IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME, ***Plaintiff,*** **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.***	**Case No. 3:13-CV-1276**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff University of Notre Dame ("Notre Dame" or "University") submits this memorandum of law in support of its motion for temporary restraining order and motion for preliminary injunction on Counts I-V of its Complaint, alleging violations of the Religious Freedom Restoration Act and the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment.

INTRODUCTION

Notre Dame, as part of the Roman Catholic Church, believes that life begins at conception and that artificial interference with life and conception is immoral. Accordingly, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled in the provision of products, services, practices, and speech that are contrary to its sincerely held religious beliefs. The Government has promulgated regulations that coerce Notre Dame to violate this sincerely held religious belief by requiring it, under threat of punitive fines, to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, artificial contraception, sterilization procedures, and related counseling (the "objectionable products and services"). *See* 45 C.F.R. § 147.130(a)(1)(iv) ("U.S. Government Mandate" or "Mandate"). Moreover, the regulations compel Notre Dame to facilitate and become entangled in the provision of objectionable drugs and services in ways that will lead many to think Notre Dame condones these services, and thus requires Notre Dame to violate the Catholic concept of "scandal" in violation of its religious beliefs. Notre Dame's forced participation in this scheme is set to begin immediately—even before the January 1, 2014 enforcement date of the U.S. Government Mandate. Indeed, as Notre Dame's third party administrator begins to implement the U.S. Government Mandate in advance of the January 1, 2014 enforcement date, Notre Dame has been given a deadline of a matter of days to violate its religious beliefs. Both preliminary and immediate injunctive relief is therefore necessary.

Despite repeated pleas from the religious community, the Final Rule narrowly defines "religious employers" as "houses of worship and religious orders," excluding Catholic service and educational organizations like Notre Dame as well as other Catholic organizations that carry out the Church's missions of health care and charity. More specifically, the Mandate divides the Catholic Church into two wings: (1) a "religious" wing limited to "houses of worship and religious orders" that provide *religious* services; and (2) an "educational and charitable" wing that provides what the Government views as *secular* services. But this artificial distinction ignores the reality that Catholic educational institutions are, according to *Ex Corde Ecclesiae*, the "heart of the church." Notre Dame's mission is just as central to Catholic faith and life as the mission of Catholic houses of worship, yet the Mandate would exclude Notre Dame and other Catholic educational organizations from the category of exempt "religious employers" and would force a substantial wing of the Catholic Church to act in a manner that is contrary to its sincerely held religious beliefs.

The Final Rule's so-called "accommodation" for "non-religious employers," moreover, is illusory because it addresses fundamental religious objections through accounting changes that nonetheless require Notre Dame to become entangled in the provision of products and services that violate its religious beliefs. Despite the accommodation, Notre Dame remains the vehicle through which the objectionable products and services are delivered to its employees.

This oppressive Mandate is irreconcilable with the Religious Freedom Restoration Act ("RFRA") and the First Amendment. *First*, under RFRA, the Government may not impose a substantial burden on Notre Dame's exercise of religion without showing that it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). The Government has excluded tens of millions from the Mandate through a series of

exemptions; thus, it cannot show a compelling interest in forcing the Mandate on the much smaller band of organizations that seek an exemption on the basis of religious hardship. Nor is the Mandate narrowly tailored because the Government could easily advance its goals without using Notre Dame to deliver objectionable products and services to Notre Dame's employees and students.

Second, the Mandate violates the First Amendment's Free Speech and Religion Clauses. It infringes on Notre Dame's freedom of speech by requiring it to issue a certification of its beliefs that, in turn, would result in the provision of 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 third party administrator to provide or procure the objectionable products and services, or the means by which the objectionable products and services are provided or procured. 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. 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.

In sum, there is no legal justification for the Government's gratuitous intrusion on Notre Dame's religious freedom. Notre Dame urgently needs injunctive relief now, without which it will be forced to decide between violating its religious beliefs or violating the law—the epitome of irreparable harm. By contrast, injunctive relief will impose no substantial harm on the Government, which has refrained from mandating contraceptive coverage for more than two centuries.

While the Court is considering Notre Dame's request for preliminary injunctive relief, Notre Dame respectfully requests that the Court enter a temporary order restraining the Government from applying or enforcing the Mandate against Notre Dame. Notre Dame's third party administrator, Meritain Health, Inc. ("Meritain"), and prescription drug insurer, Express Scripts, informed Notre Dame on Friday, December 6 that, in order to meet the January 1, 2014 enforcement deadline, they would need to begin implementing the requirements of the Mandate starting Wednesday, December 11 or Thursday, December 12, including by sending communications, such as "Contraceptive Prescription ID Cards" and related objectionable counseling, to Notre Dame's female employees and any female dependents covered by its healthcare plans. The self-certification is a condition precedent to these communications, and Notre Dame would thereby be forced to facilitate access to and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of its sincerely held religious beliefs. These implementation requirements would result from Notre Dame's plan sponsorship and self-certification, as required by the Mandate, and would entangle Notre Dame in a manner that causes scandal in violation of Notre Dame's sincerely held religious beliefs.

Without an order restraining enforcement of The U.S. Government Mandate against Notre Dame, the Mandate requires Notre Dame to do precisely what its sincerely held religious beliefs prohibit—pay for, facilitate access to, and/or become entangled in the provision of objectionable products and services. In addition to objectionable acts that will occur in the next few days, the enforcement date for the U.S. Government Mandate is January 1, 2014, which is rapidly approaching and requires emergency relief. Accordingly, Notre Dame respectfully

moves this Court to issue a temporary restraining order to preserve the *status quo* while the Court further considers the merits.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act") requires employer "group health plan[s]" to include insurance coverage for women's "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which has been defined by the Department of Health and Human Services ("HHS") to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." "Women's Preventive Services Guidelines" (Ex. A). FDA-approved contraceptives include the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce an abortion. Failure to provide these services exposes employers to fines of $100/day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health plans subjects employers to substantial annual penalties of $2,000 per employee. *Id.* § 4980H(a), (c)(1).

From its inception, the Act exempted health plans covering millions of people. *See* WhiteHouse.Gov, "The Affordable Care Act Increases Choice and Saving Money for Small Businesses" (Ex. B) at 1 ("exempt[ing] 96[%] of all firms . . . or 5.8 million out of 6 million total firms"); 26 U.S.C. §§ 4980D(d); 4980H(a). Plans that have not changed certain benefits or contributions are "grandfathered" and exempt. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). By one estimate, the Act exempts "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

From the start, however, the Government refused to exempt religious entities other than those satisfying the narrow definition of "religious employer"—intended to "accommodate" 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). Despite intense criticism, the Government finalized the narrow definition "without change." 77 Fed. Reg. 8,725, 8,727-28, 8,730 (Feb. 15, 2012).

Five weeks later, under increased pressure, the Government issued an Advanced Notice of Proposed Rulemaking ("ANPRM"), suggesting accommodations to religious objections, yet reaffirming that the "religious employer" exemption would not change. 77 Fed. Reg. 16,501-08 (Mar. 21, 2012). Religious entities explained in detail why proposals in the ANPRM would not relieve the burden on their religious freedom. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (May 15, 2012) (Ex. C) at 3 ("[The ANPRM] create[s] an appearance of moderation and compromise, [but does] not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage."). Yet, on February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM") adopting the ANPRM's proposals. The NPRM was opposed in over 400,000 comments, largely reiterating previous objections. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (Mar. 20, 2013) (Ex. D) at 3 (noting that religious entities are still required "to fund or otherwise facilitate the morally objectionable coverage").

Ignoring opposition, the Final Rule adopted substantially all of the NPRM's proposals without significant change. *See* 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) ("Final Rule"). Thus, the Mandate will be in effect for plan years beginning on or after January 1, 2014. In addition, the two relevant changes the Final Rule made to the Mandate fail to relieve the unlawful burdens the Mandate imposes on Notre Dame.

First, the Final Rule made a cosmetic change to the "religious employer" exemption by replacing the first three prongs of the "religious employer" definition with "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii)

of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. at 39,896 (codified at 45 CFR § 147.131(a)). The Government admits that this change does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules," but "restrict[s] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Thus, the Final Rule mirrors the original definition's focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. Religious entities with broader missions are still not considered "religious employers."

Second, the Final Rule establishes an illusory "accommodation" for nonexempt objecting religious entities that qualify as "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if self-insured, to its third party administrator. 26 C.F.R. § 54.9815-2713A(a). An eligible organization's self-certification requires its insurance issuer or third party administrator to provide "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). Making matters worse, self-insured organizations that self-certify are flatly prohibited 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 "accommodation" fails to relieve the burden on religious organizations' religious beliefs because a non-exempt organization's decision to offer a group health plan still

results in the provision of coverage—now in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related counseling. *Id.* § 54.9815-2713A(b)-(c). Thus, Notre Dame's provision of group health plans triggers the provision of "free" objectionable products and services to its employees and students in a manner that causes scandal in violation of its religious beliefs.

In sum, the Final Rule does not address Notre Dame's religious objections to the Mandate. This should not surprise the Government, which was repeatedly notified well before it issued the Final Rule that its "accommodation" would not relieve the burden on Notre Dame's and other religious organizations' beliefs. Despite representations that it was making a good-faith effort to address those religious objections, the Government issued the Final Rule that it knew would do no such thing. Notre Dame is still coerced, under threat of crippling fines, into being the vehicle to deliver contraception, abortion-inducing products, sterilization, and related counseling to its employees, in a manner that violates its sincerely held religious beliefs. Moreover, Notre Dame is entangled in—and placed in a position in which it appears to endorse—the process in a way that violates Notre Dame's Catholic beliefs.

II. NOTRE DAME'S BACKGROUND

Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university. Affidavit of John Affleck-Graves ("Affleck-Graves Aff.") ¶ 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. Faith is at the heart of Notre Dame's educational mission. *Id.* ¶ 11. In accordance with the aposotolic constitution *Ex Corde Ecclesia*, 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." "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.* ¶ 12. To carry out its religious mission, Notre Dame both lives and teaches its students how to live 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. It would violate Notre Dame's beliefs, including the beliefs articulated in *Ex Corde Ecclesiae*, to sever Notre Dame from the Catholic Church. *See id.* ¶¶ 21-24, 40; Compl. ¶ 29.

Just as sincerely, Notre Dame believes that life begins at the moment of conception, and that certain "preventive" services covered by the Mandate that interfere with life and conception are immoral. *See* Compl. ¶¶ 30-33; Affleck-Graves Aff. ¶¶ 14-18. Accordingly, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled with the provision of contraception, sterilization, abortion, or related counseling, including by contracting with a third party that will, as a result, provide or procure the objectionable products and services for Notre Dame's employees and students. *See* Affleck-Graves Aff. ¶¶ 13-20.

Finally, 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. *Id.* ¶ 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). Under the Mandate's "accommodation," Notre Dame's decision to provide a group health plan and the execution of a self-certification trigger the provision of "free" objectionable coverage to Notre Dame's employees and students. This process would lead many to believe that Notre Dame condones the objectionable products and services and thereby undermines Notre Dame's role in educating others on matters of religious and moral significance. The Mandate and its "accommodation" would thus involve Notre Dame in scandal

in a manner that would violate its religious beliefs. *See* Affleck-Graves Aff. ¶¶ 19-20, 47.

ARGUMENT

In evaluating a motion for preliminary injunction, "a court should grant a preliminary injunction if, after considering four factors, it determines that the balance of equities favors such relief." *See Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461 (7th Cir. 2000). The moving party must show (1) that it is "reasonably likely to succeed on the merits," (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 v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (citing *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 619 (7th Cir. 2004)). Once the moving party meets that burden, the district court applies a "sliding scale" analysis: "the district court must exercise its discretion to determine whether the balance of harms weighs in favor of the moving party or whether the nonmoving party or public interest will be harmed sufficiently that the injunction should be denied." *Christian Legal Soc'y*, 453 F.3d at 859; *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994) ("[T]he greater the moving party's chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor."). Here, a preliminary injunction is warranted because Notre Dame meet all four factors for such interim relief and the balance of harms clearly weighs in its favor.

I. NOTRE DAME IS LIKELY TO SUCCEED ON THE MERITS

Notre Dame is likely to succeed on the merits of all of its claims, including that the Mandate: (1) violates RFRA because it substantially burdens Notre Dame's exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 116-31); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Compl. Count II, ¶¶ 132-49); (3) violates the First

Amendment prohibition on compelled speech because it compels Notre Dame to become entangled with, publicly subsidize or facilitate the activity and speech of private entities that are contrary to its religious beliefs and compels Notre Dame to engage in speech that will result in the provision of objectionable products and services to Notre Dame's employees and students (Compl. Count III, ¶¶ 150-64); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Notre Dame from attempting to "influence" its third party administrator's decision to provide or procure contraceptive services or the means by which those services are provided or procured; (Compl. Count IV, ¶¶ 165-69); and (5) violates the Establishment Clause of the First Amendment because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on intrusive judgments regarding their beliefs, practices, and organizational structure (Compl. Count V, ¶¶ 170-77).

A. <u>The Mandate Violates RFRA</u>

Under RFRA, the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423 (2006). Thus, once Notre Dame demonstrates a substantial burden, the Government bears the burden of proving that application of the Mandate to Notre Dame furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428. Here, the Government cannot make such a showing.

RFRA was enacted to prevent the type of regulation codified in the U.S. Government

Mandate. Congress passed RFRA "to restore [and codify] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary,* 102d Cong., 174, 192 (1992); *see also* 139 Cong. Rec. 9,685 (1993) (statement of Rep. S. Hoyer) (noting that, post-*Smith*, a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" and that RFRA would "correct th[is] injustice[]"); *id.* at 4,660 (statement of Rep. Green) (noting that RFRA prevents the Government from "enact[ing] laws that force a person to participate in actions that violate their religious beliefs").

Here, the U.S. Government Mandate cannot possibly survive scrutiny under RFRA because: (1) it imposes a "substantial burden" on Notre Dame's free exercise of religion; (2) the Government has no compelling interest in imposing this burden; and (3) it is not the least restrictive means to achieve the Government's interest. It is not surprising, then, that the Seventh Circuit in binding precedent recently held that under RFRA the Government may not force a for-profit company or its owners to contract with a third party that would provide contraceptive coverage to the company's employees over the owners' religious objections. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. Nov. 8, 2013).[1] Moreover, the only court to have reached the

[1] Courts have issued preliminary injunctions against the Mandate in the majority of cases brought by *for-profit* companies with religious owners. If anything, a preliminary injunction is even more appropriate in this case involving a non-profit entity. *See Hobby Lobby Stores, Inc. v.*

merits of similar RFRA claims brought by Catholic non-profit entities similarly concluded that those entities—even though entitled to the Government's so-called "accommodation"—had a likelihood of prevailing on their RFRA claim and granted preliminary relief enjoining the Government from enforcing the Mandate. *Zubik v. Sebelius*, No. 2:13-cv-01459, and *Perisco v. Sebelius*, No. 1:13-cv-00303, __ F. Supp. 2d ___, 2013 WL 6118696, at *2, 32, 34 (W.D. Pa. Nov. 21, 2013).

1. The Mandate Substantially Burdens Notre Dame's Exercise of Religion.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the Plaintiff's "exercise of religion." *Id.* Where sincerity is not in dispute, RFRA's substantial-burden test involves a straightforward, two-part inquiry. A court must (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial pressure"—*i.e.*, a substantial burden—on the plaintiff to violate that belief. *See, e.g.*,

(continued…)

Sebelius, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Doc. 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. Nov. 8, 2013); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Doc. 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Doc. 12); *Bick Holdings Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Doc. 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Doc. 43); *Lindsay v. HHS*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Doc. 9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. 50); *Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. HHS*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute); *see also Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"); *Gilardi v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013). Any attempt by the Government to dispute this test is foreclosed by *Korte*, in which the Seventh Circuit applied this test and granted plaintiffs preliminary injunctive relief.

(i) "Exercise of Religion"—Notre Dame's Religious Beliefs are Sincerely Held

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 Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc)). Indeed, "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id*. "It 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." *Id.* "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." *Id.* After all, it is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Courts must therefore generally accept plaintiffs' description of their religious exercise, regardless of whether the court, or the Government, finds the beliefs that animate that exercise "logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also*

Zubik/Perisco, 2013 WL 6118696, at *24.[2] Following that approach, the Seventh Circuit in *Korte* held that it was bound to accept the plaintiffs' sincere religious belief that complying with the Mandate "would make them complicit in a grave moral wrong." 735 F.3d at 683; *see also id.* at 663 ("As the [plaintiffs] understand their religious obligations, providing the mandated coverage would facilitate a grave moral wrong.").

Not only is *Korte* controlling, but the Western District of Pennsylvania's recent order and opinion in *Zubik* and *Persico* granting preliminary injunction to similarly-situated non-profit entities that do not qualify for the religious employer exemption is instructive. That court applied the test from *Korte* and analyzed the plaintiffs' sincerely held religious beliefs as articulated, without questioning their scope:

> . . . the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. See (sic) *[United States v.] Lee*, 455 U.S. [252,] 257 [(1982)]; *Thomas*, 450 U.S. at 715-16. Indeed that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] . . . correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It 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.

Zubik/Perisco, 2013 WL 6118696, at *24 (quoting *Korte*, 735 F.3d at 683). In no case regarding the U.S. Government Mandate, including Notre Dame's prior lawsuit that was dismissed without

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[2] *See also Lee*, 455 U.S. at 257 (same); *United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (finding error where court questioned claimant's "interpretation of Islamic doctrine"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely-held religious beliefs"); *Koger v. Bryan*, 523 F.3d at 797 (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

prejudice on ripeness grounds, has the Government contested the sincerity of the plaintiffs' religious beliefs.

Here, Notre Dame has a sincere religious objection to paying for, facilitating access to, and/or becoming entangled with "coverage for contraception and sterilization in [its] employee health-care plans." *Korte*, 735 F.3d at 683. The so-called "accommodation" does not change the analysis, because even under the accommodation Notre Dame continues to have "an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [it] to do conflicts with [its] religion," *id.*, and forces Notre Dame to become associated with the U.S. Government Mandate in a way that causes scandal in violation of its religious beliefs. Affleck-Graves Aff. ¶¶ 19-20, 47-51. Among other things, the accommodation requires Notre Dame to issue a certification the sole purpose of which is to grant its third party legal permission to provide payments for abortion-inducing products, contraception, and sterilization procedures to employees and students on Notre Dame's healthcare plans. 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A. Notre Dame "object[s] on religious grounds to doing so," because taking such action would facilitate the objectionable services in a way that causes scandal. *Korte*, 735 F.3d at 683. The act and consequences of submitting the self-certification and acting as plan sponsor causes Notre Dame to become associated with the Mandate in a way that causes scandal in violation of its religious beliefs. Nor, through coerced participation in this scheme, can Notre Dame ensure disassociation with targeted communications such as those advertised to Notre Dame's employee participants and students that seek to normalize practices contrary to Notre Dame's mission, further causing scandal in violation of Notre Dame's beliefs.

It makes no difference that *the Government* believes the accommodation is adequate to dispel Notre Dame's religious objections. What matters is that *Notre Dame itself* "ha[s]

concluded that [its] legal and religious obligations are incompatible: The contraception mandate forces [Notre Dame] to do what [its] religion tells [it that it] must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.* at 685.

Thus, there can be no doubt that Notre Dame's refusal to comply with the Mandate is a protected exercise of religion under RFRA. It is undisputed that Notre Dame has a sincerely held religious belief that it may not pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, or related counseling, including by contracting with an insurance company or third party administrator that will, as a result, provide or procure the objectionable products and services for Notre Dame's employees and students. *See* Affleck-Graves Aff. ¶¶ 13-20. While courts are bound to accept Notre Dame's description of its beliefs without resort to any independent religious authority, here the sincerity of Notre Dame's beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops. *See supra* at 6. These authoritative statements of Catholic belief make it unmistakably clear that Notre Dame's objection to the Mandate is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.

For these reasons, Notre Dame's refusal to facilitate the objectionable products and services in the manner required by the Mandate is a protected exercise of religion. Accordingly, the only relevant question for this Court under the "substantial burden" analysis is whether the Mandate puts substantial pressure on Notre Dame to act contrary to this religious practice.

(ii) The Mandate "Substantial[ly] Burden[s]" Notre Dame's Sincerely Held Religious Beliefs

Once Notre Dame's refusal to pay for, facilitate access to, and/or become entangled in the provision of contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds" with his religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or otherwise "put[s] 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 (same); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (same); *Zubik/Perisco*, 2013 WL 6118696, at *23 (same) (citing *Korte*).[3] In *Yoder*, for example, the Court found a substantial burden imposed by a $5 penalty charged to the Amish plaintiffs for refusing to follow a compulsory secondary-education law. In *Thomas*, the Court similarly held that 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 716-18. Thus, it is clear that even the threat of withholding unemployement benefits, or a $5 penalty, exerts enough pressure on a religious believer to qualify as a "substantial burden."

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[3] In *Gilardi*, the D.C. Circuit applied this test to hold that the Mandate substantially burdened the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 2013 WL 5854246, at *7–8. Indeed, "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at *7 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)). The Mandate, therefore, imposed a substantial burden on the Gilardis because they were forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit in a grave moral wrong." *Gilardi*, 2013 WL 5854246, at *8. No Circuit reaching the merits of a Mandate case has adopted a contrary test.

Thus, in light of Notre Dame's sincerely held religious belief, the only question under *Korte* for purposes of the substantial burden analysis is whether the Government has imposed "substantial pressure" to force Notre Dame to comply with the Mandate. *Korte*, 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718). The *Korte* 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. 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.* at 683-84. The Seventh Circuit held that the Mandate substantially burdened the religious exercise of two corporations and their Catholic owners by requiring those corporations to include contraceptive coverage in their employee health plans. In reaching this decision, the Court expressly rejected the Government's contention that the actions required by the Mandate were too "insubstantial" or too "attenuated" to impose a substantial burden on the plaintiffs. *Id.* at 684-85. As the Court explained, the Government's argument was not merely factually incorrect but also legally flawed, because "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id*. at 683. "It 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." *Id.* The Mandate, therefore, imposed a substantial burden on the plaintiffs' religious exercise because it forced them to act contrary to their religious beliefs by taking actions that they deemed to be impermissible facilitation of contraception and related services.

As the *Korte* Court noted, the plaintiffs objected not only to *using* contraceptive drugs and services, but also "to being forced to provide insurance coverage for these drugs and services in violation of their faith." *Id.* at 684-85. And while the Government "posit[ed] that the Mandate

[was] too loosely connected to the use of contraception to be a substantial burden," that argument "purport[ed] to resolve [a] religious question"—namely, whether taking the actions required by the Mandate would "impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church." *Id.* at 685. As the Court rightly noted, "[n]o civil authority can decide that question." *Id.* Because *the plaintiffs themselves* sincerely believed that complying with the Mandate would violate their religion, forcing them to comply through threats of onerous fines was a "substantial burden" on their religious exercise.

Korte thus squarely forecloses any argument by the Government that the actions required of Notre Dame by the Mandate are too "*de minimis*" or "attenuated" to be cognizable under RFRA. As the Seventh Circuit held, religious believers must be left free to decide for themselves whether an action is "insubstantial" or only "loosely connected" to wrongful behavior. That is ultimately a religious question, and "RFRA 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. Even under the so-called "accommodation," what matters is that plaintiffs "have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise." *Id.*[4]

Applying binding Supreme Court precedent and *Korte*, the court in *Zubik* and *Persico* similarly held for non-profit entities that the Mandate "places a substantial burden on plaintiffs' right to freely exercise their religion – specifically their right to <u>not</u> facilitate or initiate the

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[4] The Tenth Circuit, sitting en banc, likewise recently held that a for-profit religious company was likely to succeed on the merits of a RFRA claim because 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." *Hobby Lobby*, 723 F.3d at 1141. The same is true here.

provision of contraceptive products, services, or counseling." 2013 WL 6118696, at *27. *First,* the court determined that the accommodation substantially burdens plaintiffs' religious exercise because it requires them "to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling." *Id.* at *24; *see also id.* at *24-25. Despite the clear legal standard, as articulated in *Korte*, the Government argued that the accommodation did not require plaintiffs to violate their religious beliefs or modify their behavior because eligible entities "merely [had to] sign a piece of paper" and inform their third party of the same religious objections they had prior to the issuance of the Mandate. *Id.* at *24.

The court rejected that argument, however, because plaintiffs sincerely believe that the accommodation requires them to take specific action that violates their religious beliefs. *See, e.g.*, *id.* at *25 ("The Government is asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose, and thus, they cannot provide it."). Although plaintiffs may be engaging in the same conduct as they did before the Mandate, the effect is significantly different under the Mandate: "in the past, such actions *barred* the provision of contraceptive products, services or counseling. Now, this type of information previously submitted to a third party will be used to *facilitate/initiate* the provision of contraceptive products, services or counseling – in direct contravention of their religious tenets." *Id.* at *24 (emphasis added). Moreover, the participation of the third party does not affect the analysis, nor "absolve" plaintiffs:

> the "accommodation" requires [plaintiffs] to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

Id. at *25. This is especially true because the Government acknowledged the effect of signing the self-certification form and conceded plaintiffs' sincerely held religious beliefs. *Id.* at *31.

Second, the court in *Zubik* and *Persico* rejected the Government's attempt to distinguish for-profit cases like *Korte*. For example, during oral argument in *Zubik* and *Persico*, the Government asserted:

> unlike the for-profit cases where the regulations do actually require the employers to provide contraceptive services in their employee plans, here again it's a third party that provides payment for contraceptive services. So the burden in these cases, in these nonprofit cases, is accommodated, really this entity is far more attenuated and unsubstantial.

Zubik/Persico, Nov. 13, 2013 Oral Arg. Tr. at 52:17-24 (Ex. H). Nevertheless, the court disagreed and "found the recent decisions pertaining to secular, for-profit organizations to be *instructive* . . . ." *Zubik/Perisco*, 2013 WL 6118696, at *19 (emphasis added) (citing *Korte*, 735 F.3d 654).

Finally, the court in *Zubik* and *Persico* found a substantial burden in the distinction between exempt and accommodated entities: by dividing the Catholic Church into a "worship arm" and "'good works' arm[]", "the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." *Id.* at *27. The court questioned: "Why should religious employers who provide the charitable and educational services of the Catholic Church be required to facilitate/initiate the provision of contraceptive products, services, and counseling, through their health insurers or TPAs, when religious employers who operate the houses of worship do not?" *Id.* at *26. The court found the religious employer exemption "enigmatic" in the manner in which it "allows the <u>same</u> members of the <u>same</u> religion to completely adhere to their religious beliefs at times (when the 'exemption' applies), while other times, forces them to violate those beliefs (when the 'accommodation' applies)." *Id.* at *27 (emphasis in original).

The Bishops "while wearing their 'house-of-worship' hats, are not in any moral peril; yet, when they wear their 'head-of-the-"good works"-agencies' hats, they must take affirmative actions which facilitate/initiate the provision of contraceptive products, services, and counseling in violation of their religious tenets." *Id.* at *26. Additionally, the court was "constrained to understand" why charitable, social services agencies

> would not be treated the same as the Church itself with respect to the free exercise of that religion. If the contraceptive mandate creates such a substantial burden on the Dioceses' exercise of religion so as to require the religious employer "exemption," the contraceptive mandate obviously creates the same substantial burden on the nonprofit, religious affiliated/related organizations like Plaintiffs . . . , which implement the "good works" of the Dioceses.

Id. at *27. The same applies here.[5]

Here, as in *Korte*, *Zubik*, and *Persico*, the Mandate imposes a substantial burden on Notre Dame's religious exercise by forcing it to do what its religion forbids: to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related counseling. Affleck-Graves Aff. ¶ 20. It does not matter that Notre Dame, unlike the *Korte* litigants and other for-profit corporations, may be eligible for the Government's so-called "accommodation." For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincerely held religious beliefs. *Hobby Lobby*, 2013 WL 3206103, at *17 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact is that the "accommodation" compels Notre Dame to contract with an insurance issuer or third party administrator that will, as

[5] *See infra* at Section I.E.1 for Notre Dame's additional argument that severing the worship arm of the Catholic Church from its good works arm violates the Establishment Clause of the First Amendment.

a result of that contract, provide or procure the objectionable products and services for Notre Dame's employees and students. Indeed, the insurance issuer or third party administrator's obligation exists *only so long as* Notre Dame's employees remain on its insurance plan.[6] *See* Affleck-Graves Aff. ¶ 46. Moreover, for self-insured organizations like Notre Dame, the required self-certification constitutes the religious organization's specific authorization or "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). *See* Affleck-Graves Aff. ¶ 48.

As Notre Dame has explained to the Government, it believes its involvement in this scheme would involve Notre Dame in scandal, an impermissible violation of its religious beliefs. *See* Affleck-Graves Decl ¶¶ 19-20, 47-51. *See also Zubik/Perisco*, 2013 WL 6118696, at *25 ("[T]he 'accommodation' requires [plaintiffs] to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, on to a secular source. The Court concludes that Plaintiffs have a sincerely-held religious belief that 'shifting responsibility' does not absolve or exonerate them from the moral turpitude created by the 'accommodation'; to the contrary, it still substantially burdens their sincerely-held religious beliefs.").

In addition, the Government's cost-neutrality assumption is implausible. It depends on the dubious assumption that the cost of contraception will be offset by "lower costs from improvements in women's health and fewer childbirths," 78 Fed. Reg. at 8,463, which in turn depends on the assumption that the Mandate will induce large numbers of women who do not currently use contraception to begin doing so. This, of course, demonstrates why Notre Dame so

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[6] *See* 29 C.F.R. § 2590.715-2713A(d) (for self-insured employers, the third party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers that offer insured plans, the insurance issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

vehemently objects to the Mandate: It forces Notre Dame to participate in a scheme *specifically designed to artificially interfere with procreation*, a practice that is irreconcilable with Catholic religious doctrine. *See* Affleck-Graves Aff. ¶ 52. More important for present purposes, however, the Government has adduced *no evidence* that women will change their behavior in sufficient numbers to achieve cost-neutrality. The same is true for self-insured organizations like Notre Dame, for whom, the Government asserts, third party administrators will be permitted to recoup their costs through reductions in user fees on federally facilitated health exchanges. *See* 78 Fed. Reg. at 39,882.

In addition, Notre Dame is required to pay for prescriptions dispensed each month at the pharmacy at Notre Dame's Wellness Center on campus. Notre Dame receives a credit for amounts it pays that are later reimbursed by third party insurers. If the U.S. Government Mandate were to be enforced, Notre Dame would have to pay its on-campus pharmacy for contraceptive products and would receive a credit for those payments only when Meritain paid for the objectionable products as directed by the Mandate. In other words, Notre Dame would be forced to "float" the cost of contraceptive products until those costs were reimbursed by Meritain. By absorbing the cost of the objectionable products until any subsequent reimbursement, Notre Dame would be forced to directly pay for the provision of these objectionable products and services in violation of its religious beliefs. Affleck-Graves Aff. ¶ 53.

Finally, the Mandate imposes enough pressure on Notre Dame to constitute a "substantial burden." If Notre Dame refuses to facilitate the objectionable products and services through its health plans, it will be subject to fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700,

Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (Feb. 24, 2012) (asserting that this fine applies to employers that violate the "preventive care" provision of the Act). On the other hand, if Notre Dame seeks to exit the insurance market altogether, it could be subject to an annual fine of $2,000 per full-time employee after the first thirty employees. *See* 26 U.S.C. § 4980H(a), (c)(1). These penalties, which would amount to millions of dollars and inflict significant competitive harms, clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 penalty that was a substantial burden in *Yoder*. There is no doubt that the threat of such penalties compels Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related counseling in a manner that causes scandal in violation of its religious beliefs.

Notre Dame does not seek to impose its religious beliefs on anyone else, or "to require the government itself to conduct its affairs in conformance with [its] religion." *Kaemmerling*, 553 F.3d at 680. On the contrary, Notre Dame recognizes that notwithstanding its religious objections, it has no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else. Notre Dame simply invokes RFRA to enforce the law that the Government may not force Notre Dame, *in its own conduct*, to take actions that violate its religious conscience. In particular, the Government may not require Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related counseling. Nor can the Government force Notre Dame to contract with a third party administrator (or insurance provider) that will, as a result, provide or procure the objectionable products and services for Notre Dame's employees and students. By imposing these requirements, the Mandate is a straightforward effort that

"forces [Notre Dame] to engage in conduct that [its] religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

In sum, the Mandate leaves no way for Notre Dame to continue its operations in a manner consistent with its sincerely held religious beliefs. Instead, it forces Notre Dame to either abandon its beliefs by paying for, facilitating access to, and/or becoming entangled in the Government's scheme to provide the objectionable products and services, causing scandal in violation of its sincerely held religious beliefs, or violate the law and face severe penalties. *See* Affleck-Graves Aff. ¶¶ 36-61. Imposing this impossible dilemma constitutes a substantial burden on Notre Dame's religious exercise. *Id.*

2. The Government Cannot Demonstrate that the Mandate Furthers a Compelling Government Interest.

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31 "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in forcing "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430-31; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-26 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013). The Government cannot begin to meet this standard.

Even if the Government had some evidence as to the need to apply the Mandate to Notre

Dame, the Government's stated general interests in "public health" and "workplace equality" are too broad to satisfy the RFRA test. The Seventh Circuit has concluded that "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686. As the D.C. Circuit explained, the Government's stated interest is "sketchy and highly abstract," which prevents the Government from "demonstrate[ing] a nexus between this array of issues and the mandate." *Gilardi*, 2013 WL 5854246, at *10. The court held it was impossible to identify the public health problem the Government was "trying to ameliorate." *Id.* at *11.

Moreover, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143. At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotiation marks and alteration omitted); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297-98. Here, the Government cannot claim an interest of the "highest order" where it exempts millions of employees from the Mandate through grandfathering provisions and small-employer exemptions. The Government cannot plausibly maintain that Notre Dame's employees and students must be covered by the Mandate when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "Americans who like their health plan can keep it." HHS.gov, "U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on 'Grandfathered' Health Plans [U]nder the Affordable Care Act" (June 14, 2010) (Ex. E). An interest is hardly compelling if it can be trumped by political expediency. Such a broad exemption "completely undermines any

compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *see also Hobby Lobby*, 2013 WL 3216103, at *23; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 929 F. Supp. 2d 402, 433-34 (W.D. Pa. Mar. 6, 2013), *injunction granted*, 2013 U.S. Dist. LEXIS 85107 (W.D. Pa. June 18, 2013); *Tyndale*, 904 F. Supp. 2d at 128.

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act at issue already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.* Likewise, "everything the Government says" about its interests in requiring Notre Dame to facilitate access to the mandated products and services "applies in equal measure" to entities that meet the Mandate's definition of "religious employer," as well as the numerous other entities that are exempt from the Mandate for non-religious reasons.

That the Government's own religious employer exemption undermines its alleged compelling interest was confirmed in *Zubik* and *Persico*, where the court reasoned that the religious employer exemption "is an acknowledgment of the lack of a compelling governmental interest as to religious employers who hire employees for their 'houses of worship,'" and the Government's claim that there is such a compelling interest as to "a different religious

affiliated/related employer fails." *Zubik/Persico*, 2013 WL 6118696, at *29. Indeed, the court concluded that the Government's justification for the distinction between exempt and accommodated entities is "speculative and unsubstantiated by the record and, therefore, unpersuasive." *Id.*[7] Ultimately, the court court found there was no compelling interest *because of* the religious employer exemption:

> If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases.

Id.

Finally, the Government's interest cannot be compelling where the Mandate would only fill, at best, a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); HHS.gov, "A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius" (Jan. 20, 2012) (Ex. F). The Government, moreover, has adduced "no empirical data or other evidence . . . that the provision of the FDA-approved emergency contraceptives . . . would result in fewer unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies." *Beckwith v. Sebelius*, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013).

[7] The court also explained that recognizing such a compelling interest "would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and 'good works,' thereby entangling the Government in deciding what comprises 'religion.'" *Zubik/Persico*, 2013 WL 6118696, at *29; *see also infra* at Sect. I.E.2.

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to significantly impact contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013). As such, the Government cannot claim to have "identif[ied] an actual problem in need of solving," *Brown*, 131 S. Ct. at 2738 (internal marks and citation omitted), much less that its proposed solution will address the alleged problem in any meaningful way. *See Zubik/Persico*, 2013 WL 6118696, at *29 (holding that the Government provided no evidence that "women who receive their health coverage through employers like plaintiffs would face negative health and other outcomes"). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

3. The Government Cannot Demonstrate that the Mandate is the Least Restrictive Means to Achieve its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal quotations marks omitted). "A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest]

without infringing [religious exercise] rights.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). "Because this burden is placed on the Government, it must be the party to make this comparison." *Id.* The Government must demonstrate that "it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (explaining that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" that will achieve the government's stated goal) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

Joining every court to reach the issue,[8] *Korte* squarely held that the Mandate cannot survive strict scrutiny. 735 F.3d at 686-87. As the Seventh Circuit explained, "[s]trict scrutiny requires a substantial congruity—a close 'fit'—between the governmental interest and the means chosen to further that interest." *Id.* at 686. The Government "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Id.* By asserting sweeping interests in "public health" and "gender equality," the Government has "guarantee[d] that the mandate" will fail strict scrutiny because it is "impossible to show that the mandate is the least restrictive means of furthering" those broad

[8] *See Gilardi*, 2013 WL 5854246, at *10–13; *Hobby Lobby*, 723 F.3d at 1143–44; *Beckwith*, 2013 WL 3297498, at *16–18; *Geneva Coll*, 929 F. Supp. 2d at 433–35; *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune*, No. 12-cv-6756 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d at 1297–98.

interests. *Id.* Moreover, even assuming the Government has a compelling interest in the more specific goal of "broaden[ing] access to free contraception and sterilization"—an assumption that is "both contestable and contested"—the Mandate still fails strict scrutiny because "there are many ways to increase access to free contraception" without forcing Catholic entities to participate in the effort. *Id.*[9] Simply put, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing non-profit religious organizations to provide free contraception and related services. *Id.*; *see also Gilardi*, 2013 WL 5854246, at *11 ("[O]ur searching examination is impossible unless the government describes its purposes with precision."). That holding is dispositive and forecloses any inquiry into strict scrutiny in this case: if the Government cannot satisfy that test in the for-profit context, it certainly cannot do so in the non-profit context. Indeed, following *Korte* the Government conceded that it cannot satisfy the strict scrutiny test. *See Diocese of Ft. Wayne-South Bend, Inc. v. Sebelius*, No. 1:12-cv-159-JD-RBC, Defs.' Surreply in Opp. to Pls.' Cross-Motion for Summ. J. at 2, n.1 (N.D. Ind. Nov. 25, 2013) ("Defendants recognize that *Korte* forecloses their arguments that the regulations satisfy strict scrutiny. Defendants . . . recognize that *Korte* controls this Court's consideration of that part of this case . . . .").

In *Zubik* and *Persico*, the Western District of Pennsylvania found that in light of the Government's failure to meet its burden on compelling interest it "need not consider whether the

[9] *See also Gilardi*, 2013 WL 5854246, at *13 (stating that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate"); *Newland*, 881 F. Supp. 2d at 1299; *Beckwith*, 2013 WL 3297498, at *18 n.16 ("[F]orcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan*, 931 F. Supp. 2d at 808 (concluding, due to existing government programs, that "the Government has not established its means as necessarily being the least restrictive").

'accommodation' was the least restrictive means of meeting the stated compelling interests." *Zubik/Persico*, 2013 WL 611866, at *30. "Nevertheless," the court concluded that "the Government failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing those interests." *Id.* at *32; *see also id.* at *31. Indeed, "there is nothing in the record to establish, or even hint, that a broader 'religious employer' exemption, to include Plaintiffs . . . , would have any impact at all on 'the entire statutory scheme'", *id.* at *31, despite the Government's assertion that the "accommodation" was the "'only possible means' of furthering the two [alleged] compelling governmental interests . . . ." *Id.* at *30. In that case, all the Government could point to in support of its least restrictive means argument was one page of the Federal Register (78 Fed. Reg. at 39,888)—a page that "clearly announces that the alternatives to the current regulations—including the contraceptive mandate—would not advance the Government's interests 'as effectively as' the contraceptive mandate and the 'accommodation.'" *Id.* at *32 (emphasis in original). But, as the court noted: "Greater efficacy does not equate to the least restrictive means." *Id.*

Here, the Government has myriad ways to achieve its asserted interests without forcing Notre Dame to violate its religious beliefs. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Notre Dame and other Catholic non-profit organizations to comply with the Mandate by providing coverage for methods of family planning

consistent with Catholic beliefs (*i.e.*, Natural Family Planning training and materials).[10] Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's utter failure to consider these alternatives is fatal, because strict scrutiny requires a "serious, good faith consideration" of workable alternatives. *Grutter*, 539 U.S. at 339; *Zubik/Persico*, 2013 WL 6118696, at *31 (holding that the Government could not meet its burden to establish that the "accommodation" is the least restrictive means because it failed to "offer[] any evidence [in the administrative record] concerning: (1) the identity of all other possible 'least restrictive means' considered by the Government; (2) the analysis of each of the 'means' to determine which was the 'least' restrictive; (3) the identity of the person(s) involved in the identification and evaluation of the alternative 'means'; or (4) 'evidence-based' analysis as to why the Government believes that the 'accommodation' is the 'least restrictive means'").

B. <u>The Mandate Violates the Free Exercise Clause</u>

The Free Exercise Clause of the First Amendment embodies a "fundamental non-persecution 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. While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Employment Division v. Smith*, 494 U.S. 872, 881 (1990), it does require strict scrutiny of laws that *disfavor* religion. *See Lukumi*, 508 U.S. at 532. Thus, "[a] law

[10] Though Notre Dame takes no position here as to the desirability of such alternatives, *Korte* held that the same alternatives are viable, less restrictive means to advance the Government's interests in free contraception. *See Korte*, 735 F.3d at 686; *Gilardi*, 2013 WL 5854246, at *13 (same).

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 practioners 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. 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." Because it offers so many secular exemptions, the Government must give equal consideration to *all* claimants who seek similar exemptions on religious grounds. The Free Exercise Clause does not merely require equal treatment for *some* religious entities. Thus, 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." *Id.* 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. If so, then the only conceivable 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 core beliefs.

Finally, the Mandate is subject to strict scrutiny because it implicates the "hybrid" rights of religious believers. In *Smith*, 494 U.S. at 881-82, the Supreme Court noted that the Free Exercise Clause can "reinforce[]" other constitutional protections, such as freedom of speech and association, which are particularly important when religious beliefs and practices are at stake. The present case illustrates why. In order to carry out its religious mission, the Catholic Church must enjoy the freedom to associate in the form of religious schools and charitable organizations, including Catholic universities like Notre Dame, without being forced to violate its core beliefs. The Mandate denies it this freedom by effectively prohibiting it from forming schools and

charities unless they (a) provide or facilitate access to contraception, and (b) sponsor Government speech in the form of contraceptive "counseling." Thus, not only does the Mandate violate Notre Dame's rights of free speech and association, but the effect of these violations is to deny Notre Dame its ability to engage in religious schooling, which is an essential component of the Catholic religion.

C. 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 and 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.2d 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 pay for, facilitate access to, and/or become entangled in the provision of "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 cannot be forced to act as a mouthpiece in the Government's campaign to expand access to abortion and contraception.

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 third party administrator 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").

D. <u>The Mandate Imposes a Gag Order that Violates the First Amendment Protection of Free Speech</u>

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." *New York 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 Mandate violates this basic principle 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.

E. <u>The "Religious Employer" Exemption Violates the Establishment Clause</u>

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 groups 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.

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, however, rejected that argument, finding that the law discriminated among denominations 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." *Id.* 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 this principle of neutrality by establishing an official category of "religious employer" that favors some religious groups 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 8,461. This definition favors religious groups that fit into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that exercise their religious faith through alternative means—including religious organizations, like Notre Dame, which express their faith through their Catholic educational misions. As Cardinal Donald Wuerl stated, "[n]ever before has the government contested that institutions like Archbishop Carroll High School or Catholic University are religious. Who would? But HHS's conception of what constitutes the practice of religion is so narrow that even Mother Teresa would not have qualified." Cardinal Wuerl: Defending Our First Freedom In Court (Ex. G).

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.* (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984)).

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 non-profit 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 8,458. 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 had "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.

II. NOTRE DAME IS SUFFERING ONGOING IRREPARABLE HARM

Notre Dame is entitled to injunctive relief because the Mandate is causing it substantial irreparable harm. "It is well settled that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale*, 904 F. Supp. 2d at 129 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Id.* (citing *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006)) ("[The plaintiff] would certainly suffer an irreparable harm, assuming of course that it is likely to succeed on the merits of its RFRA claim.")).

The forced violation of Notre Dame's faith is the epitome of irreparable injury. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) (quoting *Flower*

Cab Co. v. Petitte, 685 F.2d 192, 195 (7th Cir. 1982)), for the proposition that the loss of First Amendment Freedoms constitutes irreparable harm because "quantification of injury is difficult and damages are therefore not an adequate remedy"). The Mandate forces Notre Dame to violate central tenets of its religious beliefs. *See* Affleck-Graves Aff. ¶¶ 11-24. Absent an injunction, the Government can begin enforcing the Mandate against Notre Dame before the final resolution of this case, while there is a serious question as to whether the Mandate violates the Constitution and other applicable law. Thus, every moment that passes without relief inflicts ongoing irreparable harm to Notre Dame's religious freedoms, confronting it with the impossible choice of violating its religious beliefs or violating the law. Because this is not the type of harm that can later be remedied by monetary damages, the injury is irreparable. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) ("[irreparable] harm . . . cannot be prevented or fully rectified by the final judgment after trial").

III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM FROM A PRELIMINARY INJUNCTION

The Government cannot possibly establish any substantial harm from a preliminary injunction pending final resolution of this case because it has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate against Catholic groups before its legality can be adjudicated. In addition, given that the Mandate already contains exemptions that by some estimates are available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot possibly claim that it will be harmed by this Court granting a temporary exemption for Notre Dame.

Indeed, any claim of harm is fatally undermined by the Government's acquiescence to preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, *Sharpe*

Holdings, Inc. v. HHS, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013) (Dkt. 10); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. 18). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087, at *41 (W.D. Pa. Apr. 19, 2013).

In short, when balanced against the irreparable injury to Notre Dame if the Mandate is enforced, any harm the Government might claim from a temporary injunction is *de minimis*.

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. For one thing, the Seventh Circuit has recognized that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859 (citing *Elrod*, 427 U.S. at 373); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."). This same reasoning should also apply to the rights protected by RFRA, which is meant to give religious exercise even greater protection than that provided under the First Amendment. *Cf., e.g.*, *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001). In particular, there is a "strong public interest in a citizen's free exercise of religion, a public interest clearly recognized by Congress when it enacted RFRA . . . ." *O Centro*, 389 F.3d 973, 1010 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006).

Here, public interest in a preliminary injunction is especially high because enforcement of the Mandate would detract from Notre Dame's educational mission, which serves thousands of students, including many from disadvantaged backgrounds. By contrast, no public harm

would come from simply preserving the *status quo* pending further litigation. Even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization—a highly dubious assumption—these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

NOTRE DAME REQUESTS A TEMPORARY RESTRAINING ORDER PENDING RESOLUTION OF THIS MOTION

While the Court is considering Notre Dame's request for preliminary injunctive relief, Notre Dame respectfully requests that the Court enter a temporary order restraining the Government from applying or enforcing the Mandate against Notre Dame, its health plans, participants in its health plans, or its third party administrators or insurers.

"To warrant a TRO, a plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) plaintiff will suffer irreparable harm if the TRO is not granted." *Superior Sales, Inc. v. Bakker Produce, Inc.*, No. 2:13-cv-26, 2013 WL 214251, at *1 (N.D. Ind. Jan. 18, 2013) (citing *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005)). "If these elements are satisfied, the Court must then balance the harm to the plaintiff if the restraining order is denied against the harm to the defendant if the restraining order is granted." *Id.* Notre Dame meets these standards, as detailed above, because (1) it is likely to succeed on the merits of all five counts of its Complaint, *see supra* Section I; (2) it has no adequate remedy at law, *see supra* Section II; and (3) it will suffer irreparable harm if a temporary restraining order is not granted, *see supra* Section II. Finally, the balance of harms weighs in favor of granting Notre Dame's request for a temporary restraining order. *See supra* Sections III-IV.

Furthermore, a temporary restraining order should be granted because it would preserve the *status quo* and prevent Notre Dame from suffering irreparable harm until the Court may consider Notre Dame's motion for preliminary injunction. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974). As described above, Notre Dame's third party administrator Meritain and prescription drug insurer Express Scripts informed Notre Dame on Friday, December 6 that, in order to meet the January 1, 2014 enforcement deadline, they would need to begin implementing the requirements of the Mandate starting Wednesday, December 11 or Thursday, December 12, including by sending communications, such as "Contraceptive Prescription ID Cards" and related objectionable counseling, to Notre Dame's female employees and any female dependents covered by its healthcare plans. The self-certification is a condition precedent to these communications, and Notre Dame would thereby be forced to facilitate access to and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of its sincerely held religious beliefs. These implementation requirements would result from Notre Dame's plan sponsorship and self-certification and would entangle Notre Dame in a manner that causes scandal in violation of Notre Dame's sincerely held religious beliefs. Affleck-Graves Aff. ¶¶ 64-65. Without the requested emergency relief, Notre Dame will be required to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products, contraception, sterilization, and related education and counseling, causing scandal in violation of its sincerely held religious beliefs. *Id.* This irreparable harm to Notre Dame's religious beliefs will occur before the Government's enforcement date of January 1, 2014, because Notre Dame will be required prior to that date to facilitate the Government's "accommodation," thus authorizing and triggering the objectionable coverage and the communications to Notre Dame's employees and

their dependants. *Id.* ¶ 64. If Notre Dame allows these communications to be sent, it would become associated with the U.S. Government Mandate in a way that causes scandal. *Id.* ¶ 65. Notre Dame requires immediate relief from the U.S. Government Mandate so that it will not be coerced to violate its religious beliefs through its forced participation in this Government scheme. *Id.* ¶ 66.

Without an order restraining enforcement of The U.S. Government Mandate against Notre Dame, the Mandate requires Notre Dame to do precisely what its sincerely held religious beliefs prohibit—pay for, facilitate access to, and/or become entangled in the provision of objectionable products and services. In addition to objectionable acts that will occur in the next few days, the enforcement date for the U.S. Government Mandate is January 1, 2014, which is rapidly approaching and requires emergency relief. Accordingly, Notre Dame respectfully moves this Court to issue a temporary restraining order to preserve the status quo while the Court further considers the merits.

CONCLUSION

For the foregoing reasons, Notre Dame respectfully requests that the Court adjudicate this motion on an expedited basis and grant Notre Dame's request for a temporary restraining order and preliminary injunction enjoining Defendants from any application or enforcement of the Mandate against Notre Dame, its health plans, participants in its health plans, or its third party administrators or insurers.

Respectfully submitted, this 11th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2013, I electronically filed the foregoing Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order and Motion for Preliminary Injunction with the Clerk of the United States District Court for the Northern District of Indiana using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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