on an adherent to *modify his behavior* and to violate his beliefs." *Korte*, 735 F.3d at 682 (emphasis added and internal quotations omitted). The language "substantial pressure on an adherent to modify his behavior" comes from the Supreme Court in the pre-RFRA case of *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). *See also Nelson v. Miller*, 570 F.3d 868, 878, (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008).

So the inquiry focuses on whether the government is leaning on Notre Dame to modify *Notre Dame's own actions*, not on whether government action is offending the plaintiff's religious sensibilities. This much the Supreme Court has made clear: "A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

To break this down, if the government exerts pressure on the plaintiff to change his actions so as to violate his beliefs, I can't analyze the substantiality of the actions, or the centrality of the violated belief to his religion—it's the substantiality of the pressure that counts. But this skips over the threshold question of whether the government is actually requiring the plaintiff to modify his behavior so as to violate his beliefs.

So here's the question as I see it: under the ACA accommodation, is the government exerting substantial pressure on Notre Dame to change its own actions in a way that violates Notre Dame's sincerely held religious beliefs? Courts have used different language to try to define and describe "substantial burden," but it's such a fact-dependent question that I think the clearest way to approach it is to dive into other cases that have and haven't met the RFRA standard.

When I say "RFRA standard," I mean the "substantial burden" standard as it has been applied in cases brought under RFRA as well as under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Free Exercise Clause of the First Amendment to the Constitution. "When the significance of a religious belief is not at issue, the same definition of 'substantial burden' applies under the Free Exercise Clause, RFRA and RLUIPA." *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008); *see also Korte*, 735 F.3d at 682-83; *CLUB*, 342 F.3d at 760-61; *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1071 n.13 (9th Cir. 2008) ("That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA.")

To set the stage for comparison, I'll reiterate what Notre Dame claims is its substantial burden. In order to opt out of the contraceptive mandate, Notre Dame must complete a certification requesting the accommodation. Notre Dame claims that completing the form "authorizes" its TPA and the government to provide contraceptive coverage, the taint of which can be attributed to Notre Dame. Its critical to note at this point that if Notre Dame opts out of providing contraception, it will have *nothing to do with providing contraception*. It won't pay actual or administrative costs, and the TPA won't be looking to Notre Dame's fees to make a profit on the contraceptive program. Notre Dame obfuscates this point in its briefing, but as best I can tell by my review of the regulations, there is simply no financial burden on Notre Dame if it opts out.

Boiled to its essence, what Notre Dame essentially claims is that the government's action *after Notre Dame opts out*, in requiring the TPA to cover contraception, offends Notre Dame's religious sensibilities. And while I accept that the government's and TPA's actions do offend Notre Dame's religious views, it's not Notre Dame's prerogative to dictate what healthcare services third parties may provide. As Notre Dame admitted at the hearing, Notre Dame had already instructed its TPA in past years to not include contraception in its plan. If the preventive care requirements didn't exist, Notre Dame would continue to instruct its TPA not to cover contraception. And *even if* Notre Dame were completely exempt from the contraception requirement, it would have to certify to the TPA and the government that it is exempt to avoid being fined for noncompliance. In fact, there is no conceivable set of facts under which Notre Dame would not instruct its TPA not to include contraception on Notre Dame's plan. So Notre Dame isn't modifying its behavior in the least. The only thing that is modified, then, under the

accommodation, is that when Notre Dame tells the TPA not to provide contraception on Notre Dame's plan *the government and the TPA pay for contraception*.

In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Seventh Circuit found that the ACA—as applied to for-profit closely-held corporations and their owners—was coercive in threatening substantial fines for failure to modify their health insurance to cover contraception. The court focused on plaintiffs' choice—modifying their healthcare plans to pay for contraception for employees who wanted it and whose doctors prescribed it, versus paying stiff fines for balking. The burden found to be substantial in *Korte* was the plaintiff "being forced to provide insurance coverage for these drugs and services in violation of their faith." *Id.* at 684-85. In other words, unlike this case, the government was coercing the plaintiff to change its health plan to cover and pay for something that it objected to on religious grounds.

Notre Dame seems to think that *Korte* is essentially dispositive of this case. I fail to see why. *Korte* wasn't dealing with the ACA's religious exemption and accommodation in any way. Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA. But contrary to Notre Dame's view of it, *Korte* certainly doesn't *compel* such a finding. In my mind, this case differs greatly from *Korte* because the accommodation removes the coercion facing private for-profit companies by offering a different choice. As pointed out earlier, *Korte* itself recognized this important distinction when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was "notabl[e]," suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to Notre Dame. *Id.* at 662.

The Supreme Court has held that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). *Lyng* held that the federal government did not violate plaintiffs' free exercise of religion by building a road through plaintiffs' sacred areas. In so holding the Court noted that the concept of religious freedom does not give one "a veto over public programs that do not prohibit the free exercise of religion." *Id.* Similarly, Notre Dame need only step aside from contraception coverage, as it has always done and most assuredly would always do. By opting out it is not condoning or supporting the government's provision of access to contraception. But by refusing to formally opt out, Notre Dame would exercise a veto on the ACA's contraception requirement.

What's more, case law makes clear that a third party's objectionable use of a plaintiff's information doesn't make a viable RFRA claim. The D.C. Circuit held in *Kaemmerling v. Lappin* that a prisoner could not state a claim under RFRA based on the federal government's extraction and storage of his DNA from samples he provided. 553 F.3d 669, 679 (D.C. Cir. 2008). Plaintiff did not object to his provision of the tissue samples in itself, but to the government's actions afterwards in analyzing and storing the samples. Still, much the same as Notre Dame's argument in this case, the provision of the samples triggered the government's objectionable actions. The court pointed out that the objectionable course of action that occurs after plaintiff provided the sample "does not call for [plaintiff] to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities . . . may offend [plaintiff's] religious beliefs, they cannot be said to hamper his religious exercise **because they**

do not pressure him to modify his behavior and to violate his beliefs." *Id.* (emphasis added, but internal quotation marks and citation omitted). Similarly, Notre Dame doesn't object to the content of the certification form. How could it? The certification says that Notre Dame *opposes* contraception on religious grounds. Notre Dame's objection is to the consequence of the certification and what third parties do with it down the line.

The *Kaemmerling* opinion discussed its similarity to one of the bases for the *Lyng* decision, *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986), "where the Supreme Court held that the state's use of a Native American child's Social Security number in determining eligibility for federal welfare benefit programs did not impair her parents' freedom to exercise their religious beliefs, a tenet of which was that use of the number beyond her control would 'rob [her] spirit.'" *Kaemmerling*, 553 F.3d at 680. The state's administrative use of Social Security numbers did not restrict plaintiffs' beliefs or actions. This opinion was pre-RFRA, but as noted above, the substantial burden standard is the same. The Court's language makes it clear that the government's generally applicable administrative tools do not pose a substantial burden on plaintiff's religious exercise. "[Plaintiff] may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 700, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986).

The self-certification form is just such an administrative tool, used to relieve Notre Dame of liability for not providing contraceptive payments. It tells the government and the TPA that

Notre Dame is opting out, and it certifies that Notre Dame is eligible to do so. In sum, the certification merely denotes Notre Dame's refusal to provide contraceptive care – a statement that is entirely consistent with what Notre Dame has told its TPA in the past.

Also instructive is the Ninth Circuit's en banc examination of the substantial burden showing in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), *cert. den'd*, 556 U.S. 1281, 129 S. Ct. 2763 (2009). It confirms that *Roy* and *Lyng* are relevant to the substantial burden analysis in the RFRA era. Plaintiff American Indians objected to the blowing of artificial snow made from recycled wastewater onto a part of a ski mountain that was also a sacred place in plaintiffs' religion. The Ninth Circuit upheld the district court's finding that the government's actions were not a substantial burden to religion under RFRA. The use of recycled wastewater did "not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit," nor did it "coerce the Plaintiffs to act contrary to their religion." *Id.* "The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. . . . [U]nder Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Id.*

Similarly, while Notre Dame may disagree with the actions of the government and other third parties, its own actions and speech are not required under the ACA to change in a manner contrary to its sincerely held religious beliefs. Notre Dame may be unhappy with the outcome of opting out, and find that action less spiritually fulfilling than it would otherwise, but it is not being required to modify its own behavior.

Nothing in the body of cases involving prisoner meal requests based on religious beliefs commands a different result. Indeed, they counsel against issuing an injunction. This is because, like this case, those cases turn on whether the plaintiff is being forced to modify his behavior or risk violating his sincerely held religious beliefs. For example, in *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), a prison refused to provide the plaintiff a non-meat diet during Lent. In trying to comply with his religious convictions, the plaintiff "lost so much weight that he had to be hospitalized." *Id.* at 880. This coerced modification of behavior was a substantial burden. The same was true in *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), where the court held that the government imposes a substantial burden on an inmate when it puts pressure him to "'modify his behavior and violate his beliefs.'" *Id.* at 799 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)). In other words, it violates RLUIPA to give a prisoner the Hobson's choice of either starving himself or observing his religion. *See also Love v. Reed*, 216 F.3d 682, 689-90 (8th Cir. 2000) (prison's failure to accommodate religious diet substantially burdens a plaintiff; fasting is not an option); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814-15 (8th Cir. 2008) (no substantial burden where prisoner could purchase halal [food prepared per Muslim law] vegetarian food on meat days and request other accommodations to avoid contamination of vegetarian food by meat).

As far as I know, only three courts have reached the merits of the contraception opt-out. One has upheld the accommodation. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-1261-EGS (D.D.C. Dec. 19, 2013). Two others have struck it down. *See Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542, 2013 U.S. Dist. LEXIS

176432 (E.D.N.Y. Dec. 13, 2013) [hereinafter "*RCANY*"]; *Zubik v. Sebelius*, Nos. 13-cv-1459, 13-cv-0303, 2013 U.S. Dist. LEXIS 165922 (W.D. Pa. Nov. 21, 2013).

In *Priests for Life*, decided just yesterday, the court held—similar to this case—that the accommodations "simply do not require Plaintiffs to modify their religious behavior." No. 1:13-cv-01261-EGS, slip op. at 24. Instead, it "is entirely the activity of a third party" to provide the offending services, "and Priests for Life plays no role in that activity." *Id.* at 24-25. For that reason, the court held that there was no substantial burden being placed on the plaintiff, and so the court dismissed the RFRA claim.[3]

The *RCANY* opinion relies on the same body of case law that I do, but in my view misses a few key points. First, some necessary background: *RCANY* involves several plaintiffs, some which are "religious employers" wholly exempt from the contraception requirement and some of which are non-exempt organizations eligible for the accommodation. *See RCANY*, 2013 U.S. Dist. LEXIS 176432, at *2, 15-16. In some cases the two types of organizations are affiliated, and share a healthcare plan, but nonetheless the non-exempt organizations would be required to self-certify under the accommodation. *Id.* at *48-49. *RCANY* granted summary judgment and an injunction for the non-exempt plaintiffs based on RFRA, but not for the exempt plaintiffs. *See id.* at *3-4, 63-64. *RCANY* noted that the plaintiffs in that case believe that the very act of completing the opt-out form "authorizes" third parties to provide the services to which plaintiffs object. *Id.* at *21-22. The *RCANY* court agrees with my view that it is the compulsion to *act*

[3]The government filed the *Priests for Life* opinion as supplemental authority. (DE 28.) Notre Dame responded, attempting to distinguish *Priests for Life* on the basis that the opinion noted that plaintiffs "have no religious objection to filling out the self-certification." (DE 32 at 1 (quoting *Priests for Life*, slip op. at 3-4).) Notre Dame argues that it has a religious objection to filling out the form itself. This is a distinction without a difference. As I've said, Notre Dame hasn't, and can't, object to the *content* of the form, it's only the effect of opting out that Notre Dame objects to, which it ties to the form. The *Priests for Life* plaintiffs argued, as Notre Dame does, that the contraception requirements and accommodation have "no logical or moral distinction." *Priests for Life*, No. 1:13-cv-01261-EGS, slip op. at 9. The opinion noted that form of argument, and rejects it, as I do, because it "cast[s] as a factual allegation" "the legal conclusion . . . that [] religious exercise is substantially burdened." *Id.* at 24 n.5.

contrary to religious beliefs that creates a substantial burden. *Id.* at *35-36, 46-47. But *RCANY* sees the government as compelling plaintiffs to act *by opting out*, in completing the self-certification. The *RCANY* court isn't persuaded by the fact that plaintiffs would instruct, and have in the past instructed, their TPAs not to cover contraception even without the ACA because "the self-certification would still transform a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden." *Id*. at *46.

But as I see it, the act isn't changing, it's the consequence of the act that is. In other words, it's not the self-certification form that "transforms" Notre Dame's action into one it objects to. Instead, it's what the government and the TPA do, and Notre Dame can't exercise its RFRA rights to control the actions of others. Notre Dame isn't being required to do anything new or different – its action is the same, although, granted, the result is different due to the actions of the TPA and the government. As I've said, Notre Dame may find the act of opting out less spiritually fulfilling now, but that doesn't make it a new action.

There is also something perplexing in *RCANY*. The court agreed with the non-exempt plaintiffs that their opt-out through the self-certification form is compelled because plaintiffs object to what will happen as a result. But that logic falls apart when the court moves on to the exempt plaintiffs' claim. They say their RFRA rights would be substantially burdened by pressure to separate the health care plans for exempt and non-exempt organizations because doing so would result in the non-exempt organization self-certifying, which in turn would result in the provision of contraceptive coverage. Without much explanation the court dismisses that argument:

> [T]heir claim is that expelling the non-exempt organizations could force those affiliates to provide coverage or self-certify, which in

> turn could mean that the [exempt] Diocesan plaintiffs' prior act of expulsion facilitated the provision of contraception. **This religious objection — which is not to the act itself, but instead is entirely dependent on the conduct of third parties occurring after that act —** is quite similar to the claim rejected in *Kaemmerling*. 553 F.3d at 678. The [exempt] Diocesan plaintiffs have **therefore failed to demonstrate that the [contraception requirement] Mandate imposes a substantial burden on their religious exercise,** and defendants are entitled to summary judgment on the [exempt] Diocesan plaintiffs' RFRA claims.

Id. at *49-50 (emphasis added).

The upshot of all of this is that *RCANY* essentially says that somehow adding another degree of separation results in the alleviation of the substantial burden. I fail to see the logic in this. What *RCANY* says about the exempt plaintiffs' claims applies with equal force to a non-exempt plaintiff's claim, as well, and as I noted previously, I agree that the claims are similar to that in *Kaemmerling*.

The *Zubik* court, too, accepts plaintiffs' characterization of opting out via the self-certification form as "facilitate[ing]/initiat[ing] the provision of contraceptive products, services and counseling." *Zubik*, 2013 U.S. Dist. LEXIS 165922, at *80. When cast in that light, finding a substantial burden is assured. But as I've said, while I accept that facilitating contraception is sincerely odious to the plaintiff entities in these cases, I don't have to accept without analysis that opting out of providing contraception is a modification of behavior. The *Zubik* court even says that it's not plaintiffs' action that has changed, but the result, through the actions of third parties: "In all prior instances where the Government, an insurer, or a TPA has requested employee names or other information from Plaintiffs, the reason the information was sought was of no moment to Plaintiffs. Now, under the 'accommodation,' the reason the documentation is required is so that contraceptive products, services, and counseling can be provided in direct

contravention of Plaintiffs' sincerely-held religious beliefs." *Id.* at *82. Under *Zubik*, religious nonprofits get to veto third party action when it reduces the nonprofits' spiritual satisfaction in a particular action.

To the extent that Notre Dame claims a burden imposed by having to find a TPA that will cover contraception and enter a contract with that third party, the argument lacks factual support. Notre Dame's existing TPA is covering contraception. Notre Dame didn't have to search for a new TPA, or enter a new contract with the accommodation in mind. There's no indication that any TPAs in similar cases are refusing to pay for contraception. In fact, Notre Dame's argument is belied by the actions of its own TPA. It is the TPA's deadline to send out the appropriate paperwork that Notre Dame claims sets the December 20 deadline for this preliminary injunction decision, rather than the law's January 1, 2014 compliance deadline. *See* Meritain Affidavit ¶ 4; Suppl. Affleck-Graves Affidavit ¶ 64; *see also RCANY*, 2013 U.S. Dist. LEXIS 176432, at *40-41 (calling this argument "somewhat speculative" but not issuing a holding on it because the self-certification ruling rendered it moot).

Notre Dame also throws in an argument about the government's cost-neutrality assumption. Memo. ISO Motion for Preliminary Injunction at 24-25. This is irrelevant to Notre Dame's position, because Notre Dame bears *none* of the cost under the accommodation – not for the contraceptive care, the administration of that service, or providing the profit margin. Notre Dame seems to be suggesting, disingenuously if it has reviewed the regulations on funding for TPA-provided contraceptive services, that the government's position is that the provision of contraception will just pay for itself on the individual TPA's balance sheet. The government

makes no such claim. The services will be paid for out of the federal insurance exchange, by discounting the monthly fees insurers pay to participate in the exchange.

The final issue raised by Notre Dame relates to the effect of the contraception requirements on their on-campus pharmacy. They do this by including a single, nearly identical paragraph in their Complaint (¶ 76), Affleck-Graves Affidavit (¶ 53) and Memorandum in Support of Motion for Preliminary Injunction (at 25). Notre Dame claims that it pays up front for prescriptions dispensed from its on-campus pharmacy, which is run by Walgreens, and later gets reimbursed by appropriate third parties. Notre Dame then claims that, under the contraception requirement, it would have to pay for contraceptive products dispensed from its on-campus pharmacy, and then get reimbursed later thus forcing it to "float" the cost. Missing in all this is any allegation that Notre Dame's pharmacy even sells contraception. Notre Dame offered nothing to suggest that the contraception requirement will force them to carry contraception on campus. And the government confirmed during oral argument that the ACA doesn't require pharmacies to carry contraception. Notre Dame's confused and unsupported argument doesn't come close to meeting the plaintiff's burden in seeking a preliminary injunction.

To sum up: In my view, Notre Dame isn't being compelled to do anything it hasn't done before and won't do in the future regardless of the outcome of this case, but it still seeks to enjoin third parties from acting in a way Notre Dame finds objectionable. In other words, it isn't being asked to "modify its behavior." *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013). But Notre Dame can't be compelled to do something it would do anyway, like instruct its TPA not to cover contraception on Notre Dame's plan. To be clear, my holding isn't that a compelled action is *de minimis.* It's that no action is being compelled at all because the action would be taken even

if no contraception requirement applied. And if there's no compelled action that violates Notre Dame's religious beliefs, then there's no substantial burden.

2. Strict Scrutiny

Because I've held that Notre Dame is not likely to succeed in showing that the ACA with accommodation imposes a substantial burden on its religious exercise, the RFRA claim is unlikely to succeed. An exception to the substantial burden prohibition isn't necessary, so I don't need to reach an analysis of whether the law furthers a compelling government interest and is the least restrictive means the government could use. *See Korte v. Sebelius*, 735 F.3d 654, 672 (7th Cir. 2013).

B. The Free Exercise Claim

The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. "The Free Exercise Clause absolutely protects the freedom to believe and profess whatever religious doctrine one desires. It also provides considerable, though not absolute, protection for the ability to practice (through the performance or non-performance of certain actions) one's religion." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (citations omitted). In interpreting the Free Exercise Clause, the Supreme Court has made it clear that their "cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated . . . ." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (citations omitted). But general

applicability, for Free Exercise purposes, "does not mean absolute universality." *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008).

A law is not neutral under Free Exercise analysis if its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. 520, 533. Put another way, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43.The analysis need not end with the text of the statute; the court is permitted to look for evidence of non-neutrality. *Id.* at 533-34.

Congress enacted RFRA specifically to be more restrictive on government action than the Free Exercise Clause. So failure under RFRA means failure under the Free Exercise Clause. *See e.g., Indianapolis Baptist Temple*, 224 F.3d at 629; *Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008) ("Petitioners' failure to demonstrate a substantial burden under RFRA necessarily means that they have failed to establish a violation of the Free Exercise Clause, as RFRA's prohibition on statutes that burden religion is stricter than that contained in the Free Exercise Clause."); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. . . . [We] held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.*, at 883-890, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA)").

Notre Dame posits generally that both the contraception requirement and the accommodation that lets Notre Dame opt out violate its Free Exercise rights. I disagree with both theories. With respect to the requirement itself, the opt-out removes any burden the requirement may impose by allowing Notre Dame to refuse to provide contraception as it's always done. That solution would be inadequate if the accommodation were itself a burden, but as I held with respect to RFRA, it's not. Because RFRA has the stricter standard, I need not further examine the burden of the accommodation here.

More specifically, Notre Dame makes three arguments: *First*, it claims that the requirement isn't neutral because, essentially, most healthcare plans already cover contraception and adding it to the others wouldn't cost anything, so the only reason a plan wouldn't cover contraception is due to religious objection. Memo. ISO Motion for Preliminary Injunction at 37. *Second*, Notre Dame argues that the contraception requirement isn't generally applicable because the ACA provides exemptions, but not to religious nonprofits. *Id.* at 36-37. *Third*, Notre Dame claims that, with respect to the requirement, Free Exercise serves to reinforce other Constitutional protections, "implicat[ing] the 'hybrid' rights of religious believers." *Id.* at 37. This last argument seems to be that education is a part of the Catholic religion, and the requirement makes it impossible for Notre Dame to run an educational institution without being involved with contraception. This pressure on religious belief in turn puts pressure on Notre Dame to consider not running an educational institution, which violates its rights to freedom of association and speech. *Id.* at 37-38. I will take up each of these arguments in turn.

Notre Dame first claims, supported only by inference, is that the contraceptive requirement is aimed at religious objectors, and so is not neutral in application. But frankly there

is nothing to support this inference. And all of the evidence is decidedly to contrary. First, while Notre Dame takes issue with the contraceptive requirements, which may be widely covered already and cost-neutral to add where they're not covered, I note that the women's preventive health care requirements include many services completely unrelated to contraception, many of which Notre Dame does not appear to contest. *See* Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011), available at http://www.nap.edu/catalog.php?record_id=13181. Apart from women's preventive healthcare, the broader section of the ACA on "Coverage of Preventive Health Services" also requires free coverage of immunizations and breast cancer screenings. *See* ACA § 2713. As discussed previously, the ACA is meant to be a comprehensive overhaul of the nation's healthcare system, so it isn't surprising that it lays out many types of coverage that must be included in health insurance; it would be surprising if it didn't. Describing what coverage healthcare plans should include seems reasonable, given all of the other changes set out in the ACA. For example, everyone must henceforth have health insurance. Large employers must provide it and smaller employers need not, but individuals are required to get it if their employer doesn't offer it. *See* ACA §§ 1501 (requirement on individuals), 1511 (requirement on employers). If the ACA didn't lay out a battery of services that must be covered, insurers could offer cut-rate plans that cover almost nothing to individuals buying insurance only to meet the requirement on individuals. The fact that contraceptive services are included among a bevy of other services that must be offered is not evidence that the government is targeting those who object to contraception on religious grounds. On the contrary, the comprehensive approach to women's health issues laid out in the ACA proves the precise opposite.

The laws and regulations in question, as well as the legislative history, further show that the ACA and related regulations were enacted for reasons neutral to religion. The Congressional record indicates that the purpose of the women's preventive healthcare requirements were not related to religion. As articulated by its sponsor, the purpose of the women's health requirements is to "guarantee[] women access to lifesaving preventive services and screenings," and remedying gender discrimination in health insurance and the fact that "[w]omen are more likely than men to neglect care or treatment because of cost." 155 CONG. REC. S11985, S11986 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski). "Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles." *Id.* at S11988.

What's more, the relevant regulations were enacted based on the expert recommendations of the Institute of Medicine ("IOM"), without religious motive. Inst. of Med., Committee on Preventive Services for Women, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, 2 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181. The IOM "was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. The [IOM] acts under the responsibility given to the National Academy of Sciences by its congressional charter to be an adviser to the federal government . . . ." *Id.* at iv. The IOM recommended that the guidelines include support and counseling addressing a battery of issues including, of primary relevance here, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10. It is therefore abundantly clear

that the women's health requirements in the ACA are entirely neutral and not intended to target religion.

Notre Dame next argues that the contraception requirement isn't generally applicable because there are secular exemptions, specifically, rules applying to small businesses and to grandfathered plans. But as the *Priests for Life* court noted, "[t]he existence of categorical exemptions does not mean that the law does not apply generally." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013), slip op. at 34. The Supreme Court made that point in *United States v. Lee*, 455 U.S. 252, 260-61, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), when it held that the social security tax requirements are generally applicable despite the fact that the system contains categorical exemptions. The categories that the ACA creates and of which Notre Dame complains are objectively delineated, without reference to religion. They do not make the law not neutral.

Notre Dame's final argument – its "hybrid" claim – all depends on its Free Exercise argument, which I've explained doesn't hold water. The accommodation doesn't implicate Notre Dame's religious exercise, so there's no resulting pressure on Notre Dame's Free Speech and Free Association rights to operate its university. None of Notre Dame's constitutional claims are likely to succeed. And because of this Notre Dame can't reasonably argue that, although none of its Constitutional rights is violated individually, the fact that it alleges more than one violation somehow leads to a viable claim. Such a theory has been widely discredited, and for good reason. Two losing claims don't equal a winning one. *See Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) ("For this argument to prevail, one would have to conclude that although the regulation

does not violate the Free Exercise Clause, and although they have no viable First Amendment claim against the regulation, the combination of two untenable claims equals a tenable one. But in law as in mathematics zero plus zero equals zero." (citations omitted.)).

Based on the foregoing, I find that Notre Dame is unlikely to succeed on its Free Exercise claim.

C. The Establishment Clause Claim

The Constitution's First Amendment says that Congress can "make no law respecting an establishment of religion." "The Establishment Clause prohibits government sponsorship of, financial support for, and active involvement in religious activities." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982). Under the "Lemon Test," the law in question has to have a secular legislative purpose, the primary purpose must neither advance nor inhibit religion, and the government must avoid excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *see also Indianapolis Baptist Temple*, 224 F.3d at 630. This doesn't mean that government has to cross the street when it sees religion coming; indeed, complete avoidance of religion is often not possible. "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Com. of New York*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

Specifically, "the Supreme Court has held that the sorts of generally applicable administrative and record keeping requirements imposed by tax laws may be imposed on religious organizations without violating the Establishment Clause. The normal incidents of collecting federal employment taxes simply do not involve the intrusive government participation in, supervision of, or inquiry into religious affairs that is necessary to find excessive entanglement." *Indianapolis Baptist Temple*, 224 F.3d at 631 (collecting cases regarding state sales and use tax, federal income tax, workers' compensation program and social security tax).

In *Walz*, a real estate owner "sought an injunction in the New York courts to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties *used solely for religious worship*." 397 U.S. at 666 (emphasis added). The tax exemption differentiated between religious organizations and the way they used their property. The Supreme Court found the exemption constitutional, holding the government "has not singled out one particular church or religious group . . . ." *Id.* at 673. The exemption also applied to certain secular properties the government considered conducive to "moral or mental improvement," and still the exemption of only certain religious properties was constitutional. *Id.* at 672-73.

Notre Dame argues that this case is governed by *Larson*, but I fail to see why. Reply ISO Motion for Preliminary Injunction at 21. In *Larson*, the Supreme Court found that a Minnesota law that specifically targeted less established churches was unconstitutional under *Lemon*. 456 U.S. at 254-55. But that is not at all what the ACA does. It doesn't favor one religion over another by creating exemptions for certain categories of employers and accommodations for others.

Moreover, limited religious exemptions from generally applicable laws can take into account considerations beyond the content of one's religious beliefs. In *Droz v. Comm'r*, plaintiff objected to a law exempting from social security taxes members of organized religions that objected to social security taxes on religious grounds *and* that would provide for members who needed assistance. 48 F.3d 1120, 1124-25 (9th Cir. 1995). Plaintiff argued that his beliefs could mirror those of an exempt person, but he would still have to pay into social security because he wasn't a member of an eligible sect. *Id.* at 1124. The court found the law constitutional. It declined to apply strict scrutiny because the law did not discriminate among religions and applied a condition that had a secular purpose and did not advance or inhibit religion. *Id.* at 1124-25.

Notre Dame alleges violation of the Establishment Clause by the grant of an exemption only to a particular category of "religious employers," and because identifying what groups are in that category will excessively entangle the government with religion. Memo. ISO Motion for Preliminary Injunction at 40. Notre Dame does not claim that the ACA discriminates among faiths, but among institutions of the same faith that have different organizational structures. Nor does Notre Dame argue here that the law does not have a secular legislative purpose, or that it advances or inhibits religion. Nor could it. As I addressed above, the law has a secular purpose, and the purpose does not involve advancing or inhibiting religion.

So my application of the *Lemon* test comes down to whether there is excessive entanglement. While Notre Dame is unhappy with the distinction the law draws, I think the argument that the distinction can't be drawn without excessive government entanglement rings hollow. An organization is exempt if it's "organized and operates as a nonprofit entity and is

referred to in sections 6033(a)(1) and 6033(a)(3)(A)(I) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The distinction is based on the tax code, and the Supreme Court has upheld federal tax laws applied neutrally to religious and secular entities alike. In this case, Notre Dame had no problem determining that it's not exempt, and there is no suggestion that the government was involved in that determination. Compl. ¶ 43. Furthermore, an ACA determination based on corporate organization and tax code is surely less entangling than the one the court found constitutional in *Droz* based on membership in a religious group and specific tenets of that group's faith.

Notre Dame is therefore unlikely to be able to demonstrate that the ACA and the contraception opt-out violate its rights under the Establishment Clause.

D. The Free Speech Claim

The concept of freedom of speech includes the right to be free from Congress telling people what they must say. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) [hereinafter "*FAIR*"] ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."); *Hill v. Colo.*, 530 U.S. 703, 714-15, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). However, to violate the right to free speech, naturally a law must actually regulate speech. Even when a law conditioned federal funding on schools allowing military recruiters on campus, there was no free speech violation because letting the recruiters on campus didn't mean that the schools were voicing their support for the recruiters' message. The law in question was constitutional because it "neither limits what law schools may say nor requires them to say anything. Law schools remain free under the

statute to express whatever views they may have . . . ." *FAIR*, 547 U.S. at 60 (citation omitted).

Notre Dame alleges two separate free speech violations: *first*, that the government compels it to speak contrary to its beliefs, and *second*, that the regulations contain a "gag order" prohibiting Notre Dame from speaking as it wishes. Reply ISO Motion for Preliminary Injunction at 18-20. Neither argument is persuasive.

Notre Dame claims that the accommodation compels speech by requiring Notre Dame to facilitate contraception and counseling that may support contraception, and by requiring the completion of the certification form. I've explained at length my view that the government isn't forcing Notre Dame to do *or say* anything it wouldn't do or say otherwise. Long before the ACA Notre Dame told its TPA not to cover contraception, and it will continue to do so with or without the ACA. It can't be called compulsion for Notre Dame to do what it has done, does, and will do anyway.

Furthermore, as the government points out, not a single court has upheld a Free Speech challenge to the contraceptive-coverage regulations because most recognize that the certification requirement regulates conduct, not speech. Opp. to Preliminary Injunction at 20 (citing, e.g., *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *6 (E.D. Mich. Apr. 3, 2013); *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 418 (E.D. Pa. 2013)).

With respect to whether the ACA imposes a gag order on speech, Notre Dame points to the prohibition against "directly or indirectly, seek[ing] to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third

party administrator's decision to make any such arrangements." 26 C.F.R. 54.9815-2713A(b)(iii). Notre Dame does not include in its brief the text that immediately follows this prohibition in the final reporting of the rules, which states "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. 39,870, 39,880 n.41.

The text accompanying the final rules could not be clearer that Notre Dame is free to speak all it wants. The prohibition on influencing the TPA must involve something more than expressing Notre Dame's views. As the government put it, the regulations don't prohibit speech, but instead prevents "an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party by, for example, threatening the TPA with a termination of its relationship because of the TPA's" coverage of contraception. Opp. to Preliminary Injunction at 22. Prohibiting this type of behavior is just as permissible as prohibiting an employer from threatening employees regarding unionization, which is speech that falls clearly outside the protection of the First Amendment. *See NLRB v. Gissel Packing Co*., 395 U.S. 575, 618, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

In sum, because the regulations do not force Notre Dame to say anything, nor do they prevent Notre Dame from forthrightly expressing its views regarding the topic of contraception, Notre Dame's free speech rights are not being infringed. Consequently, Notre Dame is unlikely to succeed on its Free Speech claim.

II. Balancing the Equities

The Supreme Court has held that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). These requirements appear to be conjunctive, requiring the party seeking injunction to show all of them. However, the Seventh Circuit's sliding scale analysis referenced earlier in this opinion requires me to consider and balance the harms to Notre Dame, the government, and the public unless I find that Notre Dame has less than a "negligible chance of success." *Lineback v. Spurlino Materials*, 546 F.3d 491, 502 (7th Cir. 2008); *Kiel v. City of Kenosha*, 236 F.3d 814, 815-16 (7th Cir. 2000). This simply means that a greater harm can make up for a lesser likelihood of success. *See, e.g.*, *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002); *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 361 (7th Cir. 1993).

As an aside, the government noted in its Opposition to Preliminary Injunction its objection to the sliding scale approach as inconsistent with the Supreme Court's holding in *Winter*. Opp. to Preliminary Injunction at 8 n.4. But the government also recognizes that I am nonetheless bound to apply the sliding scale, although ultimately in this case I do not find that it slides my decision to a grant of the preliminary injunction.

An injunction is an extraordinary remedy not to be issued lightly. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. Thus, the Court has noted that '[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff,' and that 'where an injunction is asked which will adversely affect a public interest for whose impairment, even

temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13, 102 S. Ct. 1798 (1982) (citing *Yakus v. United States*, 321 U.S. 414, 440 (1944) (footnote omitted)).

As this opinion demonstrates, in my view of things Notre Dame has a low likelihood of success on the merits. Still, I can't say that it has *no chance*, particularly given the differing outcomes in other courts. Turning to interests and harms, Notre Dame and the government are basically in equipoise.[4] In my mind the low likelihood of success necessarily bears on the likelihood of irreparable injury – if it's unlikely there will ultimately be a showing of a violation of rights, then it's unlikely that there will be a violation while the case is pending. I nonetheless fully recognize that if I am incorrect and Notre Dame should ultimately prevail, then certainly the violation of its religious rights in the interim is a substantial harm. But the government also has strong interests in opposing the injunction. Congress has an interest in seeing a duly enacted law legislating its intent put into effect. And administrative agencies have an interest in enforcing carefully drafted regulations in their bailiwicks. As for the public interest, it is equally split. The public – however one chooses to define that vague term – certainly has an interest in the vindication of First Amendment rights. But it also has an interest in the full enforcement of duly enacted laws. More specifically, the women who work for Notre Dame, as a subset of the public, also have a very real stake in receiving the health care that the ACA affords to them.[5]

[4] *Korte* touches on the government's interests when it addresses RFRA's strict scrutiny analysis, but there it focuses on whether the government's interest is compelling enough to meet strict scrutiny muster. The Seventh Circuit accepts as legitimate the government's interest in "broaden[ing] access to free contraception and sterilization so that women might acheive greater control over their reproductive health," although the court questions whether it is of "surpassing importance." *Korte v. Sebelius*, 735 F.3d 654, 686.

[5] I note again the pending motion to intervene in this case filed by three Notre Dame students. *See supra*, n.1. While I have not yet had an opportunity to fully consider the appropriateness of intervention here, the motion demonstrates that the interest of affected women is not hypothetical.

And finally, I can't ignore Notre Dame's waiting to file its case until mere weeks before the wheels of the requirements were going to start to turn. Had Notre Dame acted more expeditiously the harm that they now fear could have been avoided altogether. That put the government and other interested third parties in the position of defending a case on the fly. That would be fine if it was by necessity, but it wasn't here. And the Seventh Circuit has noted that "[d]elay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will suffer irreparable harm if a preliminary injunction is not entered." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001).

So while the interests for and against injunction are very closely balanced, I find that the low likelihood of Notre Dame's success on the merits tips the sliding scale towards denial of the preliminary injunction that Notre Dame seeks.

CONCLUSION

For the foregoing reasons, plaintiff University of Notre Dame's Motion for a Preliminary Injunction (DE 9) is **DENIED**.

SO ORDERED.

ENTERED: December 20, 2013

/s/ Philip P. Simon
Philip P. Simon, Chief Judge
United States District Court