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.	)	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

ARGUMENT

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

Three circuits have now rejected the government's position that it has the power to force religious groups to violate their beliefs by compelling them to provide or facilitate health coverage for contraception, sterilization, and abortion-inducing products.[1] These courts have protected the religious rights of for-profit companies or their owners. Here, the government advances the same arguments, only this time the government takes aim at *non-profit religious groups*. The government's arguments should be rejected, just as they were rejected in *Zubik v. Sebelius*, Nos. 13cv1459, 13cv0303, 2013 WL 6118696 (Nov. 21, 2013).[2] The Court should grant plaintiffs' motion for summary judgment.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

A. The Mandate Violates the Religious Freedom Restoration Act

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Where sincerity is not in dispute, RFRA's substantial burden requires a court to: (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial pressure"—*i.e.*, a substantial burden—on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140. The government's

[1] *See Korte v. Sebelius*, -- F.3d --, 2013 WL 5960692 (7th Cir. Nov. 8, 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc).

[2] *See also* ECF No. 90.

attempts to dispute this test have been rejected by all three federal courts of appeal that have considered the question.

In *Gilardi*, the D.C. Circuit held that the Mandate substantially burdens the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 733 F.3d at 1216-17. The court rejected the government's argument that the interposition of the corporate form between the Gilardis and their employees rendered the Gilardis' participation "too remote and too attenuated" to constitute a substantial burden. *Id*. at 1217. As the D.C. Circuit explained, '"[c]ourts are not arbiters of scriptural interpretation,'" *id*. at 1216; thus, "[w]hen even attenuated participation may be construed as a sin, it is not for courts to decide that the corporate veil severs the owner's moral responsibility," *id*. at 1215 (citation omitted). Instead, the court held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id*. at 1216 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div*., 450 U.S. 707, 718 (1981)). The Mandate, therefore, imposes a substantial burden on the Gilardis because they are forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit

in a grave moral wrong. If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id*. at 1218.

Likewise, in *Korte*, the Seventh Circuit held that the Mandate substantially burdens the religious exercise of two corporations and their Catholic owners by requiring those corporations to include contraceptive coverage in their health plans. The court rejected the government's contention that the actions required by the Mandate were too "insubstantial" or "attenuated" to impose a substantial burden. 2013 WL 5960692, at *23-24. The government's argument was flawed because "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id*. at *22. "It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Id*. The Mandate, therefore, imposes a substantial burden on the *Korte* plaintiffs' religious exercise because it forces them to act contrary to their religious beliefs by taking actions that they deem to be impermissible facilitation of contraception. By threatening fines of "$100 per day per employee," the government "placed enormous pressure on the plaintiffs to violate their religious beliefs." *Id*. at *23.

The same is true here. Plaintiffs have a religious objection to providing or facilitating "coverage for contraception and sterilization in their employee health-care plans." *Id.* at *23. The Mandate's "accommodation" does not change the analysis, because plaintiffs continue to have "an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religion." *Id*. at *22. The only relevant question under the "substantial burden" test is whether the Mandate imposes "substantial pressure" on plaintiffs to violate those beliefs. *Gilardi*, 733 F.3d at 1216; ECF No. 78-1 at 12-27. As it is undisputed that, even with the accommodation, the Mandate forces plaintiffs to choose between (1) "abid[ing] by the sacred tenets of their faith, pay[ing] a [massive] penalty . . . , and crippl[ing] [their ministries]," or else (2) "becom[ing] complicit in a grave moral wrong," *Gilardi*, 733 F.3d at 1218, there can be no question that the Mandate imposes a substantial burden on plaintiffs' exercise of religion. *Id*.; *Korte*, 2013 WL 5960692, at *24.

(a) The Government's Argument Rests on a Fundamentally Flawed Understanding of the Substantial Burden Test

The government is wrong about the meaning of the term "substantial burden." The government's "insistence that the burden is trivial or nonexistent simply misses the point of this religious-liberty claim." *Korte*, 2013 WL 5960692, at *24.

"Burden" refers not to the actions required of plaintiffs, but the pressure applied by the government to perform such actions. ECF No. 78-1 at 18-22.[3] It is nonsensical to suggest that the threat of massive fines imposes a "*de minimis* burden." ECF No. 87 at 15-28. If forcing plaintiffs to choose between "paying a [massive] penalty" and "becom[ing] complicit in a grave moral wrong . . . is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' [it is not possible to] see how that standard could be met.'" *Gilardi*, 733 F.3d at 1218.

The government accuses plaintiffs of "attempt[ing] to convert the 'substantial burden' standard into a 'substantial pressure' standard." ECF No. 87 at 13. That, however, is *exactly* what each appellate court to consider the question has held: "A substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs."[4] The government's assertion that, under RFRA, courts should "look not only to the magnitude of the penalty imposed, but also the *objective* character of the actions" required, ECF No. 87 at 13, is "fundamentally flawed." *Hobby Lobby*, 723 F.3d at 1137.

---

[3] *See Korte*, 2013 WL 5960692, at *23-24; *Gilardi*, 733 F.3d at 1218; *Hobby Lobby*, 723 F.3d at 1137.

[4] *See Gilardi*, 733 F.3d at 1218; *Korte*, 2013 WL 5960692, at *22-23; *Hobby Lobby*, 723 F.3d at 1139. In so holding, these courts have followed the Supreme Court's decisions in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), *Thomas*, 450 U.S. at 718, and *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

First, as plaintiffs have explained, the government's argument is precluded by RFRA. *See* ECF No. 78-1 at 19-22; *Korte*, 2013 WL 5960692, at *22-*23. Under RFRA, the purportedly "objective character" of plaintiffs' religious exercise is irrelevant. The pertinent question is whether the government is coercing plaintiffs into foregoing that exercise of religion. The government is doing so here, by subjecting plaintiffs to massive penalties if they continue their exercise of religion.

Second, while the government insists that probing whether a religious exercise is "*de minimis*" or "attenuated"[5] is not a "theological" inquiry, it cannot alter the law by this *ipse dixit*. ECF No. 87 at 12-14; *Zubik*, at 2013 WL 6118696, at *24. No "principle of law or logic," *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. at 872, 887 (199), equips a court to decide the "significan[ce]" of a particular act of religious exercise, ECF No. 87 at 15, 20. Actions that may seem "*de minimis*" to the government may be enormously consequential to a religious believer—such as "swearing" rather than "affirming" an oath or filing a form. A court may not second guess whether a believer finds an action "significant," much less does a court have any "objective" basis to do so.[6] Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion

[5] The government's "attenuation" argument, ECF No. 87 at 28-32, is just a "different twist" on its *de minimis* argument and has been rejected by all three federal courts of appeals to have considered it. *See Korte*, 2013 WL 5960692, at *23-*24; *Gilardi*, 733 F.3d at 1216-1218; *Hobby Lobby*, 723 F.3d at 1138-41.

[6] *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

deems permissible, and "it is not for [courts] to say that [line is] unreasonable."[7]

Finally, the government repeats its refrain that the substantial burden test does not allow plaintiffs to identify a substantial burden simply by asserting it. ECF No. 87 at 25-26. But as plaintiffs have explained, this Court need only accept plaintiffs' description of their religious beliefs. ECF No. 78-1 at 25-26. The court must still determine whether the pressure on plaintiffs to violate those beliefs is "substantial," and if so, proceed to the strict scrutiny analysis. *Id*.

(b) The Mandate Requires Plaintiffs to Take Actions Antithetical to Their Sincerely Held Religious Beliefs

In addition to being legally irrelevant, the government's assertion that the Mandate requires Plaintiffs to take nothing more than *de minimis* action is wrong. *See* ECF No. 78-1 at 9-10, 15-16. The Mandate requires the non-exempt plaintiffs to provide insurance coverage for contraception, abortion-inducing products, sterilization, and related counseling, unless they opt for the "accommodation." 78 Fed. Reg. at 39896. Under the Mandate's accommodation, these plaintiffs are then forced to find and contract with a TPA that will provide payments for the objectionable services, and then issue a certification authorizing the TPA to make the objectionable payments to plaintiffs' employees—payments that can be made solely by virtue of enrollment in plaintiffs' insurance plans. ECF No. 78-1 at 15-

[7] *Thomas*, 450 U.S. at 715.

16.[8] Plaintiffs are also barred from "directly or indirectly, seek[ing] to influence the [TPA's] decision to" provide the objectionable coverage. 78 Fed. Reg. at 39893. All of these actions require plaintiffs to violate their religious beliefs, and it is untenable for the government to claim that plaintiffs are required to modify their behavior in only a *de minimis* way.[9]

The government appears to assert that attaching new legal consequences to conduct that plaintiffs have previously engaged in cannot impose a substantial burden. *See* ECF No. 87 at 16-21 (arguing that, to have a claim under RFRA, a plaintiff must "modify [his] behavior" and have an "inherent religious objection"). That is not correct. *See Zubik*, 2013 WL 6118696, at *25. The touchstone of the

[8] The certification must "include notice" of the "[o]bligations of the third party administrator" to provide payments for contraceptive coverage. 78 Fed. Reg. at 39893. The sole purpose of this is to ensure that the TPA provides plaintiffs' employees with the coverage to which plaintiffs object.

[9] In passing, the Government mentions that the Atlanta Plan is grandfathered. ECF No. 87 at 16. That fact is of no help to the government. To maintain the grandfathered status of their Plan (so as to avoid being subjected to the Mandate) the Atlanta Plaintiffs have been forced "to forego—in the face of ever-rising healthcare costs—desired and financially prudent alterations to the Atlanta Plan that . . . otherwise would have [been] made (such as increasing deductible and co-pay requirements)." ECF No. 57-1 at 48-49 n.34; *see also* Second Declaration of Charles Thibaudeau, ECF No. 80 at ¶¶ 22-23. In other words, the government-created need to maintain grandfathered status has compelled (and continues to compel) the Atlanta Archdiocese to absorb millions of dollars in increased healthcare premiums since March 23, 2010. ECF No. 80 at ¶ 24. Thus, the Mandate substantially burdens the Atlanta Plaintiffs' exercise of religion by forcing them to choose between (1) abiding by the tenets of their faith and bearing onerous financial burdens (either to maintain grandfathered status or in the form of penalties) or (2) violating their religious beliefs.

substantial burden analysis is whether plaintiffs are being compelled to violate their religious beliefs.[10] The question is not whether they must modify their behavior compared to actions they have taken in the past, but whether they must modify their behavior as compared to what they would do if free to follow their religious convictions. ECF No. 78-1 at 21-22.[11]

Nor is there any support for the notion that a plaintiff must object to the conduct at issue in all circumstances. The plaintiff in *Thomas* did not have an "inherent" objection to the act of hammering sheet steel into cylinders—he objected to doing so only in circumstances where the cylinders would be attached to a military tank. *See Thomas*, 450 U.S. at 715. Nor did the plaintiff in *Lee* have an "inherent" objection to paying taxes to support a federal program—he objected to doing so when the consequence of such payment was to "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139; *see United States v. Lee*, 455 U.S. 252, 255 (1982). In both cases, the Supreme

[10] *See Thomas*, 450 U.S. at 717; *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 218.
[11] The government's factual premise is also wrong, because the Mandate does force plaintiffs to "modify" their behavior and take actions they believe are "inherently" objectionable. *See* ECF No. 78-1 at 22-23. In the past, plaintiffs contracted with TPAs that would not provide the mandated coverage and would tell their TPA not to provide coverage for abortion-inducing products, contraception, and sterilization. Now, they must locate and identify TPAs that will provide the mandated coverage and plaintiffs are prohibited from trying to persuade the TPA otherwise. Indeed, plaintiffs are forced to submit a certification authorizing their TPA to provide payments for these products and services to their employees.

Court found a substantial burden. Similarly here, plaintiffs have no objection to a general requirement that they provide health insurance, or utilize a TPA to administer it. But it is an entirely different matter to force plaintiffs, in violation of their religious beliefs, to become morally complicit in the delivery of abortion-inducing products, sterilization, contraception, and related counseling.

In short, the Mandate imposes a substantial burden on plaintiffs' free exercise of religion because it forces them to choose between massive fines and other penalties, on one hand, and "complicit[y] in grave moral wrong," on the other.[12]

[12] *Gilardi*, 733 F.3d at 1218.

2. The Mandate Cannot Survive Strict Scrutiny[13]

All courts that have reached the issue have held that the Mandate fails strict scrutiny under RFRA.[14] "Strict scrutiny requires a substantial congruity—a close 'fit'—between the governmental interest and the means chosen to further that interest." *Korte*, 2013 WL 5960692 at *25. Because the government has asserted such abstract interests—"public health" and "gender equality"—it is "impossible to show that the mandate is the least restrictive means of furthering them." *Id*. "There

[13] The government faults plaintiffs for relying on material not contained in the administrative record crafted by defendants. ECF No. 87 at 39 n.8. But a court may examine materials outside of the record when addressing constitutional (and, by extension, RFRA) claims. ECF No. 78-1 at 38-39 (citing *Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990)); *see also Grill v. Quinn*, No. CIV-S-10-0757 GEB GGH PS, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012). Moreover, even accepting *arguendo* the government's contention that the court's review generally should be limited to the administrative record and plaintiffs' affidavits, there is no basis for the government's suggestion that the court should ignore the deposition of defendant HHS through its designee, Gary M. Cohen. *See* ECF No. 81. It is one thing for the government to ask the court to ignore *studies*; it is an entirely different thing for the government to ask the court to ignore the *government's own sworn statements*. *See Anderson v. United States*, 111 Fed. Cl. 572, 584 (2013) (admitting outside-the-administrative-record letter from government official). In any event, and as demonstrated in this brief, plaintiffs are entitled to relief even if the court limits its review to the administrative record.

[14] *See Korte*, 2013 WL 5960692 at *25-26; *Gilardi*, 733 F.3d at 1218-20; *Hobby Lobby*, 723 F.3d at 1143-44; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16-18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433-35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12- 6756, slip op. at 1 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012).

are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing non-profit religious organizations to provide free contraception in violation of their sincere religious beliefs. *Id*.

Even assuming the government has a "compelling" interest in the more specific goal of "broaden[ing] access to free contraception and sterilization"—an assumption that is "both contestable and contested"—the Mandate still fails strict scrutiny because "there are many ways to increase access to free contraception" without forcing plaintiffs to participate in the effort. *Korte*, 2013 WL 5960692, at *25-*26. Indeed, the courts in *Korte* and *Gilardi* held that the same alternatives plaintiffs have proposed here are less restrictive ways to advance the government's interests in free contraception.[15] Thus, even *assuming* a compelling governmental interest in free contraception, "the government has not come close to carrying its burden of demonstrating that it cannot achieve [that interest] in ways less damaging to religious-exercise rights." *Id*. at *26.[16]

The government contends there are no viable alternatives to the Mandate because it lacks statutory authority to provide free contraception outside the employer-based insurance system. ECF No. 87 at 41-42. But, by definition, strict scrutiny assumes that the government could pass a new statute, if necessary, to

[15] *See Gilardi*, 733 F.3d at 1223-24; *Korte*, 2013 WL 5960692, at *26.
[16] *See also Newland*, 881 F. Supp. 2d at 1299; *Beckwith*, 2013 WL 3297498, at *19 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

achieve its objectives by less restrictive means.[17] The government does not cite any case to the contrary, and plaintiffs are unaware of any. The government cites cases for the proposition that alternative means must be "workable," ECF No. 87 at 42, but none of those cases hold it is "unworkable" for the government to enact a new law. Indeed, if the government were correct, Congress could authorize regulations intruding on core constitutional rights, and then satisfy strict scrutiny as long as it was careful to forbid the executive branch from adopting any less restrictive alternatives. That is not the law.[18]

There is also no merit to the government's notion that providing free contraception without involving plaintiffs would not be "less restrictive." According to the government, that alternative "would violate plaintiffs' religious beliefs because plaintiffs' refusal to provide or pay for the services to which they object would still 'trigger' or 'facilitate' their provision or payment." ECF No. 87 at

[17] *See Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (restriction not narrowly tailored to asserted interest of empowering parents to supervise children's online viewing habits because "Congress could give parents that ability without subjecting protected speech to severe penalties").

[18] Similarly flawed is the government's claim that "expansion of Medicaid would not be a feasible alternative [because] the Medicaid program does not cover a large portion of the women whose employers elect not to provide contraceptive coverage." ECF No. 87 at 43. Assuming the truth of the government's factual assertion that Medicaid currently does not cover many women whose employers do not provide contraceptive coverage, the simple fact is that the government could expand Medicaid so as to offer those women contraceptive coverage. Strict scrutiny assumes that the government has that ability, and such a targeted expansion of Medicaid is a workable less-restrictive alternative. *See* ECF No. 78-1 at 40-42.

43. But that is not so.[19] The Mandate, unlike these alternatives, makes *plaintiffs* the go-between for providing objectionable products and services to their employees and, therefore, crosses the line—properly drawn by plaintiffs alone—into facilitation of what plaintiffs regard as immoral conduct. Because they do not require the same level of cooperation, plaintiffs' proposed alternatives do not cross that line. In arguing to the contrary, the government again asserts that plaintiffs do not understand their own religious beliefs.

Providing free contraception also does not rise to the level of a "compelling" interest "of the highest order." *Yoder*, 406 U.S. at 215. Mandating the provision of free contraception to these plaintiffs' employees may, at most, garner some increased access as a result of modest cost savings for some unspecified number of beneficiaries. Especially in light of that reality, "[e]ven giving the government the benefit of the doubt, the health concern[] underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but it does not rank as *compelling*, and that makes all the difference." *Gilardi*, 733 F.3d at 1221.

Indeed, the government flounders in trying to explain how the Mandate serves interests that are "compelling" while simultaneously offering myriad exemptions

[19] The government accuses plaintiffs of trying to pull a fast one by refusing "to commit[ ]" to the position that their proposed alternatives would not violate their religious beliefs. ECF No. 87 at 43 n.9. But plaintiffs have made plain that their alternatives would not violate their religious beliefs. *See* ECF No. 78-1 at 46-47.

that allow millions of people nationwide to go without the mandated coverage. ECF No. 78-1 at 30-34; ECF No. 57-1 at 34-36. The government states that "aside from the religious employer exemption, the 'exemptions' referred to by plaintiffs are not specific exemptions from the contraceptive coverage requirement at all, but are instead provisions of the ACA that exclude individuals and entities from various requirements imposed by the ACA." ECF No. 87 at 34. It is unclear exactly what distinction the government is trying to draw between a "specific exemption[]" and a "provision" that "exclude[s] individuals and entities" from the law. Regardless, a law cannot serve a "compelling" interest when the government excludes millions of people from the benefits the law is supposed to provide, allowing that interest to go unprotected over a span of months or years or, in many cases, indefinitely. It thus makes no difference that some of the exemptions from the Mandate are merely "transitional" or "pragmatic." *Id*. at 34, 35, 36.

The government also acknowledges that the exemption for "religious employers" is permanent, but insists that it does not undermine its asserted interest, because otherwise the government would be "discourage[d]" from "attempting to accommodate religion." *Id*. at 36. But the government should not be crafting religious exemptions based on litigation strategy and its own sense of religiosity. Rather, it is the government's obligation to *always* accommodate religious liberty

unless doing so would lead to "the gravest abuses, endangering paramount interest[s]." *Sherbert*, 374 U.S. at 406. If the government decides that an exemption for some religious groups is permissible, then by definition the exempted conduct is not a "grave[] abuse, endangering paramount interests."[20]

Indeed, the government offers only a specious explanation for why exempting some religious employers would subvert vital governmental interests, while exempting others does not. The government asserts in conclusory fashion that exempting all religious employers would make it impossible to "administer the regulatory scheme in any rational manner." ECF No. 87 at 36-37. But as the Supreme Court has repeatedly recognized (*see* ECF 78-1 at 29 n.15), a regulatory scheme exempting sincere religious objectors would be perfectly rational and workable. Courts must "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." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006).[21]

[20] *See Zubik*, 2013 WL 6118696, at *28.

[21] For the second time in its briefing, the government questions the workability of the test set out by the Supreme Court in *O Centro*. *See* ECF No. 87 at 33; ECF No. 63 at 39 n.14. But the Supreme Court "has repeatedly reaffirmed 'the feasibility of case-by-case consideration of religious exemptions to generally applicable rules[.]'" ECF No. 78-1 at 29 n.15 (quoting *O Centro*, 546 U.S. at 436).

Remarkably, the government has adduced *no evidence* of any particular "public health" or "gender equality" problems among employees of plaintiffs, or even among employees of objecting religious organizations in general. The government has not pointed to a single study addressing the critical question of how many employees of religious objectors would like to use contraception, much less how many would begin doing so if the Mandate were enforced. In lieu of actual evidence, the government attempts to cloak itself in the supposed scientific authority of the IOM report, which is touted as "the work of independent experts," and is thus "entitled to deference" under *Chevron*. ECF No. 87 at 37-38.[22] But the entire point of RFRA's strict-scrutiny standard is that the government is *not* entitled to deference in establishing a truly compelling interest. Rather, the government bears a heavy burden on this point, and the Court must undertake the strict-scrutiny analysis on the basis of the evidence presented, not the government's unsupported conclusions.

Even more importantly, the IOM report does not even *address*, much less answer, what the impact on "public health" and "gender equality" would be if religious objectors were granted an exemption from the Mandate. The general conclusions of the IOM Report, based on the population at large, say nothing about the particular impact of the Mandate on plaintiffs in particular, or religious

[22] *But see Gilardi*, 733 F.3d at 1221 ("[T]he science is debatable and may actually undermine the government's cause.").

employers in general. For example: Among employees who choose to work for objecting religious organizations, how many share their employers' religious objections to the use of contraception, sterilization, and abortion-inducing products? Of those employees who do *not* object, how many of them truly lack access to contraception, given its widespread availability at low or no cost? Of those non-objecting employees who lack access due to cost, how many would actually begin using contraception if they received free coverage? And among the fraction of women who would make the personal decision to begin using contraception due to new insurance coverage, how many incidents of health problems due to lack of use of the mandated products and services would actually be prevented? To raise these gaps in the government's evidence is not to "flyspeck" the IOM report, as the government contends. ECF No. 87 at 37.

Because the Mandate does not satisfy strict scrutiny, plaintiffs are entitled to full relief on the basis of their RFRA claim alone.

B. The Mandate Violates the Free Exercise Clause

The Mandate violates the Free Exercise Clause because it is not neutral and generally applicable and, regardless, it was enacted with discriminatory intent.

First, the government argues that, notwithstanding the many exemptions in the Mandate, it is neutral and generally applicable because the "exceptions [are] for

certain objectively defined categories of entities" and "such categorical exceptions do not negate general applicability." ECF No. 87 at 45. Even if that were the correct legal principle, it is irrelevant here because the narrow "religious employer" exemption is the antithesis of an "objectively defined category." *See infra* Part I.E.

In any event, the asserted legal principle is irreconcilable with the doctrine of general applicability, which ensures that laws do not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993). The existence of many exemptions to the Mandate for non-religious reasons, even if "categorical," but not for religious ones outside the government's narrow definition of religious employers, creates the very real risk that religion—as practiced by non-exempt religious employers—is being devalued.[23] Strict scrutiny is thus necessary to guard against "the prospect of the government's deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J).[24]

[23] Indeed, *Lukumi* itself held that the animal sacrifice ordinance at issue was not generally applicable because it had categorical exceptions. 508 U.S. at 543-44.

[24] The government's suggestion that the Free Exercise Clause is violated only if there is "a policy that create[s] a secular exemption but refuse[s] *all* religious exemptions," ECF No. 87 at 47 n.12 (emphasis added), is erroneous. In fact, the existence of a religious exemption for one religious group, but not another, is evidence that a law is neither neutral nor generally applicable. *Lukumi*, 508 U.S. at 536. Moreover, and independently, the constitution not only prohibits

Second, the government's argument that the Mandate does not deliberately target the religious practices of Catholic employers ignores the evidence that plaintiffs have put forward on this—including, for example, the remarks made by Defendant Sebelius at a NARAL fundraiser; the IOM's bias; and the fact that the Mandate was modeled on a California law targeted at Catholic organizations. *See* ECF No. 78-1 at 50-51 n.36. All of this shows that, as in *Lukumi*, the Mandate targets religious beliefs.

C. The Mandate Unconstitutionally Compels Speech

Both the counseling and the certification requirements in the Mandate violate plaintiffs' freedom of speech. The government asserts that it does not mandate any counseling that necessarily promotes contraception, but this assertion is belied by the government's claim that the Mandate is an effort to "increase women's access to and utilization of recommended preventive services."[25] ECF No. 87 at 47. The

(continued…)

discrimination against religion, but also among religious groups. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257-60 (10th Cir. 2008).

[25] The government, in addressing plaintiffs' free speech claims, argues that plaintiffs have "an overly simplistic understanding of the compelling interests underlying the regulations." ECF No. 87 at 50. But plaintiffs have simply taken the government at its word that the Mandate is "an effort to *increase women's* access to and *utilization of* recommended preventive services," *id.* at 47 (emphases added); *see also* 75 Fed. Reg. at 41733, AR 233 ("[T]he regulations are expected to increase access to and utilization of these services, which are not used at optimal levels today."); 78 Fed. Reg. at 39872 ("Use of preventive services results in a healthier population.").

government also argues that plaintiffs are not compelled to subsidize any speech. But the bar on compelled speech applies whenever the government forces someone to "help disseminate hostile views," whether or not by a subsidy. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2821 n.8 (2011). Here, the Mandate compels plaintiffs' speech by making them facilitate the objectionable counseling.

The certification requirement, moreover, compels plaintiffs to speak and to thereby *legally authorize* their TPAs to provide plaintiffs' employees with the objectionable coverage. The government responds by arguing, based on *Rumsfeld v. Forum for Academic & Institutional Rights*, Inc., 547 U.S. 47 (2006), that the self-certification form is merely incidental to the regulation of conduct, and "not speech." ECF No. 87 at 52. That is not true: Plaintiffs are being compelled to state

(continued…)

Moreover, the IOM Report, on which it relied in adopting the Mandate, suggests that education and counseling for women with reproductive capacity should be in support of contraception in general. *See* IOM Report at 107 ("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 for the individual woman, and *provide instruction in effective use of the chosen method*. (emphasis added)). Given its own statements and the statements of the IOM, the government cannot seriously dispute that the Mandate calls for counseling promoting the use of contraception. At a minimum, the Mandate requires coverage for education and counseling that promotes the use of contraception generally, even if "the purpose of the . . . education and counseling . . . is not to encourage *every woman* to use contraception." ECF No. 87 at 50 (emphasis added).

their view on specific subject matter—in other words, to engage in speech concerning their views—for no other purpose than to facilitate the government's goal of dispensing products and services to which plaintiffs object to plaintiffs' employees at no cost. In contrast, in *FAIR*, the plaintiffs were not required to make *any* statement about their views. This case, therefore, is akin to *Agency for Int'l Dev't v. Alliance for Open Society Int'l, Inc*., 133 S. Ct 2321, 2326 (2013), where the Supreme Court struck down a requirement that applicants for a government program certify their opposition to prostitution and sex trafficking. There, the Court did not credit the proposition that a statement—required to access a government benefit—was merely incidental to conduct because it was made on an application. This Court should similarly reject the government's characterization of the certification requirement here.

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

In defense of their "gag order," defendants retreat to their mantra that the regulations prevent "threat[s]" and "interfere[nce]," not speech. ECF No. 87 at 53-54. But the fact remains that the regulations broadly prevent any attempt to "directly or indirectly . . . influence[,]" 78 Fed. Reg. at 39895, and do not even

mention threats or interference. The gag rule, therefore, is a naked, content-based speech restriction. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011).[26]

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

As plaintiffs showed in their moving brief, ECF No. 78-1 at 55-57, the "religious employer" exemption to the Mandate violates the First Amendment by creating a government-defined category of "religious employers" that is foreign to the Catholic faith and unfavorable to the Catholic Church. The government contends that the Establishment Clause only prohibits it from "'officially prefer[ing]' 'one religious *denomination*' over another," and, therefore, allows it to discriminate against different Catholic entities. ECF No. 87 at 54. That is both wrong and irrelevant. It is wrong because the Establishment Clause demands that the government "treat individual religions *and religious institutions* 'without

[26] Defendants' glib reference to "common sense," ECF No. 87 at 53 n.13, ignores that there is absolutely no indication that TPAs are so economically dependent *on plaintiffs*—or even employers with religious objections to the mandated products and services generally—that they would be subject to coercion. *See* ECF No. 78-1 at 54 n.39. And, in any event, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is distinguishable on still other grounds. In *Gissel Packing*, the Court noted that "an employer's free speech right to communicate his views [concerning unionization] to his employees . . . cannot be infringed." *Id.* at 617. The Court went on to conclude that a provision of the Taft-Hartley Act "implement[ed] the First Amendment by requiring that the expression of 'any views, argument, or opinion' [by an employer to its employees] shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit[.]'" *Id.* at 617. The Mandate is not so circumscribed, as demonstrated in the "pamphlet" example described in plaintiffs' moving brief. *See* ECF No. 78-1 at 54.

discrimination or preference.'" *Colo. Christian*, 534 F. 3d at 1257 (emphasis added).

In any event, the government's argument is irrelevant because it rests on a misstatement of plaintiffs' claim. Plaintiffs are not alleging discrimination only among Catholic entities. Rather, they claim that the Mandate's narrow definition of "religious employer" discriminates in favor of denominations that consist primarily of "houses of worship," "integrated auxiliaries," or "religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (App 37), and against denominations, like the Catholic faith, that *also* exercise their religion through educational, healthcare, and charitable organizations.[27] ECF No. 78-1 at 55-57. In the same way that a law may not privilege a denomination with "well-established churches," while disadvantaging "churches which are new and lacking in a constituency," *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982), or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminate[e] between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), neither may a law prefer denominations that exercise religion principally through

[27] The government misses the mark when it suggests that the "religious employer" exemption does not discriminate among denominations because some plaintiffs are exempt while others are subject to the accommodation. ECF No. 87 at 56. Given the Catholic Church's position regarding contraception and commitment to social ministries, the exemption discriminates against the Catholic faith as a whole by disproportionately excluding Catholic organizations, even if some individual Catholic entities qualify for the exemption.

"houses of worship, and religious orders," 78 Fed. Reg. at 8461, while disfavoring a denomination whose faith "move[s] [its adherents] to engage in" broader religious ministries.[28] Such preferences have been "consistently and firmly deprecated" by the Supreme Court. *Larson*, 456 U.S. at 246.

F. The Mandate Interferes with Plaintiffs' Internal Church Governance

As previously explained, *see* ECF No. 78-1 at 57-59, in addition to imposing a substantial burden on plaintiffs' exercise of religion, the Mandate interferes with the internal governance of the Catholic Church in further violation of the First Amendment. The government barely addresses this argument, asserting that *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 698 (1976), are distinguishable. ECF No. 87 at 58 n.16.

But the controlling principles from those cases are applicable here, as this case is about plaintiffs' "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. The Mandate interferes in an area in which the First Amendment grants independence by splitting the Church—artificially dividing its "houses of worship" from its equally

[28] *Colo. Christian*, 534 F. 3d at 1259; *Bronx Household of Faith v. Bd of Educ.*, 876 F. Supp. 2d 419, 431 (S.D.N.Y. 2012).

religious service ministries—into branches that are alien to plaintiffs' beliefs. Further, the Mandate interferes with the manner in which the diocesan plaintiffs have chosen to supervise their subordinate entities. The Mandate thus interferes with "internal decision[s] that affect[] the faith and mission of the church itself."[29]

G. The Mandate Is the Result of an Unconstitutional Delegation of Legislative Authority

As plaintiffs explained in their moving brief, the Mandate is the result of an unconstitutional delegation of legislative authority, both because the ACA contains no intelligible principle governing the determination of which products and services constitute "preventive care" under 42 U.S.C. § 300gg-13(a)(4) and because, even if it did provide such a standard, it contains no intelligible principle for determining what preventive care should, and should not, be covered. ECF No. 78-1 at 60-63.

The government tries to side-step plaintiffs' first point by arguing that 42 U.S.C. § 300gg-13(a)(4) supplies the requisite standard because it "was intended to fill significant gaps relating to women's health that existed in other preventive care guidelines identified in the ACA." ECF No. 87 at 58. That purported standard supplies no "intelligible principle" for determining what constitutes "preventive care" in the first instance. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429-30 (1935). For that reason alone, the Mandate must fall.

[29] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); *Korte*, 2013 WL 5960692, at *17.

As for plaintiffs' second point, the government claims only that "the ACA is not distinguishable from the statute upheld in" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). ECF No. 87 at 59. That is not so. As compared to the unlimited discretion granted to the Health Resources and Services Administration ("HRSA") under the ACA, the EPA's task under the provision of the Clean Air Act challenged in *Whitman* was downright mechanical: "The EPA, 'based on' the information about health effects contained in the technical 'criteria' documents compiled under [42 U.S.C. § 7408(a)(2)], [was] to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level."[30] 531 U.S. 457 at 465. Unlike the statute upheld in *Whitman*, the ACA gives HRSA carte blanche to determine what preventive care must be covered. *See* 42 U.S.C. § 300gg-13(a)(4). The ACA thus does not provide the "intelligible principle" required by the non-

[30] The fact that the EPA was required to base its air quality standards on scientific information contained in already-compiled "criteria" documents helped to supply the "intelligible principle" required by the non-delegation doctrine. The government attempts to disparage the "criteria" as unspecific, but the fact of the matter is that the Clean Air Act explicitly required that the "criteria" documents "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities," including information on several specifically-enumerated and described factors. 42 U.S.C. § 7408(a)(2). The ACA, in contrast, provides no remotely similar baseline governing HRSA's exercise of discretion in recommending preventive services or choosing among recommended preventive services. *See* 42 U.S.C. § 300gg-13(a)(4).

delegation doctrine, and the Mandate is therefore the product of an improper delegation of legislative authority.

II. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION

The government concedes that success on the merits establishes irreparable harm, but asserts that injunctive relief nonetheless could be denied under the "balance of equities" and "public interest" prongs. ECF No. 87 at 61-63. That is wrong because "the infringement of First Amendment rights constitutes a serious and substantial injury," whereas neither the Government nor the public has a legitimate interest in enforcing an unconstitutional law. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). The same is true when the challenged law infringes rights protected by RFRA. *Hobby Lobby*, 723 F.3d at 1145. Because "only an injunction could vindicate the objectives of the Act," plaintiffs are entitled to one. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).[31]

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for summary judgment.

[31] In any event, injunctive relief is warranted for the reasons stated in plaintiffs' prior briefing, *see* ECF No. 57-1 at 46-49; ECF No. 83 at 5-10, and *Hobby Lobby*, 723 F.3d at 1145-47. Indeed, because the Mandate does not further a compelling interest and is not narrowly tailored, enforcement of it could not possibly be justified under the non-merits prongs for a permanent injunction.

Respectfully submitted this the 4th day of December, 2013.

By: /s/ E. Kendrick Smith
E. Kendrick Smith
Georgia Bar No. 656725
Janine Cone Metcalf
Georgia Bar No. 503401
James R. Williams
Georgia Bar No. 812411
Brian C. Lea
Georgia Bar No. 213529
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309
Telephone: (404) 581-3939
Facsimile (404) 581-8330
eksmith@jonesday.com
jmetcalf@jonesday.com
jrwilliams@jonesday.com
blea@jonesday.com

Counsel for all Plaintiffs

- and –

Stephen M. Forte
Georgia Bar No. 270035

SMITH GAMBRELL & RUSSELL LLP
1230 Peachtree Street, N.E.
Suite 3100
Atlanta, Georgia 30309
Telephone: 404-815-3500
sforte@sgrlaw.com

Counsel for Plaintiffs The Roman Catholic Archdiocese of Atlanta; The Most Reverend Wilton D. Gregory, and his successors; Catholic Education of North Georgia, Inc.; and Catholic Charities of the Archdiocese of Atlanta, Inc.

-and-

J. Curt Thomas
Georgia Bar No. 142278

BRENNAN & WASDEN, LLP
411 East Liberty Street
Savannah, Georgia 31401
Telephone 912-232-6700
cthomas@brennanandwasden.com

Counsel for Plaintiffs The Roman Catholic Diocese of Savannah; and The Most Reverend John Hartmayer, and his successors, Bishop of the Roman Catholic Diocese of Savannah.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing *Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment* uses Times New Roman 14 point font, as approved by the Northern District of Georgia in Local Rule 5.1B.

/s/ E. Kendrick Smith
E. Kendrick Smith
GA Bar # 656725
E-mail: eksmith@jonesday.com

JONES DAY
Attorney for All Plaintiffs
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
Phone (404) 581-3939
Fax (404) 581-8330

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 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.

/s/ E. Kendrick Smith
E. Kendrick Smith
GA Bar # 656725
E-mail: eksmith@jonesday.com

JONES DAY
Attorney for All Plaintiffs
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
Phone (404) 581-3939
Fax (404) 581-8330