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

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| MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, *et al.*, | ) | |
| PLAINTIFFS, | ) | CIVIL ACTION NO. 2:13-01459 |
| v. | ) | JUDGE ARTHUR J. SCHWAB |
| KATHLEEN SEBELIUS, *et al.*, | ) | |
| DEFENDANTS. | ) | |

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'**
**MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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**INTRODUCTION**

This Court has already determined based on the current record that applying the Mandate to Plaintiffs violates the Religious Freedom Restoration Act ("RFRA"). The Court held that the Mandate "places a substantial burden on Plaintiffs' right to freely exercise their religion." Slip op. at 53. It also held that the Government "failed, factually and legally, to establish" a compelling interest and "failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing those interests." *Id.* at 58, 60. The Government's motion to dismiss or, in the alternative, for summary judgment ("Government's motion") (Doc. 49) raises the same legal arguments based on the same inadequate evidence that this Court already rejected. Yet, the Government has done nothing to withdraw, modify or tailor its motion in light of the Court's opinion, insisting instead that the Court and Plaintiffs address the exact same RFRA issues a second time. The Court should not only deny the motion as to Plaintiffs' RFRA claim, but it should enter judgment in Plaintiffs' favor.

Nor has the Government articulated any valid basis for dismissing Plaintiffs' First Amendment and Administrative Procedure Act ("APA") claims. The Government's arguments are legally deficient and its motion is a naked attempt to preclude discovery and circumvent the development of a full factual record. For example, evidence developed by Plaintiffs demonstrates that the Government specifically targeted Catholic religious entities in violation of the First Amendment and APA. Plaintiffs are entitled to develop a full factual record on these claims.

Finally, the Government's entire motion should be denied because it failed to file a Concise Statement of Material Facts and Appendix, as required by the Federal Rules, by the Local Rules, and by the Revised Case Management Order that the Government signed. As a result, there is no record at all to support granting the Government's motion.

# I. BACKGROUND & PROCEDURAL HISTORY

## A. 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 (Doc. 55-49). 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). But, the Government has exempted "grandfathered" plans that have not changed certain benefits or contributions. *See* 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).

From the start, the Government refused to exempt religious objectors other than the narrow class of "house[s] of worship" and their "employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Despite intense criticism, including from the Diocese of Pittsburgh and the U.S. Conference of Catholic Bishops (Docs. 55-4 to 55-8), the Government finalized the narrow definition without significant change. *See* 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) ("Final Rule").[1] The Mandate will apply to plan years beginning on or after

[1] For additional background on the Advanced Notice of Proposed Rulemaking, the Notice of Proposed Rulemaking, and the definition for "religious employer" that preceded the Final Rule, see Plaintiffs' Memorandum in Support of Preliminary Injunction (Doc. 6).

January 1, 2014.

The Final Rule made three changes to the Mandate, none of which 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 defines "religious employer" as "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 definition "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). Religious entities with broader missions are not considered "religious employers."

*Second*, the Final Rule provides that "each employer [must] independently meet the definition of religious employer . . . in order to avail itself of the exemption," 78 Fed. Reg. 39,886, thus limiting the number of religious entities that are exempt from the Mandate. Plaintiff the Roman Catholic Diocese of Pittsburgh (the "Diocese") operates a self-insured plan that covers itself, Plaintiff Catholic Charities, and other organizations affiliated with the Diocese. Declaration of Susan Rauscher ("Rauscher Decl.") (Doc. 55-50) ¶ 7; Declaration of David Stewart ("Stewart Decl.") (Doc. 55-51) ¶¶ 4, 7-8; Declaration of Father Ronald Lengwin ("Fr. Lengwin Decl.") (Doc. 55-52) ¶¶ 7, 9. Notwithstanding the Diocese's status as an exempt "religious employer," Catholic Charities must independently meet the definition of "religious employer" in order to qualify for the exemption, which it does not. Thus, Catholic Charities is not exempt under the Diocesan health plan. Rauscher Decl. ¶ 11; Stewart Decl. ¶ 16.

*Third*, the Final Rule establishes an illusory "accommodation" for nonexempt objecting religious entities that qualify as an "eligible organization." 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)). In addition, 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 Plaintiff Catholic Charities, 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 triggers the provision of "free" abortion-inducing products, contraception, sterilization, and related counseling to their employees in a manner contrary to their beliefs. 26 C.F.R. § 54.9815-2713A(b)-(c). *See* Fr. Lengwin Decl. ¶¶ 18-19, 23.

In sum, the Final Rule does not address Plaintiffs' religious objections to facilitating access to the objectionable products and services. Rauscher Decl. ¶ 13; Fr. Lengwin Decl. ¶ 22. 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 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. Rauscher Decl. ¶¶ 15, 20; Stewart Decl. ¶ 19; Fr. Lengwin Decl. ¶ 15.

### B. Plaintiffs' Background

Plaintiffs are part of the Catholic Church and, as such, sincerely believe that they have a religious duty to provide spiritual, health, and charitable services to individuals of all faiths. Rauscher Decl. ¶¶ 16-17; Fr. Lengwin Decl. ¶¶ 34-35. 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. Fr. Lengwin Decl. ¶¶ 10-20. Specifically, as relevant here, Plaintiffs believe that abortion and direct sterilization are prohibited and that contraceptives for the purpose of contraception are immoral. *Id.* ¶¶ 10-13.

Under the internal structure and doctrine of the Catholic Church, charity and education are the heart of the Church and no less religiously significant than worship. Rauscher Decl. ¶ 21; Fr. Lengwin Decl. ¶ 37. Additionally, the Diocese controls and oversees its close affiliates, including Catholic Charities. Fr. Lengwin Decl. ¶¶ 5-6. 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. *Id.* ¶ 38. 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. *Id.* ¶¶ 38-40.

Plaintiffs' sincerely-held, longstanding beliefs are also 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 products and services for Plaintiffs' employees. *See, e.g.*, *Id.* ¶¶ 24-25; Rauscher Decl. ¶¶ 13-14; 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. 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 third-party administrator ("TPA") in providing the coverage. *Id.* ¶¶ 18, 20. Giving notice to the TPA 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 TPA to provide the objectionable coverage. *Id.* ¶ 16; 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. Fr. Lengwin Decl. ¶ 35. For example, Plaintiffs cannot act in a way that thwarts the transmission of life. *Id.* ¶ 35; Rauscher Decl. ¶ 16. But, the Mandate is predicated on the government's prediction of a decrease in the number of births. Rauscher Decl. ¶ 16. 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. Fr. Lengwin Decl. ¶ 35; Rauscher Decl. ¶ 16.

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.*, Fr. Lengwin Decl. ¶¶ 16-18; Rauscher Decl. ¶ 13.

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 violating the law and facing crippling penalties. And, that it could harm Plaintiffs' ability to directly serve the poor and needy. For example, any money paid for penalties could have otherwise supported those entities' charitable programs. Rauscher Decl. ¶ 28; Fr. Lengwin Decl. ¶ 41.

### C. Procedural History

Plaintiffs filed their Complaint (Doc. 1) on October 8, 2013 and contemporaneously moved for expedited preliminary injunctive relief (Doc. 4) and expedited scheduling order or status conference (Doc. 5). The Court ordered the Government to Answer or otherwise plead by November 8, 2013 and scheduled a preliminary injunction hearing for November 12, 2013. (Docs. 21, 27). Rather than Answer Plaintiffs' Complaint on November 8, the Government filed the instant motion (Doc. 49).

On November 12, the Court held an evidentiary hearing in which Plaintiffs presented video deposition testimony from Cardinal Timothy Dolan and live witness testimony from Bishop David Zubik, Susan Rauscher, Bishop Lawrence Persico, Father Scott Jabo, and Mary Maxwell. On November 21, this Court granted Plaintiffs preliminary injunctive relief, holding Plaintiffs satisfied all four preliminary injunction elements, including likelihood of success on the merits of their RFRA claim and that the public would be harmed without an injunction (Docs. 75, 76). Despite the Court's order granting Plaintiffs injunctive relief, the Government did not withdraw its motion to dismiss, thus Plaintiffs have responded herein.

**STANDARD OF REVIEW**

In deciding a motion to dismiss, the Court must "accept as true plaintiffs' material allegations, and construe the complaint in the light most favorable to them." *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 73-74 (3d Cir. 2011). The Court can also consider Plaintiffs' supporting declarations because they are integral to Plaintiffs' claims and amplify Plaintiffs' allegations. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (court "may consider . . . any matters incorporated by reference or integral to the claim."). Plaintiffs filed a 279-paragraph extraordinarily detailed Complaint, along with three detailed declarations. Each of Plaintiffs' claims is supported by more than sufficient facts, all of which should be taken as true at this stage.

Summary judgment is appropriate only if the moving party can demonstrate "that there is no genuine issue as to any material fact, and . . . the evidence is such that a reasonable fact finder could find only for the moving party." *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000); Fed. R. Civ. P. 56(a) (same). When ruling on a motion for summary judgment, courts must review "all evidence and draw all inferences therefrom in the light most favorable to the nonmoving party." *DeHart v. Horn,* 227 F.3d 47, 50 (3d Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). But, based on the law and the facts, a reasonable factfinder could clearly find in Plaintiffs' favor, especially viewing the facts in the light most favorable to Plaintiffs.

## ARGUMENT

## II. THE COURT HAS ALREADY HELD THAT PLAINTIFFS ALLEGED VALID CLAIMS UNDER RFRA

Under RFRA, the federal government may not "substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person (1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b). As a matter of law, the Court rejected the same arguments that the Government now proffers as a basis for granting its dispositive motion, which contains no additional arguments or facts. Therefore, the Government's motion to dismiss these claims should have been withdrawn and should now be denied, with judgment entered in favor of Plaintiffs.

### A. The Court Held that the Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Where, as here, the sincerity of Plaintiffs' beliefs is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry. A court must (1) "identify the religious belief" at issue, and once that is accomplished, (2) determine "whether the government [has] place[d] substantial pressure"—*i.e.*, a substantial burden—on the plaintiff to violate that belief. *See Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2012); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise"). This Court has already held that "Plaintiffs have met their burden of proving that complying with the 'accommodation' provision of the contraceptive mandate is a substantial burden on their free exercise of religion." Slip op. at 53.

1. Identifying Plaintiffs' Sincerely-Held Religious Beliefs

When identifying the religious exercise at issue, the court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). Its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Id.* "An inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom." *Id.* After all, it is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith." *Thomas v. Review Bd. Of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Courts must therefore generally accept plaintiffs' description of their religious exercise, regardless of whether the court, or the Government, finds the beliefs that animate that exercise "logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also* Slip op. at 48.[2]

As the Court has already held and the Government conceded, Plaintiffs have satisfied this step. Slip op. at 53. Plaintiffs alleged in the Complaint, demonstrated with declarations, and proved with witness testimony that the Court found credible, their religious beliefs that:

(a) human life is sacred from conception to natural death;

[2] *See also United States v. Lee*, 455 U.S. 252, 257 (1982) (same); *United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (finding error where court questioned claimant's "interpretation of Islamic doctrine"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely-held religious beliefs."); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Jolly*, 76 F.3d at 477 (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

(b) worship, faith, and good works are essential and integral to the practice of Catholicism ("faith without good works is dead"); and

(c) the facilitation of evil is as morally odious as the proliferation of evil.

*See, e.g.,* Slip op. at 37; Rauscher Decl. ¶¶ 13, 21; Fr. Lengwin Decl. ¶¶ 10, 18, 37. Significantly, these beliefs would be violated by signing the self-certification form and participating in the accommodation process. *See, e.g.*, Slip op. at 49. They are also brought to life by Plaintiff Catholic Charities, which cannot be separated from the unified Catholic Church, that focuses on religious practice through good works. *See, e.g.,* Slip op. at 12-20. The Government has not challenged these beliefs in its motion and previously conceded that it "has no reason to question" that "Plaintiffs sincerely believe" all of the above, including that "signing the self-certification form would . . . facilitate evil." Nov. 13, 2013 Arg. Tr. at 54:23-55:9.

2. <u>The Mandate Substantially Burdens Plaintiffs' Sincerely-Held Religious Beliefs</u>

The Court then must determine whether the Government has substantially burdened that exercise of religion. The Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds" with his religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18; Slip op. at 46-47 (citing *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013)).

Here too, the Court has decided this issue. As the Court held, the Mandate and accommodation substantially burden Plaintiffs' right to free exercise, "specifically their right to <u>not</u> facilitate or initiate the provision of contraceptive products, services, or counseling." Slip op. at 53. Indeed, the Mandate requires Plaintiffs to take specific action that violates their religious beliefs, including signing the self-certification form, under threat of "ruinous fines." *See id.* at

49; *Korte*, 735 F.3d at 684 (the "ruinous fines" for violating the Mandate are "at least as direct and substantial a burden as the denial of unemployment compensation benefits in *Sherbert* and *Thomas* and the obligation to withhold and pay Social Security taxes in *Lee*."); *see also* Slip op. at 48-53.

Additionally, the Court held that Plaintiffs' religious exercise is substantially burdened by the distinction between exempt and accommodated entities: by dividing the Catholic Church into a "worship arm" and "'good works' arm[]", "the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." Slip op. at 53. The Government has not provided—because it cannot—an answer to the Court's central question: "Why should religious employers who provide the charitable and educational services of the Catholic Church be required to facilitate/initiate the provision of contraceptive products, services, and counseling, through their health insurers or TPAs, when religious employers who operate the houses of worship do not?" *Id.* at 50-51. In fact, the religious employer exemption only allows the Bishop himself to comply with his religious beliefs when he is wearing a particular hat but forces him to violate those religious beliefs when wearing a different, equally religious, hat. *Id.* at 51-52. This clearly is a substantial burden under RFRA.

The Government offers no new arguments; it just rehashes arguments this Court has already rejected. The Government continues to argue that the Mandate requires almost "no action" from Plaintiffs and any burden it imposes is "*de minimis*" and too "attenuated" to merit relief. Defs.' Br. in Supp. ("Defs.' Br.") (Doc. 50) at 6-15.[3] Basically, the Government still

[3] In arguing that the actions required of Plaintiffs by the Mandate are *de minimis* and too attenuated to merit relief, the Government has misinterpreted RFRA to require a "substantial" exercise of religion rather than a "substantial" burden on Plaintiffs' exercise of religion. Indeed, this is the only plausible explanation for the Government's otherwise risible assertion that "the

argues that there is no substantial burden because eligible entities "merely" have to "sign a piece of paper" and inform their third party administrator ("TPA") of the same religious objections they had prior to the issuance of the Mandate. Slip op. at 47. *See also* Defs. Br. at 2 (asserting that Plaintiffs object to "regulations [that] require virtually nothing of them"). But, this Court already held that the affirmative acts required of Plaintiffs do, in fact, violate and substantially burden their religious beliefs. Slip op. at 46-49; *see also Hobby Lobby*, 723 F.3d at 1152 (Gorsuch, J., concurring) ("the problem of complicity . . . in the wrongdoing of others" is an area where "[f]or some, religion provides an essential source of guidance").[4]

The Government also continues to press the discredited argument that there is no substantial burden because the Mandate does not require Plaintiffs to change their actions: "plaintiffs need not do anything more than they did prior to the promulgation of the challenged regulations." Defs' Br. at 7; Slip op. at 47-48. As the Court explained, what matters is that the Mandate changes the effect of Plaintiffs' conduct, so that the conduct now violates their religious beliefs:

> In all prior instance where the Government, an insurer, or a TPA has requested employee names or other information from Plaintiffs, the reason the information was sought was of no moment to Plaintiffs. Now, under the 'accommodation,' the reason the documentation is required is so that contraceptive products, services, and counseling can be provided in direct contravention of Plaintiffs' sincerely-held religious beliefs. The Government is asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose, and thus, they cannot provide it.

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regulations place no burden at all on plaintiffs," Defs.' Br. at 7—one can hardly maintain that the threat of millions of dollars in fines fails to pressure Plaintiffs to violate their religious beliefs.

[4] This Court also considered and rejected the Government's attempt to distinguish for-profit entity cases like *Korte*, finding them instead to be "instructive." Slip op. at 39; *see also id.* at 44 ("Plaintiffs in the instant cases are akin to the *Korte* plaintiffs in that the instant Plaintiffs are entities to which the religious employer 'exemption' does not apply."); Nov. 13, 2013 Arg. Tr. at 52:17-24 (counsel for the Government attempting to distinguish the for-profit cases).

Slip op. at 49; *see also* Defs.' Br. at 2 (conceding that the Mandate forces Plaintiffs to participate at some level in the mechanism by which their employees receive contraceptive coverage).[5] The Government's argument is especially specious here because it has acknowledged the effect of signing the self-certification form and conceded Plaintiffs' sincerely-held religious beliefs are violated by signing it. *See* slip op. at 47; *see also* Nov. 13, 2013 Arg. Tr. at 54:23-55:9.

### B. The Court Held that the Government Failed To Demonstrate that the Mandate Furthers a Compelling Government Interest

Once a plaintiff shows that governmental action substantially burdens the exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation furthers a compelling government interest. *O Centro*, 546 U.S. at 429–31. Once again, the Court held that both "factually and legally," the Government "failed" to meet its burden "to establish" a compelling interest. Slip op. at 58.

Here, the Government has failed to offer sufficient proof in support of its two proffered generalized interests: (i) the "promotion of public health" and (ii) "assuring that woman have equal access to health care services," or, more broadly still, "gender equality." Defs.' Br. at 15-17. The Government, as it did in response to Plaintiffs' preliminary injunction motion, proffers broad interests in "expanding access" to preventive services, as well as reducing, preventing and treating diseases. *Id.* at 15-16. The Government also rehashes its unsupported and overly broad argument that "unintended pregnancies" will be prevented, along with other vague negative health consequences. *Id.* at 16. The Government argues for an equally broad and baseless interest in creating "equal access" to goods and services to enable women "to contribute to the

[5] Moreover, the participation of Plaintiffs' TPA does not affect the analysis because "Plaintiffs have a sincerely-held belief that 'shifting responsibility' [to their TPA] does not absolve or exonerate them from the moral turpitude created by the 'accommodation'; to the contrary, it still substantially burdens their sincerely-held religious beliefs." Slip op. at 49.

same degree as men as healthy and productive members of society." *Id.* at 17.[6]

This Court—and every other court that has addressed the question in the context of the Mandate—has rejected these exact arguments, holding these interests are not compelling. Slip op. at 54-58; *Korte*, 735 F.3d at 686 ("By stating the public interests so generally, the government guarantees that the mandate will flunk the test.").[7] "While the Court agrees that [the Government's claimed compelling] interests are certainly important governmental interests, the Court concludes that these two interests, as so broadly stated, are not 'of the highest order' such that 'those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" Slip op. at 54-55 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)); *see also Gilardi v. U.S. Dep't of Health and Human Servs.,* 733 F.3d 1208, 1220 (D.C. Cir. 2013) (the Government's stated interest is "sketchy and highly abstract," which prevents the Government from "demonstrat[ing] a nexus between this array of issues and the mandate."). Indeed, as the D.C. Circuit held, it is impossible to identify the public health problem the Government was "trying to ameliorate." *Id.*

As this Court explained, the Government has also undermined any claimed compelling interest in applying the Mandate to religious charitable and educational entities when it exempts equally religious houses of worship:

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[6] The irony is not lost on Plaintiffs that under the guise of protecting women's rights, the Government is actually asserting that, without receiving the objectionable services for free, a woman cannot "contribute" to society and the workplace to the same degree as a man.

[7] *Hobby Lobby*, 723 F.3d at 1143–44; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, __F. Supp. 2d__, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433-35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013) (App. 1000); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012).

> If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the "houses of worship," then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases.

Slip op. at 56. Indeed, the religious employer exemption "is an acknowledgment of the lack of a compelling governmental interest as to religious employers who hire employees for their 'houses of worship,'" and the Government's claim that there is such a compelling interest as to "a different religious affiliated/related employer fails." *Id.* at 55-56. Moreover, the Government's justification for the distinction between exempt and accommodated entities is "speculative, and unsubstantiated by the record and, therefore, unpersuasive." *Id.* at 57.[8]

The religious employer exemption further undermines the Government's asserted interests, as the Court has explained, because the exemption "was not predicated upon a 'public health' basis to meet the two purported compelling interests." *Id.* at 56. The Government provided no evidence that "women who receive their health coverage through employers <u>like plaintiffs</u> would face negative health and other outcomes . . . ." *Id.* at 57 (emphasis in original). Instead, "the evidence was to the contrary." *Id.* The Government has not offered any additional arguments, additional evidence, or additional citations than it provided in support of its opposition to the motion for preliminary injunction. For all of these reasons, the Government

[8] Similarly, other exemptions, including for grandfathered plans, further undermine the Government's stated interests. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1143 ("[T]he interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people."); Pls.' Reply Br. Supp. Prelim. Inj. (Doc. 38) at 13-14; Add'l Stip. Facts (Doc. 59) at ¶¶ 1-12; *see also Conestoga Wood Specialties Corp. v. Sec'y U.S. Dep't of Health and Human Servs.*, 724 F.3d 377, 414 (3d Cir. July 26, 2013) (Jordan, J. dissenting) (the Mandate "cannot legitimately be said to vindicate a compelling governmental interest because the government has already exempted from its reach grandfathered plans, employers with under 50 employees, and what it defines as 'religious employers.'").

has failed to satisfy its burden to show that applying the Mandate to Plaintiffs is justified by a compelling interest.

### C. The Court Held that the Government Failed To Show that the Mandate is the Least Restrictive Means to Achieve its Asserted Interests

The Government also bears the burden of demonstrating that the Mandate is the least restrictive means to achieve those vaguely articulated ends. Slip op. at 58-60. The "least restrictive means" test "is a severe form of the more commonly used 'narrowly tailored' test." *United States v. Wilgus*, 638 F.3d 1274, 1288 (10th Cir. 2011). The Government must show that "'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). This test "necessarily implies a comparison with other means," and because the burden is on the Government, "it must be the party to make this comparison." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). The Government must "demonstrate[] that [it] 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 Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (explaining that strict scrutiny requires "serious, good faith consideration of workable . . . alternatives"). It is not enough to "assume [that] a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). The Government bears the "ultimate burden of demonstrating" that workable alternatives do not suffice. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). And "[o]n this point, the [Government] receives no deference." *Id.* Although a "serious, good faith consideration of workable . . . alternatives" is necessary, "it is not sufficient to satisfy strict scrutiny." *Id.* "[I]t remains at all times the

[Government's] obligation to demonstrate, and the Judiciary's obligation to determine," that "no workable . . . alternatives" would achieve the Government's goals. *Id.*

Here, the Government has the burden of proof, and yet it points to *no* evidence in the administrative record actually demonstrating that suggested alternatives would not work.[9] Instead, the Government continues to make broad, unsupported claims that all alternatives would be "incompatible with the fundamental statutory scheme," would not be authorized by the statute, and would not be "feasible." 78 Fed. Reg. at 39,888; Defs.' Br. at 21-22. Indeed, 78 Fed. Reg. at 39,888, AR at 20, is the only page from the record it relies on. Defs.' Br. at 22-24.

But, this Court already rejected these exact same arguments and evidence. Specifically, it concluded that "the Government failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing [its alleged compelling] interests." Slip op. at 58, 60. Indeed,

> The Government neither at the Injunction Hearing, nor in the Administrative Record, offered any evidence concerning: (1) the identity of all other possible "least restrictive means" considered by the Government; (2) the analysis of each of the "means" to determine which was the "least" restrictive; (3) the identity of the person(s) involved in the identification and evaluation of the alternative "means"; or (4) "evidence-based" analysis as to why the Government believes that the "accommodation" is the "least restrictive means."

*Id.* at 59; *see also Korte*, 735 F.3d at 686 (the Government "has not come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights."); *Gilardi*, 733 F.3d at 1222 (the Government's argument "suffers from two [fatal] flaws that cannot be overcome").

[9] In fact, the Government has elsewhere admitted that it had not considered whether it could expand Medicaid as an alternative to the Mandate. Deposition of Gary M. Cohen Transcript (Doc. 52-1) at 35:17–36:11, 48: 6–23, 57:8–15.

The Court also specifically rejected each of the Government's arguments, which are rehashed here. For example, it concluded "there is nothing in the record to establish, or even hint, that a broader 'religious employer' exemption, to include Plaintiffs . . . , would have any impact at all on 'the entire statutory scheme.'" *Id.* at 60. Similarly, the Court rejected the Government's argument that its only evidence in the record, 78 Fed. Reg. at 39,888, shows the Mandate is the least restrictive means. *Id.* at 60. As this Court explained, *inter alia*, that page in the record merely states that the alternatives "would not advance the Government's interests 'as effectively as' the contraceptive mandate and the 'accommodation.'" *Id.* But, "[g]reater efficacy does not equate to the least restrictive means." *Id.* The Government's "conclusory claims" simply cannot meet its burden of offering "*affirmative evidence* that there is no less severe alternative." *Johnson v. City of Cincinnati*, 310 F.3d 484, 504-05 (6th Cir. 2002) (emphasis added).[10] The Government offers nothing more here.

* * *

Based on a more complete record, this Court already rejected every legal argument in the Government's motion. As the Court held, Plaintiffs' religious beliefs are substantially burdened by the Mandate and the Government has failed to show a compelling interest or that it employed the least restrictive means. The Government does not dispute the sincerity of Plaintiffs' religious beliefs, nor has it offered any additional evidence to support its compelling interest and narrow tailoring arguments. The Court should, therefore, deny the Government's motion and enter judgment as a matter of law for Plaintiffs on RFRA.

[10] Nor can such "conclusory assertions" support the Government's motion for summary judgment. *See Morris v. Ford Motor Co.*, 2:10cv504, 2012 WL 5947753, at *2 (N.D. Ind. Nov. 28, 2012); *Bradley v. Work*, 154 F.3d 704, 707 (7th Cir. 1998).

## III. PLAINTIFFS HAVE ALLEGED VALID CLAIMS UNDER THE FIRST AMENDMENT AND THE APA

Plaintiffs have also alleged that the Mandate violates the First Amendment's Establishment, Free Exercise, and Free Speech Clauses, as well at the APA. *First*, the Government's motion should be denied as to Plaintiffs' claims that the religious employer exemption violates the Establishment Clause. The Government claims the exemption does not violate the Establishment Clause because any entanglement between the Government and the employer is neither excessive nor pervasive and because the Mandate is not facially discriminatory. But, the Establishment Clause is still violated because the process of deciding between religious views is unconstitutional entanglement even if it is not pervasive or excessive and because the exemption effectively distinguishes between religious groups based on their substantive beliefs.

*Second*, the Government's motion should be denied as to Plaintiffs' claims that the Mandate imposes a substantial burden in violation of the Free Exercise Clause. The Government claims strict scrutiny does not apply because the Mandate is neutral and generally applicable. The Mandate, however, specifically targets Plaintiffs' religious practices and is riddled with exemptions; it is not neutral under any definition of the term.

*Third*, the Government's motion should be denied as to Plaintiffs' claims that the Mandate compels certain speech and bars other speech in violation of the First Amendment. The Mandate requires Plaintiffs to facilitate education in favor of the objectionable service and to sign the self-certification form, thereby designating their TPA to provide the objectionable coverage. Moreover, the Mandate expressly prohibits any attempt by Plaintiffs to "influence" their TPA not to provide the coverage. The First Amendment does not countenance either such type of regulation.

*Fourth*, the Government's motion should be denied as to Plaintiffs' claims that the Mandate interferes with internal Church governance. Although this Court has held that the Mandate "cleaves" the Church in two, the Government claims there is no internal governance issue here because Plaintiffs can select their own organizational structure. That the organizational structure can be chosen is an empty promise when the Mandate is interfering, under threat of ruinous penalties, with Plaintiffs' internal church decision regarding how to govern the Diocesan affiliates under Bishop Zubik, as the Court has already found.

*Fifth*, the Government's motion should be denied as to Plaintiffs' claims that the Mandate is contrary to law and invalid under the APA. There is no dispute that the Mandate covers abortifacients and the Government's semantics cannot support summary judgment. Furthermore, the Mandate's requirement that each *employer's* eligibility for the exemption or accommodation is determined on an individual basis, plainly contradicts the regulations, which provide that each *plan's* eligibility is determined by the status of the entity that "established or maintained" it.

### A. The "Religious Employer" Exemption Violates the Establishment Clause

The Government has also violated the Establishment Clause through its promulgation of the "religious employer" exemption. First, this exception fosters excessive entanglement between government and religion, by determining which employers are sufficiently religious. Second, it creates an artificial, government-defined category of "religious employers" that favors some types of religious groups over others. Therefore, the Government's motion should be denied.

#### 1. Excessive Entanglement

"[A]pplication of" the Mandate's exemption and accommodation "entangles the Government into determining what constitutes 'religion.'" Slip op. at 57. This is true because the required inquiry goes far beyond determining whether the entity is a "bona fide religious institution[]." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343–44 (D.C. Cir. 2002). Instead, it involves intrusive judgments regarding the religious beliefs, practices, and structure of the entity, including, for example, whether a group has "a recognized creed and form of worship." *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009) (listing fourteen-factor test to determine whether a group qualifies as a church or religious order); 26 C.F.R. § 1.6033-2(h) (listing factors to determine integrated auxiliary status).[11] These sorts of assessments impermissibly "cast [the Government] in the role of arbiter of the essentially religious dispute[s]," *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977), forcing it to answer inherently religious questions, such as what constitutes "worship."[12]

Here, the accommodation and exemption have the "net effect" of "cleav[ing] the Catholic Church into two parts: worship, and service and 'good works,' thereby entangling the Government in deciding what comprises 'religion.'" Slip op. at 56. Specifically, the Government is trying to set itself up as the arbiter of what is "religious," determining that religious liberty protection ends at the church doors. *See id.* at 57-58. If the Government is going to enforce the Mandate, then the determination of whether an entity is exempt or accommodated will have to be made either by a bureaucrat or a court, both of which equally violate the Establishment Clause. *Cathedral Acad.*, 434 U.S. at 133. While these determinations have not yet been made, "[r]eligious questions are to be answered by religious bodies," and there

[11] Contrary to the Government's assertions, Plaintiffs' challenge is not limited to the fourteen-factor test, but includes challenges to all "intrusive judgments" that may be made regarding their beliefs and practices, including any that may be required by 26 C.F.R. § 1.6033-2(h). Compl. ¶ 237.

[12] Courts have no competence to determine what constitutes "worship." *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (concluding that such attempts would "inevitably to entangle the State with religion in a [forbidden] manner"); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 855 F. Supp. 2d 44, 63 (S.D.N.Y. 2012) (holding that the government cannot "decide for itself which religious practices rise to the level of worship").

is harm to the "authority and autonomy of the Church" that arises even from *empowering* a government body to answer such questions. *McCarthy v. Fuller*, 714 F.3d 971, 976, 978 (7th Cir. 2013) (deciding on interlocutory appeal the propriety of a jury question that would have required a determination of a matter of religious doctrine, without waiting until it was applied). Plaintiffs should not be made to wait for the Government or a court to "troll[] through [their] religious beliefs," before they are permitted to file suit. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.).

The Government misses the point when it claims that this entanglement will not be "pervasive" or "comprehensive." Defs.' Br. at 35. Entanglement need not be pervasive "where the government is placed in the position of deciding between competing religious views." *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006). Here, because the inquiry at issue necessarily involves "intrusive judgments regarding contested questions of religious belief or practice," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008), the duration of that inquiry is of no moment. The Mandate thus violates the Establishment Clause and must be struck down.

2. Discrimination Among Religious Groups

Plaintiffs have also pleaded and can show a violation of the Establishment Clause because the Mandate discriminates among religious groups. The Mandate favors, by fully exempting, religious groups that do not share Plaintiffs' beliefs, especially in the unity of worship, faith and good works.

The Government acknowledges that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Defs.' Br. at 31. Yet, the Government would limit this principle to laws that facially discriminate, claiming the Mandate should be upheld because it does "not refer to any particular denomination." *Id.* at 32.

According to the Government, the religious employer exemption is "available on an equal basis to organizations affiliated with any and all religions." *Id.* These arguments cannot prevail here for the same reasons they failed to carry the day in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian*, 534 F.3d 1245.

Like the appellants in *Larson*, the Government maintains that "a statute's disparate impact among religious organizations is constitutionally permissible when such distinctions result from application of secular criteria." *Larson*, 456 U.S. at 246 n.23. The Court in *Larson* was not persuaded, however, because while the law at issue did not expressly identify any religious sects or denominations, it nonetheless "ma[de] explicit and deliberate distinctions between different religious organizations." *Id.* By discriminating against religious organizations that received over half of their funding from non-members, the law "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand," and "'churches which are new and lacking in a constituency, or which ... favor public solicitation over general reliance on financial support from members,' on the other hand." *Id.*; *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–35 (1993) (considering the practical effect of a law to evaluate discrimination or targeting under the Free Exercise Clause).

The same reasoning applies here. Regardless of whether it "refer[s] to any particular denomination," Defs.' Br. at 32, the religious employer definition plainly favors "houses of worship" or "religious orders" and the denominations that primarily rely on them to carry out their ministry, while disadvantaging groups that exercise their faith through good works and other means. *See, e.g.,* Slip op. at 12-16, 19-21 (describing Plaintiffs and their ministries). Indeed, *Larson* is particularly analogous to the test for an exempt integrated auxiliary here, which excludes any entity that "[n]ormally receives more than 50 percent of its support" from non-affiliated sources. 26 C.F.R. § 1.6033-2(h)(4)(ii).

By effectively asserting that the Mandate is constitutional because it "distinguishes not between types of religions, but between types of institutions," the Government's argument is also akin to the State's in *Colorado Christian*. 534 F.3d at 1259. The Tenth Circuit, however, found this to be a "puzzling and wholly artificial distinction." *Id.* While it is true that "any religious denomination" could choose to exercise its faith primarily through houses of worship or religious orders, it is likewise true that "any religion could engage in animal sacrifice or instruct its adherents to refrain from work on Saturday rather than Sunday." *Id.* (citing *Lukumi*, 508 U.S. at 524–25; *Sherbert*, 374 U.S. at 399). That fact did not stop the Supreme Court from striking down laws that discriminated on those bases. That a group can "change" its religious exercise to obtain the benefit of the exemption hardly means the exemption is nondiscriminatory. *Id.*

Indeed, in other contexts, courts have repeatedly affirmed that where a regulation has a disproportionate impact on adherents of a particular faith, it is of no moment that, in theory, it applies across the board. For example, a regulation prohibiting the display of "nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays." *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996); *see also Emp't Div. v. Smith*, 494 U.S. 872, 877–78 (1990) (stating that "[i]t would doubtless be unconstitutional … to prohibit bowing down before a golden calf," whatever the basis for the prostration). And while non-Jews may wear yarmulkes, "[a] tax on wearing yarmulkes is [still] a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Thus, while the exemption may, in theory, be "available . . . to organizations affiliated with any and all religions," Defs.' Br. at 32, given the Catholic Church's well-known stand on contraception and commitment to social ministries, in "practical terms," *Lukumi*, 508 U.S. at 536—which is what counts under the First Amendment—Catholic organizations will disproportionately be denied the benefit of the exemption. This discrimination cannot survive strict scrutiny.

### B. The Mandate Imposes a Substantial Burden on Plaintiffs that Violates the Free Exercise Clause

The Mandate additionally violates the Free Exercise Clause because it is neither generally applicable nor neutral with respect to religion. *First*, the Mandate is not "generally applicable" because the Government has chosen to exempt millions of employers and individuals. *See Geneva Coll.*, 929 F. Supp. at 435–37; *Sharpe Holdings v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012); *supra* Part I.A.2. *Second*, the Mandate is not "neutral" because it specifically targets Plaintiffs' religious practices. Therefore, the Government's motion should be denied.

*First*, the Mandate is not generally applicable because the process of implementing the Mandate was "replete with examples of the government . . . exempting vast numbers of entities while refusing to extend the religious employer exemption to include entities like" Plaintiffs. *Geneva Coll.*, 929 F. Supp. 2d at 437. The Government here has fully exempted "innumerable" employers with grandfathered plans, Slip op. at 64, and partially exempted small employers. Moreover, the Government has concluded that an exemption is warranted for *some* religious organizations but not others. Similarly, the Government has concluded that an exemption is warranted for the same religious individual—here, Bishop Zubik—when wearing certain hats but not others. *See* Slip op. at 51-52.

At bottom, the Mandate reflects the Government's determination that Plaintiffs' interest in religious freedom is less important than the secular interest in other exemptions, such as the exemption for grandfathered plans. If the Government is going to subordinate Plaintiffs' religious liberty to the Mandate, however, it must treat all other private and religious interests the same, equally subordinating all to its (supposedly) paramount regulatory interest, as when it "enforce[s] generally applicable prohibitions of socially harmful conduct." *Smith,* 494 U.S. at 884-85. Even assuming "general applicability does not mean absolute universality," Defs.' Br. at 26, the "fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best." *Geneva Coll.*, 929 F. Supp. 2d at 437.

This conclusion is fleshed out by *Employment Division v. Smith*. *Smith* addressed an "across-the-board criminal prohibition," holding that religious beliefs cannot trump the Government's power to "enforce generally applicable prohibitions of socially harmful conduct." 494 U.S. at 884-85. *Smith* itself made clear, however, that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884. Once the Government begins granting exemptions, it must take care that it does not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. As the Third Circuit has explained:

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

*Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J). Here, the Government has fully exempted "religious employers" and "innumerable" grandfathered plans, *see* Slip op. at 63-64, but judged Plaintiffs' religious beliefs to be of lesser import.

The Government argues that the Mandate is generally applicable because it allows exemptions only for "objectively defined categories of entities." Defs.' Br. at 26. But there is nothing "objective" about the Government's categories, which necessarily reflect value judgments as to which interests are sufficiently important to merit an exemption from the Mandate. The Government has apparently determined that various economic and logistical concerns merit the exemptions it has granted, including exemptions for "religious employers" and grandfathered health plans. Having determined that these other interests are valuable enough to warrant exemptions from the Mandate, the Government may not discount Plaintiffs' claim for a religious exemption, which threatens to "devalue" the importance of Plaintiffs' religious beliefs compared to other private and religious interests. *Lukumi*, 508 U.S. at 537-38.

*Second*, the Mandate is not neutral because it targets Plaintiffs' religious beliefs and practices. The evidence Plaintiffs have been able to obtain thus far shows that the Mandate was promulgated by individuals hostile to Plaintiffs' religious beliefs. For example, as alleged in Plaintiffs' Complaint, Defendant Sebelius asserted at a NARAL Pro-Choice America fundraiser, that "we are in a war," and mocked those who disagree with her position on contraception. *See* Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011) at 5 (attached hereto at Exhibit A).[13] Similarly, documents recently produced in *Pohl v. HHS* (2:13-cv-930 W.D. Pa.) ("FOIA litigation") show that as far back as early 2012 Defendants were specifically

[13] Because this speech and the IOM Dissent were "integral to" and "explicitly relied upon in the complaint," they are properly considered even if the Court treats the Government's motion as a motion to dismiss. *See, e.g., In re Rockefeller Ctr. Props., Inc. Securities Litig.*, 184 F.3d 280, 287 (3d Cir. 1999); *see also* Compl. ¶¶ 91, 169. All of the documents discussed in this section are properly before the Court if it treats the Government's motion as a motion for summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

focused on the Catholic church's "pushback" on the Mandate and realized that "[t]his issue is not going to go away . . . ." Jan. 31, 2012 Email (POHL_PSC_0000283) (attached as Exhibit B).

The evidence also shows that the Mandate is the result of significant biases against Plaintiffs and their Catholic beliefs. For example, the definition of "preventive service" at the root of Plaintiffs' claims was promulgated by an Institute of Medicine Committee that was stacked with individuals who 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." IOM Report at 232 (AR at 530). Plaintiffs also have reason to believe that the biased IOM Committee was not entirely independent from HHS. *See, e.g.*, Doc. 40-2, Sept. 15, 2010 Email (CDC_FIRSTIR0000391) ("I understand that the IOM will form a Committee to develop recommendations to HHS on preventive services for women. . . . Will HHS provide any recommendations on Committee membership?"). These anti-religious biases are further underscored by the fact that the Mandate was directly modeled on a California statute, *see* 77 Fed. Reg. at 8,726; compare 76 Fed. Reg. at 46,626, with Cal. Health and Safety Code § 1376.25(b)(1), where the chief sponsor made clear that its purpose was to strike a blow against Catholic religious authorities. *See* Editorial, *Act of Tyranny*, WASH. TIMES (Mar. 5, 2004) (attached hereto at Exhibit C) ("'Let me point out that 59 percent of all Catholic women of childbearing age practice contraception. … Eighty-eight 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.'" (quoting floor statement of Sen. Jackie Speier)).

The Government claims that it was not targeting certain religious beliefs for disfavored treatment, asserting that the Mandate was enacted "not with the object of interfering with religious practices, but instead to improve women's access to health care and lessen the disparity between men's and women's healthcare costs." Defs.' Br. at 24-25. But the Government knew that over 85 percent of employer health plans already provided coverage for contraception, and that the remaining "gap" was due largely to employers that were motivated by moral or religious concerns. Pls.' Prelim. Inj. Br. (Doc. 6) at 27 (citing 75 Fed. Reg. at 41,732). With full knowledge of these facts, the Government determined that it needed to stamp-out these recalcitrant employers' religious practices. As in *Lukumi*, "the effect of [the Mandate] in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535.

Because the Mandate is not a neutral law of general applicability and cannot survive strict scrutiny, *see supra* Part I.A.2–3, the Government's motion should be denied and Plaintiffs should be allowed to develop a full factual record in support of these claims.

**C. The Mandate Compels Speech in Violation of the First Amendment**

The Mandate violates the First Amendment prohibition on compelled speech in two ways. First, it requires Plaintiffs to facilitate access to "counseling" related to abortion-inducing products, contraception, and sterilization for their employees. Second, to qualify for the so-called "accommodation," the Mandate requires Catholic Charities to provide a "certification" that effectively authorizes a third party to provide or procure objectionable products and services for its employees. Pls.' Prelim. Inj. Br. at 34-36. Both of these requirements violate the First Amendment and, therefore, the Government's motion should be denied.

*First*, the Mandate compels Plaintiffs to facilitate counseling that they disagree with. The Government claims, incredibly, that the counseling required need not support the use of contraception. This disavowal is incompatible not only with the description of such services in the IOM Report,[14] but also with the Government's argument that the Mandate serves an allegedly compelling interest in promoting the use of contraceptives. Defs.' Br. at 15–21. If the "related" counseling is, in fact, not intended to encourage use of those products and services, the Government has no interest in forcing Plaintiffs to facilitate that speech. The counseling requirement thus either serves the claimed interest in improving women's health (by encouraging pro-contraception counseling), or it fails to advance the Mandate's asserted purpose, confirming that interest is not compelling.

But even if the requirement only covers contraception as a topic, and does not mandate a pro-contraceptive viewpoint, it still impermissibly compels speech because it deprives Plaintiffs of the freedom to speak on the issue of abortion and contraception on their own terms, outside of the confines of the Government's regulatory scheme. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 462 n.6 (D. Md. 2011), *aff'd*, 722 F.3d 184 (4th Cir. 2013) (en banc). The (implausible) assertion that the requirement mandates only a presentation of facts does not solve the First Amendment problem, because protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

Nor is it of any constitutional significance that Plaintiffs remain free "to express whatever views they may have on the use of contraceptive services" or to "encourage their employees not to use contraceptive services." Defs.' Br. at 28. Plaintiffs will still be forced to facilitate speech with which they disagree, and the Government cannot force Plaintiffs "to affirm in one breath

[14] IOM Report at 107 (AR at 405) ("Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits . . ., and provide instruction in effective use of the chosen method.").

that which they deny in the next." *Pac. Gas & Elec., Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 16 (1986).

*Second*, the Mandate compels Catholic Charities to self-certify and designate Plaintiffs' TPA to provide the objectionable coverage. The Government attempts to dismiss this requirement as mere speech "incidental to the . . . regulation of conduct." Defs.' Br. at 29. But the Government's breezy invocation of this complex First Amendment doctrine belies the fact that the "accommodation" makes the certification a trigger for the provision of services to which Plaintiffs vehemently object. That is, if an eligible organization certifies its religious objections to the Mandate, that statement obliges a third party to provide or procure the objectionable services. Consequently, Plaintiffs are forced to engage in speech that, in turn, is the trigger for the provision of products and services to which they are fundamentally opposed. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011), the Supreme Court held that such arrangements violate the First Amendment, striking down a state law that made speech supporting a privately funded candidate the trigger for his opponent's receipt of public financing. *Id.* at 2820 ("[F]orcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." (internal quotation marks omitted)). The Mandate here employs the same forbidden "trigger" effect and, therefore, is unconstitutional and the Government's motion should be denied.[15]

[15] Plaintiffs' free-speech claims do not depend on whether they *subsidize* the objectionable speech, because there is no question that the certification makes their objections the *cause* of that speech. In the *Arizona Free Enterprise* case, the plaintiffs were not made to subsidize opposition speech, only to trigger it by their own speech.

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

The Mandate further violates the First Amendment by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii); Pls.' Prelim. Inj. Br. at 36-38.

The Government attempts to portray this rule as a prohibition on "an employer's improper attempt to interfere with its employees' ability to obtain contraceptive coverage from a third party" through the use of "threats." Defs.' Br. at 30. Strikingly, however, that limitation appears nowhere in the regulation. Indeed, the regulation prohibits *any* attempt to "influence" TPAs. Consequently, Plaintiffs are barred, for example, from publicly announcing, "we will not enter into any contract with a third party administrator that would, as a result of our contract, provide contraception, abortion-inducing drugs, sterilizations, and related counseling to our employees."

The Government's assertedly "analogous" cases provide no support for the gag order. *See* Defs.' Br. at 30 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)). Both cases cited by the Government involved circumstances where one party was "economic[ally] depend[ent]" on the other, *NLRB*, 395 U.S. at 617, or particularly susceptible to pressure, *Ohralik*, 436 U.S. at 457. No such circumstances apply here, as TPAs are not obliged to contract with objecting employers, 78 Fed. Reg. at 39,880, and the Government has not demonstrated that TPAs are so "economically dependent" on Plaintiffs that they would be susceptible to coercion.

Accordingly, for the reasons stated above, this prohibition violates Plaintiffs' First Amendment rights, cannot survive strict scrutiny, *see supra* Part I.A.2–3, and must fail. Therefore, the Government's motion should be denied.

### E. The Mandate Interferes with Plaintiffs' Internal Church Governance

The First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012). Such organizations are constitutionally guaranteed "an independence from secular control or manipulation . . . [and the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This right extends to any internal decision determining "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871). Among other things, religious organizations are allowed to establish their own hierarchy, *Kedroff*, 344 U.S. at 116, to "establish their own rules and regulations for internal discipline and government," *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724 (1976), and to select "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor*, 132 S. Ct. at 710.

This Court has already found the facts underlying this claim: that the Mandate artificially splits the Catholic Church in two, separating its faith from its works as performed through its charitable, educational, and public service ministries. Slip op. at 49-53; *see also supra* at 57-58. This artificial division between "houses of worship and religious orders" and charitable and educational organizations ignores the reality that many religious groups, including the Catholic Church, offer charitable and educational services as an exercise of religion. By excluding these organizations from the category of exempt "religious employers," the Mandate interferes with "internal church decision[s] that affect[] the faith and mission of the church itself," *Hosanna-Tabor*, 132 S. Ct. at 707, namely, by effectively preventing the Church from structuring its operations in the manner it has chosen to carry out its mission.

Additionally, the Mandate also interferes with internal church governance by interfering with the manner in which the Diocese has chosen to supervise its subordinate entities. *E.g.,* Fr. Lengwin Decl. ¶ 38. The First Amendment also affords religious organizations freedom from government interference with respect to their chosen organizational and hierarchical structure. *Cf. Hosanna-Tabor*, 132 S. Ct. at 704–07; *Milivojevich*, 426 U.S. at 724-25; *Kedroff*, 344 U.S. at 115–16. Plaintiff Diocese has chosen to administer a self-insured healthcare plan for Diocesan employees and the employees of Plaintiff Catholic Charities, its equally religious charitable ministry. In this manner, the Diocese ensures that its subordinate ministry adheres to Catholic doctrine. However, the Mandate disrupts this internal arrangement, forcing the Diocese to facilitate access to the objectionable products and services for the employees of Catholic Charities, or expel Catholic Charities from its plan—options that would alter the organizational structure the Diocese has designed to further its faith and mission. The Mandate thus "violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 132 S. Ct. at 706.

For these reasons, the Government is wrong to assert that this case does not involve "any other matters of church governance." Defs.' Br. at 36. The Government is equally wrong that "plaintiffs may choose whatever organizational structure they wish," *id.*, as the Mandate clearly impedes the ability of Plaintiff Diocese to administer its operations and relationships with subordinate institutions as it chooses. And while *Hosanna-Tabor* may have specifically addressed "the selection of clergy," *id.*, it follows a long line of cases establishing the right of churches to be free from government interference in their internal operations, *see*, *e.g.*, *Milivojevich*, 426 U.S. at 724; *Kedroff*, 344 U.S. at 115–16. This is not a "mere[] restatement of plaintiffs' substantial burden theory," Defs.' Br. at 36, but rather an independent claim that requires the Mandate be struck down in light of the "special solicitude" afforded to "religious organizations" by the First Amendment. *Hosanna-Tabor*, 132 S. Ct. at 706. Therefore, the Government's motion should be denied.

**F. The Mandate Is Contrary to Law and Thus Invalid Under the APA**

The Mandate also violates the APA. The APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Mandate is "not in accordance with law" in at least one critical respect: it violates the Weldon Amendment.

The Weldon Amendment states that "[n]one of the funds made available in this Act may be made available [to the Department of Labor and the Department of Health and Human Services] . . . if such agenc[ies] . . . subject[] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). Here, the Mandate violates the Weldon Amendment because it subjects Plaintiffs to discrimination based on their refusal to include coverage for abortion-inducing products (such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella)) in their "health insurance plan[s]."

The Government's argument that the meaning of "abortion" in the Weldon Amendment does not encompass the abortion-inducing products required by the Mandate is erroneous. *See* Defs.' Br. at 36-37. Conspicuously absent is any authoritative agency interpretation of the word "abortion" as found in the Amendment. Instead, the Government relies on an HHS press release, the IOM Report, and a 1997 FDA notice pertaining to "emergency contraception," *see id.*, none of which purported to interpret the Amendment. And even if they did, the Court would not owe these interpretations the same deference as an agency interpretation of a statute within "the agency's particular expertise and special charge to administer," *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991), because neither HHS nor FDA are specially charged—or have any particular expertise—to enforce appropriation bills.

Not only is there no authoritative agency interpretation of the term "abortion" in the context of the Weldon Amendment, the Government cites no statutory definition, no medical definition, and no case interpreting the term in that context.[16] The Government's unwillingness to reference a medical dictionary is unsurprising. Stedman's Medical Dictionary, for example, defines "abortion" as the "[e]xpulsion from the uterus of an embryo or fetus [before] viability." STEDMAN'S MED. DICT. 4 (27th ed. 2006).[17] On this definition, some of the Mandate's covered services clearly qualify as "abortion."

In any event, the Government is wrong to suggest that Plaintiffs' understanding of what constitutes abortion is irrelevant. If the medical definition does not apply, then at the very least, the definition should be determined by the plan provider who claims to have been subjected to discrimination (rather than the Government). The Weldon Amendment, after all, was meant to protect the rights of conscientious objectors who were required to provide or facilitate what they

[16] The Government does cite a floor statement made by Representative Weldon years before the Amendment was passed, *see* Defs.' Br. at 38 n.20, but that is hardly persuasive evidence of meaning since "[w]hat motivate[d] one legislator to make a speech about a statute [in 2002] is not necessarily what motivate[d] scores of others to enact it" in 2012. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 n.17 (2002) (rejecting reliance on floor statements).

[17] *See also* DORLAND'S ILLUS. MED. DICT. 1500 (30th ed. 2003) (defining pregnancy as "the condition of having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon").

viewed as an abortion.[18] This interpretation is also consistent with the Affordable Care Act, which itself prohibits compelling "qualified health plans" to cover abortion services and specifically provides that "the issuer" of the plan—not the Government—"shall determine" whether or not the plan covers abortion. *See* 42 U.S.C. § 18023(b)(1)(A)-(B). Therefore, the Government's motion should be denied.

**G. The Government Erroneously Interpreted Its Own Regulations**

Finally, the Government's newly minted interpretation of the Mandate—which precludes affiliated organizations from obtaining the benefit of the exemption by participating in an exempt organization's plan—is inconsistent with the text of the Mandate, contradicts the Government's prior construction, and creates serious constitutional difficulties. Thus, the traditional deference to an agency's interpretation of its own regulation does not apply, and at the least, the Diocese should be allowed to shield its affiliated entities from the Mandate.

The Government's attempts to claim the regulatory text is ambiguous are unavailing. Defs.' Br. at 39. The language is plain: "group health plan[s] established or maintained by . . . religious employer[s]" are exempt from "any requirement to cover contraceptive services." 45 C.F.R. § 147.131(a). The regulatory text contains no suggestion that it is "employers" rather than "plans" that are exempt from the Mandate's requirements. Though the title of the subsection refers to "religious employers," it is a "well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear." *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of the City of Newark*, 344 F.3d 335, 348

[18] Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 528–30 (2007) (Attached hereto at Exhibit D); 148 Cong. Rec. H6566 *et seq.*, 2002 WL 31119206 (daily ed. Sept. 25, 2002).

(3d Cir. 2003); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 822 (D.C. Cir. 2001) (noting the "customary reluctance to give great weight to statutory headings").

Similarly unpersuasive is the Government's claim that it "never suggested that the regulations [called for] a plan-by-plan approach." Defs.' Br. at 39. The ANPRM contained just such a "suggest[ion]." 77 Fed. Reg. at 16,503. The language at issue discusses circumstances in which a hypothetical, separately incorporated school would be exempt if it (1) provided health insurance on its own, or (2) provided health insurance through an affiliated diocese. *Id.* at 16,502. The ANPRM notes that as to scenario (1), if the school met "the definition of a religious employer," it would be exempt. *Id.* As to scenario (2), "the same school" would also be exempt if "the diocese [through which it insures] is exempt." *Id.* The Government argues that "same school" refers to a school "that itself meets the definition of a religious employer." Defs.' Br. at 39-40. But such a reading renders the ANPRM's hypothetical a tautology, standing for nothing more than the self-evident proposition that an exempt employer is exempt. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting"). Were the Government's reading accurate, there would have been no reason to include this hypothetical in the ANPRM or to emphasize the availability of the exemption to employers in a "a variety of arrangements." 77 Fed. Reg. at 16,502. Therefore, the Government's motion should be denied.

## IV. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION BECAUSE THE GOVERNMENT DID NOT FILE THE REQUIRED CONCISE STATEMENT OF UNDISPUTED FACTS AND APPENDIX

Independently, the Government's motion should be denied because it did not file any Concise Statement of Material Facts or Appendix with its motion and brief. These filings are expressly required by Federal Rule of Civil Procedure 56, the Local Rules, the Court's Sample Case Management Order, and the Revised Case Management Order entered in this case. *See,* *e.g.*, Local Rule 56B ("The motion for summary judgment . . . must be accompanied by the following: 1. A Concise Statement of Material Facts. . . ."); Practices and Procedures of Judge Arthur J. Schwab, Exhibit A ¶ 6; Revised Case Management Order (Doc. 72) ¶ 5(a) ("Any such motion shall be filed in accordance with the requirements of Local Rules 56B."). Indeed, the Government has twice signed onto a Proposed Case Management Order in this case that explicitly required the Government to comply with Local Rule 56B in filing this motion. Proposed Case Management Order (Doc. 48) ¶ 7; Revised Proposed Case Management Order (Doc. 70) ¶ 5. Without such a Concise Statement from the moving party, Plaintiffs cannot craft a Responsive Concise Statement and this Court is left with an inadequate record to grant the Government's motion. This Court has dismissed summary judgment motions that failed to comply with Local Rule 56B on numerous other occasions. *See, e.g.*, *United States ex rel. Bartlett v. Ashcroft*, No. 3:04-57, 2013 WL 5817665, at *2–4 (W.D. Pa. Oct. 29, 2013).[19] It should do so again here.

**<u>CONCLUSION</u>**

For the foregoing reasons, the Court should deny with prejudice the Government's motion to dismiss or, in the alternative, for summary judgment.

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[19] *See also Brown v. Kia Motors Corp.*, No. 02:06-cv-0804, 2009 WL 5178733, at *1 (W.D. Pa. Dec. 21, 2009); *Magruda v. Belle Vernon Area Sch. Dist.*, No. 06-00995, 2007 WL 2746719, at *1–2 (W.D. Pa. Sept. 17, 2007); *Ziller v. Emerald Art Glass*, No. 05-82, 2006 WL 3853976 (W.D. Pa. Oct. 4, 2006); *Indeck Boiler Corp. v. Int'l Boiler, Inc.*, No. 03-925, 2006 BL 33541 (W.D. Pa. Mar. 9, 2006).

Dated: December 13, 2013 Respectfully submitted,

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