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

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, *et al.*,	:	
Plaintiffs,	:	**CIVIL ACTION NO. _____**
v.	:	**ELECTRONICALLY FILED**
KATHLEEN SEBELIUS, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR EXPEDITED PRELIMINARY INJUNCTION
AND MOTION FOR EXPEDITED SCHEDULING ORDER
OR EXPEDITED STATUS CONFERENCE

TABLE OF CONTENTS

Page

INTRODUCTION 1
BACKGROUND 3
I. STATUTORY AND REGULATORY BACKGROUND 3
II. PLAINTIFFS' BACKGROUND 9
ARGUMENT 12
I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS 13
A. The Mandate Violates RFRA 13
B. The Mandate Violates the Free Exercise Clause 30
C. The Mandate Violates the First Amendment Protection Against Compelled Speech 34
D. The Mandate Imposes a Gag Order that Violates The First Amendment Protection of Free Speech 35
E. The "Religious Employer" Exemption Violates the Establishment Clause 36
F. The Mandate Unconstitutionally Interferes with Plaintiffs' Rights of Internal Church Governance 40
II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM 42
III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM FROM A PRELIMINARY INJUNCTION 45
IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST 46
CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,
133 S.Ct. 2321 (2013) 34

Am. Civil Liberties Union v. Reno,
929 F. Supp. 824 (E.D. Pa. 1996), *aff'd Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) 43

Am. Pulverizer Co. v. HHS,
No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) 15

Annex Med., Inc. v. Sebelius,
No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) 15, 24

Beckwith v. Sebelius,
No. 8:13-cv-0648-T-17MAP, slip op. (M.D. Fla. June 25, 2013) 28

Bick Holding, Inc. v. Sebelius,
No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) 15, 45

Bowman v. Twp. of Pennsauken,
709 F. Supp. 1329 (D.N.J. 1989) 44

Brown v. Entm't Merchs. Ass'n,
131 S. Ct. 2729 (2011) 27, 28

Chosen 300 Ministries, Inc. v. City of Phila.,
2012 WL 3235317 (E.D. Pa. Aug. 9, 2012) 46

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) ..... *passim*

Cohen v. California,
403 U.S. 15 (1971) 36

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 37, 38

Corp. of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987) 20

Dunn v. Blumstein,
405 U.S. 330 (1972) 29

Emp't Div. v. Smith,
494 U.S. 872 (1990).....16, 17, 30, 33

Evergreen Ass'n v. City of New York,
801 F. Supp. 2d 197 (S.D.N.Y. 2011).....35

Fisher v. Univ. of Tex. at Austin,
133 S. Ct. 2411 (2013).....29

Found. of Human Understanding v. United States,
88 Fed. Cl. 203 (Fed. Cl. 2009).....39

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,
170 F.3d 359 (3d Cir. 1999).....31

Geneva College v. Sebelius,
No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265 (W.D. Pa. Mar. 6, 2013),
injunction granted 2013 WL 3071481 (W.D. Pa. June 18, 2013).....19, 26, 23

Geneva College v. Sebelius,
No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 56087 (W.D. Pa. Apr. 19, 2013).....45

Geneva College v. Sebelius,
No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013)..... *passim*

Gilardi v. HHS,
No. 13-5069 (D.C. Cir. Mar. 29, 2013).....15, 24

Gonzales v. O Centro Espírita Beneficente União Do Vegetal,
546 U.S. 418 (2006)..... *passim*

Gov't of Virgin Is., Dep't of Conservation and Cultural Affairs v. Virgin Is. Paving,
714 F.2d 283 (3d Cir. 1983), *overruled on other grounds by statute*, *Edwards v. HOVENSA, LLC*, 497 F.3d 355 (3d Cir. 2007).....44

Grote v. Sebelius,
708 F.3d 850 (7th Cir. 2013).....15, 24

Grutter v. Bollinger,
539 U.S. 306 (2003).....30

Hall v. Sebelius,
No. 13-00295 (D. Minn. Apr. 2, 2013).....15, 45

Hartenbower v. HHS,
No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013).....15

Henderson v. Kennedy,
253 F.3d 12 (D.C. Cir. 2001) 19

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) (en banc) ..... *passim*

Hodgkins v. Peterson,
355 F.3d 1048 (7th Cir. 2004) 29

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,
132 S.Ct. 694 (2012) 40, 41

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.,
515 U.S. 557 (1995) 34

Jeffreys v. My Friend's Place, Inc.,
719 F. Supp. 639 (M.D. Tenn. 1989) 44

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996) 17, 44

Kaemmerling v. Lappin,
553 F.3d 669 (D.C. Cir. 2008) 18, 22, 29

Kikumura v. Hurley,
242 F.3d 950 (10th Cir. 2001) 44

Koger v. Bryan,
523 F.3d 789 (7th Cir. 2008) 16, 17

Korte v. Sebelius,
No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) 15, 23, 24

Kos Pharms., Inc. v. Andrx Corp.,
369 F.3d 700 (3d Cir. 2004) 12, 45

Larson v. Valente,
456 U.S. 228 (1982) 37

Legatus v. Sebelius,
No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) 15

Lindsay v. HHS,
No. 13-1210 (N.D. Ill. Mar. 20, 2013) 15

Minard Run Oil Co. v. U.S. Forest Service,
No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009) 12, 45

Mitchell v. Helms,
530 U.S. 793 (2000).....38

Mobil Oil Corp. v. Henriksen Enterp.,
490 F. Supp. 74 (W.D. Mich. 1980).....44

Monaghan v. Sebelius,
No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013).....15

Mullin v. Sussex County,
No. 11-580, 2012 U.S. Dist. LEXIS 67571 (D. Del. May 15, 2012).....43

N.J. Retail Merchants Ass'n v. Sidamon-Eristoff,
669 F.3d 374 (3d Cir. 2012).....46

New York Times Co. v. Sullivan,
376 U.S. 254 (1964).....36

New York v. Cathedral Acad.,
434 U.S. 125 (1977).....40

Newland v. Sebelius,
881 F. Supp. 2d 1287 (D. Colo. 2012)..... *passim*

NLRB v. Catholic Bishop of Chi.,
440 U.S. 490 (1979).....38

O'Brien v. HHS,
No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012).....15, 24

Patrick v. LeFevre,
745 F.2d 153 (2d Cir, 1984).....17

Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny Cnty,
No. 2:06-cv-1064, 2007 WL 1007968 (W.D. Pa. Mar. 30, 2007).....43

R.J. Reynolds Tobacco Co., et al., v. FDA,
No. 11-5332 (D.C. Cir. Aug. 24, 2012), slip op. 34

Ramsey v. City of Pittsburgh,
764 F. Supp. 2d 728 (W.D. Pa. 2011).....42, 46

Sharpe Holdings, Inc. v. HHS,
No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013).....45

Sharpe Holdings, Inc. v. HHS,
No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012).....15

Sherbert v. Verner,
374 U.S. 398 (1963) 14

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 36

Sioux Chief Mfg. Co. v. Sebelius,
No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) 15, 45

Tepeyac v. Montgomery Cnty.,
779 F. Supp. 2d 456 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc) 35

Thomas v. Review Bd. of the Ind. Emp't Sec. Div.,
450 U.S. 707 (1981) 16, 17, 19, 22

Tonn & Blank Constr., LLC v. Sebelius,
No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) 15

Triune Health Grp., Inc. v. HHS,
No. 12-6756 (N.D. Ill. Jan. 3, 2013) 15

Tyndale House Publishers, Inc. v. Sebelius,
904 F. Supp. 2d 106 (D.D.C. 2012) 15, 25, 26, 42

United States v. Ali,
682 F.3d 705 (8th Cir. 2012) 16

United States v. Lee,
455 U.S. 252 (1982) 17

United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends,
322 F. Supp. 2d 603 (E.D. Pa. 2004) 16

Univ. of Great Falls v. NLRB,
278 F.3d 1335 (D.C. Cir. 2002) 37, 39

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005) 29

Washington v. Klem,
497 F.3d 272 (3d Cir. 2007) 29

Wisconsin v. Yoder,
406 U.S. 205 (1972) ..... *passim*

STATUTES

26 U.S.C. § 4980D(b) 3, 22

26 U.S.C. §§ 4980D(d) 3

26 U.S.C. § 4980H(a), (c)(1) 3, 23

42 U.S.C. § 300gg-13(a)(4) 3

42 U.S.C. § 2000bb 14, 15

42 U.S.C. § 2000bb-1(a) 2, 13

42 U.S.C. § 2000bb-1(b) 2, 14

42 U.S.C. § 2000bb-1(b)(2) 29

42 U.S.C. § 2000bb-2(4) 16

42 U.S.C. § 2000cc-5(7)(A) 16

42 U.S.C. § 18011 ..... 4, 16

Cal. Health and Safety Code § 1376.25(b)(1) 33

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ..... *passim*

OTHER AUTHORITIES

26 C.F.R. § 1.6033-2(h) 40

26 C.F.R. § 54.9815-1251T(g)(1)(v) 4

26 C.F.R. § 54.9815-2713A(a) 7

26 C.F.R. § 54.9815-2713A(b)-(c) 7

26 C.F.R. § 54.9815-2713A(c)(2)(ii) 21

26 C.F.R. § 54.9815–2713A(b)(iii) 7, 36

29 C.F.R. § 2590.715-2713A(d) 20

45 C.F.R. § 147.130(a)(1)(iv) ..... *passim*

45 C.F.R. § 147.131(c)(2)(i)(B) 20

78 Fed. Reg. 39,893 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)) 7

78 Fed. Reg. 39,896 (codified at 45 C.F.R. § 147.131(a)) 5

75 Fed. Reg. 34,542 26

75 Fed. Reg. 41,726 (July 19, 2010).....27

76 Fed. Reg. 46,621 (Aug. 3, 2011).....4

77 Fed. Reg. 8,725 (Feb. 15, 2012) 4, 33

77 Fed. Reg. 16,501 (Mar. 21, 2012).....4, 6

78 Fed. Reg. 8,456 (Feb. 6, 2013) ..... *passim*

78 Fed. Reg. 39,870 (July 2, 2013)..... *passim*

139 Cong. Rec. 9,685 (1993).....14

Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013).....28

Editorial, *Act of Tyranny*, Wash. Times, Mar. 5, 2004 (quoting floor statement of Sen. Jackie Speier), available at http://www.washingtontimes.com/news/2004/mar/5/20040305-081331-6705r/?page=all 33

The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary, 102d Cong., 174, 192 (1992) 14

INTRODUCTION

Plaintiffs, as Christians and part of the Roman Catholic Church, believe that life begins at conception and that artificial interference with life and conception is immoral. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government has promulgated regulations that coerce Plaintiffs to violate this sincerely-held religious belief by requiring them, under threat of punitive fines, to facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. *See* 45 C.F.R. § 147.130(a)(1)(iv) ("Mandate"). Despite repeated pleas from the religious community, the Final Rule narrowly defines "religious employers" as "houses of worship and religious orders," excluding Catholic charitable and other organizations—for example, Plaintiff Catholic Charities.

More specifically, the Mandate divides the Catholic Church into two wings: (1) a "worship" wing limited to "houses of worship and religious orders" that provide *religious* services; and (2) a "charitable" wing that provides what the Government views as *secular* services. But this artificial distinction ignores the reality that Plaintiffs in the Catholic Church engage in charity as an *exercise of religion*. By excluding Catholic charitable organizations from the category of exempt "religious employers," the Mandate forces the heart of the Catholic Church, including Plaintiffs, to act contrary to its sincerely-held religious beliefs.

The Final Rule's so-called "accommodation" for "non-religious employers," moreover, is illusory because it addresses fundamental religious objections through accounting gimmicks. As a result, Plaintiffs remain the vehicle by which the objectionable products and services are delivered to their employees. Indeed, the Final Rule is significantly *worse* than the proposed rule because it eliminates an important prior protection that allowed "religious employers" (*e.g.*, the Diocese) to protect their affiliated religious organizations (*e.g.*, Catholic Charities) from

operation of the Mandate by including such organizations in the insurance plan of the "religious employer." The Final Rule, therefore, actually *increases* the number of religious organizations subject to the Mandate.

This oppressive Mandate is irreconcilable with the Religious Freedom Restoration Act ("RFRA"), the First Amendment, and other federal law. *First*, under RFRA, the Government may not impose a substantial burden on Plaintiffs' exercise of religion without showing that it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(a), (b). The Government has excluded tens of millions from the Mandate through a series of exemptions; thus, it cannot show a compelling interest in forcing the Mandate on the much smaller band of employers that seek an exemption on the basis of religious hardship. Nor is the Mandate narrowly tailored because the Government could easily advance its goals without using Plaintiffs to deliver objectionable products and services to Plaintiffs' employees.

Second, the Mandate violates the First Amendment's Free Speech and Religion Clauses. It infringes on Plaintiffs' freedom of speech by requiring them to facilitate "counseling" in favor of abortion, contraception, and sterilization. It violates the Free Exercise Clause by targeting Plaintiffs' religious practices, offering a multitude of exemptions to other employers for *non-religious* reasons, but denying any exemption that would relieve Plaintiffs' *religious* hardship. It violates the Establishment Clause by creating a state-favored category of "religious employers" based on intrusive judgments about their religious practices, beliefs, and organizational structure. And, it violates the First Amendment's protection of internal church governance by splitting the Catholic Church in two and denying "religious employer" status to those entities carrying out the Church's religious mission through schools, health care, and charities.

In sum, there is no legal justification for the Government's gratuitous intrusion on Plaintiffs' religious freedom. Plaintiffs need injunctive relief now, without which they will be forced to decide between violating their religious beliefs or violating the law—the epitome of irreparable harm. By contrast, a preliminary injunction will impose no substantial harm on the Government, which has refrained from mandating contraceptive coverage for more than two centuries, and has delayed implementation of the Mandate several times. Accordingly, Plaintiffs respectfully request a preliminary injunction to preserve the status quo while this Court adjudicates this vital question of religious liberty.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act") requires employer "group health plan[s]" to include insurance coverage for women's "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), which has been defined by the Department of Health and Human Services ("HHS") to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Women's Preventive Services Guidelines (Exhibit 1). FDA-approved contraceptives include the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce an abortion. Failure to provide these services exposes nonexempt entities to fines of $100/day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health plans subjects nonexempt entities to substantial annual penalties of $2,000 per employee. *Id.* § 4980H(a), (c)(1).

From its inception, the Act exempted health plans covering millions of people. *See* WhiteHouse.Gov, The Affordable Care Act Increases Choice and Saving Money for Small Business (Exhibit 2) at 1 ("exempt[ing] 96[%] of all firms . . . or 5.8 million out of 6 million total

firms"); 26 U.S.C. §§ 4980D(d); 4980H(a). Plans that have not changed certain benefits or contributions are "grandfathered" and exempt. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). By one estimate, the Act exempts "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

From the start, however, the Government refused to exempt religious entities other than those satisfying the narrow definition of "religious employer"—intended to "accommodate" only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Despite intense criticism, the Government finalized the narrow definition "without change." 77 Fed. Reg. 8,725, 8,727-28, 8,730 (Feb. 15, 2012).

Five weeks later, under increased pressure, the Government issued an Advanced Notice of Proposed Rulemaking ("ANPRM"), suggesting accommodations to religious objections, yet reaffirming that the "religious employer" exemption would not change. 77 Fed. Reg. 16,501-08 (Mar. 21, 2012). Religious entities explained in detail why proposals in the ANPRM would not relieve the burden on their religious freedom. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (May 15, 2012) (Exhibit 3) at 3 ("[The ANPRM] create[s] an appearance of moderation and compromise, [but does] not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage."). Yet, on February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM") adopting the ANPRM's proposals. The Government received over 400,000 comments on the NPRM, largely reiterating previous objections. *See, e.g.*, Comments of U.S. Conf. of Catholic Bishops (Mar. 20, 2013) (Exhibit 4) at 3 (noting that religious entities are still required "to fund or otherwise facilitate the morally objectionable coverage"); Public Comments and Expert Opinion submitted by the Roman Catholic Diocese of Pittsburgh (April 8, 2013) (Exhibit 5), *available at*

http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-160262 (noting that "the proposed rule continues the surprising recent detour into requiring religious objectors to fund or facilitate coverage for abortifacients, contraception, sterilization, and related education and counseling[]").

Ignoring opposition, the Final Rule adopted substantially all of the NPRM's proposals without significant change. *See* 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) ("Final Rule"). Thus, the Mandate will be in effect for plan years beginning on or after January 1, 2014. The Final Rule's three changes to the Mandate fail to relieve the unlawful burdens imposed on Plaintiffs, and one change significantly *increases* the number of religious organizations subject to the Mandate.

First, the Final Rule made a cosmetic change to the "religious employer" exemption by replacing the first three prongs of the "religious employer" definition with "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. 39,896 (codified at 45 C.F.R. § 147.131(a)). The Government admits that this change does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules," but "restrict[s] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Thus, the Final Rule mirrors the original definition's focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. Religious entities with broader missions are still not considered "religious employers."

Second, the Final Rule *increases* the burden imposed on religious entities by expanding the number that are subject to the Mandate. Under the original "religious employer" definition, if a nonexempt religious entity provided health coverage to its employees through a plan offered by a separate but affiliated entity that was exempt, "then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). For example, Plaintiff Diocese operates a self-insured plan that covers Catholic Charities. Exhibit 6, Declaration of Susan Rauscher ("Ex. 6, Rauscher Decl.") ¶ 7; Exhibit 7, Declaration of David Stewart ("Ex. 7, Stewart Decl.") ¶¶ 6-8. Under the original religious employer definition, if the Diocese was an exempt "religious employer," then Catholic Charities received the benefit of that exemption. Ex. 6, Rauscher Decl. ¶ 12. But the Final Rule eliminates that protection, providing instead that "each employer [must] independently meet the definition of religious employer . . . in order to avail itself of the exemption." 78 Fed. Reg. 39,886; *see also* 78 Fed. Reg. at 8,467 (NPRM). Thus, Catholic Charities is no longer exempt under the Diocesan health plan. Rauscher Decl. ¶ 11; Ex. 7, Stewart Decl. ¶ 16. As a result, the Diocese's and Bishop Zubik's (as Chairman of the Membership Board of Catholic Charities) options, are to (1) provide Catholic Charities' employees with access to "free" objectionable products and services by virtue of the self-certification; or (2) expel Catholic Charities, subjecting it to massive fines if it does not contract with an insurer that will provide the objectionable coverage. Exhibit 8, Declaration of Father Ronald P. Lengwin ("Ex. 8, Fr. Lengwin Decl.") ¶¶ 27-33, 34, 39; Ex. 7, Stewart Decl. ¶ 18. The first option forces the Diocese and the Bishop to act contrary to their sincerely-held religious beliefs. Ex. 8, Fr. Lengwin Decl. ¶¶ 27-33. The second option makes the Diocese and the Bishop complicit in providing objectionable coverage and compels the Diocese to submit to

Governmental interference with its structure and internal operations. Ex. 8, Fr. Lengwin Decl. ¶¶ 43, 38-39; Ex. 7, Stewart Decl. ¶ 19.

Third, the Final Rule establishes an illusory "accommodation" for nonexempt objecting religious entities that qualify as "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if self-insured, to its third party administrator. 26 C.F.R. § 54.9815-2713A(a). An eligible organization's self-certification requires the insurance issuer or third-party administrator to provide "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,893 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). Making matters worse, self-insured organizations that self-certify are flatly prohibited 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(b)(iii). For self-insured organizations, like Plaintiffs, the self-certification constitutes the religious organization's "designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. This "accommodation" fails to relieve the burden on religious organizations' religious beliefs because a non-exempt organization's decision to offer a group health plan still results in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. 26 C.F.R. § 54.9815-2713A(b)-(c).

Plaintiffs' provision of group health plans triggers the provision of "free" objectionable services to their employees in a manner contrary to their beliefs. Ex. 8, Fr. Lengwin Decl. ¶¶ 22-

27. Indeed, Catholic Charities must designate the third-party administrators ("TPAs") to provide the coverage. Ex. 8, Fr. Lengwin Decl. ¶¶ 24-25; Ex. 6, Rauscher Decl. ¶¶ 13-15. Morover, the Bishop and the Diocese will be forced to facilitate provision of the objectionable services because nonexempt entities currently insured through the Diocese, such as Plaintiff Catholic Charities, will be forced to comply with the Mandate. The Diocese, through the Bishop, has power to manage, oversee, and direct the plans offered by the Diocese, and will be forced to operate those plans in a manner that will result in provision of the objectionable services. Ex. 8, Lengwin Decl. ¶¶ 27-31. The Diocese would also be providing the names of the employees and dependents who would receive the free objectionable services. Ex. 8, Fr. Lengwin Decl. ¶ 32; Ex. 7, Stewart Decl. ¶ 22. And the insurance cards used to obtain the objectionable services will say "Catholic Benefits Trust." Ex. 8, Fr. Lengwin Decl. ¶ 33; Ex. 7, Stewart Decl. ¶ 21.

In sum, the Final Rule does not address Plaintiffs' religious objections to facilitating access to the objectionable products and services. Ex. 8, Fr. Lengwin Decl. ¶¶ 10-17; Ex. 6, Rauscher Decl. ¶ 13; Ex. 7, Stewart Decl. ¶¶ 15-17. This should not surprise the Government, which was repeatedly notified well before it issued the Final Rule that its "accommodation" would not relieve the burden on Plaintiffs' religious beliefs. Despite representations that it was making a good-faith effort to address those religious objections, the Government issued the Final Rule that it knew would do no such thing. Plaintiffs are still coerced, under threat of crippling fines, into being the vehicle to deliver abortion-inducing drugs, sterilization services, contraceptives, and related counseling services to their employees, contrary to their sincerely-held religious beliefs. Ex. 8, Fr. Lengwin Decl. ¶ 15; Ex. 6, Rauscher Decl. ¶¶ 15, 28; Ex. 7, Stewart Decl. ¶ 19.

II. PLAINTIFFS' BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide educational, spiritual, health, and charitable services to individuals of all faiths. Ex. 8, Fr. Lengwin Decl. ¶ 37; Ex. 6, Rauscher Decl. ¶ 21. Just as sincerely, they believe that life begins at the moment of conception, and that certain "preventive" services covered by the Mandate that interfere with life and conception are immoral. Ex. 8, Fr. Lengwin Decl. ¶¶ 10-21. Specifically, as relevant here, Plaintiffs believe that abortion and direct sterilization are prohibited and that contraceptives for the purpose of contraception are immoral. Ex. 8, Fr. Lengwin Decl. ¶¶ 10-12, 14.

Under the internal structure and doctrine of the Catholic Church, charitable organizations including Catholic Charities, are the heart of the Church and are just as religiously significant as entities engaged in worship. Ex. 8, Fr. Lengwin Decl. ¶ 37; Ex. 6, Rauscher Decl. ¶ 21. Additionally, the Diocese controls and oversees its close affiliates, including Catholic Charities. Ex. 8, Fr. Lengwin Decl. ¶¶ 5, 38. To ensure that these entities comply with the dictates of the Catholic Church, the Diocese offers health insurance that complies with Catholic doctrine to the employees of these affiliates. Ex. 8, Fr. Lengwin Decl. ¶ 38. The Diocese offers this coverage on plans that are self-insured through the Catholic Benefits Trust (the "Trust"). Ex. 8, Fr. Lengwin Decl. ¶¶ 7, 9; Ex. 7, Stewart Decl. ¶¶ 6-8. Forcing the Diocese to expel these affiliates from its insurance plan would interfere with its ability to control them and with the internal structure and doctrine of the Diocese. Ex. 8, Fr. Lengwin Decl. ¶¶ 20, 31-34, 38.

Currently, Catholic Charities provides health insurance coverage to approximately 80 full-time employees and their dependants (for a total of approximately 300 insured individuals) through a health insurance plan ("Catholic Charities' Health Plan") that is self-insured by the Diocese through the Trust. Ex. 6, Rauscher Decl. ¶ 7; Ex. 7, Stewart Decl. ¶¶ 6-8. Those plan

options are administered by TPAs Highmark Inc. and UPMC. Ex. 6, Rauscher Decl. ¶ 7; Ex. 7, Stewart Decl. ¶ 6. The Catholic Charities' Health Plan complies with Catholic teachings on abortion-inducing products, sterilization, and contraception ("objectionable services"), by excluding abortion, sterilization, and contraceptives when prescribed for contraceptive purposes. Ex. 6, Rauscher Decl. ¶ 8; Ex. 7, Stewart Decl. ¶ 9.

Plaintiffs' sincerely-held, longstanding beliefs are violated in several ways if they provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. For example, the Mandate forces Plaintiffs to violate their religious beliefs by requiring them to designate a third party to administer, provide or procure the objectionable product and services for Catholic Charities' employees. Ex. 8, Fr. Lengwin Decl. ¶¶ 23-26, 31; Ex. 6, Rauscher Decl. ¶¶ 13-14; Ex. 7, Stewart Decl. ¶ 14.

Plaintiffs' religious beliefs are violated by facilitating the objectionable coverage and services, even if Plaintiffs do not have to contract, arrange, pay, or refer for them. Ex. 8, Fr. Lengwin Decl. ¶ 17. When it violates Plaintiffs' religious beliefs to perform certain conduct, Plaintiffs are equally prohibited from designating or assisting someone else to do it for them. *Id.* ¶ 18. There is no prohibition in paying a salary to Plaintiffs' employees, even if those employees may use the money to act contrary to Catholic doctrine. But that is completely different from the situation here. When the Diocese pays an employee's salary, it does not designate the employee to purchase pornography, does not designate the employee to administer a program that supplies pornography, and does not trigger the provision of pornography. *Id.* ¶ 19.

Here, Plaintiffs are themselves prohibited from providing this coverage, including for abortion-inducing drugs which Plaintiffs believe to be a grave moral evil, and are equally

prohibited from designating or assisting their TPAs in providing the coverage. Ex. 8, Fr. Lengwin Decl. ¶¶ 17-18. Giving notice to the TPAs of Plaintiffs' beliefs was not a violation in prior years because it did not trigger the provision of the objectionable services and did not designate the TPAs to provide the objectionable coverage. Ex. 8, Fr. Lengwin Decl. ¶ 18; Ex. 7, Stewart Decl. ¶ 14.

Additionally, Plaintiffs believe that they must bear witness, including in their deeds, to the beliefs of the Catholic Church and that it would be scandal to act inconsistently with those beliefs. Ex. 8, Fr. Lengwin Decl. ¶ 35. For example, Plaintiffs cannot act in a way that thwarts the transmission of life. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶ 16. But, the Mandate is predicated on the government's prediction of a decrease in the number of births. Ex. 6, Rauscher Decl. ¶ 18. The Mandate thus forces Plaintiffs to not only directly facilitate access to objectionable products and services, but also to participate in a government scheme specifically designed to thwart the transmission of life contrary to Plaintiffs' religious beliefs. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶¶ 16, 18.

Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services, including by contracting with a third party that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. *See, e.g.*, Ex. 8, Fr. Lengwin Decl.; ¶¶ 15-17; Ex. 6, Rauscher Decl. ¶¶ 13-14, 17.

It is a cruel irony that the Mandate—promulgated under a statute that was intended to help the poor and needy—imposes on Plaintiffs the impossible choice of either abandoning their religious principles or else violating the law and facing crippling penalties. And, that it could harm Plaintiffs' ability to directly serve the poor and needy.

ARGUMENT

A plaintiff seeking a preliminary injunction "must demonstrate '(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.'" *Minard Run Oil Co. v. U.S. Forest Service*, No. 09-125, 2009 WL 4937785, at *23 (W.D. Pa. Dec. 15, 2009) (citing *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)). All of these factors are weighed together on a sliding-scale so that "'the strength of the plaintiff's showing with respect to one may affect what will suffice with respect to another.'" *Id.* (quoting *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987) (other citation omitted)). "Thus, for example, '[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'" *Id.* (quoting *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

The rules and accepted practice ordinarily require expedited resolution by the Court when a preliminary injunction is sought. A preliminary injunction, moreover, is especially appropriate where it would preserve the status quo. "One of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharms.*, 369 F.3d at 708 (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990)).

Here, Plaintiffs meet all four factors for preliminary injunctive relief and the balance of harms clearly weighs in their favor. Moreover, a preliminary injunction would preserve the status quo, as Catholic Charities' Health Plan does not currently cover the objectionable services and its employees do not get the objectionable services for free from its TPAs. Ex. 7, Stewart Decl. ¶¶ 9, 13; *see also* Ex. 6, Rauscher Decl. ¶¶ 8. Accordingly, Plaintiffs' Motion for a Preliminary Injunction should be promptly adjudicated and granted.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are likely to succeed on the merits of all of their claims, including that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 189-99); (2) violates the Free Exercise Clause of the First Amendment because it is not a neutral and generally applicable law (Compl. Count II, ¶¶ 200-12); (3) violates the First Amendment prohibition on compelled speech because it compels Plaintiffs to support and/or facilitate "counseling" that contradicts their religious viewpoint (Compl. Count III, ¶¶ 213-26); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a third-party administrator's decision to provide or procure contraceptive services; (Compl. Count IV, ¶¶ 227-31); (5) violates the Establishment Clause of the First Amendment because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on intrusive judgments regarding their beliefs, practices, and organizational structure (Compl. Count V, ¶¶ 232-39); and (6) violates both Religion Clauses of the First Amendment because it interferes with Plaintiffs' rights of internal church governance (Compl. Count VI, ¶¶ 240-54).

A. The Mandate Violates RFRA

Under 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(a), (b); *Gonzales v. O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418, 423 (2006). Thus, once Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate

to Plaintiffs furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." *See* 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428. Here, the Government cannot make such a showing.

RFRA was enacted to prevent the type of regulation codified in the Mandate. Congress passed RFRA "to restore [and codify] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary,* 102d Cong., 174, 192 (1992); *see also* 139 Cong. Rec. 9,685 (1993) (statement of Rep. S. Hoyer) (noting that, post-*Smith*, a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" and that RFRA would "correct th[is] injustice[]"); *id.* at 4,660 (statement of Rep. Green) (noting that RFRA prevents the Government from "enact[ing] laws that force a person to participate in actions that violate their religious beliefs[]").

Here, the Mandate cannot possibly survive scrutiny under RFRA because: (1) it imposes a "substantial burden" on Plaintiffs' free exercise of religion; (2) the Government has no compelling interest in imposing this burden; and (3) it is not the least restrictive means to achieve the Government's interest. Thus, courts, including this Court, have issued preliminary injunctions against the Mandate in the majority of cases brought by *for-profit* companies with religious owners.[1] In the *Geneva College* case, this Court relied on "Supreme Court decisions

[1] Courts in at least twenty cases have afforded preliminary relief to for-profit plaintiffs

support[ing] Geneva's argument that there is a likelihood of success on the merits to its assertion that it will suffer a substantial burden under the RFRA" absent an injunction. 2013 WL 3071481, at *8. If anything, a preliminary injunction is even more appropriate in this case involving *non-profit* entities where, as outlined below, the Mandate imposes a substantial burden on the religious exercise which is at the heart of the mission of these entities and enforcement is imminent.

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

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430-31. This initial inquiry requires courts to (1) identify the particular exercise of religion at issue, and (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc) (stating

(continued…)

challenging the Mandate, including this Court in *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013). *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc); *Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (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. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Hartenbower v. HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holdings Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); *Lindsay v. HHS*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. #9); *Triune Health Grp., Inc. v. HHS*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. 50); *Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. HHS*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

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"); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under the parallel statute RLUIPA). Here, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do what their religion forbids: facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. It also prevents Plaintiffs from bearing witness to their religious beliefs, thereby causing scandal.

(i) "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). Because the exercise of religion has been interpreted to include a diverse array of conduct, ranging from refusing to give children a formal education, *see Yoder*, 406 U.S. at 210-19, to refusing to levy employee's wages, *see United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004), RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990). Protected religious exercise includes any act or practice that is "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted).

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, courts must accept plaintiffs' description of their beliefs and practices, regardless of whether the court, or Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714-15

(refusing to question plaintiff's moral line); *see also United States v. Lee*, 455 U.S. 252, 257 (1982); *Koger*, 523 F.3d at 797 (plaintiff's "dietary request [was] squarely within the definition of religious exercise"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting efforts to dispute plaintiff's representation that a medical test would violate his religion).

"Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Thus, "[r]epeatedly and in many different contexts," the Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Instead, 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 necessity, this is a modest inquiry that is restrained by the need to avoid excessive entanglement in religion. *See Jolly*, 76 F.3d at 476. The purpose of the sincerity inquiry is simply to screen out manipulative claims based on sham beliefs that can be readily identified as such, for example, a high-school student who suddenly proclaims a religious objection to Math. Courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715.

"While it is a delicate task to evaluate religious sincerity without questioning religious verity, . . . free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." *Jolly*, 76 F.3d at 476 (emphasis omitted). By screening claims for religious sincerity, and by 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." *Yoder*, 406 U.S. at 216. Based on this approach, the Supreme Court has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

Here, there can be no doubt that Plaintiffs' refusal to comply with the Mandate is a protected exercise of religion under RFRA. It is undisputed that Plaintiffs have a sincerely-held religious belief that they may not provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services, including by contracting with an insurance company or TPA that will, as a result, provide or procure the objectionable products and services for Plaintiffs' employees. *See* Ex. 8, Fr. Lengwin Decl. ¶¶ 10-19; Ex. 6, Rauscher Decl. ¶ 11. While courts are bound to accept Plaintiffs' description of their beliefs without resort to any independent religious authority, here the sincerity of Plaintiffs' beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops. *See* Comments of U.S. Conf. of Catholic Bishops (Mar. 20, 2013) (Exhibit 4). These authoritative statements of Catholic belief make it unmistakably clear that Plaintiffs' objection to the Mandate is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.

Nor do Plaintiffs 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 v. Lappin*, 553 F.3d 669, 680 (D.C. Cir. 2008). On the contrary, Plaintiffs 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.

Plaintiffs simply invoke RFRA to enforce the law that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. In particular, the Government may not require Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. Nor can the Government force Plaintiffs to contract with a third-party administrator that will, as a result, provide or procure the objectionable products and services for Catholic Charities' employees. By imposing these requirements, the Mandate is a straightforward effort that "forces [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

It is no answer to claim that Catholic Charities may be eligible for the Government's so-called "accommodation." For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincerely-held religious beliefs. *Hobby Lobby*, 723 F.3d at 1137 ("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."); *Geneva Coll.*, 2013 WL 3071481, at *9 (noting that the "[*Thomas*] Court instructed that '[c]ourts should not undertake to dissect religious beliefs' when analyzing substantial burden questions[]" and that "[h]ere, Geneva facilitates the provision of its student health insurance, and to force it to choose whether or not to facilitate a student health plan would be, like in Thomas, a line which it should not be forced to cross[]") (citing 450 U.S. at 715). The fact is that the "accommodation" compels Plaintiffs to contract with an insurance issuer or third-party administrator that will, as a result of that contract, provide or procure the objectionable products and services for Catholic Charities' employees. Ex. 8, Fr. Lengwin Decl. ¶¶ 22-26. Indeed, the third-party administrator's obligation exists *only so long as* Catholic Charities'

employees remain on Catholic Charities' Health Plan.[2] Ex. 6, Rauscher Decl. ¶ 13. Moreover, for self-insured organizations, like Catholic Charities, the required self-certification constitutes the religious organization's specific "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. 39,879. (emphasis added); *see also* Ex. 8, Fr. Lengwin Decl. ¶ 25; Ex. 6, Rauscher Decl. ¶ 14. Finally, the accommodation forces further facilitation by leading to the requirement that the Diocese provide the names of the employees and dependents whose insurance is Catholic Charities. Ex. 8, Fr. Lengwin Decl. ¶ 32; Ex. 7, Stewart Decl. ¶ 22.

As Plaintiffs have explained to the Government, they believe their involvement in this scheme would constitute impermissible facilitation of access to the objectionable products and services. *See* Public Comments of the Roman Catholic Diocese of Pittsburgh (Apr. 8, 2013) (Exhibit 5); *see also* Ex. 8, Fr. Lengwin Decl. ¶ 16; Ex. 6, Rauscher Decl. ¶ 11 This sincere religious belief is entitled to no less protection than that at issue in *Hobby Lobby* and *Geneva College*. Indeed, the Supreme Court has recognized that non-profit religious entities are entitled to more protection than for-profit corporations. *See Corp. of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 344-45 (1987) (Brennan, J., concurring).

Because Plaintiffs object to *facilitating* the objectionable products and services in the manner required by the Mandate, it is irrelevant whether the Mandate also forces them to directly *subsidize* these products and services. Ex. 8, Fr. Lengwin Decl. ¶ 17. For example, it makes no difference that insurance issuers are required to "segregate premium revenue collected from the

[2] *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 that offer insured plans, the insurance 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[]").

eligible organization from the monies used to provide payments for contraceptive services." 26 C.F.R. § 54.9815-2713A(c)(2)(ii). It also makes no difference whether payments for objectionable products and services will be "cost neutral" to Plaintiffs. 78 Fed. Reg. at 8,463. Indeed, Plaintiffs would be willing to pay increased premiums if that would allow them to avoid serving as the vehicle by which the objectionable products and services would be delivered to their employees. The Diocese is forgoing approximately $900,000 a year in additional funds to maintain grandfathered status for this very reason. Stewart Decl. ¶ 11. It is, in short, the impermissible *facilitation* of access to objectionable products and services that violates Plaintiffs' sincerely-held religious beliefs. Ex. 8, Fr. Lengwin Decl. ¶¶ 15-16. And it is undisputed that the Mandate forces Plaintiffs to engage in impermissible facilitation. Ex. 8, Fr. Lengwin Decl. ¶ 15-16; Ex. 6, Rauscher Decl. ¶ 11.

Additionally, Plaintiffs have an obligation to bear witness to the Church's teachings, particularly as defined by the Diocese. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶ 16. Being forced to act inconsistent with these teachings prevents Plaintiffs from bearing witness and causes scandal. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶ 16. By forcing Catholic Charities to provide health insurance plans under the "accommodation," the Mandate prevents Plaintiffs from bearing witness and causes scandal. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶ 16. For example, the Mandate purports to function by eliminating pregnancies and Plaintiffs simply cannot bear witness to Catholic doctrine if their actions thwart the transmission of life. Ex. 8, Fr. Lengwin Decl. ¶ 35; Ex. 6, Rauscher Decl. ¶ 16. Under the Mandate, Plaintiffs cannot practice what they preach. Ex. 8, Fr. Lengwin Decl. ¶¶ 35-36; Ex. 6, Rauscher Decl. ¶ 16.

For these reasons, Plaintiffs' refusal to facilitate the objectionable products and services

in the manner required by the Mandate is a protected exercise of religion. Similarly, bearing witness and thereby avoiding scandal is also a protected exercise of religion. Accordingly, the only relevant question for this Court under the "substantial burden" analysis is whether the Mandate puts substantial pressure on Plaintiffs to act contrary to these religious practices.

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception and to thwart the transmission of life are identified as protected religious exercises, 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 717-18; *Kaemmerling*, 553 F.3d at 678 (same). In *Yoder*, for example, the Court found a substantial burden imposed by a $5 penalty charged to the Amish plaintiffs 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. 450 U.S. at 716-18. Thus, it is clear that even the threat of withholding unemployment benefits, or a $5 penalty, exerts enough pressure on a religious believer to qualify as a "substantial burden."

Here, the Mandate imposes provides Plaintiffs an impossible choice: violating their religious beliefs or facing crippling fines. If Plaintiffs refuse to facilitate the objectionable products and services through Catholic Charities' Health Plan, they will be subject to fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (Feb. 24, 2012)

(asserting that this fine applies to employers that violate the "preventive care" provision of the Act). And, if Plaintiffs seek to exit the insurance market altogether, they could 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). These penalties, which would amount to millions of dollars and inflict significant competitive harms, clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 penalty that was a substantial burden in *Yoder*. There is no doubt that the threat of such penalties places a "substantial burden" on and indeed compels Plaintiffs to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling in violation of their religious beliefs. Ex. 8, Fr. Lengwin Decl. ¶¶ 41-42; Ex. 6, Rauscher Decl. ¶ 11, 28; Ex. 7, Stewart Decl. ¶¶ 19-20.

This Court recently addressed a challenge by a non-profit Christian college against a previous version of the Mandate, and found that the college had established a likelihood of success on the merits where the "quintessential substantial burden" was demonstrated by the college being "forced to 'modify [its] behavior and to violate [its] beliefs' by either giving up its student health insurance generally or providing the objectionable coverage." *Geneva Coll.*, 2013 WL 3071481, at *9. Here, Plaintiffs face the same quintessential substantial burden of either facilitating access to the objectionable products and services or giving up their employee health plans, plus they would have to pay substantial fines, thus modifying their behavior and services to the needy.

The Seventh and Tenth Circuits have recently addressed challenges by for-profit companies against the Mandate in a pair of closely related cases. In two cases in the Seventh Circuit, the district court granted injunctions pending appeal against enforcement of the Mandate because the plaintiffs demonstrated a likelihood of success on their RFRA claim. In *Korte v.*

Sebelius, the court ruled that the "[t]he contraception mandate applies to [plaintiffs] as an employer of more than 50 employees," and that, as Catholics, they "would have to violate their religious beliefs to operate their company in compliance with it." No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012). In light of the penalties for non-compliance, plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4. In the companion case, on a nearly identical challenge, the court found that the Mandate would present an even greater burden on the plaintiffs' religious liberties because they operated self-insured health plans. *See Grote,* 708 F.3d at 854.[3] The Tenth Circuit, sitting *en banc*, likewise recently held that a for-profit religious organization was likely to succeed on the merits of a RFRA claim because 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*, 723 F.3d at 1141. The same is true here.

In sum, the Mandate leaves no way for Plaintiffs to continue their operations in a manner consistent with their sincerely-held religious beliefs. Instead, it forces them to either abandon their beliefs by facilitating access to objectionable products and services, or violate the law and face severe penalties. *See* Ex. 8, Fr. Lengwin Decl. ¶¶ 15-16, 41-42; Ex. 6, Rauscher Decl. ¶¶ 28; Ex. 7, Stewart Decl. ¶¶ 19-20. Imposing this impossible dilemma constitutes a substantial burden on Plaintiffs' religious exercise.

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

[3] *See also Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24) (granting injunction pending appeal); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (same); *O'Brien v. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same).

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 forcing "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*, 904 F .Supp. 2d at 125-26. The Government cannot begin to meet this standard.

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 quotation marks and alteration omitted); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297-98. Here, the Government cannot claim an interest of the "highest order" where it exempts millions of employees from the Mandate through grandfathering provisions, small-employer exemptions, and religious employer exemption.

The Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "Americans who like their health plan can keep it." HHS.gov, U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on 'Grandfathered' Health Plans [U]nder the Affordable Care Act (June 14, 2010) (Exhibit 9). Grandfathering is not a "transition," it is a complete exemption with

no sunset provision. Unless it makes certain specified changes, a plan can maintain its grandfathered status in perpetuity, and defendants have repeatedly stated that employers have a "right" to maintain their grandfathered status. *See, e.g.,* 75 Fed. Reg. 75 Fed. Reg. 34,538, 34,540, 34,558, 34,562, 34,566 (June 17, 2010); *Newland*, 811 F. Supp. 2d at 1298 n.14. An interest is hardly compelling if it can be trumped by political expediency. Such a broad exemption "completely undermines 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 1143-44; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *70-72 (W.D. Pa. Mar. 6, 2013), *injunction granted* 2013 WL 3071481 (W.D. Pa. June 18, 2013) ("[T]he mere fact that defendants granted such a broad exemption in the first place severely undermines the legitimacy of defendants' claim of a compelling interest."); *Tyndale*, 904 F. Supp. 2d at 128. Moreover, if the Government's interests were truly of the "highest order," the preventive services mandate could have been included among the other mandates that were imposed on grandfathered plans. *See* 75 Fed. Reg. at 34,542 (grandfathered plans cannot impose lifetime limits and must extend coverage to dependent children until age 26).

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act at issue already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns

regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.*

The Government's claim that its interests are compelling is further undermined because it has no justification for distinguishing between exempt and accommodated entities. The Final Rule provides, without any evidentiary support, that the religious employer exemption is justified because the employees of those institutions are more likely to agree with their employer's view on the objectionable services and products the Mandate requires. 78 Fed. Reg. at 39,874, 39,887. Setting aside the question of how the government could possibly claim to know the extent to which particular believers adhere to specific teachings of the Church, the corporate structure of Catholic entities is not a reliable proxy for the religious devotion and agreement of their respective employees, and the government offers no evidence that it is. For example, some Catholic schools are exempt because they are legally part of the diocesan corporation or a parish, whereas others, which are otherwise identical, are accommodated because they are separately incorporated. Just like in *O Centro*, "everything the Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities that meet the Mandate's definition of "religious employer," as well as the numerous other entities that are exempt from the Mandate for non-religious reasons.

Finally, the Government's interest cannot be compelling where the Mandate would only fill, at best, 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 for free and at reduced cost and are also already covered by "over 85 percent of employer-sponsored health insurance plans."[4] 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); HHS.gov, A Statement

[4] In other cases, the Government has claimed there would be an increase in use because

by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012) (Exhibit 10). The Government, moreover, has adduced "no empirical data or other evidence . . . that the provision of the FDA-approved emergency contraceptives . . . would result in fewer unintended pregnancies, an increased propensity to seek prenatal care, or a lower frequency of risky behavior endangering unborn babies." *Beckwith v. Sebelius*, No. 8:13-cv-0648-T-17MAP, slip op. at 32 (M.D. Fla. June 25, 2013).

To the contrary, recent scholarship confirms that a modest increase in *coverage* for contraception is unlikely to significantly impact contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013). As such, the Government cannot claim to have "identif[ied] an actual problem in need of solving," *Brown*, 131 S. Ct. at 2738 (internal marks and citation omitted), much less that its proposed solution will address the alleged problem in any meaningful way. 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.

(continued…)

the Mandate makes the objectionable services available for free from employers who currently provide them at a cost. Even if the Government were correct (and Plaintiffs dispute the Government's argument for several reasons), that could only justify requiring employers who already cover the services to provide them for free. It would not and cannot justify forcing Plaintiffs to violate their religious beliefs to fill the modest gap of people for whom the objectionable services were not previously covered at all.

3. The Government Cannot Demonstrate that the Mandate Is the Least Restrictive Means to Achieve Its Asserted Interests.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal quotations marks omitted). "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 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). "Because this burden is placed on the Government, it must be the party to make this comparison." *Id*. The Government must demonstrate 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) (explaining that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" that will achieve the government's stated goal) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

Here, the Government has myriad ways to achieve its asserted interests without forcing Plaintiffs to violate their religious beliefs. Plaintiffs in no way recommend these alternatives and oppose many of them as a matter of policy, but the fact that they are available to the Government

shows 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; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Plaintiffs to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (*i.e.*, Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's failure to consider these alternatives is fatal, as strict scrutiny requires a "serious, good faith consideration" of workable alternatives. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

B. The Mandate Violates the Free Exercise Clause

The Free Exercise Clause of the First Amendment embodies a "fundamental non-persecution principle" that prevents the Government from "enact[ing] laws that suppress religious belief or practice." *Lukumi*, 508 U.S. at 523. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that *disfavor* religion. *See Lukumi*, 508 U.S. at 532. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

In *Lukumi*, for example, the Supreme Court invalidated a municipal ordinance that

imposed penalties on "[w]hoever . . . unnecessarily . . . kills any animal." *Id*. at 537. Although the ordinance was not facially discriminatory, the Court found that its practical effect was to disfavor religious practitioners of Santeria because it allowed exemptions for secular but not for religious reasons. Once the city began allowing exemptions, the Court held that the law was no longer "generally applicable," and the city could not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Id.* at 537-38. Likewise, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.), the Third Circuit invalidated a police department policy that prohibited a Sikh police officer from wearing a beard because it contained an exemption for officers who were unable to shave for medical reasons but not for religious reasons. Relying on *Lukumi*, the court found that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* at 365.

The same reasoning applies here. The Mandate is not "generally applicable" because it is riddled with exemptions, *see supra* at 4, and yet there is no such exemption for *religious* employers like Plaintiffs. It makes no difference that the Mandate contains an exemption for a narrow subset of religious groups—namely, those that meet the Government's limited definition of a "religious employer." *See, e.g.*, *Lukumi*, 508 U.S. at 520 (finding a violation even though there was already a religious exemption); *O Centro*, 546 U.S. at 433 (same). Because it offers so many secular exemptions, the Government must give equal consideration to *all* claimants who seek similar exemptions on religious grounds. The Free Exercise Clause does not merely require equal treatment for *some* religious entities. Thus, the Mandate fails the test of general applicability, and the Government may not "refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537-38.

In addition, the Mandate is not "neutral" because it is specifically targeted at Plaintiffs' religious practice of refusing to provide or facilitate access to contraception. When the Government promulgated the Mandate, it was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government itself concedes that 85% of health plans already cover contraception, and it asserts that adding contraception to the remaining 15% is cost-neutral. If so, then the only conceivable reason why the latter plans would *not* include contraceptive coverage is a religious or moral objection. But instead of pursuing a wide variety of options for increasing access to contraception without forcing religious groups like Plaintiffs to participate in the effort, the Government deliberately chose to pick a high-profile fight by forcing religious groups to provide or facilitate access to contraception in violation of their core beliefs.

The record, moreover, establishes that the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, at a NARAL Pro-Choice America fundraiser, Defendant Sebelius stated, "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely affordable contraceptive services? Not so much." (Compl. ¶ 169). Likewise, the original definition of "preventive service" was promulgated by an Institute of Medicine Committee that was stacked with individuals who, like Defendant Sebelius, strongly disagreed with many Catholic teachings, 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." (*Id.* ¶¶ 88-93; *see also* Inst. Of Med., Clinical Preventive Services for Women: Closing the Gaps," at 232 (2011)). This anti-religious bias is further confirmed by the fact that it was directly modeled on a California statute,

see 77 Fed. Reg. at 8726 (explaining that the federal Mandate was modeled on state law); *compare* 76 Fed. Reg. at 46,626, *with* Cal. Health and Safety Code § 1376.25(b)(1), whose chief legislative sponsor made clear that its purpose was to strike a blow against Catholic religious authorities: "'59 percent of all Catholic women of childbearing age practice contraception.'" "'[88] percent of Catholics believe . . . that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.'"[5] Thus, not only the "real operation" but also the intended effect of the Mandate is to target and suppress Plaintiffs' religious practices. *Lukumi*, 508 U.S. at 533–35.

Finally, the Mandate is subject to strict scrutiny because it implicates the "hybrid" rights of religious believers. In *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990), the Supreme Court noted that the Free Exercise Clause can "reinforce[]" other constitutional protections, such as freedom of speech and association, which are particularly important when religious beliefs and practices are at stake. The present case illustrates why. In order to carry out their religious mission, Plaintiffs must enjoy the freedom to associate in religious schools and charities without being forced to violate their core beliefs. The Mandate denies them this freedom by effectively prohibiting them from forming schools and charities unless they (a) provide or facilitate access to contraception, and (b) sponsor Government speech in the form of contraceptive "counseling." Thus, not only does the Mandate violate Plaintiffs' rights of free speech and association, but the effect of these violations is to deny Plaintiffs their ability to engage in religious schooling, health care, and charity, which are essential components of their religion.

[5] Editorial, *Act of Tyranny*, Wash. Times, Mar. 5, 2004 (quoting floor statement of Sen. Jackie Speier), *available at* http://www.washingtontimes.com/news/2004/mar/5/20040305-081331-6705r/?page=all.

C. The Mandate Violates the First Amendment Protection Against Compelled Speech

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co., et al., v. FDA*, No. 11-5332 (D.C. Cir. Aug. 24, 2012), slip op. at 10. (citing *United States v. United Foods, Inc*., 533 U.S. 405, 410-11 (2001)). Protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to provide, pay for, and/or facilitate access to "counseling" related to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services for their employees. Ex. 8, Fr. Lengwin Decl. ¶¶ 15-16. Because Plaintiffs oppose abortion and contraception, they strongly object to providing any support for "counseling" that encourages, promotes, or facilitates such practices. Ex. 8, Fr. Lengwin Decl. ¶¶ 17-19. Indeed, opposition to abortion and contraception is an important part of the religious message that Plaintiffs preach, and they routinely counsel men and women against engaging in such practices. Ex. 8, Fr. Lengwin Decl. ¶¶ 35-36; Ex. 6, Rauscher Decl. ¶¶ 16, 19. Consequently, forcing Plaintiffs to support "counseling" in *favor* of such practices, or even to give details about the availability of such practices, imposes a serious burden on their freedom of speech. Ex. 8, Fr. Lengwin Decl. ¶¶ 35-36; Ex. 6, Rauscher Decl. ¶¶ 16, 19. In short, Plaintiffs cannot be forced to

act as mouthpieces in the Government's campaign to expand access to abortion and contraception.

Second, to qualify for the so-called "accommodation," the Mandate requires Plaintiffs to provide a "certification" stating their objection to the provision of abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. This "certification" in turn designates and triggers an obligation on the part of Plaintiffs' third-party administrator (or their insurance provider, if they do not self-insure) to provide or procure the objectionable products and services for Plaintiffs' employees. Plaintiffs object to this certification requirement both because it compels them to engage in speech that triggers provision of the objectionable products and services, and because it deprives them of the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own choosing, outside of the confines of the Government's regulatory scheme. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011) (striking down law requiring crisis pregnancy centers to issue disclaimers that they did not provide abortion-related services); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 462 n.6 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc) (enjoining enforcement of law requiring crisis pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider"). *See also* Ex. 8, Fr. Lengwin Decl. ¶¶ 35-36; Ex. 6, Rauscher Decl. ¶¶ 16, 19.

D. The Mandate Imposes a Gag Order that Violates The First Amendment Protection of Free Speech

At the very core of the First Amendment is the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New*

York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Indeed, the imposition of "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment

> is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

The Mandate violates this basic principle 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(b)(iii). This sweeping gag order cannot withstand First Amendment scrutiny. Plaintiffs believe that contraception is immoral, and by expressing that conviction they routinely seek to "influence" or persuade their fellow citizens of that view. *See* Ex. 8, Fr. Lengwin Decl. ¶¶ 13, 35-36; Ex. 6, Rauscher Decl. ¶ 19. The Government has no authority to outlaw such expression.

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

The "religious employer" exemption violates the Establishment Clause of the First Amendment in two ways. First, it creates an artificial, Government-favored category of "religious employers," which favors some types of religious groups over others. Second, it creates an excessive entanglement between government and religion.

1. Discrimination Among Religious Groups

The principle of equal treatment among religious groups lies at the core of the Establishment Clause. Just as the Government cannot discriminate among sects or denominations, so too it cannot "discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Because religious liberty encompasses not only the freedom of religious belief, but also the freedom to adopt different practices and institutional structures, official favoritism for certain "types" of religious institutions is just as insidious as favoritism based on creed.

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated organizations." *Id.* at 231-32. The state defended the law on the ground that it was facially neutral and merely had a disparate impact on some religious groups. The Court, however, rejected that argument, finding that the law discriminated among denominations by privileging "well-established churches that have achieved strong but not total financial support from their members," while disadvantaging "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 247 n.23 (internal quotation marks omitted). The D.C. Circuit has followed similar reasoning, stating that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between *kinds* of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (emphasis added).

Here, the Mandate violates this principle of neutrality by establishing an official category of "religious employer" that favors some religious groups over others. The exemption is defined

to include only "nonprofit organization[s] described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." As the Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,461. This definition favors religious groups that fit into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that exercise their religious faith through alternative means—including religious organizations, like Plaintiffs the Bishop, the Diocese, and Catholic Charities, which express their faith by providing various charitable services to the young, elderly, poor, and needy. *See* Ex. 8, Fr. Lengwin Decl. ¶ 37; Ex. 6, Rauscher Decl. ¶ 21.

2. Excessive Entanglement

"It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colorado Christian*, 534 F.3d at 1261 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits (as here)." *Id.* (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 397 (1984)).

In determining eligibility for a religious exemption, the Government may not ask intrusive questions designed to determine whether a group is "*sufficiently* religious," *Univ. of*

Great Falls v. NLRB, 278 F.3d at 1343, or even whether the group has a "substantial religious character." *Id.* at 1344. Rather, any inquiry into a group's eligibility for a religious exemption must be limited to determining whether the group is a "*bona fide* religious institution[]." *Id.* at 1343-44 (approving of a religious exemption that would include any non-profit group that "holds itself out" as religious, but reserving the question of whether groups could be required to show that they are "affiliated with . . . a recognized religious organization").

Here, the Government's criteria for the "religious employer" exemption go far beyond determining bona fide religious status. By its terms, the exemption applies to groups that are "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." This category includes (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." 78 Fed. Reg. at 8,458. The IRS, however, has adopted an intrusive 14-factor test to determine whether a group meets these criteria. *See Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). The fourteen (14) criteria ask whether a religious group has

> (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for the religious instruction of the young; and (14) schools for the preparation of its ministers.

Id. (citing *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55, 64 (1983)). Similar problems arise in evaluating whether an organization is an "integrated auxiliary," an inquiry governed by Treasury Regulations that assesses, among other things whether an organization "shares common religious doctrines, principles, disciplines, or practices with a church," or

"receives more than 50% of its support" from non-church sources. *See* 26 C.F.R. § 1.6033-2(h).

Not only do these factors favor some religious groups over others, but they do so on the basis of intrusive judgments regarding religious beliefs, practices, and organizational structure. For example, probing into whether a group has "a recognized creed and form of worship" not only requires the Government to determine which belief systems will be deemed "recognized creed[s]," but also demands inquiry into which practices qualify as "forms of worship." In answering such questions, the Government cannot escape being "cast in the role of arbiter of [an] essentially religious dispute." *New York v. Cathedral Acad.*, 434 U.S. 125, 132-33 (1977). Similarly, in determining whether a religious group has had "a distinct religious history," the exemption not only favors long-established religious groups, but also requires the Government to probe into potentially disputed matters of religious history. Any dispute as to whether a group's history is sufficiently "distinct" or "religious," should not be resolved by the Government. Indeed, "church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id*. at 133.

F. The Mandate Unconstitutionally Interferes with Plaintiffs' Rights of Internal Church Governance

The Supreme Court has recognized that the Religion Clauses of the First Amendment prohibit the Government from interfering with matters of internal church governance. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012), the Court held that the Government may not apply anti-discrimination laws to interfere with religious groups in the hiring and firing of ministers because the First Amendment prohibits "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Indeed, because "the autonomy of religious groups . . . has often served as a shield against oppressive civil laws," the Court has "long recognized that the

Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring).

Here, the Mandate violates this principle by artificially splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. *See, e.g.*, Ex. 8, Fr. Lengwin Decl. ¶¶ 20, 38-39; Ex. 6, Rauscher Decl. ¶ 23. In particular, the religious employer definition treats the Catholic Church as having two wings—a worship one and a charitable one—and treats only the former as a religious employer, when, in fact, the Church's worship and charitable arms are one and the same: "The Church cannot neglect the service of charity anymore than she can neglect the sacraments and the word." USCCB's Papal Visit Blog, Benedict XVI's Plea: Put the Poor at the Heart of Catholic Life (Mar. 25, 2008) (Exhibit 11); *see also* Ex. 8, Fr. Lengwin Decl. ¶ 37. Thus, by refusing to recognize the Church's charitable functions as those of a single, integrated "religious employer," the Mandate directly interferes with Catholic Church structure. Ex. 8, Fr. Lengwin Decl. ¶¶ 20, 38-39; Ex. 6, Rauscher Decl. ¶ 21; Ex. 7.

The Mandate, moreover, compounds this error by interfering with the Church hierarchy's ability to ensure that subordinate institutions, including various charitable and educational ministries, adhere to Church teaching through participation in a single insurance trust. Ex. 8, Fr. Lengwin Decl. ¶¶ 20, 38-39. Such an arrangement is currently in place in Pittsburgh, where the Diocese makes its self-insured health plans available to the employees of its religious affiliate, Catholic Charities through the Trust. Ex. 8, Fr. Lengwin Decl. ¶¶ 9, 38; Ex. 7, Stewart Decl. ¶¶ 6-8. By serving as the insurance provider for Catholic Charities, the Diocese and the Bishop can directly ensure that Catholic Charities offers its employees a health plan that is in all ways consistent with Catholic beliefs. Ex. 8, Fr. Lengwin Decl. ¶ 38. The Mandate disrupts this

internal arrangement by forcing the Diocese to either sponsor a plan that will provide the employees of Catholic Charities with access to "free" abortion-inducing products, contraception, sterilization, and related counseling; or expel Catholic Charities from the Trust, thereby forcing Catholic Charities to enter into a different contract for the objectionable coverage. Ex. 8, Fr. Lengwin Decl. ¶ 39; Ex. 7, Stewart Decl. ¶ 18. If Plaintiff Catholic Charities fails to provide the objectionable products and services, it will be subject to onerous fines. Ex. 6, Rauscher Decl. ¶ 28. Either way, the Mandate directly undermines the Diocese's and the Bishop's ability to ensure that its religious affiliates remain faithful to Church teaching.

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

Plaintiffs are entitled to injunctive relief because the Mandate is causing them substantial irreparable harm. "It is well settled that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013). "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." *Id.* (citing *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd* 546 U.S. 418 (2006)) ("[The plaintiff] would certainly suffer an irreparable harm, assuming of course that it is likely to succeed on the merits of its RFRA claim.")).

The forced violation of Plaintiffs' faith is the epitome of irreparable injury. "It is well established that when First Amendment interests are either threatened, or in fact being impaired at the time relief is sought, the loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury." *Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 734 (W.D. Pa. 2011) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Swartzwelder v.*

McNeilly, 297 F.3d 228, 241 (3d Cir. 2002)).[6] "District courts are given broad 'leeway to fashion effective remedies to correct offenses to the Constitution.'" *Pittsburgh League of Young Voters Educ. Fund v. Port Authority of Allegheny Cnty*, No. 2:06-cv-1064, 2007 WL 1007968, at *7 (W.D. Pa. Mar. 30, 2007) (citing *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 887 (3d Cir. 1986)). Accordingly, where Plaintiffs' First Amendment rights are chilled as a result of a statute, the Court has broad discretion to grant injunctive relief. *Reno*, 929 F. Supp. at 851. And, Plaintiffs' allegations of Establishment Clause violations are "sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination." *Mullin v. Sussex County*, No. 11-580, 2012 U.S. Dist. LEXIS 67571, at *38-39 (D. Del. May 15, 2012).

The Mandate forces Plaintiffs to violate central tenets of their religious beliefs by facilitating grave moral evil through the triggering of objectionable services to their employees. *See* Ex. 8, Fr. Lengwin Decl. ¶¶ 10-19; Ex. 6, Rauscher Decl. ¶ 11. Absent an injunction, the Government can begin enforcing the Mandate against Plaintiffs before the final resolution of this case, while there is a serious question as to whether the Mandate violates the Constitution and other applicable law. Plaintiffs, thus, are confronted with the impossible choice of violating their religious beliefs or violating the law. Plaintiffs need to resolve these outstanding issues before their plans go into effect on January 1, 2014 and should have more clarity before open enrollment begins in November 2013, so they know what coverage to offer their employees as of January 1, 2014. Ex. 6; Rauscher Decl. ¶¶ 22-24; Ex. 7, Stewart Decl. ¶¶ 24-26.

[6] The fact that Plaintiffs are likely to succeed on the merits of their First Amendment claims supports a finding of irreparable injury. *See Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("In a case in which the injury alleged is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success of the merits."), *aff'd Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

Additionally, the harms of non-compliance extend far beyond monetary loss. For example, imposing fines on Catholic Charities may well limit the charitable services it can provide, including affecting employee retention and donations. Ex. 6, Rauscher Decl. ¶¶ 25-30.

Because these are not the types of harm that can later be remedied by monetary damages, the injuries are irreparable. *Cf., e.g.*, *Mobil Oil Corp. v. Henriksen Enterp.*, 490 F. Supp. 74, 77 (W.D. Mich. 1980) (holding that irreparable harm occurs when monetary damages would be inadequate). And every moment that passes without relief inflicts an ongoing, cumulative harm to Plaintiffs' religious freedoms. Moreover, injunctive relief is particularly appropriate to prevent future enforcement of an unconstitutional statute. *See Bowman v. Twp. of Pennsauken*, 709 F. Supp. 1329, 1348 (D.N.J. 1989) ("[I]njunctive relief is a particularly appropriate remedy when the harm is prospective enforcement of an unconstitutional statute.").

Similarly, Defendants' violation of Plaintiffs' rights under RFRA, which is meant to give religious exercise even greater protection than provided under the First Amendment, is also an irreparable injury. *See Gov't of Virgin Is., Dep't of Conservation and Cultural Affairs v. Virgin Is. Paving*, 714 F.2d 283, 286 (3d Cir. 1983) ("Nor is the irreparable harm factor a significant hurdle to a preliminary injunction in most statutory violation cases."), *overruled on other grounds by statute*, *Edwards v. HOVENSA, LLC*, 497 F.3d 355 (3d Cir. 2007); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Where Congress has enacted legislation to prevent the injury that forms the basis of Plaintiffs' claims, violating that statute constitutes irreparable injury. *See Virgin Is. Paving*, 714 F.2d at 286; *Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 647 (M.D. Tenn. 1989). Here, Congress enacted RFRA "to prevent the very injury asserted here," *Jeffreys*, 719 F. Supp. at 647, that is, the violation of Plaintiffs' sincerely-held religious beliefs. The violation of RFRA

is thus an irreparable injury.

III. THE GOVERNMENT WILL SUFFER NO SUBSTANTIAL HARM FROM A PRELIMINARY INJUNCTION

Ordinarily, Defendants' harms need to outweigh the burden on Plaintiffs for this factor to support denying injunctive relief. *See, e.g., Minard Run Oil Co.*, 2009 WL 4937785, at *23. Here, Defendants would need an even greater showing of harm given the strength of Plaintiffs' claims on the merits. *See Kos Pharm.*, 369 F.3d at 729 ("We have recognized that [t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.").

Here, the Government cannot possibly establish any substantial harm from a preliminary injunction pending final resolution of this case because it has not mandated contraceptive coverage for over two centuries, has previously delayed implementation of the Mandate, and there is no urgent need to enforce the Mandate against Catholic groups before its legality can be adjudicated. In addition, given that the Mandate already contains exemptions that by some estimates are available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot possibly claim that it will be harmed by this Court granting a temporary exemption for Plaintiffs.

Indeed, any claim of harm is fatally undermined by the Government's acquiescence to preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, *Sharpe Holdings, Inc. v. HHS*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); *Hall v. Sebelius*, No. 13-0295 (D. Minn. Apr. 2, 2013) (Dkt. 10); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. 18). As this Court has already found, 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 U.S. Dist. LEXIS 56087, at *41

(W.D. Pa. Apr. 19, 2013).

In short, when balanced against the irreparable injury to Plaintiffs if the Mandate is enforced, any harm the Government might claim from a temporary injunction is *de minimus*.

IV. GRANTING A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Preliminary relief also serves the public interest. "The Court of Appeals for the Third Circuit has determined that '[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.'" *Ramsey*, 764 F. Supp. 2d at 734-35 (citing *AT & T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)). Moreover, there is a significant public interest in upholding Plaintiffs' constitutional and statutory religious liberty rights. *Id.* at 735 ("many courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.") (collecting cases); *Chosen 300 Ministries, Inc. v. City of Phila.*, 2012 WL 3235317, at *25-26 (E.D. Pa. Aug. 9, 2012) (citing *O Centro*, 389 F.3d at 1010) ("There is a strong public interest in protecting the free exercise of religion, whether this protection derives from a legislative enactment . . . or a constitutional amendment."). This is true "because the State 'does not have an interest in the enforcement of an unconstitutional law[.]'" *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388-89 (3d Cir. 2012) (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)).

Here, public interest in a preliminary injunction is especially high because enforcement of the Mandate will threaten or diminish the continuation of Plaintiffs' charitable services, which serve thousands of needy individuals. *See, e.g.*, Ex. 6, Rauscher Decl. ¶ 25-28. If the Government goes ahead with the enforcement of the Mandate, Plaintiffs may be forced to reduce

or restructure their operations, leaving a gap in the network of critical social services relied on by so many in their communities. *Id.* By contrast, no public harm would come from simply preserving the *status quo* pending further litigation. Even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization—a highly dubious assumption—these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

CONCLUSION

Applying the four factor test and balancing the equities involved, this Court should grant Plaintiffs' request for preliminary injunction. Plaintiffs have a likelihood of success on the merits; are suffering and will continue to suffer irreparable injury without the injunction; the harms to Plaintiffs are not outweighed by the harms to Defendants; and the public interest will be furthered by granting the injunction. Plaintiffs respectfully request this Court to enter a preliminary injunction, exempting them from application of, enforcement of, and compliance with the Mandate, including exempting them from being forced to provide any self-certification to their TPAs. Plaintiffs further request that the Court consolidate the preliminary injunction hearing with a trial on the merits, at which Plaintiffs will be prepared, on an expedited basis, to fully present evidence on all of the issues necessary to resolve their claims.

Respectfully submitted, this the 8th day of October, 2013.

By: */s/ Paul M. Pohl*

Paul M. Pohl (PA ID No. 21625)
John D. Goetz (PA ID No. 47759)
Leon F. DeJulius, Jr. (PA ID No. 90383)
Ira M. Karoll (PA ID No. 310762)
Mary Pat Stahler (PA ID No. 309772)
JONES DAY
500 Grant Street – Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
(412) 394-7959 (fax)
Counsel for Plaintiffs Most Reverend David A. Zubik, The Roman Catholic Diocese of Pittsburgh, and Catholic Charities of the Diocese of Pittsburgh, Inc.

Rita Ferko Joyce (PA ID No. 21918)
DIOCESE OF PITTSBURGH
111 Blvd. of the Allies
Pittsburgh, PA 15222
(412) 456-3126
(412) 456-3183 (fax)
Counsel for Plaintiffs Most Reverend David A. Zubik and The Roman Catholic Diocese of Pittsburgh