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**

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The resolution of this case turns on the answer to a straightforward question: absent interests of the highest order, can the Government force religious organizations to take actions that violate their sincerely held religious beliefs?

The Government does not dispute that Notre Dame's sincerely held religious beliefs bar it from participating in a scheme to provide its employees and students with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Nor does the Government dispute that the regulations at issue here (the "Mandate") require Notre Dame to participate in just such a scheme on pain of substantial financial penalties. Rather, the Government contends that if Notre Dame participated in this scheme, its involvement would be "*de minimis*." Indeed, the Government finds it "[r]emarkabl[e]" that Notre Dame objects to a Mandate that—according to the Government—"require[s] virtually nothing" of it.

Nothing, however, could be further from the truth. The Mandate compels Notre Dame to do precisely what it believes to be wrong: become enmeshed in the provision of coverage for abortion-inducing products, contraceptives, sterilization, and related education and counseling (the "objectionable products and services") to its employees and students. Notre Dame must find a third party willing to provide the mandated coverage, contract with that party, and subsequently authorize that party, via a compelled certification, to provide the very products and services to which Notre Dame objects.[1] Those products and services, moreover, would be offered to Notre Dame's employees and students only so long as they remain on Notre Dame's health plans. In fact, as the Government has conceded, "technically, the contraceptive [and other objectionable] coverage is part of the [Notre Dame] plan . . . ." Nov. 22, 2013 Hr'g Tr. in

[1] Notre Dame has been informed that, in order to meet the January 1, 2014 enforcement deadline, its third party administrator Meritain Health, Inc. ("Meritain") and/or its prescription drug provider Express Scripts would need to begin implementing the requirements of the Mandate starting Friday, December 20, including providing eligibility information and thereafter sending communications to Notre Dame's female employees and any female dependents covered by its healthcare plans informing them about the availability of FDA-approved contraceptive methods and enclosing a Contraceptive Prescription ID Card. Affleck-Graves Aff. (Doc. 10) ¶¶ 64-66; Supplemental Affidavit of John Affleck-Graves ("Affleck-Graves Suppl. Aff.) ¶ 14; *see also* Affidavit of Meritain Health, Inc. ¶¶ 1-5.

Archbishop of Washington, et al. v. Sebelius, et al., No. 1:13-cv-01441-ABJ, D.D.C. (relevant portion attached as Ex. A) at 18. Once offered, until later credited by a third party, Notre Dame pays the cost of these objectionable products and services, which would be available at facilities on Notre Dame's campus. And such products and services will be obtained through "cards" that participants will carry by virtue of their relationship with Notre Dame. The Mandate thus forces Notre Dame to violate its religious beliefs by taking specific actions that entangle it in the provision of the mandated coverage in a manner that creates "scandal."

Indeed, it is impossible for Notre Dame to disentangle itself from the Mandate. It cannot, for example, offer a group health plan that does not provide access to the objectionable services. Nor may it drop health coverage altogether. Either of those actions would subject it to crippling fines and other negative consequences. In this regard, the Government's vaunted "accommodation" is materially indistinguishable from the regulation applicable to for-profit entities enjoined by the Seventh Circuit in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013). Both require employers to offer health plans that cover contraceptives (again, even for Notre Dame, the Government concedes that "the contraception coverage is part of the plan," *Archbishop of Washington v. Sebelius, et al.,* Tr. at 18). The only difference is that the coverage is written into Notre Dame's plans in invisible ink. The Mandate thus clearly imposes a substantial burden on Notre Dame's religious exercise.

The Government seeks to avoid this simple conclusion by fundamentally transforming the substantial burden inquiry. It asks this Court not to evaluate the *legal* question of whether the Mandate places a substantial burden on Notre Dame's exercise of religion, but instead, to make a *religious* judgment that the actions required by the Mandate are "*de minimis*" or too "attenuated" to be significant violations of Notre Dame's beliefs. This radical transformation of the substantial-burden test has been squarely rejected by the Seventh Circuit—and indeed, by every appellate court to consider the question in the context of the Mandate. *See Korte*, 735 F.3d at 682–85; *Gilardi v. U.S. Dep't of Health & Human Services*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (*en banc*);

see also Zubik, et al. v. Sebelius, et. al., No. 2:13-cv-01459, 2013 WL 6118696, at *24 (W.D. Pa. Nov. 21, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542 (E.D.N.Y. Dec. 16, 2013) ("*New York* Slip op.") (Slip op. attached as Ex. B).[2] And for good reason. Such a test would require this Court to "rule that [Notre Dame]"—which sincerely believes it cannot participate in the mandated scheme—"misunderstand[s] [its] own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). This approach "cannot be squared with the Constitution or [Supreme Court] precedents," *id.*, which squarely hold that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982); *Korte*, 735 F.3d at 682–83. Instead, the test is limited to an inquiry into the sincerity of plaintiff's beliefs and the degree of pressure the Government places on it to violate those beliefs. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Korte*, 735 F.3d at 682–84; Mot. for Prelim. Inj. ("Pl. Br.") (Doc. 18) at 13–27.

Thus, the question for this Court is not whether compliance with the Mandate is a *substantial violation* of Notre Dame's religious beliefs; instead, the question is whether the Mandate *substantially pressures* Notre Dame to violate those beliefs. *Thomas*, 450 U.S. at 717–18. Here, once the moral "line" drawn by Notre Dame is properly identified, *id.* at 715, it is readily apparent that the Mandate places substantial pressure on Notre Dame to cross that line. In accordance with Catholic teaching, Notre Dame opposes creating scandal by taking the actions required by the Mandate to facilitate access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. The Mandate, however, threatens Notre

[2] Plaintiff's arguments are bolstered by the preliminary injunctions granted in *Zubik* and *Archdiocese of New York*, which are the only decisions in the country to analyze application of the Mandate to "accommodated" eligible organizations. Plaintiff has extensively briefed the well-reasoned *Zubik* opinion, which explicitly rejected all of the arguments the Government proffers here, yet the Government dismisses it in a single footnote. The Government also accuses the *Zubik* court of rendering its opinion "without citation to any legal authority," Gov't Br. at 11 n.6 (citing *Zubik*, 2013 WL 6118696, at *24–27), but that characterization is grossly unfair to the *Zubik* court's analysis, *see* 2013 WL 6118696, at *23–32 (discussing cases), which has now been confirmed by *Archdiocese of New York*.

Dame with millions of dollars in fines and other negative consequences if it does not do precisely "what [its] religion [says it] must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

Accordingly, for the same reasons detailed by the Seventh Circuit in *Korte*, the Mandate is irreconcilable with the Religious Freedom Restoration Act ("RFRA") and should be enjoined. If this Court agrees, it need not address the other issues in this case, but regardless, Notre Dame is similarly entitled to an injunction on its claims that the Mandate violates the First Amendment.

ARGUMENT

I. NOTRE DAME IS LIKELY TO SUCCEED ON THE MERITS

A. The Mandate Violates the Religious Freedom Restoration Act

The Government concedes that its strict-scrutiny arguments have been foreclosed by *Korte*. Defs.' Mem. in Opp'n ("Gov't Br.") at 16. The only remaining question under RFRA, therefore, is whether the Mandate imposes a "substantial burden" on Notre Dame's religious beliefs. On that issue, too, however, *Korte* is dispositive. Accordingly, Notre Dame is entitled to injunctive relief.

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

Where plaintiff's sincerity is not in dispute, RFRA's substantial burden prong 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. *Hobby Lobby*, 723 F.3d at 1140 (*en banc*); *see also Korte*, 735 F.3d at 682–84; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise"); Pl. Br. at 13–27. Under the first step, the court's inquiry is necessarily "limited"; its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must

therefore accept plaintiff's description of their religious exercise. *Id.* at 714–15; Pl. Br. at 14–17. Under the second step, the court must determine whether the Government has substantially burdened that exercise by compelling an individual "to perform acts undeniably at odds" with his beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 12, 16–18.

Here, it is clear that the Mandate substantially burdens Notre Dame's exercise of religion. Notre Dame exercises its religion by, inter alia, refusing to take certain actions that create scandal and facilitate access to the mandated coverage. The Mandate, however, requires Notre Dame to take precisely those actions that its religious beliefs forbid. Affidavit of John Affleck-Graves ("Affleck-Graves Aff.") (Doc. 10) ¶ 20. This Court is bound to accept Notre Dame's representations regarding its beliefs, the sincerity of which the Government does not dispute. Thus, the only question is whether the Mandate substantially pressures Notre Dame to act contrary to those religious beliefs. As the Mandate forces Notre Dame to (1) violate its religious beliefs, or (2) pay crippling monetary penalties and suffer other negative consequences,[3] the Government has "placed enormous pressure on [Notre Dame] to violate [its] religious beliefs and conform to its regulatory mandate." *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1218; *Hobby Lobby*, 723 F.3d at 1140.

The Government finds this straightforward analysis "[r]emarkabl[e]." Gov't Br. at 2. Arguing that the Mandate requires "virtually nothing" of Notre Dame and that its involvement is "*de minimis*," *id.* at 2, 10–16, the Government's brief is an extended effort to convince this Court that the Mandate is "no big deal." For Notre Dame, however, the Mandate is a very big deal, and the Government has no right to suggest otherwise. Contrary to the Government's claims, the Mandate forces Notre Dame, itself, to take actions that violate its beliefs. More significantly, the

[3] *See* Affleck-Graves Aff. ¶ 56 (Doc. 10).

Government's arguments rest on a fundamentally flawed understanding of the substantial burden inquiry that conflates the two steps described above.

(a) The Mandate Requires Notre Dame to Act in Violation of Its Sincerely Held Religious Beliefs

The Government argues that the Mandate requires Notre Dame to engage in almost no action, and therefore, cannot violate RFRA. Gov't Br. at 2, 10–16. Nothing could be further from the truth. Notre Dame objects not only to the use of abortion-inducing drugs, sterilization, contraceptive products and services themselves, but also to being forced to facilitate the provision of such items in a manner that violates the Catholic doctrine of scandal. As explained by the district court in *Archdiocese of New York*, "Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services." *New York* Slip op. at 26. What matters is that Notre Dame is required to provide a health care plan that serves as the vehicle for the delivery of abortion-inducing products, contraceptives, sterilization, and related counseling. Towards that end, Notre Dame must locate a third party willing to provide the services it deems objectionable, enter into a contract with that party that will result in the provision of those services, and authorize the provision of those services through self-certification. Pl. Br. at 16, 23–25. And despite the Government's claims, Notre Dame's funds will also subsidize the provision of these services. *Id.* at 24–25.

Indeed, for all practical purposes, the Mandate as applied to Notre Dame is indistinguishable from the requirements invalidated by the Seventh Circuit in *Korte*, the en banc Tenth Circuit in *Hobby Lobby*, and the D.C. Circuit in *Gilardi*. In those cases, a private employer's decision to offer a group health plan automatically resulted in the provision of the mandated coverage. So too here, Notre Dame's decision to offer a health plan automatically results in coverage for the objectionable products and services. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the benefits are directly tied to the employers' health plans: they are available only "so long as [employees] are enrolled in [the organization's] health plan, " 29 C.F.R. § 2590.715-2713A, they must be provided "in a manner consistent" with the provision of

explicitly covered health benefits, 78 Fed. Reg. at 39, 870, 39,876–77 (July 2, 2013), and they will be offered only to individuals the organization identifies as its employees. Thus, the Government's (repeated) claim that Notre Dame need not "arrange" for contraceptive coverage, *e.g.*, Gov't Br. at 1, 2, 3, 6, 7, 16, is manifestly false. More importantly, however, what matters for purposes of RFRA is that Notre Dame has an "'honest conviction'" that the actions detailed above violate its religious beliefs. *Korte*, 735 F.3d at 683. By compelling Notre Dame to take such actions, the Mandate "force[s Notre Dame] to engage in conduct that [its] religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). While the Government may find it "[r]emarkabl[e]" that Notre Dame holds such beliefs, Gov't Br. at 2, RFRA protects Notre Dame's religious exercise regardless of whether the Government finds it "acceptable, logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714–15.

The Government is thus wrong to claim that this case is analogous to situations where a plaintiff states a religious objection to an "'activit[y] of [a third party], in which [he] play[ed] no role.'" Gov't Br. at 13 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). In *Kaemmerling*, the plaintiff objected "to the government collecting his DNA information from any fluid or tissue sample" *already in the government's possession*. 553 F.3d at 678. Notably, Kaemmerling did not object to the process by which the Government obtained samples of his blood, saliva, skin, or hair. *Id.* He objected only "to the government extracting DNA information from . . . specimen[s]" they already had. *Id.* at 679. The D.C. Circuit thus concluded that Kaemmerling failed to state a claim under RFRA because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* The extraction of DNA from samples already in the Government's possession involved "no action" by Kaemmerling, and thus imposed no "restriction on what Kaemmerling c[ould] believe or do." *Id.* at 679–80.[4] Importantly, Kaemmerling did not allege religious beliefs (such as the

[4] The reasoning of *Kaemmerling* was derived largely from *Bowen v. Roy*, 476 U.S. 693 (1986). In that case, the Supreme Court concluded that Roy failed to establish that his religious exercise was substantially burdened when he objected to the conduct of a third party, namely, to the government's use of a social security number to administer his daughter's public welfare

theological concepts of entanglement and scandal that Notre Dame holds here) that caused Kaemmerling to object to giving the samples themselves.

Here, in contrast, provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Notre Dame] plays no role." *Id.* To the contrary, as described above, Notre Dame objects to the requirements the Mandate imposes on the University to impermissibly create scandal by taking actions that entangle the school in the provision of the mandated coverage. Indeed, even the Government concedes that the Mandate forces Notre Dame to participate at *some* level in the mechanism by which its employees and students receive contraceptive coverage. *E.g.*, Gov't Br. at 2. This case thus involves a straightforward application of the long-settled principle that, absent interests of the highest order, the Government cannot force individuals—in their own conduct—to take actions that violate their religious beliefs. *See New York* Slip op. at 26-27 (distinguishing *Kaemmerling*).

(b) The Government's Arguments Rest on a Fundamentally Flawed Understanding of the Substantial Burden Test

The Government also argues that the Mandate imposes only a *de minimis* burden on Notre Dame's exercise of religion.[5] But the Government's "insistence that the burden is trivial or nonexistent simply misses the point of this religious liberty claim." *Korte*, 735 F.3d at 684.

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benefits. *Id.* at 700. Roy, however, also objected to the requirement that *he provide* the government with his daughter's social security number in order for her to receive benefits. *Id.* at 701–712 (opinion of Burger, C.J.). Though it did not decide the question due to a dispute over mootness, a majority of the Court would have held that this requirement imposed a substantial burden on Roy's exercise of religion. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

[5] The Government briefly claims that the burden on Notre Dame's religious exercise is "too attenuated to be substantial." Gov't Br. at 15. Even assuming this argument is anything more than a "different twist" on its *de minimis* argument, *Korte*, 735 F.3d at 684, the Government acknowledges that this Court is bound by the Seventh Circuit's rejection of the argument in *Korte*. Gov't Br. at 15–16; *see also Korte*, 735 F.3d at 685, at *24 (stating that to argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to impermissibly "purport[] to resolve the religious question underlying [this] case[]"); *see also Gilardi*, 733 F.3d at 1217 (rejecting argument that the burden imposed by the Mandate was "too remote and too attenuated" to be substantial").

Under the Mandate, Notre Dame's decision to obey its religious beliefs would subject it to crippling fines and other negative consequences—an obvious substantial burden. Defendants' contrary argument rests on a fundamental misunderstanding of the substantial burden test. Once a plaintiff's sincere religious beliefs have been identified, a court's "only task is to determine whether" "the government has applied substantial pressure on the claimant to violate [those] belief[s]." *Hobby Lobby*, 723 F.3d at 1137. Indeed, an understanding of substantial burden that looks beyond "'*the intensity of the coercion* applied by the government to act contrary to those beliefs,'" *Korte*, 735 F.3d at 683, is "fundamentally flawed." *Hobby Lobby*, 723 F.3d at 1137.

By nonetheless arguing that the actions required of Notre Dame are *de minimis* and too attenuated to merit relief, the Government has misinterpreted RFRA to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on Notre Dame's exercise of religion. Indeed, this is the only plausible explanation for the Government's otherwise risible assertion that "the regulations place no burden at all on plaintiff," Gov't Br. at 12, as one can hardly maintain that the threat of millions of dollars in fines does not place substantial pressure on Notre Dame to violate its religious beliefs. The Governments' flawed understanding of the substantial burden test fails for two reasons.

(i) RFRA Protects "Any Exercise of Religion"

As an initial matter, the Government's reading is plainly contrary to the statutory text. RFRA protects "'*any* exercise of religion . . . *whether or not compelled by, or central to, a system of religious belief*." *Korte*, 735 F.3d at 682 (quoting 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)). RFRA contains no requirement that the actions required of a plaintiff be "significant" or "substantial": "any exercise of religion" is protected. *Id.* Here, because Notre Dame's refusal to become enmeshed in a scheme to provide access to the mandated coverage clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a protected exercise of religion for purposes of RFRA.

Contrary to the Government's contention, this interpretation does not "ignore" RFRA's use of the "term 'substantial.'" Gov't Br. at 14. It simply puts the term in its proper place—

modifying "burden" rather than "exercise of religion." As is plain from the statutory text, "substantial[]" refers not to the type of actions required of a plaintiff—*i.e.*, its religious exercise—but rather the type of pressure imposed by the Government —*i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("*Government* shall not substantially burden a person's exercise of religion." (emphasis added)). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice," *Korte*, 735 F.3d at 683—it has nothing to do with the nature of Notre Dame's religious exercise.

Thus, in evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercion employed by the government, rather than the "significance" of the actions required of a plaintiff. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh Day Adventist plaintiff of working on Saturday was "*de minimis*." Gov't Br. at 10. Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to forgo [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404. Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory producing tank turrets "require[d him] to change his behavior in any significant way." Gov't Br. at 3. Rather, the Court evaluated the "coercive impact" of the State's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." *Thomas*, 450 U.S. at 717–18.

In short, as recognized by the district court in *Archdiocese of New York*, the Government's argument—"which essentially reduces to the claim that completing the self-certification places no burden on plaintiffs' religion because 'it's just a form'— finds no support in the case law. . . . [W]here a law places substantial pressure on a plaintiff to perform

affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*." *New York* Slip op. at 24 (citing cases).

For much the same reasons, the Government is equally wrong to suggest that RFRA's protections are limited to laws that require a plaintiff to significantly modify its conduct. Gov't Br. at 11–12, 15. The touchstone of the substantial burden analysis, rather, is whether a plaintiff is compelled to act in violation of its religious beliefs. *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry "begin[s]" with an assessment of whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 398 (same); *Korte*, 735 F.3d at 682 ("At a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.'" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1971)). The question is not whether the believer must modify his behavior compared to actions he has taken in the past, but whether he must modify his behavior compared to what he would do if free to follow his religious conscience. For example, an anesthesiologist would theoretically perform the same procedure for a knee surgery and an abortion. If, however, the anesthesiologist was a devout Roman Catholic opposed to abortion, the Government could not compel her to perform that identical act contrary to her beliefs. If the circumstances make conduct immoral, then the Government cannot compel it under threat of fines.

In any case, as noted above, the Mandate *does* force Notre Dame to modify its behavior: in the past, Notre Dame has always sought to enter into health insurance contracts with companies that would *not* provide contraceptive coverage to its employees and students. Affleck-Graves Aff. ¶ 44. Under the Mandate, Notre Dame must now enter contracts with companies that *will* provide the objectionable coverage. Notre Dame is also required to take numerous additional steps as part of the overall scheme. *See supra* p. 6. All of these actions cause Notre Dame to act in a way that would lead many to believe that Notre Dame condones the use of these objectionable products and services, thereby creating scandal. Accordingly, even

under the Government's erroneous understanding of the law, Notre Dame is required to modify its behavior in a way that runs directly contrary to its sincerely held religious beliefs.

Because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), the Government's attempt to distinguish *Korte* is wholly unavailing. Gov't Br. at 14–15. As *Korte* makes clear, the precise nature of the religious exercise at issue *is irrelevant* to the substantial burden analysis. 735 F.3d at 682–84. The court's only task is to determine whether the asserted exercise—whatever that may be—is sincere and religious and then to assess the "coercive effect of the governmental pressure on the adherent's religious practice." *Id.* at 683. Thus, it is immaterial that the plaintiffs in *Korte* exercised their religion by refusing to "purchase the required contraception coverage," 735 F.3d at 668, while Notre Dame exercises its religion by refusing to become entangled in the process by which a third party will pay for the objectionable products and services: what matters is that in this case, as in *Korte*, the Mandate forces Notre Dame to act contrary to its religious beliefs. As Judge Sykes explained: "[t]he contraception mandate forces [plaintiffs] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.* at 685.

(ii) Improper Evaluation of Religious Beliefs

The Government's reading of RFRA also impermissibly "cast[s] the Judiciary in a role that [it was] never intended to play." *Lyng*, 485 U.S. at 458. Rather than evaluating whether the pressure placed on Notre Dame to violate its beliefs is "substantial," the Government would have this Court determine whether compliance with the Mandate is a "substantial" violation of Notre Dame's religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. As the Seventh Circuit explained, the Government's interpretation of RFRA would have this Court "resolve the religious questions underlying th[is] case: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. But obviously, "[n]o civil authority can decide that question." *Id.* The judiciary has no competence to determine the significance of a particular religious act; "[i]t is not within the

judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Korte*, 735 F.3d at 682–83. Rather, it is left to Notre Dame to "'dr[a]w a . . . line'" regarding the actions their religion deems permissible, and once that line is drawn, it "'is not for [courts] to say [it is] unreasonable.'" *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 715).

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is "significant" or "meaningful" is self-evident. Gov't Br. at 3, 11. On the Government's theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de mimimis*" act. *Id.* at 13. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] virtually nothing of [him]." *Id.* at 2. No "principle of law or logic" equips a court to decide the "significan[ce]" or "meaning[]" of these acts. *Smith*, 494 U.S. at 887; Gov't Br. at 3, 11. As stated by the district court in *Archdiocese of New York*, "There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection." *New York* Slip op. at 25. What may be "no big deal" to the Government may be a very big deal to a believer. [6] That is exactly the case here: "The non-exempt plaintiffs are required to complete and submit the self-certification, which authorizes a third-party to provide the contraceptive coverage to which they object. They consider this to be an endorsement of such coverage; to them, the self-certification 'compel[s] affirmation of a repugnant belief.' It is not for this Court to say otherwise." *Id*. at 25 (quoting *Sherbert*, 374 U.S. at 402).

[6] That Notre Dame is free "to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive services," Gov't Br. at 3, does not remedy the RFRA violation. This is not a case where believers merely want to express a religious viewpoint and the government has limited the channels for expression. Rather, Notre Dame is forced to take actions that violate its religion. *See, e.g.*, *Thomas*, 450 U.S. at 713–18 (concluding that compelling plaintiff to take action that would violate his pacifist beliefs imposed a substantial burden, without analyzing whether his beliefs could be expressed in other ways, such as participation in antiwar demonstrations). No amount of counter-speech can cure that harm.

In short, if Notre Dame interprets the "creeds" of Catholicism to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [Notre Dame's] interpretation[]." *Hernandez*, 490 U.S. at 699. Thus, in *Thomas*, the Supreme Court did not ask whether working at a factory that manufactured tank turrets—as opposed to being handed a gun and sent off to war—was a "meaningful" breach of the pacifist convictions of a Jehovah's Witness. 450 U.S. at 713–18. Rather, the Court credited the moral line the plaintiff drew. *Id.* at 715. Likewise in *Lee*, the Court rejected the Government's contention that payment of social security taxes was too "[in]significant" a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, the Court readily accepted the plaintiffs' representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257. "As the Supreme Court accepted the religious belief in *Lee* [and *Thomas*,] so must [this Court] accept [Notre Dame's] beliefs." *Hobby Lobby*, 723 F.3d at 1141.[7]

Likewise, there is no merit to the argument adopted by some courts that there is no meaningful distinction between the payment of wages and the provision of contraceptive coverage. *E.g.*, *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012). That conclusion involves "impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). Whether one action (paying wages that may be used to purchase contraceptives) is morally indistinguishable from another (providing access to coverage for contraceptive services) is a question for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable

[7] As the *Hobby Lobby* court explained, the religious belief in *Lee* was similar to the belief at issue here. Part of the objection to paying into the social security system was that it would "enable other Amish to shirk their duties toward the elderly and needy." 723 F.3d at 1139. "Thus, the belief at issue in *Lee* turned in part on a concern of facilitating others' wrongdoing." *Id.*; *id.* at 1137 (rejecting the notion that there is no "RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties"). Notre Dame "stand[s] in essentially the same position as the Amish carpenter in *Lee*, who objected to" "enabl[ing] someone else to behave in a manner he considered immoral." *Id.* at 1141.

observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Indeed, even if it were "unreasonable" for religious believers to draw a line between becoming entangled in a scheme to provide access to contraceptive coverage and providing a salary that could be used to purchase contraceptives, it would not be for a court to second-guess that line. *See Thomas*, 450 U.S. at 715–16 (refusing to question a line between manufacturing raw material for the production of tanks and using that material to fabricate tanks). What matters is whether the religious belief is sincere, not whether it is "reasonable."

But in any case, the line drawn by Notre Dame is eminently reasonable. Employees may use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary belongs to the employee, and the employer has no input into its use. But when an employer complies with the Mandate, it causes its employees to be furnished with a health plan "coupon" that can *only* be redeemed for contraceptives—as often as the employee chooses, and as long as the employment relationship lasts. The employer is thus knowingly entangled in the provision of contraceptive coverage, making such action qualitatively different from leaving it up to employees to use their paychecks as they see fit.

Finally, it is important to understand what Notre Dame is not saying. Notre Dame does not contend that the "mere fact" it "claims" the Mandate "imposes a substantial burden on [its] religious exercise" "make[s] it so." Gov't Br. at 14. Far from it. This Court need only accept Notre Dame's description of its religious exercise. *Supra* pp. 4–5, 12–14. The Court must still proceed to step two and conduct an independent assessment of whether the Government is substantially pressuring Notre Dame to violate its religious beliefs. *Id.* at 4–5. Here, that inquiry is simple, as the Government imposes crippling fines on Notre Dame if it refuses to comply with the Mandate.[8]

[8] Thus, despite the Government's evident concern, this standard does not give religious actors carte blanche to exempt themselves from federal law. Even after accepting a plaintiff's description of its religious exercise, courts still must evaluate whether (1) the belief is sincerely held, (2) the belief is religious in nature, (3) the law places "substantial pressure" on adherents to

* * *

At bottom, the Government's argument reflects a misunderstanding of Notre Dame's religious objection. Notre Dame objects not only to the use of contraceptives, but also to facilitating or becoming enmeshed in a scheme that will provide those services in a way that leads others to believe that Notre Dame condones their use. *Cf. Hobby Lobby*, 723 F.3d at 1140; *Korte v. Sebelius*, No. 12-3844, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012). Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may a Catholic violate the moral law if in certain circumstances he facilitates or becomes otherwise entangled in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

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

723 F.3d at 1152 (Gorsuch, J., concurring). Notre Dame's faith has led it to the conclusion that the actions required of it by the Mandate cross the "line" between permissible and impermissible entanglement in wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably the University's to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Notre Dame to cross this line, the Government has substantially burdened Notre Dame's exercise of religion.

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modify their beliefs, (4) the Government has a "compelling interest" in the law, and (5) the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b). Likewise, courts need not accept claims "so bizarre, so clearly nonreligious . . . , as not to be entitled to protection." *Thomas*, 450 U.S. at 715. For decades, these safeguards have prevented religious actors from becoming a law unto themselves. *Hobby Lobby*, 723 F.3d at 1141 n.16. And finally, the actual religious beliefs themselves provide a limit. Notre Dame has not alleged a religious belief that would challenge the Government providing the products and services directly. The Government's proposed examples, such as payment through Medicaid, are not implicated by Notre Dame's beliefs.

Finally, Notre Dame wishes to briefly respond to the Government's assertion that this litigation is nothing more than an attempt to "to prevent anyone else from providing [the mandated] coverage." Gov't Br. at 12. That is simply not the case. In comment letters, in numerous filings, and in repeated public statements, Notre Dame's only request has been to be excluded from the process by which the objectionable products and services are delivered. As Fr. John Jenkins, President of the University, has explained: "Our abiding concern . . . has been Notre Dame's freedom—and indeed the freedom of many religious organizations in this country—to live out a religious mission . . . . We have sought neither to prevent women from having access to services, nor even to prevent the government from providing them."[9] If the Government believes all women must be provided with free abortion-inducing products, sterilization, and contraceptives, Notre Dame asks only that the Government not force it to participate in that effort. Indeed, Notre Dame has suggested as a potential less restrictive means that the Government itself provide contraceptive services to women. Pl. Br. at 31–35. The claim that Notre Dame seeks to use RFRA "to prevent anyone else from providing" individuals with contraceptives is, therefore, a baseless distortion of Notre Dame's sincerely held religious beliefs.

B. The Mandate Violates the Free Exercise Clause

As explained in Notre Dame's initial brief, the Mandate violates the Free Exercise Clause because it is neither generally applicable nor neutral with respect to religion. Pl. Br. at 35–38. The Mandate is not "generally applicable" because it exempts millions of employers and individuals. *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 435–37 (W.D. Pa. 2013); *Sharpe Holdings v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012). And the Mandate is not "neutral" because it targets Notre Dame's religious practices. Despite the Government's claims, this case is simply not analogous to *Employment Division v. Smith*. *Smith* addressed an "across-the-board criminal prohibition,"

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

holding that religious beliefs cannot trump the Government's power to "enforce generally applicable prohibitions of socially harmful conduct." 494 U.S. at 884–85. That is a far cry from the present case, where the process of implementing the Mandate was "replete with examples of the government . . . exempting vast numbers of entities while refusing to extend the religious employer exemption to include entities like" Notre Dame. *Geneva Coll.*, 929 F. Supp. 2d at 437.

The Government claims that the Mandate is not discriminatory because these exemptions are available to "objectively defined categories of entities." Gov't Br. at 17. But there is nothing "objective" about the Government's categories, which necessarily reflect value judgments as to which interests are sufficiently important to merit an exemption from the Mandate. The Government has apparently determined that various economic and logistical concerns merit an exemption for grandfathered plans and a partial exemption for small employers. As the Third Circuit has observed, the creation of these sorts of "categorical exemption for individuals with a secular objection but not for individuals with a religious objection" directly implicates the concerns that animated *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); namely the prospect of the government "deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J). In short, even assuming "general applicability does not mean absolute universality," Gov't Br. at 17, the "fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best." *Geneva Coll.*, 929 F. Supp. 2d at 437.

C. The Mandate Violates Notre Dame's Freedom of Speech

The Mandate impermissibly compels speech in two ways. First, it requires Notre Dame to facilitate access to "counseling" related to the mandated coverage. Second, the "accommodation" requires Notre Dame to provide a "certification" that effectively authorizes a third party to procure coverage for the objectionable products and services for its employees and students. Pl. Br. at 38–39.

As to the counseling requirement, the Government claims, incredibly, that the counseling required need not support the use of the objectionable products and services. Gov't Br. at 21. This disavowal is incompatible not only with the description of such services in the IOM Report,[10] but also with the Government's claims elsewhere that the Mandate serves an allegedly compelling interest in promoting the use of contraceptives. But even if the requirement only covers contraception as a topic, it still impermissibly deprives Notre Dame of the freedom to speak on the mandated coverage on its own terms. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011). And the protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).[11]

As for the required certification, the Government attempts to dismiss this requirement as mere speech incidental to the regulation of conduct, citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("FAIR"). Gov't Br. at 20–21. But the Government's breezy invocation of this complex First Amendment doctrine ignores the fact that certification is a trigger for the provision of services to which Notre Dame objects. The Supreme Court has held that such arrangements violate the First Amendment, striking down a state law that made speech supporting a privately funded candidate the trigger for his opponent's receipt of public financing. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011) ("[F]orcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes . . . the First Amendment . . . ."). Moreover, in *FAIR*, the plaintiffs

[10] IOM Report at 107, *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-services-for-Women-Closing-the-Gaps.aspx (relevant pages attached as Ex. C) ("Education and counseling . . . provide information about the availability of contraceptive options, elucidate method-specific risks and benefits . . ., and provide instruction in effective use of the chosen method.").

[11] While Notre Dame may "express whatever views they may have on" contraception, Gov't Br. at 20, the Government cannot force it "to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15–16 (1986) (plurality op.).

were not required to make any statement about any of their views. This case, therefore, is akin not to *FAIR*, but to *Agency for International Development v. Alliance for Open Society International, Inc.*, where the Supreme Court struck down a requirement that applicants for a government program certify their opposition to prostitution and sex trafficking. 133 S. Ct. 2321, 2326 (2013). There, the Court did not give any credence to the proposition that a statement, required to access a government benefit, could be speech incidental to conduct merely because it was made on an application. This Court should similarly disregard the Government's characterization of the certification requirement here.

D. The Mandate Imposes a Gag Order that Violates The First Amendment

The Mandate also violates the First Amendment by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir TPA's] decision" to procure the mandated coverage. 26 C.F.R. § 54.9815–2713A(b)(iii); Pl. Br. at 39–40. While the Government claims this rule prohibits only "an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party" through the use of "threat[s]," Gov't Br. at 22, that limitation appears nowhere in the regulation. Indeed, the regulation prohibits *any* attempt to "influence" TPAs. Thus, Notre Dame could not, for example, publicly announce "we refuse to contract with a TPA that will provide free contraception to our employees."[12]

[12] The Government's assertedly "analogous" cases provide no support for the gag order. Gov't Br. at 22. Both cases involved circumstances where one party was "economically dependent" on the other, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), or particularly susceptible to pressure, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978). Here, TPAs are not obliged to contract with objecting employers, 78 Fed. Reg. at 39,880, and the Government has not shown they are so "economically dependent" on Notre Dame as to be susceptible to coercion.

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

The "religious employer" exemption violates the Establishment Clause in two ways. First, it creates a category of "religious employers" favoring some religious groups over others. Second, it fosters excessive entanglement between government and religion. Pl. Br. at 40–44.

1. Discrimination Among Religious Groups

The Government maintains that the Mandate does not "discriminate among religions" because it does not refer to any particular denomination and is "available on an equal basis to organizations affiliated with any and all religions." Gov't Br. at 23–25. For the same reasons these arguments failed to carry the day in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), they cannot prevail here.

Like the appellants in *Larson*, the Government maintains that "a statute's disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria." 456 U.S. at 246 n.23. But regardless of whether the Mandate refers to any particular denomination, the exemption plainly favors "houses of worship" or "religious orders" and the denominations that primarily rely on them to carry out their ministry, while disadvantaging groups that exercise their faith through alternative means. The Mandate is thus akin to the law in *Larson* that "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,'" and "'churches which are new and lacking in a constituency, or which . . . favor public solicitation over general reliance on financial support from members.'" *Id.*; 26 C.F.R. § 1.6033-2(h)(4)(ii) (defining integrated auxiliaries with respect to whether an entity "[n]ormally receives more than 50 percent of its support" from non-affiliated sources).

By effectively asserting that the Mandate is constitutional because it "distinguishes not between types of religions, but between types of institutions," the Government's argument rests on a "puzzling and wholly artificial distinction." *Colorado Christian*, 534 F.3d at 1259. While the exemption may, in theory, be available "to organizations affiliated with any and all religions," Gov't Br. at 24, given the Catholic Church's well known objection to contraception and its

extensive use of ministries that are not traditional houses of worship, there can be little doubt that it discriminates against Catholic organizations in "practical terms." *Lukumi*, 508 U.S. at 536.

2. Excessive Entanglement

As noted in Notre Dame's initial brief, determining a group's eligibility for an exemption involves intrusive judgments regarding the religious beliefs, practices, and structure of the entity, including, for example, whether a group has "a recognized creed and form of worship." *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009); 26 C.F.R. § 1.6033-2(h); Pl. Br. at 42–44. These sorts of assessments impermissibly "cast [the Government] in the role of arbiter of essentially . . . religious dispute[s]," *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977), forcing it to answer religious questions, such as what constitutes "worship."

The Government's claim that no government body would be called upon to make these sorts of determinations defies belief. Gov't Br. at 25. While no application may be required for religious employer status, there can be little doubt that the Government and private citizens will seek to enforce these regulations. 29 U.S.C. § 1132(a)(1)(B) (authorizing private suits). Courts are no more entitled to decide religious questions than Government bureaucrats. *Cathedral Acad.*, 434 U.S. at 133; *supra* Part I.A.1.

Nor is it relevant that these determinations have yet to be made. With respect to government determinations regarding matters of religion,"[i]t is not only the conclusions that may be reached [that] may impinge on rights guaranteed by the Religion Clauses, *but also the very process of the inquiry leading to findings and conclusions*." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (emphasis added). Notre Dame need not wait for the Government or a court to "troll[] through [its] religious beliefs," before filing suit. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *McCarthy v. Fuller*, 714 F.3d 971, 976, 978 (7th Cir. 2013)

(declining to wait for a jury to decide a religious question before invalidating the offending instruction).[13]

II. NOTRE DAME SATISFIES THE EQUITABLE FACTORS FOR A PRELIMINARY INJUNCTION

In addition to demonstrating that it is (1) "reasonably likely to succeed on the merits, Notre Dame has also shown (2) that it is "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted"; (3) that "there is no adequate remedy at law"; and (4) that "an injunction would not harm the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); Pl. Br. at 44–47.

In *Korte*, the Government conceded that if the Mandate violated RFRA, then the equitable factors favored a preliminary injunction. *See* 735 F.3d at 666. The Government has not offered any explanation for why it has changed its position here, but in any event its new position is wrong. As *Korte* explained, "RFRA protects First Amendment free exercise rights," and "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," *id.*, even if borne for only "minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The same fact explains why, under RFRA, "once the moving party establishes a likelihood of success on the merits, [1] the balance of harms "normally favors granting preliminary injunctive relief" and "[2] 'injunctions protecting First Amendment freedoms are always in the public interest.'" *Korte*, 735 F.3d at 666 (quoting *Christian Legal Soc'y*, 453 F.3d at 867). Moreover, because an injunction is the only way to stop the Government from enforcing the Mandate, Notre Dame has no adequate remedy at law. In short, just as in *Korte*, this case "turn[s] entirely on whether the plaintiff['s] RFRA claims are likely to succeed." *Id.* Because they are, an injunction is plainly warranted.

[13] The claim that this entanglement will not be pervasive misses the point. Gov't Br. at 26. Where entanglement is "substantive," rather than "procedural," its duration is irrelevant. *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006); *Colo. Christian*, 534 F.3d at 1261.

The Government contends that the court should not find any irreparable harm here due to Notre Dame's "inexplicable and inexcusable delay" of "five months" before bringing this lawsuit. Gov't Br. at 1, 10, 27–29. In fact, this short delay is neither inexplicable nor inexcusable. For one thing, the cases cited by the Government undermine its argument. For example, in *Ty, Inc. v. Jones Group Inc.*, 237 F.3d 891, 903 (7th Cir. 2001), the court held that a delay of eight months did not "lessen" a claim for irreparable injury because the defendants failed to show that "[the] delay negatively affected them." The same is true here. In addition, Notre Dame did not rush to sue because it wanted to thoroughly consider whether the actions required under the so-called "accommodation" could be squared with its understanding of Catholic doctrine. Notre Dame took pains to reflect on the matter, consulting with several theologians and receiving input from the U.S. Conference of Catholic Bishops. *See* Affleck-Graves Suppl. Aff., ¶¶ 4-14. It was only then, after a full "theological and factual analysis of the Mandate and its implications," that "Notre Dame came to the eventual conclusion that it had no choice but to bring this lawsuit." *Id.* ¶ 12. There is no small irony in the Government's complaint about timing, given that the Government moved to dismiss on ripeness grounds an earlier suit that Notre Dame filed against a pre-"accommodation" version of the Mandate. *See Univ. of Notre Dame v. Sebelius, et al.*, No. 3:12-cv-253 (N.D. Ind.). At that time, the Government stated that "[o]nce the forthcoming amendments are finalized, if plaintiff's concerns are not laid to rest, plaintiff 'will have ample opportunity [] to bring its legal challenge at a time when harm is more imminent and more certain.'" Defs.' Br. in Support of Mot. to Dismiss at 18, *Univ. of Notre Dame*, No. 3:12-cv-325 (Doc. 17). Now the harm is imminent and certain, and the Government still does not think the timing is right. First seeking dismissal of Notre Dame's claims because Notre Dame sued "too early," and now, only months later, seeking dismissal of Notre Dame's claims because it sued "too late," the Government fails to delineate just how small it believes the window is for protecting such fundamental rights.

In addressing the balance of the equities, the Government briefly contends that agencies always have an interest in enforcing their regulations and that delaying enforcement of the

Mandate would undermine the Government's regulatory goals. *See* Gov't Br. at 28. As Notre Dame has explained, however, those generic interests pale in comparison to the serious harm that will be inflicted on the University's religious liberty if the Mandate is not enjoined pending the outcome of this litigation. Pl. Br. at 44–45. Indeed, "[o]ne of the goals of the preliminary injunction analysis is to maintain the status quo." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). In addition, the Government cannot credibly object to a temporary delay in enforcement of the Mandate given the grandfathering provisions that delay the Mandate's applicability to millions of employees nationwide. Pl. Br. at 45–46.

Finally, the Government makes much of the supposed public benefits of providing free contraception to Notre Dame's employees and their families, but essentially ignores the immense public harm that comes from forcing religious believers to act in violation of their consciences, contrary to the clear directive of Congress as set forth in RFRA. *See* Gov't Br. at 28–29. Considering the staggering coercion inherent in the Government's scheme, whatever interests the Government may have are "outweighed by the harm to the substantial religious-liberty interests on the other side." *Korte*, 2012 WL 6757353, at *4. Additionally, the public, including Notre Dame's employees, have a direct interest in the injunctive relief, without which Notre Dame could be subject to crippling fines. Notre Dame's mission is far reaching, and its services are vast both locally and globally. While the Court further considers the merits, no good would be served by imposing such penalty by enforcing these provisions as part of an Affordable Care Act that, with each passing day, produces more and more extensions of deadlines and requirements as it is implemented. *Cf. Feed the Children, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 330 F. Supp. 2d 935, 948 (M.D. Tenn. 2002) (noting that "it is generally in the public interest for charities to be able to raise money [or donate services] without undue interference from government").

CONCLUSION

Accordingly, the Court should grant Notre Dame's request for a preliminary injunction.

Respectfully submitted, this 16th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I electronically filed the foregoing Plaintiff's Reply in Support of 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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