IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Appellants—the Roman Catholic Archdiocese of Washington ("ADW"), the Consortium of Catholic Academies of the Archdiocese of Washington ("CCA"), Archbishop Carroll High School ("ACHS), Catholic Charities of the Archdiocese of Washington ("Catholic Charities"), and the Catholic University of America ("CUA")—submit this motion for a preliminary injunction against a series of regulations that force Appellants to violate their religious beliefs (the "Mandate"). The Government has now finalized the Mandate and indicated that enforcement will begin on January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). Contrary to the Government's prior representations, the Mandate continues to require religious organizations, including Appellants, to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs.

With the Mandate bearing down, Appellants respectfully request that this Court exercise its authority under 5 U.S.C. § 705 and Federal Rule of Appellate Procedure 8(a) to issue a preliminary injunction, and remand this case to the district court for further proceedings on the merits. The relevant facts are undisputed, the issues are purely legal, and a remand without relief would serve only to create further delay and uncertainty.

BACKGROUND

The Government promulgated the Mandate pursuant to its authority to require employer health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the category of "preventive care" to include all "FDA-approved contraception," the Mandate requires employer health plans to cover abortion-inducing products, contraception, sterilization, and related counseling.[1] Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). Dropping their health plans altogether, moreover, subjects employers to substantial annual penalties of $2,000 per employee. *Id.* § 4980H(a), (c)(1).

The Mandate contains an extremely narrow "religious employer" exemption that is effectively limited to "houses of worship." 78 Fed. Reg. at 39,874 (citing 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013)). The exemption includes Appellant Archdiocese, but does not include many religious schools and charitable organizations, including Appellants Catholic Charities, CCA, ACHS, and CUA. And because several of these nonexempt organizations participate in the Archdiocese's health plan, the "exempt" Archdiocese is still burdened by the Mandate because it must either (a) sponsor a health plan that will facilitate access

[1] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited July 29, 2013). The category of mandatory FDA-approved contraceptives includes the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce abortions.

to the objectionable products and services for the employees of these nonexempt organizations, or (b) no longer extend its plan to these ministries.[2]

Appellants filed this suit in district court on May 21, 2012, shortly after the original version of the Mandate was finalized. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:12-cv-00815 (D.D.C. May 21, 2012). In response to this and similar litigation, the Government promised that "the regulations [would] *never* be enforced in their present form," and that the Government was planning to make "amendments to the regulations in an effort to accommodate religious organizations with religious objections to contraceptive coverage." Defs.' Supp. Br. at 4, *Archbishop*, No. 1:12-cv-00815 (D.D.C. Jan. 16, 2013) (Dkt. # 38) (emphasis added). It then issued a Notice of Proposed Rulemaking ("NPRM") outlining its proposed "solution." *See* 78 Fed. Reg. 8,456 (Feb. 6, 2013). Based on those representations, the district court dismissed this suit on ripeness grounds, and this appeal followed.

While this appeal was pending, the Government continued to represent that it was devising an "accommodat[ion]" for religious organizations, and made a "binding commitment" that it would "*never*" enforce the Mandate against religious organizations until the new accommodation was released. *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012). As a result, this appeal was held in

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[2] Ex. D, Affidavit of the Archdiocese of Wash. ¶ 14.

abeyance pending publication of the Final Rule. *See* Order, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5091 (D.C. Cir. June 21, 2013) (Dkt. # 17). On June 28, the Government published the Final Rule.

Contrary to the Government's promises, the Final Rule continues to infringe on Appellants' free exercise of religion. The vaunted "accommodation" is nothing more than an accounting gimmick whereby, as before, Appellants' health insurance plans serve as the conduit by which "free" contraception is delivered to Appellants' employees. Thus, eligible religious organizations must provide a "self-certification" to their insurance issuer or (for self-insureds) to their third-party administrator, objecting to coverage for FDA-approved contraception. That very self-certification, however, has the perverse effect of requiring Appellants' own insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for Appellants' employees. *See* 78 Fed. Reg. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The mandated "payments" last only as long as the employees remain on Appellants' health plans.[3] And for self-insured entities, the "self-certification" actually "*designat*[*es*] . . . the third party

[3] *See* 29 C.F.R. § 2590.715-2713A(d) (for self-insured employers, the third-party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers offering insured plans, the issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). In short, under the original version of the Mandate and the Final Rule, the end result is the same: a nonexempt religious organization's decision to offer a group health plan results in the provision of "free" abortion-inducing products, contraception, sterilization, and related counseling, to its employees in a manner directly contrary to Appellants' religious beliefs.

Needless to say, this shell game does not address Appellants' fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Government because the Archdiocese and like-minded religious objectors repeatedly informed Appellees that the so-called "accommodation" (as set forth in the NPRM) would not relieve the burden on Appellants' religious beliefs.[4] Despite its representations to this and other courts that it was making a good-faith effort to address the religious objections of Appellants and like-minded organizations, the Government finalized the NPRM's proposal without any material change. Consequently, as before,

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[4] *E.g.*, Ex. A, Comments of U.S. Conference of Catholic Bishops at 3 (Mar. 20, 2013); Ex. B, Comments of Archdiocese of Wash. at 2 (Apr. 4, 2013); Ex. C, Comments of U.S. Conference of Catholic Bishops at 3, 10–18 (May 15, 2012).

Appellants are coerced, through threats of crippling fines and other pressure, into acting directly contrary to their sincerely held religious beliefs.[5]

ARGUMENT

Section 705 of the Administrative Procedure Act provides:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, *including the court to which a case may be taken on appeal* from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added). Federal Rule of Appellate Procedure 8(a) and Circuit Rule 8(a) likewise authorize motions for "emergency relief" upon a showing that "moving first in the district court would be impracticable." Under both provisions, courts apply "the four-part test used to evaluate requests for interim injunctive relief," *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) (internal quotations and citation omitted): "(1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

Here, Appellants plainly satisfy all four factors. In addition, waiting for relief from the district court would be impracticable. Accordingly, this Court

[5] *See* Ex. D, Affidavit of ADW ¶¶ 13-16; Ex. E, Affidavit of CUA ¶¶ 5-11; Ex. F, Affidavit of CCA ¶¶ 5-10; Ex. G, Affidavit of ACHS ¶¶ 5-10; Ex. H, Affidavit of Catholic Charities ¶¶ 4-10.

should grant the requested relief "to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

Under the Religious Freedom Restoration Act ("RFRA"), the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). Here, the Mandate cannot possibly survive scrutiny under RFRA.[6]

A. The Mandate Substantially Burdens Appellants' Exercise of Religion

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires courts to (1) identify the particular exercise of religion at issue and then (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, No.

[6] The Mandate also violates the Free Speech Clause and Religion Clauses of the First Amendment, and various statutory prohibitions on compelled support for abortion and interference with student health plans. Because the RFRA claim is adequate to afford complete relief at this stage in the proceedings, these other arguments are not set forth in greater detail herein.

12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (distinguishing between the exercise of religion and the burden on that religious exercise). Here, the Mandate imposes a substantial burden on Appellants' religious exercise by forcing them to do precisely what their religion forbids: impermissibly facilitate access to abortion-inducing products, contraception, sterilization, and related counseling.

1. "Exercise of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, a court must accept Appellants' description of their beliefs and practices, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15. "Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Id.* at 716.

In keeping with the deference owed to private claims of religious belief, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). By screening claims for sincerity, and allowing the Government to impose burdens that are truly necessary to serve a compelling interest, courts can apply RFRA to grant bona fide religious exemptions without "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). The Supreme Court has thus repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

Here, there can be no doubt that Appellants' refusal to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling is a protected exercise of religion under RFRA. Appellants do not seek to impose their religious beliefs on anyone else, or "to require the government itself to conduct its affairs in conformance with [their] religion." *Kaemmerling*, 553 F.3d at 680. On the contrary, Appellants recognize that notwithstanding their religious objections,

they have no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else. Appellants simply invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. In short, by requiring Appellants to serve as the conduit by which FDA-approved contraception is delivered to their employees, the Mandate is a clear-cut effort to "force[] them to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

2. "Substantial Burden"

Once Appellants' refusal to facilitate access to FDA-approved contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, a federal law "substantially burdens" an exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas,* 450 U.S. at 716–18. In *Yoder*, for example, the Court found that a substantial burden was imposed by a $5 penalty imposed on the Amish Appellants for refusing to follow a compulsory secondary-education law. In *Thomas*, the Court similarly held that the denial of

unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets.

Here, refusal to comply with the Mandate will subject Appellants to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Appellants seek to exit the insurance market altogether, they will be subject to an annual fine of $2,000 per full-time employee after the first thirty employees. *See* 26 U.S.C. § 4980H(a), (c)(1). Such costs and penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 fine that was found to be a substantial burden in *Yoder*. In the face of such pressure, the Tenth Circuit recently held that a *for-profit* organization challenging the Mandate was likely to succeed on the merits of its RFRA claim, emphasizing that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 2013 WL 3216103, at *21. The same is true here.

It is no answer to claim that Appellants, unlike the *Hobby Lobby* litigants, may be eligible for the Government's so-called accommodation, because that "accommodation" does nothing to resolve the conflict with Appellants' religious beliefs. For purposes of this Court's analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious

beliefs. *Id.* at *19 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact remains that the accommodation compels Appellants, through their health insurance plans, to serve as the conduit through which objectionable products and services are provided to Appellants' employees, in violation of Appellants' sincerely held religious beliefs. These sincere religious beliefs are entitled to no less protection than the nearly-identical sincere religious beliefs at issue in *Hobby Lobby*.

B. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31; *Tyndale House*

Publishers, Inc. v. Sebelius, No. 12-1635, 2012 WL 5817323, at *15 (D.D.C. Nov. 16, 2012) (same). This, it cannot begin to do.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012). Here, the Government cannot claim an interest of the "highest order" because the Mandate already exempts millions of employees—through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103, at *23; *Newland*, 881 F. Supp. 2d at 1298; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 2012 WL 5817323, at *18.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and

are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

C. The Mandate Is Not Narrowly Tailored

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[a] statute or regulation is the least restrictive means if no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Kaemmerling*, 553 F.3d at 684 (internal quotation marks and citation omitted). The government, moreover, cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal (internal quotation marks and citation omitted)).

Here, the Government has myriad ways to achieve its asserted interests without conscripting Appellants to violate their religious beliefs. Appellants in no way recommend these alternatives, and, indeed, oppose many of them as a matter of policy. But the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; or (iv) grant tax credits or deductions to women who purchase contraceptive services.[7] In light of these alternatives, there is no possible justification for forcing Appellants to violate their religious beliefs.

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[7] *See, e.g., Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *18 n.16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013) ("[T]he Government has not established its means as necessarily being the least restrictive."); *Newland*, 881 F. Supp. 2d at 1299 (Mandate not narrowly tailored in light of "the existence of government programs similar to Plaintiffs' proposed alternative").

II. INTERIM RELIEF IS NEEDED TO PREVENT IRREPARABLE HARM

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal quotation marks and citation omitted). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale*, 2012 WL 5817323, at *18 (citing *O Centro Espirita Beneficente União do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418). Here, coercing Appellants to facilitate access to FDA-approved contraception in direct violation of their faith is the epitome of irreparable injury.

The impending enforcement of the Mandate is also causing significant disruption to Appellants' hiring and human-resources planning. Health plans do not take shape overnight, but instead require a number of analyses, negotiations, and decisions before Appellants can offer a health benefits package to their employees. Employers using an outside insurance issuer must work with actuaries to evaluate their funding reserves, and then negotiate with the insurer to determine the cost of the products and services they want to offer their employees. Employers that are self-insured must similarly negotiate with third-party administrators. Under normal circumstances, Appellants must begin the process of

determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the Mandate make this already lengthy process even more complex. In addition, if Appellants choose to follow their religious conscience instead of complying with the Mandate, they will be subject to massive fines and penalties. Appellants require time to budget for such additional expenses. Such jarring uncertainties adversely affect Appellants' ability to hire and retain employees.[8]

III. INTERIM RELIEF WOULD IMPOSE NO HARM ON THE GOVERNMENT

The Government cannot possibly establish that it would suffer any substantial harm from a preliminary injunction pending final resolution of this case. The Government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate immediately against Appellant before its legality can be adjudicated. In addition, given that courts have concluded that the Mandate already contains exemptions available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot plausibly claim that it will be harmed by a temporary delay in enforcement against Appellants.

[8] These facts, which the Government has never disputed, are laid out in detail in Appellants' affidavits filed below in response to the Government's Motion to Dismiss. *See* Ex. I, Duffy Aff. ¶¶ 13–35; Ex. J, Houle Aff. ¶¶ 7–14; Ex. K, Conley Aff. ¶¶ 12–18; Ex. L, Blaufuss Aff. ¶¶ 12–17; Ex. M, Enzler Aff. ¶¶ 11–16; Ex. N, Persico Aff. ¶¶ 8–14.

Indeed, any claim of harm to the Government is fatally undermined by the fact that it consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036, (W.D. Mo. Feb. 28, 2013) (Dkt. # 9); Order, *Hall v. Sebelius*, No. 13-cv-00295, (D. Minn. Apr. 2, 2013) (Dkt. # 11). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). Indeed, "[i]f the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith*, 2013 WL 3297498, at *18. In short, especially when balanced against the serious irreparable injury being inflicted on Appellants, any harm the Government might claim from a preliminary injunction is *de minimis*.

IV. INTERIM RELIEF WOULD SERVE THE PUBLIC INTEREST

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA,

there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010. Thus, the public interest favors protecting Appellants' religious liberty by enjoining enforcement of the Mandate until it is struck down, or the Government can show it is the least restrictive means to further a compelling interest.

V. SEEKING INJUNCTIVE RELIEF IN THE DISTRICT COURT WOULD BE IMPRACTICABLE

With enforcement of the Mandate set to begin, there is insufficient time for Appellants to await a remand before seeking interim relief. On remand, Appellants will need to file an amended complaint and then immediately seek preliminary relief. Full briefing and argument in the district court could take months, as even the "expedited" procedure for seeking a preliminary injunction does not entitle plaintiffs to obtain a *hearing* until 21 days after their brief is filed. *See* LCVR 65.1(d). After that, Appellants would have to await a high-stakes decision from the district court, and then possibly face even more delay if it is necessary to file another appeal. In the meantime, with each passing day, the legal uncertainty and disruption to Appellants' operations becomes ever more severe as enforcement draws nearer.

There is, moreover, no reason to prolong these harms with a remand to the district court. The relevant facts are undisputed and, for the reasons explained herein, Appellants' entitlement to a preliminary injunction is clear. This is

precisely why numerous federal courts across the country have issued preliminary relief against the Mandate in cases involving for-profit religious entities.[9]

CONCLUSION

From the time this lawsuit was filed, the Government has deployed a series of delay tactics and empty promises designed to stave off adjudication on the merits. As a result, Appellants have suffered considerable prejudice as they have been left wondering whether and when their religious practices would be outlawed. Now the Government has made clear its intentions and set a date certain, and there is no reason for further delay. Accordingly, for the foregoing reasons, this Court should grant Appellants' request for a preliminary injunction and remand this case to the district court for further proceedings on the merits.

[9] *See Hobby Lobby*, 2013 WL 3216103; Order, *Gilardi v. U.S. Dep't of Health & Human Servs*., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. # 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); Order, *Ozinga v. U.S. Dep't of Health & Human Servs*., No. 1:13-cv-03292 (N.D. Ill. July 16, 2013) (Dkt. # 25); *Beckwith*, 2013 WL 3297498; *Geneva Coll.*, 2013 WL 1703871; Order, *Johnson Welded Prods. v. Sebelius*, No. 1:13-cv-00609 (D.D.C. May 24, 2013) (Dkt. # 8); Order, *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); Order, *Hall*, No. 13-00295 (Dkt. # 11); Order, *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 19); Order, *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); Order, *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013) (Dkt. # 21); *Monaghan*, 2013 WL 1014026; Order, *Sioux Chief*, No. 13-0036 (Dkt. #9); Order, *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. # 50); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale*, 2012 WL 5817323; *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012); *Newland*, 881 F. Supp. 2d 1287.

Respectfully submitted, this the 12th day of August, 2013.

By: /s/ *Noel J. Francisco*

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CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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