IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| **MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, *et al.*,** | |
| **Plaintiffs,** | **CIVIL ACTION NO. 1:13-cv-00303** |
| **v.** | **ELECTRONICALLY FILED** |
| **KATHLEEN SEBELIUS, *et al.*,** | |
| **Defendants.** | |

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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By promulgating and imminently applying the regulations at issue (the "Mandate"), the United States Government is forcing Plaintiffs—all nonprofit religious organizations—to take specific actions that violate their sincerely held religious beliefs, without narrowly tailoring the requirement to any compelling interest. As the record shows and as further presentation will show, Plaintiffs are therefore likely to succeed on the merits of their claims and, absent a preliminary injunction, will be irreparably harmed by the Mandate forcing them to choose between their religious beliefs and onerous fines.

The Government has not called into question the likelihood of Plaintiffs' success on the merits, nor the irreparable harm to Plaintiffs. Indeed, the Government does not dispute the description or sincerity of Plaintiffs' religious beliefs, nor the existence of substantial fines for non-compliance. As a result, the Court can accept as undisputed the fact that the Mandate compels Plaintiffs to take affirmative actions that trigger and facilitate the provision of abortion-inducing drugs, sterilization, contraception, and related education and counseling ("Preventive Services") contrary to their sincerely held beliefs. Specifically, Plaintiffs must:

- trigger facilitation of the objectionable Preventive Services via self-certification,
- designate a third party administrator ("TPA") to provide Preventive Services,
- provide the TPA with names of those eligible to receive Preventive Services; and
- sponsor the insurance whose cards will be used to obtain Preventive Services.

Moreover, the provision of those products and services is directly tied to Plaintiffs because it terminates when employment with Plaintiffs terminates. Effectively, the Mandate writes contraceptive coverage into Plaintiffs' plans in invisible ink. In addition, as part of the definitions the Government seeks to use, for the first time in history, many religious organizations such as Catholic charities or high schools controlled by Catholic Dioceses will be viewed as outside the definition of "religious," will be unprotected by the First Amendment, and will be subject to various types of Government regulation.

The central disputed issues for determining Plaintiff's likelihood of success on their RFRA claim are, therefore: (1) whether the Mandate imposes a "substantial burden" on Plaintiffs' undisputed religious exercise; (2) whether the Government has justified that substantial burden

with compelling interests; and (3) whether the Mandate is narrowly tailored to further those interests. All three issues should be decided in Plaintiffs' favor.

*First*, the Mandate imposes a substantial burden on Plaintiffs' religious exercise because it requires them to choose between violating their religious beliefs and paying fines. The Government attempts here to alter this substantial burden inquiry by arguing that the Mandate does not require substantial conduct from Plaintiffs. But that is a non-sequitur with no legal relevance under the Religious Freedom Restoration Act ("RFRA"). The Government is asking the Court to decide questions of religious doctrine that the Supreme Court has expressly held lie beyond judicial competence. *See, e.g., United States v. Lee*, 455 U.S. 252, 257 (1982). Instead, Plaintiffs have met their burden by showing that adhering to their religious beliefs will cause them to incur substantial fines. *Wisconsin v. Yoder*, 406 U.S. 205, 208, 218 (1972).

*Second*, the Government has not shown a compelling interest because the Mandate is riddled with exemptions and is based on overbroad and factually suspect justifications. The Government also has not met its burden of showing a compelling interest in applying the Mandate to Plaintiffs. In fact, the Government has no evidence to justify mandating coverage of the Preventive Services by any employer, let alone religious objectors. *Third*, the Mandate is not narrowly tailored to any proper and demonstrated compelling interest. The Government did not explore several readily available options, including using the Medicaid program or tax credits.

Additionally, the Government has not shown any harm, let alone greater harm, will come to it from granting the requested preliminary injunction. The Government has exempted millions of employees, without attempting to ensure that they receive Preventive Services. Nor is an injunction contrary to the public interest, which favors protecting Plaintiffs' religious exercise.

## ARGUMENT

### I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

#### A. The Mandate Violates the Religious Freedom Restoration Act

Under RFRA, the federal government may not "substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person (1) is in

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b).

**1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion**

Where plaintiffs' 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 Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (*en banc*); *see also 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"); Pls. Br. at 15–16. 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 v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Courts must therefore accept plaintiffs' description of their religious exercise. *Id.* at 714–15; Pls. Br. at 16–17. 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; *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013).

Here, it is clear that the Mandate substantially burdens Plaintiffs' exercise of religion. Plaintiffs exercise their religion by, *inter alia*, refusing to take certain actions that facilitate access to the Preventive Services. The Mandate, however, requires Plaintiffs to take precisely those actions that their religious beliefs forbid. Detisch Decl. ¶ 12. This Court is bound to accept Plaintiffs' representations regarding their beliefs, the sincerity of which the Government does not dispute. Thus, the only question is whether the Mandate substantially pressures

Plaintiffs to act contrary to those religious beliefs. As the Mandate forces Plaintiffs to (1) violate their religious beliefs or (2) pay crippling monetary penalties (Maxwell Decl. ¶¶ 13–14, Detisch Decl. ¶¶ 15-18, 22–26, Jabo Decl. ¶¶ 8, 12–17), "it is difficult to characterize the pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140; *Gilardi*, 2013 WL 5854246, at *7–8.

The Government finds this straightforward analysis "[r]emarkabl[e]." Defs.' Mem. in Opp ("Opp'n") at 2–3. Arguing that the Mandate requires "virtually nothing" of Plaintiffs and that their involvement is "*de minimis*" and "attenuated," *id.* at 9–19, the Government's brief is an extended effort to convince this Court that the Mandate is "no big deal." For Plaintiffs, however, the Mandate is a profoundly religious and moral issue; it is a very big deal. More significantly, the 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 Plaintiffs to Act in Violation of Their Sincerely Held Religious Beliefs**

The Government argues that the Mandate requires Plaintiffs to engage in almost no action, and therefore, cannot violate RFRA. Opp'n at 2–3. Nothing could be further from the truth. Plaintiffs object not only to using the Preventive Services, but also to being forced to *facilitate* the provision of such items. Detisch Decl. ¶¶ 7–11, 14; Jabo Decl. ¶ 4. The Mandate forces Plaintiffs to take concrete steps to that end. Among other things, if they will not, because of their beliefs, agree to offer these services directly in their insurance plans, they must either face huge fines or they must 1) designate a TPA as a plan administrator for the provision of the Preventive Services; 2) self-certify, triggering the facilitation of the Preventive Services; 3) provide the TPA with the names of employees of the non-exempt entities eligible to receive Preventive Services; and 4) sponsor the plan whose insurance cards will be used to obtain Preventive Services. *See* Maxwell Decl. ¶¶ 11–12; Murphy Decl. ¶¶ 14–23; Detisch Decl. ¶¶ 21-24; Jabo Decl. ¶¶ 10-11. Plaintiffs cannot avoid these requirements without subjecting themselves to crippling fines and/or other negative consequences.

Indeed, for all practical purposes, the Mandate as applied to Plaintiffs is indistinguishable

from the requirements invalidated by 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 coverage for the Preventive Services. So too here, Plaintiffs' decision to offer a group health plan automatically results in coverage for the Preventive Services. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the benefits are directly tied to the employers' insurance policies: 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 39,876–77, and they will be offered only to individuals the organization identifies as its employees.

The Government is thus wrong to analogize this case to *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). Kaemmerling did not prevail because he failed to identify *a religious exercise*, not a *substantial burden*. *Id.* at 679. Here, in contrast, there is no dispute that the exercise of Catholicism[1] includes the refusal to take affirmative steps that facilitate access to the Preventive Services. Detisch Decl. ¶¶ 7–11.[2] Moreover, Kaemmerling objected only "to the government extracting DNA information from specimen[s]" *already in the government's possession*, involving "no action" by Kaemmerling. *Id.* at 678–80. Here, Plaintiffs object to the requirements the Mandate imposes on *them* to take actions that facilitate access to the Preventive Services. Indeed, even the Government concedes that the Mandate forces Plaintiffs to participate at some level in their employees receiving contraceptive coverage. *E.g.*, Opp'n at 13.

In any event, what matters under RFRA is that Plaintiffs sincerely believe the actions detailed above violate their beliefs. By forcing Plaintiffs to take such actions, the Mandate "force[s Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253

[1] Catholics and many other Christian sects believe that the practice of their faith requires not just worship within houses of worship but also doing acts of charitable service outside of such places of worship. Not all faiths share that view. The regulations at issue here attempt to constrict the protection of the First Amendment to what occurs in houses of worship by definitional changes. Trying to exclude the practices of religion outside houses of worship from First Amendment protection – or reducing that protection – is unconstitutional.

[2] *See also Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("exercise of religion" includes abstention from physical acts).

F.3d 12, 16 (D.C. Cir. 2001). While the Government may find it "[r]emarkable" that Plaintiffs hold such beliefs, Opp'n at 2, RFRA protects Plaintiffs' religious exercise regardless of whether the Government finds it "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714–15.

**(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* or attenuated burden on Plaintiffs' exercise of religion. This, too, is plainly wrong. It is "fundamentally flawed" because it looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs." *Hobby Lobby*, 723 F.3d at 1137. Instead, after identifying a sincerely-held religious belief, a court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant to violate that belief." *Id.* Here, the burden is substantial because obeying their religious beliefs subjects Plaintiffs to crippling fines.

By nonetheless arguing that the actions required of Plaintiffs 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 Plaintiffs' exercise of religion. The unfortunate core of this dispute seems to be that the promoters of the Mandate wish to trivialize or denigrate the sincerely held belief that enabling or facilitating the use of abortifacients, sterilization, and contraception services is morally wrong. But, at the heart of RFRA and the First Amendment is that the Government or the majority cannot sweep aside the sincere religious beliefs of the minority – or dismiss them as out of date or unworthy of belief. Thus, Defendants' 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." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). RFRA contains no requirement that the actions required of plaintiffs be "significant" or "substantial." *Id.* Here, because Plaintiffs' refusal to facilitate access to the Preventive Services clearly involves the

religiously-motivated "performance of (or abstention from) physical acts," *Smith*, 494 U.S. at 877, it is a protected exercise of religion for purposes of RFRA.

The Government argues that this "read[s] the word 'substantial' out of RFRA." Opp'n at 16. As is plain from the statutory text, however, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their 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."). It requires courts to assess the pressure the government exerts on a plaintiff to violate his religious beliefs, not the nature of the 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 plaintiffs. 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*." Opp'n 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 for[]go [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." Opp'n 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." 450 U.S. at 717–18. The central question did not turn on whether there was some added burden in time or effort between working in a factory that made turrets as compared with metal in a foundry. The Government's attempt here to focus on how much time or effort is involved in the self-certification process

misses the proper analytical point. The burden is the impact to the individual's religious beliefs by becoming a participant in the delivery of abortion, sterilization, and contraception services.

The Government is wrong to suggest that RFRA's protections are limited to laws that require plaintiffs to significantly modify their conduct. Opp'n at 14–16. The touchstone of the substantial burden analysis, rather, is whether plaintiffs are compelled to act in violation of their 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 403-04 (same). The fact that a plaintiff's actions do not change or that not much physical effort is required is unimportant for the analysis. For example, an anesthesiologist would theoretically perform the same procedure for a knee surgery and an abortion. The Government could not, however, compel a devout Roman Catholic anesthesiologist to perform that identical act to facilitate an abortion contrary to her beliefs, under threat of fines.

In any case, as noted above, the Mandate *does* force Plaintiffs to modify their behavior: in the past, Plaintiffs have always sought to enter into health insurance contracts that would *not* result in the provision of such coverage to their employees. Murphy Decl. ¶¶ 7, 14-15; Jabo Decl. ¶¶ 5-6. Rather, the Diocese notified its TPA that it would not cover the Preventive Services, and this notification never triggered the provision of the services. Murphy Decl. ¶ 15. Under the Mandate, Plaintiffs must now enter into contracts that *will* facilitate provision of the Preventive Services. They are, moreover, required to take numerous additional steps as part of the overall scheme. *See supra* at 1, 4-5. Furthermore, by now agreeing to a plan that provides Preventive Services, Plaintiffs are forced to offer their tacit permission for wrongful acts.[3] Accordingly, even under the Government's erroneous understanding of the law, Plaintiffs are required to modify their behavior in a way that runs directly contrary to their sincerely held religious beliefs.

[3] For example, the Government would force Erie Catholic, through self-certification, to trigger and participate in the delivery of such services, including counseling about such services even though an integral part of the school's mission is teaching that such services are immoral.

**(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 v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Rather than evaluating whether the pressure placed on Plaintiffs to violate their beliefs is "substantial," the Government would have this Court determine whether compliance with the Mandate is a "substantial" violation of Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. But 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). Rather, it is left to plaintiffs 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." *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. Opp'n at 10. 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 10. 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 significance or "meaning[]" of these acts. *Smith*, 494 U.S. at 887; Opp'n at 10. What may be "no big deal" to the Government may be a very big deal to a believer.

The Government's arguments on "attenuat[ion]" further illustrate this point. Opp'n at 17–19. First, the Government argues that Plaintiffs cannot obtain relief under RFRA because they are "separated from the use of contraception by a 'series of events' that must occur before the use of contraceptive services to which plaintiffs object would 'come into play.'" *Id.* at 18. This is not an evaluation of the pressure placed on Plaintiffs to violate their beliefs, but is rather a particularly obvious invitation for the Court to assess whether Plaintiffs' conduct is sufficiently remote from the use of contraceptives so as to absolve them from moral culpability for their

actions. Courts, however, have no competence to make this religious determination. If Plaintiffs interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699.

Thus, 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 too attenuated a breach of pacifist convictions for a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the line the plaintiff drew. *Id.* at 715. And in *Lee*, the Court rejected the Government's contention that payment of social security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it 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 we must accept [Plaintiffs'] beliefs." *Hobby Lobby*, 723 F.3d at 1141.[4]

Likewise, the Government's argument that there is no meaningful distinction between the payment of wages and the provision of access to contraceptive benefits, *see* Opp'n at 19, 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). The moral distinction between wages used to purchase contraception and the Mandate is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Indeed, even if the line were "unreasonable," it would not be for a court to second-guess Plaintiffs' line. *Thomas*, 450 U.S. at 715–16.

[4] Similarly, part of the religious objection in *Lee* was to paying social security that would "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 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 that there is no "RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties"). Plaintiffs "stand 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.

But in any case, the line here 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 ensures that its employees are 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 a necessary part of, and complicit in, the purchase of contraceptives, making such action qualitatively different from leaving it to employees to use their paychecks as they see fit. *See* Detisch Decl. ¶¶ 15–16.

Finally, it is important to understand what Plaintiffs are not saying. Plaintiffs do not contend that the "mere fact" they "claim" the Mandate "imposes a substantial burden on their religious exercise" "make[s] it so." Opp'n at 14. Far from it. This Court need only accept Plaintiffs' description of their religious exercise. *Supra* Part I.A.1. The Court must still proceed to step two and conduct an independent assessment of whether the Government is substantially pressuring Plaintiffs to violate their religious beliefs. *Id.* Here, that inquiry is simple, as the Government imposes crippling fines on Plaintiffs if they refuse to comply with the Mandate.[5]

* * *

At bottom, the Government's argument reflects a misunderstanding of Plaintiffs' religious objection. Plaintiffs object not only to using contraceptives, but also to taking actions that facilitate their use. *Cf. Hobby Lobby*, 723 F.3d at 1140; *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Decl. 28, 2012). In addition, Plaintiffs sincerely believe that by complying with the Mandate, they would commit the further offense of giving scandal. *See*

[5] Thus, despite the Government's evident concern, Opp'n at 16–17, this standard does not give religious actors carte blanche to exempt themselves from federal law. Even after accepting plaintiffs' description of their religious exercise, courts still must evaluate (1) sincerity, (2) if it is religious, (3) the "substantial pressure" placed on adherents to modify their beliefs, (4) the stated Government "compelling interest," and (5) if 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. Such safeguards address the Government's claimed concerns. *Hobby Lobby*, 723 F.3d at 1141 n.16.

Detisch Decl. ¶¶ 15, 26; Jabo Decl. ¶ 13. Just as criminal law prohibits aiding and abetting a crime one did not personally commit, Catholic moral law prohibits cooperating in the commission of impermissible acts by others. 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). Plaintiffs' faith has led them to the conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably theirs to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on the Plaintiffs to cross this line, the Government has substantially burdened Plaintiffs' exercise of religion.

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

Once a plaintiff shows that governmental action substantially burdens the exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation furthers a compelling government interest. *O Centro*, 546 U.S. at 429–31. Here, the Government has proffered two generalized interests: (i) the "promotion of public health" and (ii) "assuring that women have equal access to health care services," or, more broadly still, "gender equality." Opp'n at 21–22. As every court that has addressed the question in the context of the Mandate has concluded, these abstract interests fail to satisfy the demanding RFRA standard.[6]

[6] *Gilardi*, 2013 WL 5854246, at *10–13; *Hobby Lobby*, 723 F.3d at 1143–44; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

**(a) The Government Has Not Established That Granting an Exemption for Plaintiffs Would Undermine Its Interests**

The Government cannot satisfy its burden. Both of its stated interests "are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 2013 WL 5854246, at *10 (describing these interests as "sketchy and highly abstract"). "[U]nder RFRA[,] invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. Instead, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—*the particular claimant* whose sincere exercise of religion is being substantially burdened." *Id.* at 430–31. The Government must therefore demonstrate with "particularity how [even] admittedly strong interest[s] . . . would be adversely affected by granting an exemption" to the plaintiff. *Yoder*, 406 U.S. at 236.

Simply put, even assuming "public health" and "gender equality" are compelling interests in the abstract, the Government has not shown that these interests would be undermined by granting *Plaintiffs* an exemption from the Mandate. *Hobby Lobby*, 723 F.3d at 1143 (recognizing "the importance of these interests" but concluding that "in this context they do not satisfy the Supreme Court's compelling interest standards"). The Government appears to dispute the workability of this case-by-case approach. Opp'n at 22 n.13. The Supreme Court, however, has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U. S. 709, 722 (2005)). Indeed, by enacting RFRA, "Congress determined that [this] '*is* a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Id*. (quoting 42 U.S.C. § 2000bb-1(a)) (emphasis added). The Government can only counter by arguing that the Supreme Court did not mean what it said in *O Centro*, relying on appellate authority that predates that case, *see* Opp'n at 22 n.13 (citing cases).

The Government also cannot justify the Mandate by claiming an exemption for Plaintiffs

would be "completely unworkable" and would "undermine defendants' ability to enforce the regulations in a rational manner," Opp'n at 22 n.13, 25. "[T]here is nothing to suggest the [Mandate] would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement." *Gilardi*, 2013 WL 5854246, at *14. Also, such vague, unsubstantiated assertions cannot satisfy the Government's heavy burden to establish that the particular exemption requested would "seriously compromise its ability to administer the program" at issue. *O Centro*, 546 U.S. at 435. The Government offers no explanation for why an exemption for Plaintiffs—as opposed to the bevy of already exempt employers, *infra* Part I.A.2(b)—would "undermine" its ability to enforce the Mandate. Rather, the Supreme Court has consistently "rejected [such] slippery-slope argument[s]." *O Centro*, 546 U.S. at 436; *Gilardi*, 2013 WL 5854246, at *10. Because the Government cannot show exempting Plaintiffs would compromise its asserted interests, it does not have a "compelling" reason to force Plaintiffs to violate their religious beliefs. *Hobby Lobby*, 723 F.3d at 1143.

**(b) The Mandate Is Riddled with Exemptions**

A compelling interest is one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). But "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Here, however, the Government has exempted numerous employers from the Mandate, including those with "grandfathered" health plans or that meet the Government's narrow definition of "religious employer."[7] As numerous courts have found, such exemptions "completely undermine[] any compelling interest in

[7] The Government recently postponed one of the Mandate's key enforcement mechanisms, leaving hundreds of thousands of employees without access to the mandated coverage in 2014, and has completely exempted employers with fewer than fifty employees from that provision. 26 U.S.C. § 4980H(a); Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, Treasury Notes (July 2, 2013), http://go.usa.gov/ jKeH; Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Representative Paul Ryan, Chairman, Committee on the Budget at 4 (July 30, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/files/2013/07/EmployerPenalties-RyanLtr.pdf.

applying" the Mandate to objecting religious organizations. *Newland*, 881 F. Supp. 2d at 1298; *Tyndale*, 904 F. Supp. 2d at 129; *Geneva Coll.*, 929 F. Supp. 2d at 434; *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 2013 WL 5854246, at *13 ("[T]he mandate is unquestionably underinclusive").

The Government responds with semantics and assumptions. It claims grandfathering is "a transition in the marketplace," not "really a permanent 'exemption.'" Opp'n at 23. But the fact remains that such plans do not need to provide the Preventive Services, so the Government was willing to ignore "appreciable damage to [its] supposedly vital interest." *Lukumi*, 508 U.S. at 547. By the Government's own estimates, at least 49% of all health plans, *covering more than 90 million employees*, will be grandfathered at the end of 2013. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Geneva Coll.*, 929 F. Supp. 2d at 434. The Government provides no explanation for why those 90 million employees do not currently require access to the Preventive Services, while Plaintiffs' employees do. Moreover, the Government does not even attempt to explain why other Affordable Care Act requirements *were* imposed on grandfathered plans, such as coverage for dependent children until age 26. *See* 75 Fed. Reg. at 34,542. The Government's interest cannot be "compelling" where, as here, it "fails to enact feasible measures to restrict other conduct producing . . . alleged harm of the same sort." *Lukumi*, 508 U.S. at 522.[8]

Moreover, grandfathering is not a "transition," because grandfathered status may be maintained in perpetuity. Indeed, the grandfathering exemption "makes good on President Obama's promise that Americans who like their health plan can keep it,"[9] and the Government has repeatedly stated that employers have a "right" to grandfathered status. *See, e.g.*, 75 Fed. Reg. at 34,540, 34,558, 34,562, 34,566. If the Government wishes to balance such "competing interests" when implementing a "complex statutory scheme," Opp'n at 23-24, it cannot claim to

[8] Exempting small employers from one of the mechanisms to enforce the Mandate likewise undermines whatever alleged interest the Government has in compelling employers to provide the mandated coverage. Were employer participation truly necessary, it would not have established a system whereby employees of small employers could be forced onto the exchanges.

[9] Press Release, U.S. Dep't of HHS, U.S. Departments of HHS, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010).

be pursuing interests "of the highest order." *Lukumi*, 508 U.S. at 547. By definition, an interest cannot be "paramount," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), when that interest takes a backseat to interests of administrative and political expediency.

The Government asserts that the only "true exemption" from the Mandate is for "the group health plans" of those it deems "religious employers." Opp'n at 24. Even if this were true, the Supreme Court has found that a single exemption for one religious group is enough to doom efforts to deny a similar exemption to other religious practitioners. *O Centro*, 546 U.S. at 433; Pls.' Br. at 27. In *O Centro,* the Court held that an exemption for the religious use of peyote undermined the Government's claimed interest in refusing to provide a similar exemption for the religious use of hoasca. 546 U.S. at 433–37. So too here, the Government's exemption for certain "religious employers" undermines any interest in refusing to exempt Plaintiffs.

The Government contends the distinction is justified because employees of employers it deems "religious" are more likely to agree with their employer's views regarding contraceptives. Opp'n at 24. But, the Government offers no evidence to support this assertion on which it bears the burden of proof. Indeed, it has conceded it has "no [such] evidence." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-cv-02542 (E.D.N.Y.), Dep.of Gary M. Cohen ("Cohen Dep.") at 34:9–24. There is also no way the Government could know the devotion of particular employees. And, the Government cannot discriminate among religious institutions based upon its perception of their religiosity. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (discrimination between "pervasively sectarian" and "sectarian" entities).[10]

**(c) Absence of an Actual Problem in Need of Solving**

Finally, in order to meet the compelling interest standard, the Government must also "specifically identify an actual problem in need of solving" that would justify the intrusion on Plaintiffs' liberty. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). The

[10] The Form 990 categories do not fit this employee devotion test. A nonexempt Catholic charity may well have a greater percentage of "devout" employees than an exempt diocese. To satisfy its burden, the Government must do more than guess at "how religious" employees are.

Government, therefore, must adduce concrete evidence to prove that enforcing the Mandate against religious objectors is "actually necessary to the solution" and that there will be a "direct causal link" between the Mandate and its asserted goals. *Id.* at 2738–39. The Government "bears the risk of uncertainty," and offers of "ambiguous proof will not suffice." *Id.* at 2739.

Here, the Government cannot claim to have identified an "actual problem" where it admits that the vast majority of employer sponsored plans (85%) already cover contraception, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); contraception is available at free or reduced costs through a variety of government programs, *infra* note 17; and contraceptives are readily available at virtually every pharmacy in America. The Week, "The Cost of Birth Control: By the Numbers" (Mar. 12, 2012) (generic birth-control pills cost an average of $9 per month). Any interest in closing whatever "modest gap" remains in coverage cannot be compelling, as 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 (no compelling interest in closing 20% gap).[11]

More importantly, however, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* Part I.A.2.a. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at 39,887. But, "the science is debatable and may actually undermine the government's cause." *Gilardi*, 2013 WL 5854246, at *12; *see also* Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379 (2013). And, to say that lack of access to contraception can have negative health implications does not

[11] The Government attempts to avoid this by claiming that the real benefit of the Mandate comes from "eliminat[ing] cost-sharing." Opp'n at 20 n.12. But the Government has not only admitted that "85 percent" of employer plans "cover[] preventive services," but also that they do so "without [beneficiaries] having to meet a deductible." 75 Fed. Reg. at 41,732. Thus, the coverage is widely available without a significant form of cost sharing. And, the 15% gap, is further closed by eliminating cost-sharing for employers who have no religious objection.

establish a significant lack of access *among Plaintiffs' employees* or that the Mandate would significantly increase contraception use among these employees. Indeed, the Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

*First*, the fact that Plaintiffs do not provide their employees with free contraception does not prove that these employees suffer from a "lack of access" to it. The Government has not shown that any, let alone a substantial number of affected employees cannot afford to pay for contraception or otherwise obtain it through free clinics or other outlets. Instead, it relies on sweeping generalities such as claims that, "[d]ue largely to cost, Americans used preventive services at about half the recommended rate,"[12] and that "many women forgo preventive services because of cost-sharing." Opp'n at 5, 21 n.14. The Government then supports these assertions by citing to pages of the IOM Report relying on studies addressing "preventive services" generally and which in some cases, *did not even consider contraceptive coverage*.[13]

*Second*, the Government has provided no concrete evidence that the Mandate would significantly increase the use of contraception among Plaintiffs' employees and why that increase is deemed to be a compelling interest. *Supra* at 12-14, 16-21. "[T]here are many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost." Alvaré, 58 VILL. L. REV. at 398–99;[14] Pls.' Br. at 28-29. Accordingly, "responses to the mandate" will be "complex and related to employees' age, marital status, education, income, and numerous other factors, none of which appear to have been analyzed by the Departments or the studies on which they rely, [n]or is there any analysis or evidence that considers the extent to

[12] The Government does not give any citation to what is the "recommended" rate, how that was determined, and by whom.

[13] *See, e.g.*, IOM Report at 20 (AR at 318) (citing Robertson, *et al.*, *Women at Risk: Why Increasing Numbers of Women Are Failing to Get the Health Care They Need and How the Affordable Care Act Will Help*, REALIZING HEALTH REFORM'S POTENTIAL 8-9 (2011), which addressed "preventive screening tests [for] blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer").

[14] The record rule does not apply here and the woefully inadequate "Administrative Record" produced by the Government warrants further discovery. *See* Doc. No. 21 at 9-14.

which the demographics and behavior of employees of religious [entities] could differ from those of secular organizations." Aff. of Prof. Scott E. Harrington, Ex. 1 to Comments of the Diocese of Pittsburgh (Apr. 8, 2013). The evidence actually cuts against the Government. For example, sources cited in the IOM Report indicate that 89 percent of women at risk of unintended pregnancy are already using contraceptive services[15] and that cost is not the primary explanation for most women who do not use contraception, even among the most at-risk populations.[16]

The Government admits that 85 percent of employers already provide contraceptive coverage to their employees, as noted. Yet. the Government makes no attempt to demonstrate that there is a higher rate of unintended pregnancies or negative health outcomes among the other 15 percent. Instead, the Government relies on sweeping generalizations based on empirical samples that are wildly inapposite. For example, it relies on the IOM Report, which states that 1 in 20 American women *overall* have an unintended pregnancy each year. IOM Report at 102 (AR at 400). But the Government has made no showing regarding unintended pregnancy among women who work for Plaintiffs, or even more generally for religious employers. Much less has the Government demonstrated that higher rates of unintended pregnancies or negative health outcomes among this group would be attributable to a lack of access to contraception. Here too, the Government asks the Court to ignore the lack of evidence and rely on speculation, stereotypes, and "predictive judgment[s]" about women's health. *Brown*, 131 S. Ct. at 2738.

What seems to be the unstated core of the Government's "compelling interest" argument is that it somehow follows that increased usage or "free" provision of sterilization, abortifacients, and contraceptive services necessarily equates with improvements in women's health or that such population control by the Government is a legitimate and compelling interest. Although the Government's brief depends on such sweeping assertions, the record here and the "Administrative Record" produced thus far, do not support that point.

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[15] The Guttmacher Inst., *Facts on Contraceptive Use in the United States* (Aug. 2013).

[16] R. Jones, *et al.*, *Contraceptive Use Among U.S. Women Having Abortions*, 34 Perspectives on Sexual and Reproductive Health at 294-303 (Nov./Decl. 2002).

There is nothing in the legislative history of the Affordable Care Act to indicate that Congress, in a vote or in discussing the benefits of the proposed legislation ever identified increased use of such services or population control or reduction as a goal. Indeed, never in U.S. history or in the drafting of the Constitution did the Framers or a Congress vote or establish population control or reduction as a legitimate aim of government.

Notwithstanding the absence of evidence establishing that as a compelling interest, on March 1, 2012, HHS Secretary Kathleen Sebelius testified to a House panel during questioning by Representative Tim Murphy (R-Pa.) that the provision of the services to people employed by religious organizations would be "free." Fred Lucas, *Sebelius: Decrease in Human Beings Will Cover Cost of Contraception Mandate*, CNS News (Mar. 1, 2012). She testified "the reduction in the number of pregnancies compensates for the cost of contraception." *Id.* Rep. Murphy said, "So you are saying, by not having babies born, we are going to save money on health care? . . . Not having babies born is a critical benefit. This is absolutely amazing to me." *Id.* Secretary Sebelius said "Family planning is a critical health benefit in this country, according to the Institute of Medicine." *Id.*

The Government's brief does nothing to support its apparent position that population control or reduction has become a compelling government interest even where it impinges on the sincerely held, constitutionally and statutorily protected religious views of Plaintiffs and those who share their beliefs.

The Government's brief advances positions from the IOM that seem misplaced or unfounded, including asserting that the increased use of sterilization, abortifacients, and contraceptive services "is a key part of these predicted health outcomes, as unintended pregnancies have proven in many cases to have negative health consequences for women and developing fetuses." Opp'n at 20. Just as it is not clear in the context of this argument how the use of an abortifacient could ever be seen as beneficial to a developing fetus, it is also a non-sequitur that through the increased use of such services "individuals will experience improved health as a result of reduced transmission, prevention, or delayed onset, and earlier treatment of

disease," *id.*, unless the proponents of the argument have the view that pregnancy is a disease. In so many respects, the other Courts that have examined this issue have concluded the Government's compelling interest arguments are without merit.

*Finally*, the Government has failed to show that enforcing the Mandate against religious employers is necessary to address any compelling problem with respect to "equal access to health care services" for women. Opp'n at 21. But, Plaintiffs object to providing contraception for men and women alike, and thus the Mandate does not address any disparate treatment. *See Gilardi*, 2013 WL 5854246, at *12-13 (rejecting this interest in the context of the Mandate); *In re Union Pac. R.R.*, 479 F.3d 936 (8th Cir. 2007) (concluding that declining to provide contraceptive coverage does not constitute discrimination). And, as explained above, unintended pregnancies and negative health consequences for women cannot demonstrate discrimination because the Government has failed to prove that women employed by Plaintiffs or other objecting religious organizations face any real lack of access to contraception, or that enforcing the Mandate against such employers would significantly increase contraceptive use, much less significantly reduce unintended pregnancies or "negative health outcomes."

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

The "least restrictive means" test "is a severe form of the more commonly used 'narrowly tailored' test." *United States v. Wilgus*, 638 F.3d 1274, 1288 (10th Cir. 2011). The Government must show that "'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). This test "necessarily implies a comparison with other means," and because the burden is on the Government, "it must be the party to make this comparison." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). It is not enough to "assume [that] a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). The Government bears the "ultimate burden of demonstrating" that workable alternatives do not suffice. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

Here, "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 2013 WL 5854246, at *13; Pls.' Br. at 30. The most obvious is for the Government itself to provide contraception coverage—either directly or through grants or tax credits. The Government has not even attempted to carry its burden of showing that this or other alternatives would be ineffective. In fact, the Government admitted that it has not considered whether it could, for example, expand Medicaid as an alternative. Cohen Dep. at 35:17–36:11. Here, it simply asserts *ipse dixit* that all of the proposed alternatives would not be "feasible." 78 Fed. Reg. at 39,888; Opp'n at 27 (same). But "conclusory claims" that lack any evidentiary support cannot meet the Government's burden of offering "affirmative evidence that there is no less severe alternative." *Johnson v. City of Cincinnati*, 310 F.3d 484, 504-05 (6th Cir. 2002); *see also Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (strict scrutiny requires "serious, good faith consideration of workable . . . alternatives").

The Government cannot make sweeping, unsupported assertions that Plaintiffs' proposed alternatives would impose "considerable new costs." Opp'n at 27. The alternatives need not be cost-neutral on the Government, and holding otherwise would gut the least restrictive means test. *E.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 799–800 (1988) (indicating that a state could conduct a public information campaign and "vigorously enforce its antifraud laws," rather than force fundraisers to make disclosures). It is thus the Government's obligation to "adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women." *Newland*, 881 F. Supp. 2d at 1299. Yet the Government has not produced a single fact—not even a cost estimate—to that end. And any "infeasibility" claim is further undermined by the fact that it already spends millions of dollars to "provide[] free contraception to women" through numerous programs. *Id.*[17] In light of the

[17] *See, e.g.*, The Guttmacher Inst., *Facts on Publicly Funded Contraceptive Services in the United States* (July 2013) ( "public expenditures," including state and federal funding, "for family planning services totaled $2.37 billion in FY 2010"); Family Planning Grants, 42 U.S.C. § 300, *et seq.*; Teenage Pregnancy Prevention Program, Pub. L. No. 112-74, 125 Stat. 786, 1080.

countless mandates and complex regulatory structure of the Affordable Care Act, the Government cannot maintain that Plaintiffs' modest proposals are too costly and burdensome.[18]

Additionally, there are other potential alternatives. The Government could offer tax credits or deductions to women to purchase contraceptives, it could compel manufacturers or distributors of contraceptives to provide them for free or at reduced rates, or it could work with the numerous entities already providing such services to increase public awareness of contraceptives available for free or reduced rates.[19] Indeed, the Government may well be able to "accomplish [its] goal with a broader educational campaign," *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006), regarding the alleged importance and ready availability of free contraceptives due to the millions of dollars already spent on such services, *supra* note 17; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (plurality op.) (striking down ban on advertising alcohol prices because of less restrictive alternatives, including educational campaigns on the dangers of excessive drinking).

The Government also claims that Plaintiffs' proposed alternatives would not be "equally effective" in advancing its asserted interests. Opp'n at 28. But, the Government has no evidence for this and has, instead, conceded that it is unaware of "any studies that show that contraception or sterilization services, if provided by or subsidized by the government, is less efficient than if provided by an employer health plan." Cohen Dep. at 48:6–14. The Government cannot "slide through the [least restrictive means] test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The Government's final argument is that, under Plaintiffs' alternatives, their religious beliefs would still be violated because they would still somehow impermissibly "'facilitate' the

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[18] *See 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 ("[T]he Government has not established its means as necessarily being the least restrictive.").

[19] Statement by U.S. Department of HHS Secretary Kathleen Sebelius (Jan. 20, 2012).

availability of [contraceptive] coverage." *See* Opp'n at 26–27. But that is simply not so. The Mandate, unlike these alternatives, makes Plaintiffs the enabling vehicle by which the Preventive Services are delivered to their employees and, therefore, crosses the line into impermissible facilitation. Because they do not require that same level of cooperation, Plaintiffs' proposed alternatives do not cross that line.[20] In arguing the contrary, Defendants again impermissibly contend that Plaintiffs do not understand their own religious beliefs. *Supra* Part I.A.1.b.

**B. The Mandate Violates the Free Exercise Clause**

As explained in Plaintiffs' initial brief, the Mandate violates the Free Exercise Clause because it targets Catholics and is neither generally applicable nor neutral with respect to religion. Pls.' Br. at 30–34. Despite the Government's claims, this case is simply not analogous to *Employment Division v. Smith*. *Smith* addressed an "across-the-board criminal prohibition," 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" Plaintiffs. *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." Opp'n at 30. But the Government's categories are not "objective;" they reflect value judgments as to which interests are important enough to merit respect. Apparently, 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 *Lukumi*; namely the prospect of the government "deciding that

[20] The Government claims Plaintiffs cannot "contend that the regulations are not the least restrictive means while simultaneously" "oppos[ing]" proposed alternatives. Opp'n at 26–27. But Plaintiffs' *policy* opposition to other means, Pls.' Br. at 30, should not limit or affect their right to object to a scheme that forces them to violate their religious beliefs.

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 if "general applicability does not mean absolute universality," Opp'n at 30, 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.[21]

**C. The Mandate Violates Plaintiffs' Freedom of Speech**

The Mandate impermissibly compels two types of speech: (1) "counseling" in favor of the Preventive Services and (2) designating a TPA to procure them. Pls.' Br. at 34–36.

*First*, the Government claims that the required counseling need not support the use of the Preventive Services. That argument both undermines the Government's stated compelling interest in promoting the use of contraceptives and impermissibly deprives Plaintiffs of the freedom to speak on the Preventive Services on their own terms. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995). This argument is also inconsistent with the IOM Report's description of the counseling services.[22]

*Second*, the Government argues that the certification is merely incidental to the regulation of conduct. Opp'n at 33–34. But that complex doctrine does not apply because the certification triggers the provision of services to which Plaintiffs object. *Az. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011) (striking down a state law that made private speech supporting a candidate the trigger for his opponent receiving public financing).

**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

[21] The Government's neutrality claim is made even more dubious by evidence that the Mandate was promulgated by individuals hostile to Plaintiffs' religious beliefs. Pls.' Br. at 32–33.

[22] IOM Report at 107 (AR at 405) ("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.").

Preventive Services. 26 C.F.R. § 54.9815-2713A(b)(iii); Pls.' Br. at 36–37. While Defendants claim 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]," Opp'n at 35, that limitation appears nowhere in the regulation. Indeed, the regulation prohibits *any* attempt to "influence" TPAs. Thus, Plaintiffs could not, for example, publicly announce "we refuse to contract with a TPA that will provide free contraception to our employees."[23]

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

#### 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." Opp'n at 36–37. For the same reasons these arguments failed to carry the day in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colo. 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." *Larson*, 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. It is unwarranted and improper to use the Revenue Code definition for exemption from filing Form 990 to split Catholic organizations into two classes, with one category getting less protection.

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

[23] The Government's assertedly "analogous" cases, Opp'n at 37, provide no support because in both cases 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). But the Government has shown no such dependence or susceptibility by TPAs that are not obligated to contract with objecting employers, 78 Fed. Reg. at 39,880.

on a "puzzling and wholly artificial distinction." *Colo. Christian*, 534 F.3d at 1259. While the exemption may in theory, be available "to organizations affiliated with any and all religions," Opp'n at 37, its burdening of religions that oppose contraception and operate extensive ministries, such as schools and charities, that are not traditional houses of worship, leaves little doubt that it discriminates against Catholic organizations in "practical terms." *Lukumi*, 508 U.S. at 536.

**2. Excessive Entanglement**

As explained, Pls. Br. at 38-41, the exemption from the Mandate involves intrusive judgments regarding the entity's religious beliefs, practices, and structure, including, 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); Pls.' Br. at 39–40. 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). This process alone constitutes unconstitutional excessive entanglement, even before it is applied to Plaintiffs. *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) ("It 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*."). Plaintiffs can sue before the Government "troll[s] through [their] religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *McCarthy v. Fuller*, 714 F.3d 971, 976, 978 (7th Cir. 2013).

**F. The Mandate Interferes with Plaintiffs' Internal Church Governance**

The First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). Such organizations are guaranteed "an independence from secular control or manipulation . . . [and the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115-16 (1952).[24] Here, the Mandate interferes

[24] Among other things, religious organizations are allowed to establish their own hierarchy, *Kedroff*, 344 U.S. at 116, to establish their own rules "for internal discipline and government,"

with matters of internal church governance in two primary ways. Detisch Decl. ¶¶ 5, 28–32.

*First*, rather than deferring to Plaintiffs' decisions regarding the entities that will "carry out their mission," the Mandate relies on a Revenue Code provision adopted for the purpose of who must file a Form 990 and thereby splits the Church in two—separating its faith from its works as performed through its ministries. This artificial division between "houses of worship" and charitable and educational organizations ignores the reality that many religious groups, including the Catholic Church, offer charitable and educational services as an exercise of religion. By refusing to exempt these organizations, the Mandate interferes with "internal church decision[s] that affect[] the faith and mission of the church itself," preventing the Church from structuring its operations in the manner it has chosen to carry out its mission. *Hosanna-Tabor*, 132 S. Ct. at 707. It makes controlled affiliates like Erie Catholic into second-class religious organizations and thereby arbitrarily and improperly discriminates against Catholics.

*Second*, the First Amendment also protects religious organizations from government interference with their chosen organizational and hierarchical structure. *Cf. Hosanna-Tabor*, 132 S. Ct. at 704–07; *Milivojevich*, 426 U.S. at 724; *Kedroff*, 344 U.S. at 115–16. Plaintiff Diocese has chosen to administer one self-insured plan for Diocesan employees and the employees of its equally religious charitable and educational ministries, including the other Plaintiffs. The Diocese thus ensures that its subordinate ministries adhere to Catholic doctrine. However, the Mandate unconstitutionally involves the Government "in such ecclesiastical decisions," forcing the Diocese to either facilitate access to the Preventive Services for the employees of accommodated entities or expel them from its plan. *Hosanna-Tabor*, 132 S. Ct. at 706.

## II. PLAINTIFFS ARE SUFFERING CONTINUING IRREPARABLE HARM AND THE BALANCE OF HARMS WEIGHS IN PLAINTIFFS' FAVOR

In addition to "(1) a likelihood of success on the merits," plaintiffs have shown "(2) that [they] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief

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*Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724 (1976), and to select who will "teach their faith, and carry out their mission," *Hosanna-Tabor*, 132 S. Ct. at 710.

will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

**A. Plaintiffs Are Suffering Irreparable Harm**

As indicated in their initial brief, Pls. Br. at 42–45, Plaintiffs have shown irreparable harm because the Mandate forces them to violate their religious beliefs, a burden that "unquestionably constitutes irreparable injury" even if borne for only "minimal periods of time." *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). This is true under both the First Amendment and RFRA. *Tyndale*, 904 F. Supp. 2d at 129; *see also O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418.

The Government offers no argument as to whether Plaintiffs have demonstrated irreparable harm, and does not dispute the fact that the Mandate's impact on Plaintiffs will be immediate and irreparable. Opp'n at 41. Accordingly, the Government has conceded the irreparable-harm prong because Plaintiffs they have shown a likelihood of success on the merits.

**B. The Balance of Harms Weighs in Plaintiffs' Favor**

The Government generally and 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* Opp'n at 41. Those generic interests pale in comparison, however, to the serious harm that will be inflicted on Plaintiffs' religious liberty if the Mandate is not enjoined before January 1, 2014. Pls. Br. at 45–46. Indeed, "[o]ne of the goals of the preliminary injunction analysis is to maintain the status quo." *Kos Pharms*., 369 F.3d at 708.

In any event, the Government cannot credibly object to a temporary delay in enforcement of the Mandate when it is arguing that it has a compelling interest because grandfathered plans will be subject to the strictures of the Mandate "over time." Opp'n at 24. Similarly, in other cases the Government has acquiesced in preliminary injunctions that have imposed temporary enforcement delays. The Government claims that its acquiescence in those cases was motivated by "an effort to conserve judicial and governmental resources," Opp'n at 41 n.22, but surely similar consideration is warranted to avoid irreparably trampling on Plaintiffs' religious exercise.

## III. PRELIMINARY RELIEF WILL SERVE THE PUBLIC INTEREST

The Government's arguments with respect to the public interest assume that the Government's arguments on the merits will prevail. For that reason, the Government does not seriously attempt to rebut the clearly established rule that, "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994). Because Plaintiffs have made both of these showings, the public interest favors entry of a preliminary injunction. *See* Pls. Br. at 47–48.

The Government makes much of the supposed public benefits of providing free contraception to Plaintiffs' 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* Opp'n at 42. 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 *5. With numerous plans excluded from the Mandate, the Government cannot assert that temporarily excluding Plaintiffs' plans would result in significant public harm. "Where there is no compelling state interest to justify a burden on religious freedom, 'the public interest clearly favors the protection of constitutional rights.'" *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 561 (W.D. Pa. 2003).

Additionally, the public, including Plaintiffs' employees, have a direct interest in the injunctive relief, without which Plaintiffs could be subject to crippling fines. Such fines could lead to a reduction in the services that Plaintiffs provide and a reduction in the number of people that Plaintiffs may employ in the execution of those services. *Cf. Feed the Children, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 330 F. Supp. 2d 935, 948 (M.D. Tenn. 2002).

## CONCLUSION

Accordingly, the Court should grant Plaintiffs' request for a preliminary injunction.

Respectfully submitted, this 5th day of November, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2013, I electronically filed the foregoing Plaintiffs' Reply in Support of their Motion for Preliminary Injunction with the Clerk of the United States District Court for the Western District of Pennsylvania using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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