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

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, *et al.*,	:	
Plaintiffs,	:	
v.	:	**CIVIL ACTION NO. 1:12-cv-00123**
KATHLEEN SEBELIUS, *et al.*,	:	**HON. SEAN J. MCLAUGHLIN**
Defendants.	:	**ELECTRONICALLY FILED**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND MOTION FOR RULE 65(A)(2) CONSOLIDATED TRIAL AND PRELIMINARY INJUNCTION HEARING

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INTRODUCTION

Plaintiffs are being irreparably harmed now and in the imminent future by both parts of the regulation at issue in this case and will continue to be irreparably harmed until this Court issues an injunction. Defendants ignore these irreparable harms. Instead, they attempt to redefine or trivialize Plaintiffs' established, sincerely-held religious beliefs, so they can argue those newly-defined, and considerably narrowed, religious beliefs are not substantially burdened by the Mandate. But such a characterization ignores the protections of the Religious Freedom Restoration Act ("RFRA") and Constitution. When properly characterized and analyzed under existing law, Plaintiffs' religious beliefs *are* being substantially burdened by the Mandate. For these reasons and those that will be presented at the requested hearing, the Court should grant an injunction on an expedited basis.

As Plaintiffs finalized this Reply Brief, they became aware of the court's October 31, 2012 decision in *Legatus v. Sebelius*, Case No. 2:12-12061, 2012 WL 5359630 (E.D. Mich Oct. 31, 2012). In this decision, the court granted plaintiffs' motion for preliminary injunction with respect to the for-profit plaintiffs, recognizing that the Government has not articulated how its alleged generalized interests are compelling even as to for-profit plaintiffs. *Id.* at *10 ("The court has no doubt that every level of Government has an interest in promoting public health as a general matter, but remains uncertain that the Government will be able to prove a *compelling* interest in promoting the specific interests at issue in this litigation.") (emphasis in original). The court dismissed the non-profit entity without prejudice, but importantly, this entity's only alleged concrete injury was that "the Government's promise of future rulemaking is non-binding and the HRSA Mandate could be enforced against them at any time." *Id.* at *5. Here, however, Plaintiffs have provided **unrebutted** affidavits demonstrating concrete current and imminent injuries.

ARGUMENT

The record before the Court now has a motion to dismiss that did not cover all counts of the Complaint, affidavits that stand unrebutted, and only generalized arguments from the Defendants that do not address the specific facts of this case. Accordingly, only two of the four preliminary injunction elements are at issue here: 1) likelihood of success on the merits and 2) irreparable harm. After failing to address the other two elements, Defendants cannot now dispute that: 1) an injunction will not cause greater harm to Defendants than to Plaintiffs and 2) an injunction is in the public interest. Dkt 32, Pls.' Br. at 9-10; Dkt 41, Gov't Br. at 10. Furthermore, after failing to dispute two of Plaintiffs' Administrative Procedure Act ("APA") claims, Defendants cannot now dispute that the regulations at issue are arbitrary and capricious and illegal. Compl., Counts VIII, IX; Pls.' Br. at 30 n.12. Therefore, the only issues this Court is being asked to resolve are: 1) Plaintiff's likelihood of success on their other substantive claims and 2) whether Plaintiffs have established irreparable harm. Plaintiffs satisfy both of these elements.

I. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ALL OF THEIR CLAIMS.

This case is centered on two provisions of the new regulations. First, the requirement that employers provide health care coverage that includes abortifacients, sterilization, and contraception, which Plaintiffs have been calling the Mandate. Second, the **final**,[1] narrow

[1] As Plaintiffs have indicated to the Court, the religious employer definition is final. *See* Oct. 18, 2012 Ltr. to McLaughlin, J. (citing 77 Fed. Reg. at 16,504). Based on this regulation, it is clear that, even if any accommodation is implemented, Defendants will continue using the "religious employer" definition as the basis for determining benefits eligibility: "[T]he participants and beneficiaries covered under the health plans offered by a 'religious employer' compared to those covered under the health plans offered by a 'religious organization' will have differential access to contraceptive coverage." *Id.*

definition of religious employer in the regulatory exemption to the Mandate. Because both provisions have been promulgated in violation of the First Amendment, RFRA and APA, this Court should enjoin their application and enforcement.

A. Religious Freedom Restoration Act Claims

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

The Government fundamentally misunderstands both the substantial burden test and Catholic doctrine. The Government argues that because the Mandate does not directly require Catholics (including Plaintiffs' employees) to utilize the objectionable services, the Mandate is not burdening Plaintiffs' religious exercise. Gov't Br. at 18-20. But, Plaintiffs' sincerely-held religious beliefs prohibit more than "use" of these services and the Government's proposed rewriting of Plaintiffs' beliefs would require going well beyond any court's competence.

The Government's primary error is conflating the "religious exercise" and "substantial burden" analyses. Under RFRA, courts must 1) identify the religious exercise at issue, and 2) determine whether the government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007); *see also Garraway v. Lappin,* No. 12–1867, 2012 WL 3090945 (3d Cir. July 31, 2012). Without properly identified religious beliefs in the first step, courts cannot determine whether "substantial pressure" has been applied. The Government makes the same crucial mistake with the first step as the *O'Brien v. HHS* court, No. 4:12-cv-00476, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), misstating or rewriting Plaintiffs' belief, as if only *use* of the mandated services is prohibited. Catholic teaching, however, equally forbids *utilizing*, *subsidizing* and *facilitating* access to these services. Compl. ¶¶ 10, 152. At the requested hearing, Plaintiffs are prepared to provide live testimony to

establish beyond peradventure that the Mandate substantially burdens and offends their long-standing, core, and sincerely-held Catholic beliefs.

Defendants' misidentification of the relevant religious exercise is fatal to their argument. First, Defendants overstep their bounds by failing to accept Plaintiffs' representations of their religious beliefs. The Government has, in a patronizing and unconstitutional manner, determined that some of Plaintiffs' beliefs are not worthy of protection. *United States v. Lee*, 455 U.S. 252, 257 (1982) ("It is not within the judicial function and judicial competence to determine whether [a plaintiff] or the Government has the proper interpretation of the [challenger's] faith.").[2] Instead, Plaintiffs' interpretation of their belief that they cannot use, *subsidize*, or *facilitate* coverage for the objectionable services, must be accepted at face value. *Thomas*, 450 U.S. at 715. ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). While Plaintiffs are not being "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 2012 WL 4481208, at *6, Plaintiffs are entitled to draw their own line and have their beliefs receive the same protection as the listed beliefs and practices that are apparently favored. 42 U.S.C. § 2000cc-5(7)(A) (broad religious exercise definition).[3]

Once Plaintiffs' beliefs are properly defined, the question becomes whether the Mandate places "substantial pressure" on Plaintiffs to violate *their* beliefs, not the *Defendants'* nor the *O'Brien* court's version. *Thomas*, 450 U.S. at 718. Requiring Plaintiffs to facilitate the

[2] *See also Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, [the Supreme Court has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

[3] Indeed, under the *O'Brien* analysis, it would seem to be equally "attenuated" for Catholics to object to providing coverage for such practices as surgical abortion or euthanasia.

mandated coverage or pay massive fines, is the epitome of a substantial burden,[4] *see, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding a substantial burden where believers were "affirmatively compel[led]" to perform "acts undeniably at odds with fundamental tenets of their religious beliefs" or face monetary penalties), and is not "too attenuated."[5] *See, e.g., Thomas*, 450 U.S. at 713–18 (denial of unemployment substantially burdens pacifist who refused to work at a factory that manufactured tank turrets, even though he was not being sent to war). The new, final definition of religious employer levies an additional burden on Plaintiffs by pressuring these religious organizations to serve and employ only people of their own faith, in fundamental contravention of Catholic religion. As explained at the September 11, 2012 hearing:

> [R]ight now the Bishop, the head of [] Catholic Charities, the head of St. Martin's Center, so on, have been serving people of all faiths, of no faith, people where they never say when you come to our center, what religion are they. They don't keep records. So now, the Bishop and my witnesses, as stated in the affidavits and in the brief and in the allegations of the complaint, always believed that a central tenet of their faith is to serve people of all faiths or no faith. They don't ask the 57,000 people who they served last year, what faith are you. **If they're going to have to decide whether to go for [the] religion exemption, they'll have to decide whether they're going to start keeping records of who they're serving.**

[4] The Government misses the point when it compares the Mandate to employee salaries. Gov't Br. at 20. Plaintiffs' religious doctrine can draw a line between salaries and health plans, even if that line is "unreasonable." *Thomas*, 450 U.S. at 715. Here, that line is eminently reasonable. Employees may use their paychecks as they please, because the money is not earmarked for particular purposes and is spent without employer input. The health plans at issue here, however, are *sponsored* and *subsidized* directly by Plaintiffs who thereby *facilitate* the products and services used under the plan. The Mandate effectively requires Plaintiffs to hand employees free tickets they can "redeem for contraceptives, abortifacients, or sterilization only."

[5] Likewise, in *Lee*, the Supreme Court rejected the Government's contention that paying social security taxes into the general treasury was too indirect a violation to "threaten the integrity 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 Amish's own representation that "the payment of the taxes . . . violate[d their] religious beliefs." *Id.* at 257.

Sept. 11, 2012 Tr. at 7:12-24. This Court rightly recognized, "How would you do that?" *Id.* at 7:21-25.

2. Defendants Have Not Articulated Any Compelling Interests

Under RFRA, Defendants must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] *the particular claimant whose sincere exercise of religion is being substantially burdened*." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 420 (2006) (emphasis added). Defendants cannot satisfy their burden; they baldly assert that two generalized interests apply equally to Plaintiffs. This argument is contrary to established law and would gut RFRA.

Defendants cannot justify the substantial burden they impose on Plaintiffs' religious exercise by citing broad interests in promoting women's health and "equalizing the provision of preventive health care [services]" between men and women. Gov't Br. at 1–2. The Supreme Court has expressly rejected such sweeping assertions of generalized interests. *See, e.g.*, *O Centro*, 546 U.S. at 430–31, 38 ("general interest in promoting public health," "standing alone, is not enough"); *Yoder*, 406 U.S. at 221 (education). Moreover, the massive numbers of grandfathered or exempted plans cuts against Defendants' argument that these interests are compelling, especially when weighed against constitutionally recognized freedom of religion.

As the *Legatus* court recently recognized, the Government has not articulated how its alleged generalized compelling interests are compelling even as to for-profit plaintiffs. 2012 WL 5356930, at *10. The Government in that case made the same exact arguments it makes here, plus arguments about a slippery slope regarding for-profit institutions. *Id.* But the court was still unconvinced. *Id.* ("The court has no doubt that every level of Government has an interest in promoting public health as a general matter, but remains uncertain that the Government will be able to prove a *compelling* interest in promoting the specific interests at issue in this litigation.")

(emphasis in original). Here, Plaintiffs are all non-profit entities so their likelihood of success is even greater.

Defendants cannot meet this requirement by baldly asserting that their stated general interests "are compelling . . . when applied specifically to plaintiffs," because Plaintiffs do not currently offer the mandated coverage. Gov't Br. at 21–22 & n.11. This badly mischaracterizes the compelling interest inquiry.[6] Such reasoning would also eviscerate RFRA's compelling interest prong, because it would apply to *all* RFRA plaintiffs who will *always* be in violation of (or seeking an exemption from) the law at issue. Under Defendants' reasoning, for example, the Government's interest in ensuring children were educated until age sixteen would have been "particularly" compelling as applied to the Amish, who did not send their children to school beyond eighth grade; but the Supreme Court held otherwise. *See Yoder*, 406 U.S. at 207, 221; *see also id.* at 236 (Defendants must "show with . . . particularity how [even] admittedly strong interest[s] . . would be adversely affected by granting an exemption").

Moreover, the Mandate's exceptions undercut any claimed compelling interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."); *see also O Centro*, 546 U.S. at 433; *Newland v. Sebelius*, No. 1:12-CV-1123, 2012 WL 3069154, at *7 (D. Colo. July 27, 2012). The Government argues that one exception—grandfathering—is not limited to the Mandate and is not

[6] Throughout their brief, Defendants rely on inapposite state court decisions upholding state laws that allowed employers to avoid state mandates by dropping prescription drug coverage. *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) ("Plaintiffs are not required by law to purchase prescription drug coverage at all."); *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 75, 91 (Cal. 2004). Those cases have no bearing on how a federal court should review the Mandate that substantially fines employers who drop coverage.

a true exemption because it is merely a way of phasing-in the Affordable Care Act ("ACA") requirements, including the Mandate. Gov't Br. at 24-25. By exempting plans from certain ACA requirements but not others, however, grandfathering reflects a Congressional determination that the excluded requirements, including the Preventive Care requirement, need not apply to every employer. Additionally, anyone who has heard the President insist that they will be able to keep their current health care plans would be shocked to learn that it is simply a phase-in program. While many companies will lose their grandfathered status in the coming years, the law is drafted to allow those plans to remain grandfathered in perpetuity.[7]

3. The Mandate is Not the Least Restrictive Means of Achieving Any Compelling Interest

The Government has also failed to make the required showing that the Mandate is the "least restrictive means" of achieving its goals. The Government accuses Plaintiffs of "misunderstand[ing] the nature of the least restrictive means inquiry"—but it is the Government that misstates its obligations, while mischaracterizing case law in the process.

The Government asserts that it is not required, under RFRA, to adopt a new legislative or administrative scheme. Gov't Br. at 23. But the application of strict scrutiny under RFRA *does* require the Government to *consider* "workable . . . alternatives that will achieve" the Government's stated goals. *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). "[I]f there are

[7] Moreover, Defendants have admitted that "85 percent of employer-sponsored health insurance plans cover[] preventive services" already "without [beneficiaries] having to meet a deductible," 75 Fed. Reg. 41726, 41732—in other words, without a significant form of cost sharing. And, Defendants cannot claim to have "identif[ied] an actual problem in need of solving," because they admit that contraceptives are widely available. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); Gov't Br. at 21 n.11. In response, the Government now articulates a narrower compelling interest in "eliminating . . . cost-sharing." Gov't Br. at 21 n.11. Even if compelling, that narrow interest is non sequitur for Plaintiffs who do not already provide the coverage and whose employees have wide access to such services.

other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)).

Plaintiffs' prior filings make clear at least two alternatives. First, the Government could directly subsidize or provide these drugs and services. Pls.' Br. at 20-21. Second, the Government could provide a broader definition of religious employer, as it has consistently done in the past. *See, e.g.,* 29 U.S.C. § 1002(33) (definition of "church plan"). The record contains no evidence that the Government considered these or any other proposed methods of achieving its goal before enacting the Mandate. The Government has yet to offer a reasoned explanation for why it cannot exempt Plaintiffs or for why it did not adopt Plaintiffs' suggested alternative means. Its cursory assertion that "Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and are otherwise impractical," Gov't Br. at 24, is insufficient to meet its burden of offering "some *affirmative evidence* that there is no less severe alternative," *Johnson*, 310 F.3d at 505 (emphasis added). And the Government has also failed to adduce facts supporting its claim that there are administrative and logistical obstacles to Plaintiffs' proposed alternatives, especially because "the government already provides free contraception to women." *Newland*, 2012 WL 3069154, at *7–8.

Even the Government's cases actually support *Plaintiffs*' position. For example, *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011), stresses that the Government need not prove the negative that one could never come up with an alternative; rather, it provides that the Government *is* responsible for "support[ing] its choice of regulation, and . . . refut[ing] the alternative schemes offered by the challenger." *Id.* at 1289. Here, Plaintiffs are not asking the

Government to disprove the feasibility of *any conceivable* alternative scheme. Plaintiffs instead ask only that the Government engage with, and provide its reasoned analysis for rejecting the feasible alternatives Plaintiffs offer—as it is required to do.[8]

B. Establishment, Excessive Entanglement Claims

The Government claims the regulations do not create an impermissible entanglement between church and state for two reasons. First, the Government contends that Plaintiffs' challenge is "premised on speculation" about how the religious employer exemption will be enforced. Gov't Br. at 31-32. This is a reprise of the Government's justiciability arguments that have been fully briefed and argued separately. As Plaintiffs have demonstrated, the religious employer regulation at issue is final, the Government has disavowed any intent to alter it, and it will continue to harm Plaintiffs even after any ANPRM process is complete. *See, e.g.,* 77 Fed. Reg. 16501, 16504 (providing for two-tier determination of benefits under the ANPRM).

Second, the Government denies that the entanglement dictated by the Mandate is "excessive." Gov't Br. at 32-33. But, the exemption's intrusive judgments about an organization's "purpose," "religious tenets," and practices are exactly the inquiries which have been branded as excessively entangling by the Supreme Court and lower courts. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs."); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (noting entanglement that would result from determining "which words and activities fall within 'religious worship and religious teaching'" and the "continuing need to monitor group meetings to ensure compliance with the rule"); *NLRB v. Catholic Bishop of*

[8] Plaintiffs merely ask the Government to satisfy the legally required least restrictive means test; they are not asking it "to subsidize private religious practices." Gov't Br. at 23.

Chicago, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").[9]

Even the *risk* that the some religious employers will qualify for the exemption while others will not, under the Government's discretionary application of the exemption, is alone grounds for finding excessive entanglement. *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."). That risk is especially significant here, because the Government will have broad discretion to apply terms like "primarily." Sadly, it seems impossible for any Catholic hospital, school, or social service agency to qualify for the new definition of religious employer, while other religions that serve only their own members can satisfy the new standard. This unlawfully discriminates against Catholics, who believe they must serve all.

Defendants rely on cases finding no excessive entanglement by virtue of "routine regulatory interaction" between Government and religious organizations. Gov't Br. at 32-33. The regulations at issue in those cases have no bearing on the invasive interrogation of a religious employer's "religious tenets" and purpose as mandated by the exemption here. *See Hernandez v. Comm'r of IRS*, 490 U.S. 680, 696 (1989) (determining whether transactions

[9] *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 698 (1970) (Harlan, J., concurring) (religious property tax exemption constitutional, as "its administration need not entangle government in difficult classifications of what is or is not religious"); *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) ("[T]he inquiry into the employer's religious mission is not only likely, but inevitable . . . . Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.")

qualified as charitable contributions did not "requir[e] the Government to distinguish between 'secular' and 'religious' benefits or services, which may be fraught with the sort of entanglement that the Constitution forbids"); *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (monitoring use of federal funds in accordance with federal grant program, not the recipient's religious "purpose" or "tenets"); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764 (1976) (annual determinations of how federal funds are spent, where the Court was bound by district court's factual finding that reviews would be "quick and non-judgmental").[10]

C. APA Notice-and-Comment Claim

Defendants continue to concede that they did not follow the required notice and comment. Instead, they claim their make-up procedure was (a) authorized by statute and (b) harmless error. Defendants' position that they were expressly authorized by statute to promulgate regulations on an interim final basis without prior notice and comment is based on statutory language providing that the Defendant Secretaries may "promulgate any interim final rules as the Secretar[ies] determine[] are appropriate" to carry out the relevant statutory provisions. Gov't Br. at 33-35. Such generic statements alone do not suffice to "supersede or modify" the APA's notice-and-comment requirement. Pls.' Br. at 26 (citing 5 U.S.C. § 559). Indeed, the Government's own case, *Coalition for Parity, Inc. v. Sebelius*, analyzed the same statutory language at issue here, and held that the language did not evidence a clear Congressional intent to supplant the APA's notice-and-comment procedures. 709 F. Supp. 2d 10, 17-19 (D.D.C. 2010).

[10] The Government relies on *Agostini v. Felton*, 521 U.S. 203, 212 (1997) as finding that a similar or greater entanglement was not excessive. Gov't Br. at 33. But, the point of the monitoring in *Felton* was to ensure that public school teachers placed in sectarian schools would not take part in religious education. 521 U.S. at 212. In other words, the public teachers, not the sectarian schools, were subject to supervision and monitoring. *See id.* at 234 ("There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees.").

Defendants cite four cases to support their argument that they had express statutory authority to bypass prior notice and comment. Two cases involved statutes that expressly provided detailed procedures for the agencies to follow when implementing regulations, unlike the statutes at issue here. *See Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (statute instructed agency to issue an interim final rule followed by public comment); *Asiana Airlines v. FAA*, 134 F.3d 393, 397-98 (D.C. Cir. 1998) (same). The other cases only considered a statute's generic authorization to issue interim rules as one factor when analyzing "good cause" to bypass the APA's notice-and comment-requirement, not as a sufficient or determining factor. *See Nat'l Women, Infants, and Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 105 (D.D.C. 2006); *Coalition for Parity, Inc.,* 709 F. Supp. 2d at 17-19. But, Defendants cannot satisfy the good cause exception here, Pls.' Br. at 26-28, and have made no argument to the contrary. Gov't Br. at 33 n.18 (merely stating that they claimed "good cause" in the Federal Register without providing any argument or reasoning).

Defendants argue that the absence of prior notice and comment constitutes harmless error because the public was given a post-promulgation opportunity to comment. Gov't Br. at 33-36. The Third Circuit has rejected such post-hoc rationalization. *See Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380-81 (3d Cir. 1979) (sixty-day period for comments after promulgation of a rule cannot substitute for the prior notice and comment required by the APA absent good cause).

Finally, Defendants do not deny that: (a) the HRSA guidelines for required women's preventive care have a substantial impact on regulated employers and insurers and (b) they published these guidelines in a press release and a website—without any proposal, notice, comment period, or even formal publication. Gov't Br. at 36-37. This evidences a clear violation of the APA. *See Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95-97

(D.C. Cir. 2002) (finding that a press release from the Department of Agriculture that set forth bid procedures constituted a rule and that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.").[11]

D. First Amendment, Substantial Burden Claim

1. Strict Scrutiny Applies

First, the Mandate is not neutral and generally applicable because the vast majority of secular group health plans and commercial insurance issuers already provide coverage for the objectionable services and also because many plans have been exempted. Thus, contrary to the Government's contention, "the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see also* Gov't Br. at 26. As a result, strict scrutiny applies. Indeed, the effect of the Mandate is no different from the prohibition on animal slaughter in *Lukumi*, which, although it applied equally to all, was found to be "motivated by religious belief" because of its singular impact on the religious practices of Santeria. 508 U.S. at 545.[12]

Moreover, the Mandate targets Plaintiffs. Defendants do not dispute Plaintiffs' claim that

[11] Defendants merely argue that they received considerable feedback on the HRSA guidelines, so any additional comments would have likely been duplicative of other comments they received. Gov't Br. at 36-37. But Defendants' position would eviscerate the APA. *See Sugar Cane*, 289 F.3d at 97 ("if the government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—section 553 would obviously be eviscerated.").

[12] Defendants attempt to distinguish *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, because the "preventive services coverage regulations . . . contain both secular and religious exemptions." Gov't Br. at 26 n.15 (citing 170 F.3d 359 (3d Cir. 1999)). But *Fraternal Order* itself does not recognize such a distinction. Instead, then-Judge Alito's decision is premised expressly on government valuation of secular burdens over religious burdens, which is repeated here by the broad secular exemptions for small employers and grandfathered plans, in contrast to the narrow exemption for religious employers. *Id.* at 365-66. Moreover, *Fraternal Order* is based on cases like *Lukumi* that also had a separate religious exemption. *Id.* at 364-66.

the weight of employers who did not previously provide coverage for the objectionable services had religious objections. If the Government had a legitimate concern for requiring secular employers who already covered the objectionable services to do so without cost-sharing, it could have crafted such a neutral, generally applicable law. But it did not. Instead, the regulations also force employers that have never provided coverage for these services to institute coverage for the first time. That effect falls almost exclusively on religious organizations like Plaintiffs.

Second, strict scrutiny applies because Plaintiffs have asserted claims of hybrid rights. *See* Pls.' Br. at 22-23. The Government's only response is that the Third Circuit has declined to apply strict scrutiny to "hybrid rights" claims. Gov't Br. at 26 n.14. The Government meets the truth halfway. The court has declined to endorse the hybrid rights theory where the plaintiff failed to make out a claim justifying its adoption. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 284 n.24 (3d Cir. 2009) ("Brown does not propound it here."); *McTernan v. City of York*, 564 F.3d 636, 647 n.5 (3d Cir. 2009) ("McTernan has not articulated reasons specifically supporting our application of the doctrine here."). The Third Circuit has, however, expressly left open the possibility of strict scrutiny for such claims. *See e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 n.26 (3d Cir. 2002) ("Strict scrutiny may also apply when a neutral, generally applicable law incidentally burdens rights protected by the Free Exercise Clause in conjunction with other constitutional protections . . . ."). This is such a case.

E. Free Speech Claim

The Government argues that forcing Plaintiffs to facilitate and subsidize counseling for the objectionable services does not implicate their free speech rights because the regulations do not require Plaintiffs "to say anything," Gov't Br. at 27, and the compelled conduct here is not "inherently expressive," Gov't Br. at 28-29. This ignores the bedrock principle that government may not compel a person to embrace a government-favored message, *see Wooley v. Maynard*,

430 U.S. 705, 714 (1977), including by "compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) ("First Amendment values are at serious risk if the government can compel [citizens] to pay special subsidies for speech on the side that it favors[.]"); *see also Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) (compulsory dues to finance political and ideological activities with which state bar members disagreed violated right of free speech). There can be no dispute that the Mandate requires Plaintiffs' health plans to subsidize or facilitate education and related counseling in favor of the objectionable services. It does not matter that "the [Plaintiffs] here [are] required simply to support speech by others, not to utter the speech [themselves]." *United Foods*, 533 U.S. at 413. Plaintiffs firmly believe that use of the objectionable services is morally wrong, yet they are being forced to fund and facilitate the delivery of messages to the contrary.

F. Establishment, Discrimination Claims

Defendants attempt to argue that the Mandate does not enact a preference for certain religions over others, *see Larson v. Valente*, 456 U.S. 228, 244 (1982), because the "definition of 'religious employer' does not refer to any particular denomination." Gov't Br. at 31. But a denominational preference cannot escape constitutional scrutiny merely because it does not appear on the face of the statute or regulation. *See Children's Health. Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("To facially discriminate among religions, a law need not expressly distinguish between religions by sect name."). Otherwise the Government could flout the Establishment Clause by targeting particular denominations without mentioning them by name. That is exactly the nature of the law struck down on First Amendment grounds in *Larson*. *See* 456 U.S. at 232 n.3. And the new religious employer definition has been drafted in terms that Catholic organizations cannot meet.

II. PLAINTIFFS HAVE ESTABLISHED BOTH IMMEDIATE AND IMMINENT IRREPARABLE HARMS SUFFICIENT TO WARRANT AN INJUNCTION.

Defendants claim that immediate, not imminent, harm is required. Gov't Br. at 17. First, Plaintiffs need only present evidence of *imminent* harm, *see Chester ex. rel. NRLB v. Grane Health. Co.*, 666 F.3d 87, 89 (3d Cir. 2011), and the standard is lessened in the First Amendment context to prevent chilling of constitutional rights. *Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 734 (W.D. Pa. 2011); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002).

Second, even if immediate harm were required, Plaintiffs have satisfied this standard. The current law impinges on Plaintiffs' religious freedoms in an irreparable manner and has an immediate effect on Plaintiffs' operations. Plaintiffs are forced to decide, **right now**, during the current Open Enrollment Period for the new plan benefits starting January 1, 2013, whether to be bound by the indemnity agreement which Highmark, the third-party administrator ("TPA") for Plaintiffs' plan, has requested that an authorized representative for the Diocese sign. (*See* Dkt 24-3, Murphy ¶¶ 12-17; Dkt 24-3, Ex. B). Additionally, the Diocese must decide, **right now**, in advance of the new January 1, 2013 benefits year, how to respond to Highmark's request that the Diocese certify whether it meets all four prongs of the "religious employer" exemption. (*See* Dkt 24-3, Murphy ¶¶ 9-11; Dkt 24-3, Ex. A). Failure to sign the indemnity agreement, and failure to complete the religious employer exemption form may well irreparably alter Plaintiffs' relationship with Highmark, forcing Plaintiffs to search for a new TPA to provide benefits **starting January 1, 2013**. (*See id.* ¶ 11).

Additionally, because of the Mandate, Plaintiffs are unable to make necessary operational decisions. For example, Catholic Charities has already begun the process of planning for expansion of its current social services, but this planning is confounded by the looming fines for noncompliance with the Mandate, along with considerations as to whether Plaintiffs will be

forced to restructure so as to fall within the religious employer exemption. (Dkt 24-2, Maxwell ¶¶ 14-16). The harms outlined above go far beyond the planning for future contingencies which were presented in *Belmont Abbey College v. Sebelius* and *Wheaton College v. Sebelius*. No. 11-1989, 2012 WL 2914417, at *14-15 (D.D.C. July 18, 2012); No. 12-1169, 2012 WL 3637162, at *4 (D.D.C. Aug. 24, 2012). And the safe harbor and amendment process which Defendants cite does nothing to alleviate these harms.

Plaintiffs have also presented evidence of imminent harms, including that, months in advance of March 2013, the Diocese must determine whether to participate in a scholarship program that would assist children from failing public schools, but the Diocese cannot participate in this program and also attempt to fall within the religious employer exemption. (Dkt 24-3, Murphy ¶¶ 18-21). Moreover, the government grants that Plaintiffs St. Martin Center and Prince of Peace Center currently receive are in jeopardy because of the Mandate and religious employer exemption. (Dkt 24-2, Maxwell ¶¶ 6-12). And donations that these Plaintiffs receive may be in jeopardy as a result of compliance with the Mandate. (*Id.* ¶ 13). Finally, months in advance of November 2013, Plaintiffs must make cost projections, finalize the budget, and determine what benefits they will offer for their July 1, 2014 plan year, but cannot do so without information as to what benefits they will be able to offer. (Dkt 24-3, Murphy ¶¶ 22-26). These immediate and imminent harms militate in favor of injunctive relief.

CONCLUSION

Therefore, in the face of Defendants' Opposition Brief that does not address all of the points necessary to rebut Plaintiffs' motion for injunctive relief and the completely unrebutted affidavits, this Court should grant Plaintiffs' request for injunctive relief on an expedited basis and should then consolidate the preliminary injunction hearing with a trial on the merits.

Date: November 2, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2012, a true and correct copy of the foregoing was electronically filed 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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