IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO.: 1:12-CV-3489-WSD**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Unless otherwise noted, all emphases herein have been added by Plaintiffs; in addition, Plaintiffs generally have omitted parenthetical notations such as "citing" or "quoting" in order to preserve readability.

INTRODUCTION

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

The Government does not dispute that Plaintiffs' sincerely held religious beliefs bar them from participating in a scheme to supply their employees with health plans that provide free access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Nor does it dispute that the regulations at issue (the "Mandate") require Plaintiffs to participate in just such a scheme on pain of substantial financial penalties. Rather, the Government contends that Plaintiffs' participation in this scheme would be "*de minimis*" and "attenuated." The Mandate, the Government insists, "require[s] virtually nothing" of Plaintiffs beyond the "mere act of certifying that they are eligible for an accommodation." The Government finds it "[r]emarkabl[e]" and "extraordinary" that Plaintiffs would object to what the Government apparently believes to be inconsequential actions.

In fact, the Mandate compels Plaintiffs to do that which they affirmatively believe to be wrong: provide health plans that are vehicles for access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. They cannot avoid this Mandate by either providing health insurance

with no access to the objectionable services or dropping health insurance coverage altogether, as either action would subject them to crippling fines and/or other negative consequences. Thus, under the Mandate, Plaintiffs must identify and contract with a third party willing to provide the mandated coverage, and subsequently authorize that party to provide to Plaintiffs' employees, for as long as they remain on the health plan, the very products and services to which Plaintiffs object. Thus, there can be no serious question that the Mandate compels Plaintiffs to act in violation of their beliefs.

At bottom, the Government asks this Court to make a *religious* judgment about whether the actions required by the Mandate are "*de minimis*" or too "attenuated" to count as significant violations of Plaintiffs' beliefs. This inherently religious judgment—which is wrong as a factual matter—lies well beyond the power of federal courts. To rule in favor of the Government, this Court would have to "rule that [Plaintiffs]"—who sincerely believe they cannot in good conscience participate in the mandated scheme—"misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). This would "cast the Judiciary in a role that [it was] never intended to play." *Id.* It "cannot be squared with the Constitution or with [Supreme Court] precedents," *id.*, which establish that "[i]t is not within 'the judicial function'" to determine whether

a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982). The substantial burden test is limited to inquiring into the sincerity of Plaintiffs' beliefs and the degree of pressure the Government places on them to violate those beliefs.[1]

In accordance with Catholic teaching, Plaintiffs oppose taking the actions required by the Mandate to facilitate access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. The Mandate, however, threatens Plaintiffs with massive fines and other negative consequences if they do not do what they believe their religion forbids. It is thus beyond question that the Mandate imposes a substantial burden on Plaintiffs' religious exercise. This burden, moreover, cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

Accordingly, the Mandate is irreconcilable with the Religious Freedom Restoration Act ("RFRA"), the First Amendment, and other federal laws, and this Court therefore should grant Plaintiffs' Motion for Summary Judgment and deny the Government's Motion to Dismiss or, in the Alternative, for Summary Judgment.

[1] *See Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716–18 (1981); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137-41 (10th Cir. 2013) (en banc).

ARGUMENT

Summary judgment is proper if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. A court passing on a motion for summary judgment may not consider conclusory assertions. *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

Here, the undisputed facts demonstrate that Plaintiffs are entitled to summary judgment on all counts.

I. THE MANDATE VIOLATES RFRA

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). Here, Plaintiffs have demonstrated that the Mandate imposes a substantial burden on their religious exercise, and the Government has failed to show that the Mandate is

the least restrictive means of furthering a compelling interest.

A. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Since the sincerity of Plaintiffs' beliefs is not in dispute, RFRA's substantial burden test here involves only a two-part inquiry. The Court must (1) "identify the religious belief" at issue, and then (2) determine "whether the government [has] place[d] substantial pressure"—i.e., a substantial burden—on Plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140.

In identifying the religious exercise, the court's inquiry is "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). Its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious," *id.*, as it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. The Court must accept Plaintiffs' description of their religious exercise, regardless of whether it, or the Government, finds it "logical, consistent, or comprehensible." *Id.* at 714–15.

Then, the Court must determine whether the Government has substantially burdened that exercise of religion. A "substantial burden" occurs if the Government compels an individual "to perform acts undeniably at odds" with his religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450

U.S. at 717-18.

Here, application of this test shows that the Government has substantially burdened Plaintiffs' exercise of religion. Plaintiffs exercise their religion by, *inter alia*, refusing to take certain actions that facilitate access to abortion-inducing products, contraceptives, sterilization, or related education and counseling. They have confirmed that such actions violate Catholic beliefs. *See* Preliminary Injunction Brief ("PI Brief") at 9.[2] The question is whether the Mandate substantially pressures Plaintiffs to act contrary to those beliefs. It does, as it forces Plaintiffs to give their employees an insurance plan that is the vehicle by which objectionable products and services are provided to them. Plaintiffs cannot provide a plan that does not facilitate access to such products and services, nor can they refuse to provide insurance coverage at all, without exposing themselves to crippling fines. Where the Government has forced Plaintiffs to choose between (1) acting in violation of their religious beliefs, or (2) paying penalties and/or suffering other negative consequences, "it is difficult to characterize the pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140.

The Government, however, deems it "[r]emarkabl[e]" that Plaintiffs object to the Mandate. D.E. 63 at 13. According to the Government, the Mandate requires

[2] *See also* Plaintiffs' Statement of Material Facts and Additional Statement of Facts ("Plaintiffs' SMF") ¶¶ 6-8, 17-27, 40-43.

almost "no action" on Plaintiffs' part, and their participation in the scheme to provide contraceptive coverage to their employees is "*de minimis*." *Id.* at 25-35. Ultimately, the Government seeks to convince the Court that the Mandate is "no big deal."

For Plaintiffs, however, the Mandate is a very big deal. It forces them to take actions that violate their religious beliefs. Moreover, the Government's arguments rest on a fundamentally flawed understanding of the substantial burden inquiry. Though this Court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant[s] to violate th[eir] belief[s]," *Hobby Lobby*, 723 F.3d at 1137, the Government asks this Court to assess whether the Mandate requires Plaintiffs to violate their beliefs in a "meaningful" way, a test that distorts the substantial burden analysis and requires this Court to determine things beyond its proper role.

1. The Mandate Requires Plaintiffs to Act in Violation of Their Sincerely Held Religious Beliefs

The Government asserts that Plaintiffs object to "regulations [that] require virtually nothing of them" beyond the "mere act of certifying that they are eligible for an accommodation." D.E. 63 at 13-14. Nothing could be further from the truth. As explained above, Plaintiffs must provide a health care plan that serves as the vehicle for delivery of objectionable products and services. Plaintiffs, moreover, are

forced to take concrete steps toward that end, including identifying a third party willing to provide the very services they deem objectionable, entering into a contract with that party that will result in the provision of those services, and authorizing the provision of those services through self-certification.[3]

As applied to Plaintiffs, the Mandate is indistinguishable from the requirements invalidated by the Tenth Circuit in *Hobby Lobby*. There, a private employer's decision to offer a group health plan automatically caused the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. So too here, Plaintiffs' decision to offer a group health plan results in the provision—in the form of "payments"—of the objectionable coverage. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the employers' actions result in "free" contraceptive benefits for their employees that 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 39876-77, and they will be offered only to individuals the

[3] And indeed, despite the Government's claims to the contrary, it is likely that Plaintiffs' funds will subsidize the provision of these services. PI Br. at 31-34.

organization identifies as employees, *cf. id.* at 39876.[4]

The Government is thus wrong to claim that this case is analogous to situations where a plaintiff states a religious objection to a third party's activities, in which the plaintiff plays no role. *See* D.E. 63 at 25-26 (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). In *Kaemmerling*, the plaintiff objected "to the government collecting his DNA information from any fluid or tissue sample" *already in the government's possession*. 553 F.3d at 678. Notably, Kaemmerling made it clear that he did not object to the process by which the Government obtained samples of his blood, saliva, skin, or hair. *Id.* He objected only "to the government extracting DNA information from the specimen." *Id.* at 679. The D.C. Circuit concluded that Kaemmerling failed to state a RFRA claim because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* The extraction of DNA from samples already in the Government's possession involved "no action" on Kaemmerling's part, and thus imposed no "restriction on what [he] c[ould] believe or do." *Id.* at 679–80.[5]

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[4] Nor can the Government contend that Plaintiffs are alleviated of costs that private employers must bear, as it has repeatedly asserted that the Mandate is cost-neutral. *E.g.*, *id.* at 39877.

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

Here, providing contraceptive coverage is not an "activit[y] of [a third party], in which [Plaintiffs] play[] no role." *Id.* at 679. Rather, Plaintiffs object to the requirements that the Mandate imposes on *them* to facilitate access to contraceptives. Absent circumstances of the highest order, the Government cannot force individuals—in their own conduct—to take actions that violate their religious beliefs.

2. 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 wrong. Plaintiffs' decision to obey their religious beliefs rather than the Mandate subjects them to crippling fines—an obvious substantial burden. *Yoder*, 406 U.S. at 208, 218 ($5 fine is substantial burden). The Government's contrary argument rests on a misunderstanding of the substantial burden test.

Once a plaintiff's sincere religious beliefs have been identified, a court's

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(continued…)

number to administer his daughter's public welfare benefits. *Id.* at 700. Roy, however, also objected to the requirement that *he provide* the government with his daughter's social security number in order for her to receive benefits. *Id.* at 701–712 (opinion of Burger, C.J.). A majority of the court would have held that this requirement imposed a substantial burden on his exercise of religion. *See id.* at 715–716 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, and dissenting in part); *id.* at 733 (White, J., dissenting). This forecloses the Government's assertion that *de minimis* or administrative acts receive no protection.

"only task is to determine whether . . . the government has applied substantial pressure on the claimant to violate [those] belief[s]." 723 F.3d at 1137-39. The focus is only on "the intensity of the coercion." *Id.* at 1137.

In arguing that that the actions required of Plaintiffs by the Mandate are *de minimis*, the Government misinterprets RFRA to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on Plaintiffs' exercise of religion. This explains the Government's otherwise risible assertion that "the regulations place no burden *at all* on plaintiffs," D.E. 63 at 25; one can hardly maintain that the threat of millions of dollars in fines fails to pressure Plaintiffs to violate their religious beliefs. That distinction matters, and the Government's reading fails for two reasons.

a. RFRA Protects "Any Exercise of Religion"

First, the Government's reading is contrary to the statutory text. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[6] In other words, RFRA contains no requirement that the actions required of plaintiffs be "significant" or "substantial." Here, because Plaintiffs' refusal to facilitate access to the objectionable products and services clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a

[6] 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added).

protected exercise of religion for purposes of RFRA.

Contrary to the Government's contention, this does not "read[] the word 'substantial' out of RFRA." D.E. 63 at 30. It simply puts the word in its proper place—modifying "burden" rather than "exercise of religion." As is plain from the statutory text, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather to the type of pressure—*i.e.*, the burden—imposed by the Government. 42 U.S.C. § 2000bb-1(a) ("*Government* shall not substantially burden a person's exercise of religion."). The word requires the court to assess how strongly the Government is pressuring an individual to violate his sincerely held religious beliefs.

Supreme Court precedent confirms this analysis. When called upon to decide whether Government action imposes a substantial burden on religious exercise, the Court has consistently evaluated the magnitude of the coercive mechanism 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 a Seventh-Day Adventist plaintiff of working on Saturday was "*de minimis*." Instead, the Court accepted her representation that her religion forbade work on Saturday and assessed whether the resulting denial of unemployment benefits effectively coerced her to abandon this

religious exercise, concluding that it did. *Id.* at 404.[7]

Despite the Government's assertions to the contrary, D.E. 63 at 29, RFRA's protections are not limited to laws that require plaintiffs to modify significantly their conduct. The touchstone of the substantial burden analysis is not whether plaintiffs are forced to modify their behavior, but whether they 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 the "law . . . compel[s] a violation of conscience"). The fact that a plaintiff must outwardly modify his behavior is sufficient, but not necessary, evidence that he is being forced to act in violation of his beliefs. Indeed, if the Government were correct, it could, for example, pass a law compelling Plaintiffs to pay into a fund used to feed the homeless, and it could continue to require Plaintiffs to pay into that fund if it subsequently decided to use those monies to subsidize abortion: As Plaintiffs were already paying into the fund, the fact that the fund's new purpose would violate Plaintiffs' religious beliefs would, in the Government's view, be irrelevant. That is

[7] Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory producing turrets for tanks "require[d him] to change his behavior in any significant way." D.E. 63 at 14. 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 it "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717-18.

plainly not the law.

In any case, the Mandate *does* force Plaintiffs to modify their behavior in a way that violates their sincerely-held religious beliefs: In the past, Plaintiffs have always sought to enter into health insurance contracts that would *not* result in the provision of contraceptive coverage to their employees.[8] Under the Mandate, Plaintiffs must now enter into contracts that *will* result in the provision of the objectionable coverage. They are, moreover, required to complete a self-certification form that effectively authorizes a third party to provide contraceptive coverage to their employees "for free." Thus, even under the Government's erroneous reading of the law, Plaintiffs are required to modify their behavior in a way that violates their sincerely held religious beliefs.

b. Improper Evaluation of Religious Beliefs

The Government's reading of RFRA also would impermissibly "cast the Judiciary in a role that [it was] never intended to play." *Lyng*, 485 U.S. at 458. The Government asks this Court to determine not whether the pressure placed on Plaintiffs to violate their beliefs is substantial but instead whether compliance with the Mandate constitutes a "substantial" violation of their religious beliefs. The former analysis involves an exercise of *legal* judgment; the latter is an inherently

[8] Plaintiffs' SMF ¶¶ 26-27.

religious inquiry. To assign such a role to the judiciary would be to ignore the Supreme Court's warning that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Thus, 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 of courts determining whether an exercise of religion is "significant" or "meaningful" is self-evident. D.E. 63 at 23, 29. On the Government's theory, an Orthodox Jew could be forced to flip a light switch (contrary to religious doctrine) on the Sabbath because doing so is a "*de minimis*" act that would take less than a second and "requires virtually nothing of [him]." *Id.* at 2, 25, 27. No "principle of law or logic" equips a court to decide the "significan[ce]" or "meaning[]" of such an act. *Smith*, 494 U.S. at 887.

The Government's "attenuat[ion]" arguments further illustrate this point. D.E. 63 at 32-35. First, it argues that Plaintiffs cannot obtain relief because they are "separated from the use of contraception by a 'series of events' that must occur before the use of contraceptive services . . . ." *Id.* at 33. This is not an evaluation of the pressure placed on Plaintiffs to violate their beliefs. Rather, it invites the Court to assess whether Plaintiffs' conduct is sufficiently remote from the use of

contraceptives so as to absolve them from moral culpability. But, 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 v. C.I.R.*, 490 U.S. 680, 699 (1989).

For example, 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 Amish plaintiffs' representation that "the payment of the taxes . . . violate[d] [their] religious beliefs." *Id.* at 257.[9] This Court should do the same here.[10]

Likewise, the Government's argument that there is no meaningful distinction between the paying wages and providing access to contraceptive benefits, *see* D.E.

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[9] Likewise, in holding that denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his religious exercise, the Court in *Thomas* did not question whether working in the factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of his pacifist convictions as a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the line the plaintiff drew. *Id.* at 715.

[10] As the *Hobby Lobby* court explained, the religious belief in *Lee* was similar to the belief at issue here. Part of the objection to paying into the social security system was that it would "enable other Amish to shirk their duties toward the elderly and needy." *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.*; *see also id.* at 1137. Here, Plaintiffs "stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables someone else to behave in a manner he considered immoral." *Id.* at 1141.

63 at 32, 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).[11] The question of whether one action is morally indistinguishable from another is for religious authorities and individuals, not courts. *Hobby Lobby*, 723 F.3d at 1142. The judiciary is simply not equipped to determine whether claimants "correctly perceive[] the commands of their [own] faith." *Thomas*, 450 U.S. at 716. Indeed, even if the line between providing a salary and complying with the Mandate were "unreasonable," it would not be for a court to second guess how Plaintiffs have drawn that line. *See id.* at 715–16.

But in any case, the line here is reasonable. Employees may use their paycheck to purchase anything. An employer has no input into how an employee uses his salary. 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. The employer is thus made complicit in the purchase of products to which it objects.

Plaintiffs do not contend that the "mere fact" that they "claim" the Mandate "imposes a substantial burden on their religious exercise . . . make[s] it so." D.E. 63 at 28. This Court need only accept Plaintiffs' description of the nature of their

[11] *Aff'd* No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

religious exercise. But, to determine whether a substantial burden exists, the Court must conduct an independent analysis to determine whether the Government has imposed substantial pressure on Plaintiffs to violate their religious beliefs. *See supra* 5-7. Here, that inquiry is simple, since the Government imposes crippling fines on Plaintiffs if they refuse to conform to the Mandate's requirements.[12]

At bottom, the Government misunderstands Plaintiffs' religious objection. Plaintiffs object not only to using contraceptives, but also to taking actions that facilitate their use in a morally significant way.[13] This concept of responsibility for an act committed by another is not unique to the Catholic faith. 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

[12] Despite the Government's evident concern, D.E. 63 at 30-31, 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 whether (1) the belief is sincerely held, (2) the belief is religious in nature, (3) the law places "substantial pressure" on adherents to violate their beliefs, (4) the Government has a "compelling interest," and (5) the Government has used the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b). For decades those safeguards have proved more than equal to the task of preventing religious actors from becoming a law unto themselves. *Hobby Lobby*, 723 F.3d at 1141 n.16.

[13] *Cf. Hobby Lobby*, 723 F.3d at 1140; *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013).

> assist others in committing wrongful conduct themselves bear moral culpability.

723 F.3d at 1152 (Gorsuch, J., concurring). Plaintiffs "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the conclusion that the actions required of them by the Mandate cross the "line" into impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. That line is theirs to draw, *id.*, and the Government has substantially burdened Plaintiffs' exercise of religion by placing substantial pressure on Plaintiffs to cross that line.

B. 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 Government bears the burden of demonstrating that the regulation furthers a compelling government interest. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429-31 (2006). Here, the Government has proffered two generalized interests: (i) the "promotion of public health" and (ii) "assuring that woman have equal access to health care services," or, more broadly still, "gender equality." D.E. 63 at 35-38. As every court that has addressed the question in the context of the Mandate has concluded, these interests

are not compelling, for numerous reasons.[14]

1. The Government Has Not Established a Compelling Interest in Applying the Mandate to the Plaintiffs

"[B]oth interests as articulated by the government are insufficient under *O Centro* because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143. "[U]nder RFRA[,] invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. "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." *O Centro*, 546 U.S. at 430–31. This standard requires courts to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

Here, the Government has not demonstrated a compelling interest in the specific activity at issue: forcing religious institutions to provide their employees

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[14] *Hobby Lobby*, 723 F.3d at 1143–44; *Beckwith Elec. Co. v. Sebelius*, 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) (Doc. No. 50); *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.

with access to FDA-approved contraceptive services and products. Regardless of how important the Government's interests may be, without a showing that it is necessary to conscript these "particular claimant[s]" to achieve the Government's aims, *O Centro*, 546 U.S. at 420, the "mere invocation of the general characteristics" of public health or gender equality "cannot carry the day," *id.* at 432. Thus, even assuming the Government could show that increased access to contraceptives promotes "health" and "gender equality," it has not demonstrated that such access must be facilitated by Plaintiffs.[15]

The Government claims that an exemption for Plaintiffs would be "completely unworkable" and would "undermine defendants' ability to enforce the regulations in a rational matter." D.E. 63 at 39 n.14, 43.[16] 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

[15] The Government appears to dispute the workability of this test. D.E. 63 at 39 n.14. 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. 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.*

[16] The Tenth Circuit rejected that claim in *Hobby Lobby*, 723 F.3d at 1143.

to the bevy of other exempt employers, *see infra* 22-26—would somehow "undermine" its ability to enforce the Mandate. Rather, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436. The Supreme Court has "rejected [such] slippery-slope argument[s]." *Id.* Because the Government cannot show that exempting Plaintiffs would compromise its stated interests, it cannot show that those interests are "compelling."

2. 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 (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." *Id.* at 547. Here, the Government has exempted a host of employers from the Mandate because, *inter alia*, their health plans are "grandfathered" or they meet the Government's narrow definition of "religious employer." Moreover, the Government has exempted employers with fewer than 50 employees from one of the Mandate's principal enforcement mechanisms. 26 U.S.C. § 4980H. These exemptions "undermine[] any compelling interest in applying the preventive care coverage mandate." *Newland*,

881 F. Supp. 2d at 1298; *see also Hobby Lobby*, 723 F.3d at 1143.

Indeed, the Government has recently taken steps that will ensure that even fewer women receive access to the mandated coverage by announcing a one-year delay in one of the key mechanisms to enforce the Mandate—26 U.S.C. § 4980H, which imposes annual fines of $2,000 per employee on certain large employers for failure to provide group health insurance. (Plaintiffs' SMF ¶ 53.) The Congressional Budget Office ("CBO") estimates that, because of this delay, "roughly 1 million fewer people are expected to be enrolled in employment-based coverage in 2014." *Id.* The CBO further reports that "roughly half [of those individuals] will be uninsured," while "the others will obtain coverage through the exchanges" or other government programs. *Id.* The fact that the Government is willing to delay enforcement of these penalties, even though it knows thousands of women will be left without the mandated coverage as a result, provides further evidence it is not pursuing interests "of the highest order."

The Government seeks to minimize the significance of these exemptions. It first asserts that "grandfathering is not really a permanent 'exemption,' but rather . . . a transition in the marketplace." D.E. 63 at 41. But by declining to require such plans to provide contraceptive coverage, 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, this means that at least 49% of all health plans, *covering more than 90 million employees*, will be grandfathered at the end of 2013. 75 Fed. Reg. at 34,552; *Geneva Coll.*, 929 F. Supp. 2d at 434.[17] The Government cannot explain why those 90 million employees do not currently require access to employer-sponsored contraceptive coverage, while Plaintiffs' employees do. To the contrary, "[e]verything the Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities with grandfathered plans. *O Centro*, 546 U.S. at 433.[18] An interest cannot be "compelling" where the Government "fails to enact feasible measures to restrict other conduct producing . . . alleged harm of the same sort." *Lukumi*, 508 U.S. at 522.[19]

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[17] The Government's characterization of grandfathering as a "transition" is belied by the fact that there is no sunset on grandfathering status. Unless an employer makes specified changes, a grandfathered plan can maintain its status in perpetuity. Indeed, the Government has stated that employers have a "right" to maintain grandfathered status. *See, e.g.*, 75 Fed. Reg. at 34540, 34558, 34562, 34566.

[18] The Government's failure to require grandfathered plans to comply with the Mandate is particularly striking given that the Government felt compelled to impose *other* requirements on grandfathered plans, such as the ban on lifetime limits and the extension of coverage for dependent children until age 26. *See* 75 Fed. Reg. at 34542.

[19] The Government also attempts to minimize the significance of exempting small employers from one of the mechanisms to enforce the Mandate. D.E. 63 at 42-43. But the Government cannot credibly argue that such action does anything but undermine whatever alleged interest it has in compelling *employers* to provide the mandated coverage. Were employer participation truly necessary to achieve the

This is not to say that the Government cannot balance "competing interests" when implementing a "complex statutory scheme." D.E. 63 at 41. But if it does so, it cannot claim to be pursuing interests "of the highest order." *Lukumi*, 508 U.S. at 547. By definition, the Government's interests cannot be "of the highest order" when they take a backseat to interests of administrative and political expediency.[20]

The Government next asserts that the only "true exemption" from the Mandate is for "the group health plans" of those it deems "religious employers." D.E. 63 at 43. This is not true, but even if it were, the Supreme Court has found that a single exemption for one religious group is enough to doom the Government's efforts to deny a similar exemption to others. In *O Centro,* the Court held that the exemption from the Controlled Substances Act 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. *See* 546 U.S. at 433. So too here: The Government's exemption from the Mandate for certain "religious employers" undermines the Government's claimed interest in refusing to provide a similar

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Government's interests, it would not have established a system whereby employees of small employers could be forced onto the exchanges.

[20] Nor can the grandfathering exemption be deemed irrelevant because it "is not specifically limited to the preventive services coverage regulations." D.E. 63 at 41. It clearly applies to those regulations and, indeed, provides an even broader exemption from the preventive services requirements than that sought by Plaintiffs.

exemption to Plaintiffs.[21]

3. The Government has Not Demonstrated an Actual Problem in Need of Solving

To satisfy the compelling interest test, the Government "must specifically identify an actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). Although the Government asserts "public health" and "equal access to health care services" as its compelling interests, it provides woefully little evidence that there is a public health crisis or that access to health care services is unequal. D.E. 63 at 36-38.

With respect to public health, the Government claims 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 39887. But the

[21] The Government contends that the distinction is justified because the employees of employers it deems "religious" are more likely to agree with their employer's views regarding contraceptives. D.E. 63 at 43. But it offers no evidence to support this assertion—it has conceded that it has no such evidence—which is fatal, as the Government bears the burden of proof. (Plaintiffs' SMF ¶ 57.)

In any case, the corporate structure of Catholic entities is hardly a reliable proxy for answering the question of how devout their employees are likely to be. A large diocese, for example, may employ those who do not share the Church's beliefs. And it appears that two Catholic schools may be materially indistinguishable from one another, yet be treated differently under the Mandate because one is separately incorporated (and hence subject to the Mandate) and the other is legally part of the diocesan corporation (and hence exempt). The corporate structure of such entities says *nothing* about the religious devotion of their employees. To satisfy strict scrutiny, the Government must offer more than such baseless speculation.

IOM Report indicates that only 1 in 20 American women have an unintended pregnancy each year. (Plaintiffs' SMF ¶ 60.) And not all unintended pregnancies involve adverse health consequences. The studies cited in the IOM Report appear at best to establish correlation, not causation, between unintended pregnancy and negative health outcomes, and the Report makes no effort to determine the extent of correlation. (Plaintiffs' SMF ¶ 61.) The percentage of women experiencing negative health outcomes correlated to unintended pregnancy is thus likely lower than 5%.

The Government also presents little evidence of inadequate access to contraception. In fact, the IOM Report cited a study reporting that "[m]ore than 99 percent of U.S. women aged 15 to 44 years who have ever had sexual intercourse with a male have used at least one contraceptive method." (Plaintiffs' SMF ¶ 62.) This statistic suggests that there is no access problem. Indeed, the Government acknowledges that contraceptives are widely available at free or reduced cost and that "over 85 percent of employer-sponsored health insurance plans" already cover them. *See, e.g.*, 75 Fed. Reg. 41726, 41732 (July 19, 2010); PI Br. at 36.

Given the small percentage of unintended pregnancies relative to the female population and the still smaller percentage of women suffering adverse health effects from unintended pregnancy, the Government's interest in promoting positive health outcomes by requiring employers to provide cost-free contraception can only

be seen as addressing a "modest gap" in coverage. An interest in closing that gap is not 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).

The Government responds by claiming that the real benefit of the Mandate comes not from increased access to contraception, but from "eliminat[ing] cost-sharing." D.E. 63 at 36 n.13. But the Government has not only admitted that "85 percent of employer-sponsored health insurance plans cover[] preventive services," but also that they do so "without [beneficiaries] having to meet a deductible"—that is, without a significant form of cost sharing. 75 Fed. Reg. at 41732. And, of course, exempting Plaintiffs would do *nothing* to undermine whatever alleged benefits result from eliminating cost-sharing for the many secular employers who have no objection to providing the mandated coverage.

The Government nonetheless claims that an "actual problem" exists by conflating contraceptive services with broader "preventive services." *See* D.E. 63 at 16-18, 36-37. Relying on the IOM Report, the Government asserts that, "[d]ue largely to cost, Americans used preventive services at about half the recommended rate," and that "many women forgo preventive services because of cost-sharing imposed by their health plans," *id.* at 16, 36 n.13. But the cited pages of the IOM

Report rely in large part on a study that though addressing "preventive services" *did not consider contraceptive coverage*.[22]

In any event, assuming that the correlation between unintended pregnancy and harmful health effects is an "actual problem," the Government must establish that applying the Mandate to objecting employers is "actually necessary to the solution" and that there is a "direct causal link" between employer-provided cost-free contraception coverage and better public health. *Brown*, 131 S. Ct. at 2738-39. The Government's reasoning, however, appears to take no fewer than four inferential leaps: (1) the Mandate will increase access to contraceptive services; (2) increased access will lead to increased use of contraception; (3) this increased use will result in fewer unplanned pregnancies; and (4) fewer unplanned pregnancies will lower the incidence of "conditions harmful to women's health and well-being." D.E. 63 at 37. The evidence simply does not bridge these leaps.

The Government must have convincing evidence that its solution will actually fix the problem. It cannot simply rely on its "predictive judgment," and "ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2738-39. Here, much of the research cited by the Government "appears to be based on correlation, not . . . causation." *Id.*

[22] Plaintiffs' SMF ¶ 63. "The survey asked women whether they had received a set of recommended preventive screening tests: blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens." *Id.*

For example, the IOM Report cites to material indicating that evidence on causation is correlative. (Plaintiffs' SMF ¶ 61 (citing IOM, *The Best Intentions* 65 (1995), which asks whether negative health outcomes are "caused by or merely associated with unintended pregnancy").

In fact, much of the evidence cuts against the Government's claims. For example, sources cited in the IOM Report indicate that 89% of women at risk of pregnancy are already using contraceptive services.[23] Other sources cited in the Report also reveal that cost is not the primary reason why women fail to use contraception, even among the most at-risk populations.[24] Indeed, studies indicate

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[23] Plaintiffs' SMF ¶ 64.

[24] Plaintiffs' SMF ¶ 65 (citing R. Jones, *Contraceptive Use Among U.S. Women Having Abortions*, 34 Perspectives on Sexual and Reproductive Health at 294-303 (Nov./Dec. 2002); *see, e.g.*, Helen M. Alvare, No Compelling Interest: The "Birth Control" Mandate and Religious Freedom, 58 VILL. L. REV. 379, 398-99 (2013) ("[T]here are many and varied reasons why women choose not to use contraception, most of which have nothing to do with cost. . . . [D]ue to both method and use failures, contraception use does not guarantee the prevention of pregnancy."); Scott E. Harrington, Comments on Coverage of Certain Preventive Services Under the Affordable Carte Act at 5-6 (Apr. 8, 2013) (stating that "responses to the mandate" "would 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 which the demographics and behavior of employees of religious [entities] could differ from those of secular organizations")).

To the extent that the Government means to suggest that this Court's review of Plaintiffs' claims—including the RFRA and constitutional claims—is limited to the administrative record, D.E. 64-1 at 9, the Government is incorrect. *E.g.*, *Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993); *Rydeen v. Quigg*,

that a modest increase in employer-provided coverage for contraceptive services is unlikely to have a significant impact on effective contraceptive use. Alvare, *supra*, at 380; PI Br. at 36-37. Even if the Government had adequately identified a public health problem, the evidence does not establish that the Mandate would solve it.[25]

Accordingly, the Government simply does not have a compelling interest in forcing Plaintiffs to facilitate access to abortion-inducing products, contraceptives, sterilization, and related counseling, contrary to their sincerely held beliefs.

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

Finally, even if the Mandate furthers its asserted interests, the Government

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748 F.Supp. 900, 906 (D.D.C. 1990). The Government's suggestion shows only that the record should be supplemented and the rule reconsidered in light of the complete record. The Government cannot craft a record that allegedly supports its position, then purport to exclude all contrary evidence from consideration.

[25] The Government's claim that the Mandate addresses the problem of unequal access to health care services fares even worse. *See* 78 Fed. Reg. at 39887. The Government argues that, given the "unique health care needs" of women, the Mandate will ensure that they "achiev[e] health outcomes on an equal basis with men," which would, in turn, "help[] women contribute to society to the same degree as men." *Id.* The Government, however, does not cite a shred of evidence that, as a result of those costs, women have worse health outcomes or that they contribute less to society. But even if the Government could establish that women contribute less and have worse health than men, it offers no evidence establishing a direct link between (1) access to contraception and (2) women's health and contributions to society relative to men. Instead, the Government invites the Court to pile unsupported inference upon unsupported inference.

has not shown that the Mandate is the least restrictive means to those ends. 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. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). This test requires "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." *Playboy*, 529 U.S. at 824. The Government bears the "ultimate burden of demonstrating" that no workable alternatives would achieve its goals. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013). "On this point, the [Government] receives no deference." *Id.*

There are, of course several alternatives available to the Government to pursue its asserted interests here.[26] The Government has not even attempted to carry its burden of showing that these alternatives would be ineffective.

For example, the most obvious alternative is for the Government itself to

[26] *See* PI Br. at 38-39 (The Government could, *inter alia*, directly provide the services, offer grants to entities that provide the services, offer related tax credits or deductions, or allow Plaintiffs to offer services consistent with their beliefs.).

provide contraception services or coverage to women whose health care plans do not provide such coverage—either directly, or through grants or tax credits. This alternative arguably would be more effective than the exception-riddled Mandate in achieving the Government's claimed interests because it would ensure that even more women have access to cost-free contraception. And it would do so without requiring the active participation of objecting employers.

Implementing this alternative would not be unworkable because it would merely build on the vast federal machinery that already exists for providing health care subsidies on a massive scale. For example, the Government could simply extend contraception coverage through the Medicaid program to women whose employers do not provide the required coverage. Although this would require some tweaks to the program, it is already undergoing a massive expansion due to the Affordable Care Act ("ACA"). (Plaintiffs' SMF ¶ 71.) A minor adjustment to provide coverage for contraception services for women who cannot obtain such coverage through their employers would be insignificant by comparison. So too would be the increased monetary costs to the Government. After all, the Government itself acknowledges that "over 85 percent" of employer health plans already cover contraception services. 75 Fed. Reg. at 41732. The added cost of providing contraception coverage through Medicaid—hardly a prohibitive

expense—for the small percentage of women whose employers will not provide such coverage is miniscule compared to the cost of expanding Medicaid eligibility as required by the ACA.

The Government points to no evidence in the administrative record that demonstrates that the foregoing alternatives would not work.[27] Instead, it simply asserts that they would not be "feasible." 78 Fed. Reg. at 39888; D.E. 63 at 47. But "conclusory claims" 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, 505 (6th Cir. 2002).

Nor can the Government rely on unsupported assertions that the proposed alternatives would impose "considerable new costs and other burdens on the government." D.E. 63 at 47. The Government does not have, and has never asserted, a compelling interest in providing contraceptive services to women at no cost *to itself*. Moreover, less restrictive means often involve additional cost to the Government.[28] It is the Government's burden to "adduce facts establishing that . . .

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[27] In fact, the Government has elsewhere admitted that it had not considered whether it could expand Medicaid as an alternative to the Mandate. (Plaintiffs' SMF ¶ 72.)

[28] *See, 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 more "vigorously enforce its antifraud laws," rather than force professional fundraisers to make their own disclosures).

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. Here, the Government has no facts to support that proposition.

Moreover, the Government's claim that Plaintiffs' proposed alternatives are impractical is not credible given that the Government already spends millions of dollars to provide free contraception to women[29] through numerous programs.[30] This claim makes even less sense when viewed in light of the ACA, one of the largest, most complex pieces of social legislation in American history. The Government cannot credibly maintain that implementation of the ACA is doable while at the same time claiming that Plaintiffs' modest proposal is too costly and

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[29] *See* HHS, Office of Population Affairs, Announcement of Anticipated Availability of Funds for Family Planning Service Grants ("The President's Budget for Fiscal Year (FY) 2012 requests approximately $237 million for the Title X Family Planning Program."); Guttmacher Inst., Facts on Publicly Funded Contraceptive Services in the United States (July 2013) (noting that state and federal "public expenditures" "for family planning services totaled $2.37 billion in FY 2010"); Plaintiffs' SMF ¶ 70.

[30] *See* Family Planning grants in 42 U.S.C. § 300, *et seq.*; Teenage Pregnancy Prevention Program, Pub. L. No. 112-74, 125 Stat 786, 1080; Healthy Start Program, 42 U.S.C. § 254c-8; Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 701; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*; Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, *et seq.*; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); NIH Clinical Center, 42 U.S.C. § 281; Personal Responsibility Education Program, 42 U.S.C. § 713; and Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

burdensome. Because the Government already provides these services through myriad programs, it can easily achieve its stated goals without forcing Plaintiffs to violate their religious beliefs.

But even if it were infeasible for the Government itself to provide the coverage through already-existing programs, there are still other alternatives that would achieve the Government's objectives without mandating Plaintiffs' participation. The Government could offer tax credits or deductions to women for the purchase of contraceptives, it could compel manufacturers or distributors of contraceptives to provide them at reduced rates, or it could work with the numerous "community health centers, public clinics, and hospitals" already providing such services to increase public awareness of contraceptives available for free or reduced rates.[31] There is no reason to believe the Government could not "accomplish [its] goal with a broader educational campaign," *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650-52 (7th Cir. 2006), regarding the ready availability of free contraceptives due to the millions of dollars it and other organizations have already spent on such services, *see supra* notes 29, 30.

The Government also claims, citing no evidence, that the proposed alternatives would not be "equally effective" in advancing its asserted interests. D.E.

[31] Plaintiffs' SMF ¶ 59.

63 at 48; 78 Fed. Reg. at 39888. Instead, it posits that the ACA "provid[es] coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39888. From this premise, the Government conjectures that "[i]mposing additional barriers to women receiving the intended coverage[,] . . . by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." *Id.* But the Government fails to cite a single statistic or study showing that any meaningful number of women will be dissuaded from obtaining free contraception coverage merely because they have to sign up for it through a non-employer-based program.[32] In other words, the Government has utterly failed to carry its burden of producing "affirmative evidence" that the proposed alternative will not further its asserted interests. *Johnson*, 310 F.3d at 505.

But even if the Government can show that the proposed alternatives would be less effective, it still has not satisfied its burden. "[T]he 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).

[32] Indeed, the Government conceded as much when its deponent in a related case testified that he was 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." (Plaintiffs' SMF ¶ 73.)

Courts routinely identify less restrictive means that are arguably less optimal than the challenged law.[33]

Unable to show that the proposed alternatives are infeasible or ineffective, the Government resorts to arguing that its hands are tied because the relevant agencies lack statutory authority to implement the alternatives. D.E. 63 at 45-46; 78 Fed. Reg. at 39888. But in a challenge to a federal regulation under RFRA, the question is whether *the federal government*—not an individual agency—could adopt a proposed less restrictive means.[34] In any case, as the Government's willingness to exempt other entities makes plain, they are certainly not *required* by the statute to violate Plaintiffs' rights under RFRA. Nothing prohibits the agencies from granting a similar exemption to Plaintiffs.

Finally, the Government argues that the proposed alternatives would not be any less restrictive than the Government's "accommodation." *See* D.E. 63 at 46-47. It contends that, under Plaintiffs' alternatives, their religious beliefs would still be violated because Plaintiffs would still impermissibly "'facilitate' [the] availability"

[33] *See, e.g.*, *Playboy*, 529 U.S. at 807 (allowing individual households to request cable operators to block undesired channels was less restrictive than compelling cable operators to either block or limit transmission of sexually explicit signals).

[34] *See* 42 U.S.C. §§ 2000bb-1(b) (limiting ability of "Government" to substantially burden religious exercise).

of contraceptive coverage. *Id.* at 46.[35] But that is simply not so. The Mandate, unlike these alternatives, makes Plaintiffs the vehicle by which objectionable products and services are delivered to Plaintiffs' employees and, therefore, crosses the line into impermissible facilitation of what Plaintiffs regard as immoral conduct. The Court should reject the Government's suggestion to the contrary because, as explained above, *see supra* 14-19, it would violate the constitution for either the Government or this Court to second-guess the line Plaintiffs have drawn.

II. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE

The Mandate violates the Free Exercise Clause because it is neither generally applicable nor neutral with respect to religion. PI Br. at 39-42. It is not "generally applicable" because the government has chosen to exempt from its requirements millions of employers and individuals. *See supra* Part I.B.2. And it is not "neutral" because it specifically targets Plaintiffs' religious practices.

This case is not analogous to *Smith*, which addressed an "across-the-board criminal prohibition," holding that religious beliefs cannot trump the Government's

[35] The Government also suggests that Plaintiffs' proposed alternatives cannot be less restrictive because Plaintiffs' have stated that they "'oppose many of' the alternatives that they put forth." D.E. 63 at 46. What Plaintiffs actually said was that they would "oppose many of [the proposed alternatives] *as a matter of policy*." PI Brief at 38 n.31 (emphasis added). That in no way implies that Plaintiffs' religious beliefs would be violated by such action. Plaintiffs only object to being *compelled to participate* in such a scheme.

power to "enforce generally applicable prohibitions of socially harmful conduct." 494 U.S. at 884-85. Here, the Government has "exempt[ed] 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.

Smith itself made clear that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." 494 U.S. at 884. Once the Government begins granting exemptions, it must take care that it does not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. As the Third Circuit has observed:

> While the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

Fraternal Order of Police v. Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J).

The Government claims that the Mandate is not discriminatory because it allows exemptions only for "objectively defined categories of entities." D.E. 63 at 50. But there is nothing "objective" about the Government's categories, which

necessarily reflect value judgments as to which interests are sufficiently important to merit an exemption. The Government has apparently determined that various political, economic and logistical concerns merit an exemption for grandfathered plans and a partial exemption for small employers, and has concluded that an exemption is warranted for *some* religious organizations. Having determined that such interests warrant exemptions, the Government may not discount Plaintiffs' claim for a religious exemption, thereby "devalu[ing]" the importance of Plaintiffs' religious beliefs compared to other interests. *Lukumi*, 508 U.S. at 537.

The Mandate reflects the Government's determination that Plaintiffs' interest in religious freedom is less important than the Government's goal of promoting access to contraception. *Fraternal Order*, 170 F.3d at 365. The Government, however, is entitled to make that determination only if it treats all other private and religious interests the same, equally subordinating all to its interest, as when it "enforce[s] generally applicable prohibitions of socially harmful conduct." *Smith,* 494 U.S. at 884-85. Even assuming "general applicability does not mean absolute universality," D.E. 63 at 50, 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.

Finally, the Government insists that it was not targeting certain religious

beliefs for disfavored treatment. D.E. 63 at 49. But it knew that more than 85 percent of employer health plans already provided coverage for contraception and that the remaining "gap" was due largely to employers motivated by moral or religious concerns. *See* PI Br. at 40-41. Indeed, if, as the Government asserts, provision of contraceptive coverage is cost-neutral, the only conceivable reason why employers would not provide it must be due to religious or moral objections. Knowing these facts, the Government decided that recalcitrant employers' religious practices should yield to what it deemed to be the more important goal of expanding access to contraception. The Government's goal was to squelch the small number of religious hold-outs whose views were incompatible with the Government's desire to maximize the availability and use of the objectionable products and services. As in *Lukumi*, "the effect of [the Mandate] in its real operation is strong evidence of its object." 508 U.S. at 535. This is particularly true where, as here, there is evidence that the Mandate was promulgated by individuals hostile to Plaintiffs' beliefs.[36]

[36] Defendant Sebelius asserted at a NARAL Pro-Choice America fundraiser that "[w]e are in a war" and mocked those who disagree with her position on contraception. *See* SMF ¶ 74. The original definition of "preventive service" was promulgated by an IOM Committee stacked with individuals who strongly disagree with many Catholic teachings, *see* Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts ¶ 3, causing the Committee's lone dissenter to lament that the Committee's recommendation reflected the other members' "subjective determinations filtered through a lens of advocacy." (Plaintiffs' SMF ¶ 75.) This anti-religious bias is further underscored by the fact that the Mandate was directly

Accordingly, the Government's argument that the Mandate is a neutral law of general applicability is incorrect. Instead, under the Free Exercise Clause, it is subject to strict scrutiny, which it cannot survive. *See supra* 19-39.

III. THE MANDATE VIOLATES PLAINTIFFS' FREEDOM OF SPEECH

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to facilitate access to "counseling"—speech—related to abortion-inducing products, contraception, and sterilization for their employees. *Second*, to qualify for the so-called "accommodation," the Mandate requires Plaintiffs to provide a "certification" that effectively authorizes a third party to provide or procure objectionable products and services for Plaintiffs' employees. PI Br. at 40-44. To counter Plaintiffs' free-speech claims, the Government mischaracterizes them both.

First, as to the counseling requirement, the Government suggests that the counseling need not support the use of contraception. This suggestion conflicts not

(continued…)

modeled on a California statute, *see* 77 Fed. Reg. 8726; *compare* 76 Fed. Reg. at 46626, *with* Cal. Health and Safety Code § 1376.25(b)(1), where the chief sponsor made clear that its purpose was to strike a blow against Catholic religious authorities. (Plaintiffs' SMF ¶ 76.)

only with the description of such services in the IOM Report,[37] but also with the Government's argument that the Mandate serves an allegedly compelling interest in promoting the use of contraceptives. D.E. 63 at 36-39. If the "related" counseling is, in fact, not intended to encourage use of those products and services, the Government has no interest in forcing Plaintiffs to facilitate that speech. The counseling requirement thus either serves the claimed interest in purportedly improving women's health (by encouraging pro-contraceptive counseling), or it fails to advance the Mandate's asserted purpose, confirming that interest is not compelling.

But even if the requirement does not mandate a pro-contraceptive viewpoint, it still impermissibly compels speech because it deprives Plaintiffs of the freedom to speak on the issue of abortion and contraception on their own terms, outside of the confines of the Government's regulatory scheme.[38] The (implausible) assertion that the requirement mandates only presentation of facts does not solve the constitutional problem, as protection against compelled speech "applies not only to expressions of

[37] Plaintiffs' SMF ¶ 31 ("Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits . . ., and provide instruction in effective use of the chosen method.").

[38] *See, e.g., Evergreen Ass 'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 462 (D. Md. 2011), *aff'd* No. 11-1314, 11-1336, 722 F.3d 184 (4th Cir. 2013) (en banc).

value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

Second, as for the required certification, the Government attempts to dismiss this requirement as "speech incidental to the regulation of conduct." D.E. 63 at 51. But the Government's breezy invocation of that complex doctrine belies the fact that the "accommodation" makes certification a trigger for the provision of services to which Plaintiffs object. That is, if an eligible organization certifies its religious objections to the Mandate, that statement obliges a third party to provide or procure the objectionable services. Consequently, Plaintiffs are forced to engage in speech that, in turn, triggers the provision of products and services to which they are fundamentally opposed. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011), the Supreme Court held that such arrangements violate the First Amendment, striking down a state law that made speech supporting a privately funded candidate the trigger for his opponent's receipt of public financing. *Id.* at 2820. The Mandate here employs the same forbidden "trigger" effect and, therefore, is unconstitutional.

IV. 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] third party

administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A; PI Br. at 44-45. While the Government attempts to portray this sweeping gag order as a prohibition on "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]," D.E. 63 at 52, the regulation in fact prohibits *any* attempt to "influence" third party administrators. Consequently, Plaintiffs are barred, for example, from sending a third party administrator pamphlets claiming that the facilitation of contraceptive services is immoral.[39]

The Government's "analogous" cases provide no support for the gag order. *See* D.E. 63 at 52-53 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)). Both involved circumstances where one party was "economically dependent" on the other, *Gissel Packing*, 395 U.S. at 617, or particularly susceptible to pressure, *Ohralik*, 436 U.S. at 457. No such circumstances apply here: The Government has not demonstrated that third party administrators are so susceptible to pressure or "economically dependent" on Plaintiffs that they would be susceptible to coercion. The gag order violates the First Amendment, cannot survive strict scrutiny, *supra* 19-39, and must

[39] Similarly, Plaintiffs are barred from publicly announcing: "We will not enter into any contract that would result in the provision of contraception, abortion-inducing drugs, sterilizations, and related counseling to our employees."

fail.

V. THE "RELIGIOUS EMPLOYER" EXEMPTION VIOLATES THE ESTABLISHMENT CLAUSE

The "religious employer" exemption violates the Establishment Clause because it creates an artificial, government-defined category of "religious employers," which favors some types of religious groups over others.

Though acknowledging that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," the Government claims that the Mandate does "not . . . discriminate among religions" and that the exemption is "available on an equal basis to organizations affiliated with any and all religions." D.E. 64-1 at 10-12. For the reasons these arguments failed in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colo. Christian Univ. 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. The *Larson* Court, however, was not persuaded, because while the law at issue did not expressly identify any religious sects, it nonetheless "ma[de] explicit and deliberate distinctions between different religious organizations." *Id.* By discriminating against religious organizations that received over half of their

funding from non-members, the law "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand," and "'churches which are new and lacking in a constituency, or which . . . favor public solicitation over general reliance on financial support from members,' on the other hand." *Id.* The same reasoning applies here. The religious employer definition plainly favors "houses of worship" or "religious orders" and denominations that primarily rely on them, while disadvantaging groups that exercise their faith through alternative means.

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 is also akin to the State's in *Colo. Christian*. 534 F.3d at 1259. The Tenth Circuit, however, found this to be a "puzzling and wholly artificial distinction." *Id.* While it is true that "any religious denomination" could choose to exercise its faith primarily through houses of worship or religious orders, it is likewise true that "any religion could engage in animal sacrifice or instruct its adherents to refrain from work on Saturday rather than Sunday." *Id.* That fact did not stop the Supreme Court from striking down laws that discriminated on those bases. That a group can "change" its religious exercise to obtain the benefit of the exemption hardly means the exemption is nondiscriminatory. *Id.*

Indeed, in other contexts, courts have affirmed that where a regulation has a disproportionate impact on adherents of a particular faith, it is of no moment that, in theory, it applies across the board. For example, a regulation prohibiting the display of "nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays." *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996).[40] Thus, while the exemption may, in theory, be "available . . . to organizations affiliated with any and all religions," D.E. 64-1 at 12, given the Catholic Church's well-known stand on contraception and commitment to social ministries, in "practical terms," *Lukumi*, 508 U.S. at 536, Catholic organizations will disproportionately be denied the benefit of the exemption. This discrimination cannot survive strict scrutiny. *Supra* 19-39.

VI. THE MANDATE INTERFERES WITH PLAINTIFFS' INTERNAL CHURCH GOVERNANCE

The First Amendment guarantees religious organizations "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 Russian Orthodox Church in*

[40] *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (While non-Jews may wear them, "[a] tax on yarmulkes is [still] a tax on Jews.").

N. Am., 344 U.S. 94, 116 (1952). This right extends to any internal decision determining "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). Among other things, religious organizations are allowed to establish their own hierarchy, *Kedroff*, 344 U.S. at 116, to "establish their own rules and regulations for internal discipline and government," *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724 (1976), and to select "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 710 (2012). Here, the Mandate interferes with matters of internal church governance by (1) splitting the Catholic Church in two, and (2) interfering with the manner in which the Diocesan Plaintiffs have chosen to supervise their subordinate entities. (Plaintiffs' SMF ¶¶ 34-41, 44-48); PI Br. at 45–46.

Rather than deferring to Plaintiffs' decisions regarding the entities that will "carry out their mission," the Mandate's "religious employer" definition imposes an artificial division between "houses of worship and religious orders" and charitable and educational organizations. By excluding the latter organizations from the category of exempt "religious employers," the Mandate "interferes with "internal church decision[s] that affect[] the faith and mission of the church itself," *Hosanna-*

Tabor, 132 S. Ct. at 707, namely, by effectively preventing the Church from structuring its operations in the manner it has chosen to carry out its mission.

Additionally, the First Amendment also affords religious organizations freedom from government interference with their organizational structure. *Cf. Milivojevich*, 426 U.S. at 724; *Kedroff*, 344 U.S. at 115–16. Here, the Diocesan Plaintiffs have chosen to administer self-insured health plans for their employees and for those who work for equally-religious affiliated organizations, such as Plaintiffs Catholic Charities and CENGI. In this manner, the Diocesan Plaintiffs ensure that their subordinate ministries adhere to Catholic doctrine. However, the Mandate disrupts those internal arrangements, and in the process it forces the Atlanta Archdiocese potentially to forego substantial savings to remain grandfathered in order to maintain its unified health plan. The Mandate thus violates the Establishment Clause. *See Hosanna-Tabor*, 132 S. Ct. at 706.[41]

[41] As made plain in the text, the Government is wrong to assert that this case does not involve "matters of church governance." D.E. 63 at 54. It is equally wrong that "plaintiffs may choose whatever organizational structure they wish," *id.*, as the Mandate impedes the ability of the Diocesan Plaintiffs to administer their operations and relationships with subordinate institutions as they choose. And while *Hosanna-Tabor* may have specifically addressed "the selection of clergy," *id.*, it follows a long line of cases establishing the right of churches to be free from government interference in their internal operations, *see, e.g.*, *Kedroff*, 344 U.S. at 115–16.

VII. THE MANDATE IS THE RESULT OF AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

The United States Constitution vests "[a]ll legislative [p]owers" in Congress. U.S. Const. Art. I, § 1. "Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Therefore, when Congress delegates authority, it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 429-30. When Congress fails to supply such a standard in delegating authority, executive action taken pursuant to that delegation is invalid. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42, 551 (1935).[42]

In the ACA, Congress failed to provide the requisite intelligible principle. The provision at issue requires that "[a] group health plan[,] . . . at a minimum provide coverage for[,] . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ["HRSA"] for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). In effect, the ACA gives HHS a blank

[42] The Government faults Plaintiffs for challenging the Mandate, rather than the ACA, on non-delegation grounds. *See* D.E. 64-1 at 16. But it is well-established that executive action (like the Mandate) may be challenged on the ground that it is the result of an unconstitutional delegation of legislative authority (like the ACA). *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 410-11, 414, 433 (1935).

check when it comes to deciding which medical services and procedures qualify as "preventive care" for which coverage must be provided.

It is no answer to observe, as defendants do, that the intelligible-principle threshold is not difficult to meet. *See* D.E. 64-1 at 17-18. While the cases on which defendants rely involved broad standards, they involved standards nonetheless. For example, in *Yakus v. United States*, 321 U.S. 414 (1944), the Court held that the Emergency Price Control Act of January 30, 1942, set forth an intelligible principle governing the actions of the Price Administrator because it: (1) required him to fix prices so as "to prevent war-time inflation and its enumerated disruptive causes and effects"; (2) provided that "the prices established must be fair and equitable"; and (3) explicitly provided a baseline and other considerations to guide his decisions. *See id.* at 666-67. Similarly, in *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1965), the Supreme Court held that the Communications Act of 1934 provided an intelligible principle governing the FCC's decisions related to radio licensing because it specified that the FCC was to act for "the public interest, convenience, or necessity" and to "encourage the larger and more effective use of radio in the public interest," and the nature of radio, particularly its inherent scarcity, firmed up that standard. *See id.* at 216-17, 225-26.

Unlike the laws discussed in the cases cited by Defendants, the ACA contains

no standard to which the HHS must adhere in determining which products and services constitute "preventive care." Defendants, relying on *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457 (2001), suggest that no such standard is needed because "that is precisely the question that Congress delegated to public health experts." D.E. 64-1 at 17. But the statute at issue in *Whitman*, the Clean Air Act, did contain a standard. The EPA was to set air quality standards "requisite to protect the public health," 42 U.S.C. § 7409(b)(1), and it was to "base[]" its determinations on information contained in statutorily-required "criteria" documents. *Whitman*, 531 U.S. at 465. While the Court said it "ha[d] never demanded . . . that statutes provide a determinate criterion for saying how much of the regulated harm is too much," *id.* at 475, it made that statement in the context of evaluating a statute that, unlike the ACA, specified a standard—albeit one providing room for agency discretion—governing the exercise of delegated authority. *Whitman* does not speak to the current situation, where Congress has provided no standard at all.

Even if the ACA did provide an intelligible principle for determining what qualifies as "preventive care," it provides no intelligible principle for determining what preventive care must be covered. Instead, it provides only that the "preventive care and screenings" must be "provided for in comprehensive guidelines supported by the [HRSA] for purposes of this paragraph," 42 U.S.C. § 300gg-13(a)(4), without

specifying a standard governing the HRSA's exercise of discretion. Defendants attempt to supply a standard in their brief, claiming that "the guiding principles" are "increas[ing] access to and utilization of recommended preventive services." D.E. 64-1 at 18. But those "guiding principles" say nothing about how the HRSA should exercise its discretion in *recommending* preventive services or *choosing among* recommended preventive services. Because it is the product of an improper delegation of legislative authority, the Mandate must fall.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and deny Defendants' motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted this the 21st day of October, 2013.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing *Brief in Opposition to Defendants' Motion to Dismiss Or, in the Alternative, for Summary Judgment, and in Support of Plaintiffs' Cross-Motion for Summary Judgment* uses Times New Roman 14 point font, as approved by the Northern District of Georgia in Local Rule 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

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