No. __-___

IN THE

Supreme Court of the United States

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, A CORPORATION SOLE, ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Whether the contraceptive-coverage Mandate of the Affordable Care Act violates the free exercise rights of nonprofit religious organizations under the Religious Freedom Restoration Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are the Roman Catholic Archbishop of Washington ("the Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., and the Catholic University of America. Thomas Aquinas College was also a Plaintiff in the proceeding below, but is not a Petitioner here. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were Defendants below, are Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari before judgment in a case pending before the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the district court is reported at 2013 WL 6729515 (Pet. App. 1a). The order of the D.C. Circuit granting an injunction pending appeal is attached as Appendix C (Pet. App. 127a).

JURISDICTION

The district court entered judgment on December 20, 2013. The notice of appeal (Pet. App. 228a) was filed on December 21, 2013. The case was docketed in the court of appeals on December 23, 2013, as No. 13-5371. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix G (Pet. App. 230a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A; 29 C.F.R. §§ 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

Petitioners are entities affiliated with the Catholic Church and, as such, sincerely believe that life begins at the moment of conception, and that certain "preventive" services that interfere with the transmission of life are immoral. Accordingly, Petitioners believe that they may not provide, pay for, and/or facilitate access to contraception, sterilization,

abortion, or related counseling in a manner that violates the teachings of the Catholic Church. *See* Pet. App. 142a–45a, 151a–53a, 160a–62a, 170a–73a, 179a–82a, 188a–90a, 197a–99a, 207a–09a, 213a.

Historically, Petitioners have exercised this religious belief by excluding coverage for such services from their health plans in a manner consistent with Catholic teaching. Pet. App. 207a, 214a. Petitioner Roman Catholic Archbishop of Washington (the "Archdiocese") operates a self-insured health plan that includes not only its own employees, but also the employees of Petitioners Consortium of Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and Catholic Information Center. Their plan year began on January 1, 2014. Pet. App. 213a–14a. Catholic University offers its employees insured health care plans provided by United Healthcare, and makes insurance available to its students through AETNA. Catholic University's employee plan year begins on December 1, and its student plan year begins on August 14. Pet. App. 206a–07a.

1. The mandate at issue was promulgated pursuant to the Government's statutory authority under the Affordable Care Act to require group health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). By defining "preventive care" to include all "FDA-approved contraception," the Mandate requires group health plans to cover contraception, sterilization, abortion-inducing

products, and related services.[1] Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping coverage altogether subjects covered employers to annual penalties of $2,000 per employee and/or other negative consequences. *Id.* § 4980H.

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the Act's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Moreover, small employers—those with fewer than fifty employees—are exempt from the penalty for dropping coverage. 26 U.S.C. § 4980H(a). And in an apparent acknowledgment of the burden the Mandate places on religious exercise, the Government created a narrow exemption for plans sponsored by so-called "religious employers," though that definition is essentially restricted to "group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013); 45 C.F.R. § 147.131(a). All told, by the Government's own estimates, over 90 million individuals participate in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

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[1] Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/ womensguide lines (last visited Dec. 18, 2013).

The Government, however, has steadfastly refused to create a broader religious exemption, either for individuals seeking to run their businesses in accordance with their faith or for nonprofit religious organizations beyond houses of worship. For for-profit corporations, the Government offered no relief, prompting the *Hobby Lobby* litigation this Court will hear later this Term. For nonprofit religious organizations, the Government offered a so-called "accommodation" that is the subject of this litigation and other similar lawsuits filed throughout the country. 78 Fed. Reg. 39,870 (July 2, 2013).

Under the "accommodation," eligible nonprofit organizations are forced to provide a "self-certification" to their insurance company or third-party administrator, which has the perverse effect of authorizing the insurance company or third-party administrator to provide or arrange "payments for contraceptive services" for the organization's students or employees. *See* 26 C.F.R. § 54.9815-2713A(a)-(c). These mandated "payments" last only as long as the students or employees remain on the religious organizations' health plans. 29 C.F.R. § 54.9815-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). For self-insured organizations, moreover, 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 (emphasis added). Absent this self-certification, insurance companies and third-party administrators have no authority to provide the contraceptive payments under the accommodation. "[T]hese final regulations apply to group health plans . . . for plan

years beginning on or after January 1, 2014." *Id.* at 39,870.

In short, under the accommodation, Petitioners must designate a third party to provide the very coverage they find morally objectionable. "The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013). "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* at *8. "If the institution does sign the permission slip, and only if the institution signs the permission slip, the institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

Suffice it to say, the "accommodation" does not resolve Petitioners' religious objection to participation in this regulatory scheme. *See infra* Part III.A.1. Indeed, the Government *knew* its so-called accommodation would not resolve Petitioners' concerns, because well before the regulations were finalized, Petitioners and the U.S. Conference of Catholic Bishops repeatedly informed the Government that the now-codified proposals were inadequate.[2] The Government, however, ignored Petitioners' concerns.

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[2] *E.g.*, Comments of Archdiocese of Washington at 2 (Apr. 4, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/04/Comments-4-4-13-Archdiocese-of-Washington.pdf; Comments of U.S. Conference of

2. Left with no other alternative to avoid violating their sincerely held religious beliefs, Petitioners filed this suit on September 20, 2013, to enjoin application of the Mandate.[3] On December 20, 2013, twelve days before the Mandate was scheduled to go into effect, the district court, which had jurisdiction under 28 U.S.C. § 1331, issued its ruling. The court "determine[d that] compliance" with the Mandate does not "actually constitute[] compelled 'facilitation'" of immoral conduct, Pet. App. 35a, or "give rise to 'scandal . . . in a way inconsistent with church teachings,'" Pet. App. 40a. According to the district court, Petitioners do not really object to the actions the Mandate requires of them, but rather to the actions the Mandate requires of third parties. Therefore, the court held that the Mandate did not substantially burden Petitioner Catholic University's exercise of religion, and that the remaining Petitioners lacked standing to challenge the Mandate.[4] Pet. App. 37a–49a, 59a–66a.

3. Petitioners immediately noticed their appeal on December 21, 2013. The case was docketed in the

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Catholic Bishops at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

[3] With the exception of the Archdiocese, Petitioners are subject to the so-called "accommodation."

[4] The district court also granted summary judgment for Thomas Aquinas College, Pet. App. 49a–59a, which is not a party to this Petition or the underlying appeal, and denied a motion for injunction pending appeal, Pet. App. 120a.

U.S. Court of Appeals for the District of Columbia Circuit on December 23, 2013, and that same day, Petitioners moved for an injunction pending appeal. That motion was granted by the D.C. Circuit on December 31, 2013. As of this filing, no briefing schedule or oral argument date has been set.

REASONS FOR GRANTING THE PETITION

The Government has promulgated a regulatory mandate that exposes Catholic and likeminded organizations to draconian fines unless they abandon their religious convictions and take actions they believe make them complicit in the provision of abortion-inducing products, contraceptives, and sterilization for their employees and students. Incredibly, the Government *concedes* both that Petitioners sincerely believe the regulations at issue force them to act in violation of their religious beliefs and that circuit precedent bars the conclusion that those regulations can satisfy strict scrutiny. Pet. App. 133a–40a. In other words, the Government has adopted the unprecedented position that it can force believers to violate their religious beliefs based on nothing more than its ipse dixit. This extraordinary conclusion violates the Religious Freedom Restoration Act ("RFRA") and flies in the face of this Court's clear precedent, which establishes that absent interests of the highest order, the Government cannot compel an individual "to perform acts undeniably at odds" with his religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Government's "remarkable" position that it can force entities—much less religious organizations whose free exercise rights receive "special solicitude" in our constitutional system, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012)—to take actions contrary to their beliefs based on nothing more than its own say so makes this case "of such imperative public importance" that a "deviation from normal appellate practice" is justified, Sup. Ct. R. 11. Indeed, this Court has acknowledged the significance of the issues at stake in this litigation by granting certiorari in cases involving for-profit corporations challenging the Mandate. *See Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354; *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356. The ultimate question presented in those cases—whether the parties' free exercise rights "are violated by the application of the contraceptive-coverage Mandate of the [Affordable Care Act]"[5]—is the same question presented here and in numerous nonprofit cases currently dividing the lower courts. As this Court will already be addressing application of the Mandate to for-profit companies, Petitioners submit it would be appropriate to decide the rights of nonprofit entities at the same time. *See Gratz v. Bollinger*, 539 U.S. 244, 260 (2003).

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[5] Question Presented, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, *available at* http://www.supremecourt.gov/qp/13-00356qp.pdf.

I. THIS CASE INVOLVES ISSUES OF IMPERATIVE PUBLIC IMPORTANCE ALREADY PENDING BEFORE THIS COURT

It should go without saying that the issues at stake are of "imperative public importance." Quite literally, the question before this Court is whether the Government can force religious believers to take actions they believe to be immoral. It is hard to imagine a question closer to the heart of the guarantee of religious freedom embodied in both the First Amendment and RFRA. "The Framers of the Constitution clearly embraced the philosophical insight that government coercion of moral agency is odious," *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013), and absent interests of the highest order, this Court has never endorsed such a practice.

Indeed, this Court has already recognized the "imperative public importance" of the issues presented in this litigation by granting certiorari in *Hobby Lobby* and *Conestoga*. It is well established that the pendency of cases involving similar issues counsels in favor of a grant of certiorari before judgment. *See, e.g.*, *Gratz*, 539 U.S. at 260 (noting that certiorari before judgment was granted to enable the Court to address the question presented in *Grutter v. Bollinger* "in a wider range of circumstances"); *Taylor v. McElroy*, 360 U.S. 709, 710 (1959) (per curiam) (granting certiorari before judgment "because of the pendency here of *Greene v. McElroy*," a case involving similar issues); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (granting certiorari before judgment "by reason of the close relationship of the important question raised to the question

presented in *Porter v. Lee*").[6] The grant of certiorari before judgment in such cases "present[s] the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles [those cases] involve than if only one case is considered, or if they are resolved separately and at different times or in different terms." Pet. for Certiorari at 15, *Gratz*, 539 U.S. 244 (No. 02-516).

Should this Court reach the merits in *Hobby Lobby* and *Conestoga*, it will undeniably have to resolve questions at issue in this litigation. For example, the Court will have to decide whether using threats of onerous fines to force entities to take actions that violate their religious beliefs imposes a substantial burden on religious exercise. The same question is at issue in this litigation. If the Court concludes that such action imposes a substantial burden, it will then have to determine whether that burden is the least restrictive means of furthering a compelling government interest. Again, the same question is at issue here.

This remains true despite the fact that the parties in *Hobby Lobby* and *Conestoga* are not eligible for the "accommodation," while the majority of Petitioners here are. Because RFRA protects "*any* exercise of religion," 42 U.S.C. §§ 2000bb-2(4),

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[6] *See also United States v. Booker*, 543 U.S. 220, 229 (2005); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963); *United States v. Thomas*, 361 U.S. 950 (1960) (per curiam); *Reid v. Covert*, 354 U.S. 1, 5 (1957); *Graham v. Goodcell*, 282 U.S. 409, 411–12, 415 n.2 (1931).

2000cc-5(7)(A) (emphasis added), the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis. Thus the fact that the parties in the for-profit cases exercise their religion by refusing to themselves include contraceptive coverage in their health plans, while Petitioners exercise their religion by, *inter alia*, refusing to designate a third party to provide the objectionable coverage through self-certification is of no moment. The legal questions remain the same in both contexts: has the Government placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs"? *Thomas*, 450 U.S. at 718. If so, is that substantial burden the least restrictive means of furthering a compelling government interest? 42 U.S.C. § 2000bb-1.

Indeed, this Court has recognized that certiorari before judgment is appropriate where, as here, the Government has attempted (but failed) to remove the alleged infirmities of a law pending before the Court in a related matter. In *United States v. Butler*, 297 U.S. 1 (1936), the Court considered the constitutionality of the Agricultural Adjustment Act of 1933. During the pendency of that litigation, Congress amended the Act in 1935. So as to decide the validity of the Act once and for all, this Court granted certiorari before judgment in *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110 (1936), a case challenging the constitutionality the 1935 amendment. One week after striking down the Act in *Butler*, the Court held in *Rickert* that the 1935 amendment "do[es] not cure the infirmities of the original act which were the basis of the decision in [*Butler*]." *Id.* at 113. So too here. The Government apparently recognized the illegality of its initial

regulation and purported to fix the problem by amending the Mandate. The accommodation failed to "cure the infirmities of the original" Mandate, *id.*, and as in *Rickert*, certiorari before judgment is appropriate to resolve the validity of both the Mandate and the Government's subsequent amendment.

Ultimately, granting certiorari before judgment would allow this Court to resolve the core question of whether and how RFRA protects any employer—for-profit or nonprofit—from the Mandate. Should the Court rule in favor of *Hobby Lobby* and *Conestoga*, there can be little doubt that the Government will continue to argue that such a holding does not bind courts considering application of the Mandate to nonprofit entities (as it has done in this case, though the D.C. Circuit has enjoined application of the Mandate to for-profit entities, *Gilardi*, 733 F.3d 1208). Failure to decide the for-profit and nonprofit cases together thus creates the potential for an incongruous situation in which the free exercise rights of for-profit organizations are secure while the free exercise rights of nonprofit entities remain in doubt. *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954) (granting certiorari before judgment to allow the case to be heard with *Brown v. Board of Education*, 347 U.S. 483 (1954), preventing a situation in which the states would be required to integrate their schools while the District of Columbia would not).

II. THIS ISSUES PRESENTED IN THIS CASE HAVE DIVIDED THE LOWER COURTS

The courts below have already issued a number of diverging opinions on the validity of the accommodation. *See United States v. Mistretta*, 488

U.S. 361, 371 (1989) (identifying "disarray among the Federal District Courts" as a reason for granting certiorari before judgment). At the time of this filing, thirteen district courts have granted permanent or preliminary relief to plaintiffs challenging the Mandate, and five have declined to do so. [7] Those five cases have been appealed, and the

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[7] *Compare Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 2:12 CV 92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-CV-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same)*; Grace Schs. v. Sebelius*, No. 3:12-CV-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene*, 2013 WL 6804265 (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12), *with Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013) (denying injunction); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013) (Doc. 40) (same); *Catholic Diocese of Nashville v. Sebelius*, No.

circuits have split with respect to whether injunctive relief pending appeal is warranted. The D.C. Circuit and the Sixth Circuit issued injunctions, while the Seventh and Tenth declined to do so.[8] This Court, in turn, has temporarily enjoined the case arising out of the Tenth Circuit.[9] Meanwhile, numerous additional cases are pending.[10]

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3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013) (same); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013) (same); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013).

[8] *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (granting injunction pending appeal); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-5368 (D.C. Cir. Dec. 31, 2013) (same); *Mich. Catholic Conf. v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same), *with Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Dec. 30, 2013) (denying injunction); *Little Sisters of the Poor v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (same).

[9] *Little Sisters of the Poor v. Sebelius*, No. 13A691, 2013 WL 6869391 (U.S. Dec. 31, 2013).

[10] *E.g.*, *Ave Maria v. Sebelius*, No. 2:13-cv-630 (M.D. Fla.); *Belmont Abbey v. Sebelius*, No. 1:13-cv-01831 (D.D.C.); *Colo. Christian Univ. v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo.); *Archdiocese of St. Louis v. Sebelius*, No. 4:13-cv-02300 (E.D. Mo.); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489 (N.D. Ga.); *Louisiana Coll. v. Sebelius*, No. 12-cv-463 (W.D. La.); *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100 (N.D. Iowa); *Fellowship of Catholic Univ. Students*

In short, the issues presented in this case will eventually arrive at this Court. There is no advantage, however, to waiting for those issues to percolate. The questions here are legal ones virtually identical to those in *Hobby Lobby* and *Conestoga*. This Court, moreover, already has the benefit of appellate decisions addressing the application of the Mandate to for-profit entities, as well as numerous district court opinions on file in the nonprofit context. Granting certiorari now will save parties from the significant time and expense of additional litigation and uncertainty and relieve the courts of protracted battles over legal issues ripe for consideration.

III. THE MANDATE VIOLATES RFRA

Petitioners' right to relief under RFRA is readily apparent. In short, Petitioners believe compliance with the Mandate violates their religious beliefs. The district court said it does not. As such determinations are for individuals and religious institutions, not courts, and because the Mandate cannot survive strict scrutiny, Petitioners have standing and will prevail on their RFRA claim.

A. The Mandate Substantially Burdens Petitioners' Religious Exercise

When, as here, a claimant's sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1)

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v. Sebelius, No. 1:13-cv-03263 (D. Colo.); *Right to Life of Mich. v. Sebelius*, No. 1:13-cv-01202 (W.D. Mich.); *Dobson v. Sebelius*, No. 1:13-cv-03326 (D. Colo.).

identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists when a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").[11]

Under the first step, the court's inquiry is necessarily limited. The nature of a plaintiffs' religious exercise is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *United States v. Lee*, 455 U.S. 252, 257 (1982) (same). "Courts are not arbiters of scriptural interpretation" and 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*, 450 U.S. at 716; *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (same). It is thus left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is

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[11] This articulation of the substantial burden test has been reaffirmed by every appellate court to consider the question in the context of the Mandate. *Korte v. Sebelius*, 735 F.3d 654, 682–85 (7th Cir. 2013); *Gilardi*, 733 F.3d at 1216–18; *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc).

not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18.

Here, Petitioners exercise their religion by, *inter alia*, refusing to take certain actions that facilitate access to abortion-inducing products, contraceptives, sterilization, or related education and counseling. By threatening Petitioners with onerous penalties unless they take precisely those actions their religious beliefs forbid, the Mandate substantially pressures Petitioners to act contrary to their religious beliefs.

1. Petitioners Exercise Their Religion by Refusing to Comply with the Mandate

The "exercise of religion" includes "the performance of (or abstention from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "*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) (emphasis added). In this case, Petitioners exercise their religion by refusing to participate in a regulatory scheme to provide their employees with access to abortion-inducing products, contraceptives, sterilization, and related education and counseling. Most obviously, Petitioners believe

they cannot submit the required self-certification, because doing so would render them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218. The Mandate, however, requires Petitioners both to authorize provision of the objectionable coverage, and also to take numerous additional steps in furtherance of this regulatory scheme.

In particular, Petitioners' undisputed affidavits establish that their Catholic faith prohibits them from, among other things: (1) providing contraceptive coverage directly, (2) authorizing or designating someone else to provide the coverage by completing and filing the self certification, (3) maintaining or entering into an arrangement with an insurance company or third-party administrator where such entities are authorized to provide the objectionable coverage to Petitioners' employees and students, and (4) identifying benefits-eligible employees or providing other information to their insurance company or third-party administrator that will facilitate coverage for the objectionable products and services.[12] Each of these actions or forbearances constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because, again, Petitioners sincerely believe that, under the Catholic doctrines of material cooperation and "scandal," taking these actions would make them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218.

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[12] Pet. App. 142a–45a, 147a–48a, 151a–54a, 156a–57a, 160a–63a, 165a–67a, 170a–73a, 175a–77a, 179a–82a, 184a–86a, 188a–91a, 193a–94a, 197a–200a, 202a–03a, 207a–209a.

Critically, there is no dispute as to whether Petitioners sincerely believe they may not take the specific actions necessary to comply with the "accommodation." As the Government conceded below: "[W]e understand the plaintiffs believe that participating in the accommodation requires facilitation of contraceptive coverage and that that's a violation of their religious beliefs. We don't question that. We're not asking Your Honor to question that either." Pet. App. 135a. That being the case, to determine whether the Mandate imposes a substantial burden on Petitioners' religious exercise, the only question is whether Petitioners face "substantial pressure" to take these actions.

2. The Mandate Places "Substantial Pressure" upon Petitioners to Violate Their Religious Beliefs

Once Petitioners' refusal to facilitate contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As this Court has held, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18. In *Yoder*, for example, this Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 208, 218. Likewise, in *Thomas*, 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 713–18.

Here, the Mandate plainly imposes a "substantial burden" on Petitioners' religious exercise. Failure to take the actions required by the Mandate will subject Petitioners to potentially fatal fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). If Petitioners drop health coverage altogether, they will be subject to annual fines of $2,000 per full-time employee after the first thirty employees, *id.* § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer a crucial healthcare benefit.[13] These penalties, which could involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

In short, Petitioners are faced with a stark choice: violate their religious beliefs or pay potentially crippling fines. This Court has repeatedly held that compelling a plaintiff to act in violation of his religious beliefs is the very definition of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *see also Yoder*, 406 U.S. at 218. As the Seventh Circuit explained: "[t]he contraception mandate forces [Petitioners] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

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[13] Pet. App. 145a, 153a–54a, 162a–63a, 167a, 173a, 182a, 190a–91a, 199a, 204a, 209a.

B. The Mandate Cannot Survive Strict Scrutiny

As Petitioners have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–31; 42 U.S.C. § 2000bb-1. And as every court to consider the question in the context of the Mandate has concluded, the Government cannot meet this demanding standard.[14]

1. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government

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[14] *E.g.*, *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *E. Tex. Baptist*, 2013 WL 6838893, at *23–24; *RCNY*, 2013 WL 6579764, at *16–19; *Zubik*, 2013 WL 6118696, at *28–32; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

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 demonstrate a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. This, it has not begun to do.

Here, the Government has proffered two generalized interests: (i) "public health" and (ii) "ensuring that women have equal access to health care." 78 Fed. Reg. at 39,872. "[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Moreover, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government

cannot claim an interest of the "highest order" because the Mandate exempts millions of employees—through "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686. Simply put, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 733 F.3d at 1222–23.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). As this Court has observed, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* pp. 21–22. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at

39,887. In the first place, according to the D.C. Circuit, "the science [behind that claim] is debatable and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Petitioners' employees or that the Mandate would significantly increase contraception use among those employees.[15] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

2. The Mandate Is Not the Least Restrictive Means of Furthering the Government's Asserted Interests

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "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). 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.'"

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[15] In fact, recent scholarship suggests otherwise. Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 380 (2013).

Sherbert, 374 U.S. at 407. To meet its burden, the Government must engage in a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citation omitted).

Once again, every court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[16] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing nonprofit religious organizations to provide access to free contraception in violation of their sincere religious beliefs. *Korte*, 735 F.3d at 686. These include the same alternatives Petitioners proposed here: "The Government could provide the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 2013 WL 6579764, at *18–19; *see also Korte*, 735 F.3d at 686 (same); *Gilardi*, 733 F.3d at 1222 (same). While Petitioners in no way recommend these alternatives, and oppose many of them as a

[16] *E.g.*, *E. Tex. Baptist*, 2013 WL 6838893, at *24; *RCNY*, 2013 WL 6579764, at *18–19; *Zubik*, 2013 WL 6118696, at *30–32; *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

matter of policy, that they remain available to the Government shows the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no justification for forcing Petitioners to violate their religious beliefs.

C. The District Court's Holding Was in Error.

The district court, however, ignored the straightforward analysis laid out above. Instead, it impermissibly arrogated unto itself the authority to determine whether compliance with the Mandate "actually" violated Petitioners' beliefs, Pet. App. 35a, ultimately concluding that under the "accommodation," Petitioners are not required to act in a manner that constitutes impermissible cooperation with immoral conduct or gives rise to scandal, Pet. App. 35a–49a. Based on this erroneous conclusion, the district court held that though Petitioners alleged the Mandate forced them to take actions that violate their religious beliefs, all Petitioners but Catholic University lacked standing to even challenge the Mandate, Pet. App. 59a–66a, and that, in any event, all Petitioners failed to demonstrate that the Mandate imposed a substantial burden on their exercise of religion, Pet. App. 35a–49a, 65a. In so holding, the district court impermissibly made itself an "arbiter[] of scriptural interpretation." *Thomas*, 450 U.S. at 715, 718.

1. The District Court Erred in Dismissing Church-Plan Petitioners for Lack of Standing

The district court erroneously held that eight out of the nine Petitioners lack standing because they participate in the self-insured health plan of the Archdiocese, which is a "church plan" exempt from

ERISA. Pet. App. 59a–66a. This holding is based on the Government's assertion that, if Petitioners' church-plan third-party administrator ("TPA") refuses to provide Petitioners' employees with the objectionable payments upon receipt of Petitioners' self-certification, then there is, as of now, no enforceable penalty against the TPA. But even if that is true, it is undisputed that the regulations that apply *to Petitioners* force *Petitioners* to engage in conduct contrary to their religious beliefs. Namely, Petitioners are required, on pain of substantial penalties, to submit a self-certification that provides their TPA with legal authority to provide their employees with payments for contraceptives. This is plainly sufficient to establish Article III standing,[17] and the district court held otherwise only by impermissibly concluding that the mandated conduct did not violate Petitioners' religious beliefs.

At the outset, it is worth noting that the regulations contain no exemption for church-plan TPAs. Rather, they require *all* TPAs to provide contraceptive payments upon receipt of an eligible organization's self-certification. *See* 29 C.F.R. § 2590.715–2713A(b)(2) (stating that "[i]f a third party administrator receives a copy of the [self]

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[17] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (explaining that when "the plaintiff is himself an object of" regulation, "there is ordinarily little question" that the regulation "has caused him injury"); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (stating that a plaintiff "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning . . . the Free Exercise Clause").

certification . . . the third party administrator shall provide or arrange payments for contraceptive services"). Moreover, the exact same requirements are spelled out in 26 C.F.R. § 54.9815–2713A(b)(2), a regulation issued not pursuant to ERISA, but under the Internal Revenue Code. The district court's entire, erroneous theory of standing, therefore, rests on the speculative notion that TPAs operating in a highly regulated industry will flout their legal obligations. But the "possibility that third parties may violate the law is too speculative to defeat standing." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994).

More importantly, even if the Government is correct, the Mandate *still* requires Petitioners to engage in conduct contrary to their religious beliefs. Regardless of what Petitioners' TPA must do, it is undisputed that the regulations require *Petitioners* to, *inter alia*, (a) provide their employees with contraceptive coverage directly, or (b) issue a self-certification authorizing their TPA to do so. It is equally undisputed that both of those actions are contrary to Petitioners' sincerely held religious beliefs and that the Government will impose crushing fines on them if they do not comply.

Indeed, in response to the Government's argument, each church-plan Petitioner issued an undisputed sworn affidavit specifically stating that its "sincerely held religious beliefs" "not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so—even if the third-party administrator ultimately has the discretion not to

provide such payments and/or coverage." [18] As Petitioners explained below, the certification requirement is akin to requiring Petitioners to certify that they oppose the death penalty and then making the issuance of that certification the legal authority for the executioner to flip the switch. Regardless of what the executioner does, issuing that certification would be contrary to Petitioners' religious beliefs because of what it requires *Petitioners* to do—namely, authorize a third-party to engage in immoral conduct.

The notion that Petitioners lack standing to challenge regulations that apply directly to them and require them to take actions they find religiously objectionable, is both erroneous and unprecedented. *See Lujan*, 504 U.S. at 561–62. This is precisely why every other court to consider this question has concluded that church-plan organizations identical to Petitioners have Article III standing. *RCNY*, 2013 WL 6579764, at *6–7; *Reaching Souls*, 2013 WL 6804259, at *4–5; *Mich. Catholic Conf.*, 2013 WL 6838707, at *4; *Little Sisters*, 2013 WL 6839900, at *5–7; *E. Tex. Baptist*, 2013 WL 6838893, at *12–13; *Beaumont*, 2014 WL 31652, at *5. As Judge Cogan explained:

> [Plaintiffs] alleged injury is that the Mandate renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. This alleged spiritual complicity is independent of whether the scheme

[18] Pet. App. 147a–48a, 156a–57a, 165a–67a, 175a–77a, 184a–86a, 193a–94a, 202a–03a.

> actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPA, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

RCNY, 2013 WL 6579764, at *7. Because Petitioners are "directly affected by the [regulations] against which their complaints are directed," their standing is indisputable. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

2. The Mandate Substantially Burdens Petitioners' Religious Exercise

The district court also concluded that even if the church-plan Petitioners had standing, the Mandate does not substantially burden their exercise of religion. Pet. App. 65a. That conclusion, like the district court's conclusion that the Mandate does not burden Catholic University's exercise of religion, was

erroneous.[19] Petitioners believe that participation in the accommodation would impermissibly "facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling" in a manner contrary to the Catholic doctrines of material cooperation and scandal. *Supra* Part III.A.1. Under the established law described above, the district court was required to accept that description of Petitioners' beliefs. As in *Thomas*, Petitioners "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable," 450 U.S. at 715, 718; if Petitioners interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, as they do, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699.

But instead of accepting the line Petitioners drew, the district court sought to "determine whether compliance with the [Mandate] *actually constitutes* compelled 'facilitation.'" Pet. App. 35a (emphasis added). In other words, the district court "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic

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[19] Although the district court's substantive analysis applied to Catholic University, based on its summary holding that the other plaintiffs likewise failed to establish a substantial burden, Pet. App. 65a, Petitioners treat the district court's reasoning as to Catholic University as applicable to all Petitioners.

Church?" *Korte*, 735 F.3d at 685.[20] The district court's answer was ultimately "no," but of course, "[n]o civil authority can decide that question." *Id.*; *supra* Part III.A.

The district court claimed reliance on this Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986) and the D.C. Circuit's decision in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). But those cases stand for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Id.* at 679 (emphasis added). In *Bowen*, for example, this Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Appellee's religious exercise was not substantially burdened because his objection was to the conduct of a third party; namely, to the

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[20] Indeed, the district court's opinion is littered with unconstitutional evaluations of Petitioners' religious beliefs that run directly contrary to Petitioners express representations. *Compare* Pet. App. 40a (stating that the Mandate "does not place Catholic University in a position where it will give rise to 'scandal by acting in a way inconsistent with church teachings'"), *with* Pet. App. 209a ("Were the University to comply with the Mandate . . . CUA would commit the further offense of giving scandal."). *Compare* Pet. App. 42a (declaring that the "self-certification . . . cannot be accurately characterized as an act that 'facilitates' the employees' access to the services"), *with* Pet. App. 208a (listing the self-certification as among the acts that impermissibly "facilitate[s] access to" the mandated coverage "in a manner contrary to CUA's sincere religious beliefs").

government's use of a social security number to administer his daughter's public welfare benefits. *Id.*[21] Likewise, in *Kaemmerling*, the plaintiff did not object to any action he was forced to take, but only "to the government extracting DNA information from . . . specimen[s]" *it already had*. 553 F.3d at 679. The D.C. Circuit thus concluded that Kaemmerling failed to state a RFRA claim because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.*

Here, in contrast, the provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Petitioners] play no role." *Id.* Whereas Kaemmerling "did not object to what the government forced him to do," Petitioners "vigorously object on religious grounds to the act[s] the government requires *them* to perform, not merely to later acts by third parties." *E. Tex. Baptist*, 2013 WL 6838893, at *18; *supra* Part III.A.1. The district court had no authority to discount the significance of these actions. While the court describes the self-certification as

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[21] If anything, *Bowen* supports Petitioners' position. The Appellee in that case objected not only to the government's use of his daughter's social security number, but also to the *separate* requirement that *he provide* the government with that number in order for her to receive benefits. 476 U.S. at 701–12 (opinion of Burger, C.J.). Though it did not decide the question due to a dispute over mootness, a majority of the Court would have held that this requirement imposed a substantial burden on Appellee's religious exercise. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

nothing more than an "organization rais[ing] its hand and say[ing] 'I object,'" Pet. App. 44a, Petitioners attach far more serious consequences to the act. The Court might believe "'it's just a form,'" *RCNY*, 2013 WL 6579764, at *13, but for Petitioners, submitting that form makes them "complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1217–18. "It is not for [a] Court to say otherwise." *RCNY*, 2013 WL 6579764, at *14.

Continuing to parse Petitioners' religious beliefs, the district court claimed that Petitioners object only to the *consequences* of their actions, not to the actions themselves. Pet. App. 42a (stating that Petitioners object to the "consequences of the self-certification, not to the action of certifying itself"); Pet. App. 43a ("[T]he reason plaintiffs' object to the self-certification is that they object to what happens after someone else receives it."). This is both incorrect and irrelevant. In the first place, Petitioners' undisputed affidavits state their religious objections to taking the actions the Mandate requires of *them*. *See supra* Part III.A.1. And in any event, there is no authority for the bizarre notion that RFRA does not protect the religious exercise of plaintiffs who object to taking certain actions because of their consequences. After all, the consequences of an action, or the context in which the action takes place, can determine whether the action itself is morally acceptable. For example, giving a neighbor a ride to the bank may not, in and of itself, be morally objectionable, but it would be if one knows that the neighbor intends to rob the bank.

Indeed, the district court's conclusion was inconsistent with this Court's precedent. For example, in *Lee,* the Amish plaintiff had no inherent

objection to the payment of taxes; rather, he objected to the payment of taxes when the "consequence" of that action was to "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139. Likewise, the pacifist plaintiff in *Thomas* had no inherent objection to the act of hammering steel into cylinders; he objected to hammering steel into cylinders when those cylinders would be placed atop military tanks and used to prosecute the war effort. *See Thomas*, 450 U.S. at 715; *RCNY*, 2013 WL 6579764, at *14 (explaining that the Government "transform[ed] a voluntary act that plaintiffs believe to be consistent with their religious beliefs into a compelled act that they believe forbidden"); *Zubik*, 2013 WL 6118696, at *25 (analogizing to "a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.").[22]

[22] Despite the district court's claim, the Mandate substantially burdens the religious exercise of Petitioners Don Bosco and Catholic Information Center. Pet. App. 65a. Though not statutorily required to provide health care, 26 U.S.C. § 4980H, if these Petitioners provide noncompliant health coverage, they will be fined $100 a day per affected beneficiary, *id.* § 4980D(b). Moreover, dropping coverage to avoid the Mandate would inhibit their ability to exercise their religion and would be economically ruinous. Pet. App. 167a, 204a; *Hobby Lobby*, 723 F.3d at 1140–41; *Legatus*, 2013 WL 6768607; *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 3071481, at *9–10 (W.D. Pa. June 18, 2013). Finally, although the

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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January 8, 2014

(continued…)

Archdiocese meets the Mandate's definition of a "religious employer," it is still injured by the Mandate because many of the Archdiocese's non-exempt affiliates offer their employees health coverage through the Archdiocese's plan. The Archdiocese must therefore either maintain an insurance plan with a third-party administrator authorized to provide contraceptive benefits to its affiliates' employees, or else decline to extend its heath plan to those affiliates. Pet. App. 215a–16a.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 13-1441 (ABJ)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

ORDER

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that defendants' motion for summary judgment [Dkt. # 26] is GRANTED with respect to plaintiff Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to

law claims in Count VII. Plaintiffs' cross- motion for summary judgment [Dkt. # 27] is denied with respect to those claims.

It is FURTHER ORDERED that defendants' motion to dismiss [Dkt. # 26] the church plan plaintiffs' RFRA claims in Count I, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction is GRANTED. Plaintiffs' cross-motion for summary judgment on those counts is moot.

It is FURTHER ORDERED that plaintiff Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I, and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV are GRANTED, and defendants' motion for summary judgment with respect to those claims is denied. Defendants are permanently enjoined from enforcing the contraceptive mandate as it is currently revised by 29 C.F.R. § 2590.715-2713A(b) against plaintiff Thomas Aquinas College, and the prohibition on influencing a third-party administrator in 29 C.F.R. § 2590.715-2713A(b)(l)(iii) ("The eligible organization . . . must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.") is hereby declared to be invalid and unenforceable. This is an appealable order.

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AMY BERMAN JACKSON
United States District Judge

DATE: December 20, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 13-1441 (ABJ)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

This case concerns the requirements imposed on certain employers under the Affordable Care Act to offer healthcare plans to their employees that provide cost-free coverage for contraceptive services. Plaintiffs the Roman Catholic Archbishop of Washington ("the Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., Catholic University of America, and Thomas Aquinas College

have filed this case against defendants Kathleen Sebelius, the Secretary of Health and Human Services; Thomas Perez, the Secretary of Labor; Jacob Lew, the Secretary of the Treasury; the U.S. Department of Health and Human Services; the U.S. Department of Labor; and the U.S. Department of the Treasury. In their complaint, plaintiffs allege that the contraceptive mandate violates the Religious Freedom Restoration Act ("RFRA") as applied to them, as well as the Free Exercise Clause, the Free Speech Clause, and the Establishment Clause of the First Amendment to the U.S. Constitution. Compl. ¶¶ 237–312 [Dkt. # 1]. They also assert that defendants violated the Administrative Procedure Act and advanced an erroneous interpretation of the religious employer exemption to the mandate when they adopted the contraceptive mandate in its final form. *Id.* ¶¶ 313–39.

Plaintiffs filed a motion for preliminary injunction in light of the impending January 1, 2014 contraceptive mandate enforcement date. Pls.' Mot. for Prelim. Inj. [Dkt. # 6]. Pursuant to Federal Rule of Civil Procedure 65(a)(2), this Court consolidated the motion with the merits on September 26, 2013. Defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and to dismiss plaintiffs' Establishment Clause count under Federal Rule of Civil Procedure 12(b)(1). Defs.' Mot. to Dismiss or, in the alt., for Summ. J. ("Defs.' Mot.") [Dkt. # 26]; Defs.' Mem. in Supp. of Mot. to Dismiss or, in the alt., for Summ. J. ("Defs.' Mem.") [Dkt. # 26-1]. They also moved, in the alternative, for summary judgment under Federal Rule of Civil Procedure 56. Defs.' Mot. at 1; Defs.' Mem. at 9. Plaintiffs then filed a cross-motion for summary

judgment. Pls.' Opp. & Cross-Mot. for Summ. J. ("Pls.' Opp. & Cross-Mot.") [Dkt. # 27-1]. The case has been fully briefed, and the Court held oral argument on November 22, 2013.

For the reasons stated below, the Court will grant defendants' motion for summary judgment with respect to Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII.[1] The Court will also grant defendants' motion to dismiss the RFRA claims in Count I that are advanced by those plaintiffs who are covered under the Archdiocese's healthcare plan, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Finally, the Court will grant Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I, and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV.

Plaintiffs allege that the contraceptive mandate burdens their religious exercise because it requires

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[1] Although defendants' motion is styled as a motion to dismiss, or in the alternative, for summary judgment, the Court will decide those claims for which it has jurisdiction under the summary judgment standard because plaintiffs have alleged enough facts to satisfy Iqbal's and Twombly's pleading requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

them "to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs." Compl. ¶ 241. This is practically identical to the claim that the Archdiocese and four of the other plaintiffs advanced in the suit they filed in this Court in May of 2012. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-0815, Compl. ¶ 181 [Dkt. # 1] ("The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs."). Plaintiffs' religious beliefs remain the same, but in the interim, the law has changed. Defendants have created an accommodation for the specific purpose of alleviating the burden that the mandate imposes on religious organizations that are not entirely exempt. And in the case of all but one of the plaintiffs—the self-insured Thomas Aquinas College—the Court finds that the law no longer requires plaintiffs to provide, pay for, or facilitate access to contraception. Thus, it does not require plaintiffs to "modify [their] behavior and to violate [their] beliefs," as the Supreme Court defined an unacceptable burden more than thirty years ago in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981), or to "meaningfully approve and endorse the inclusion of contraceptive coverage" in their plans, as the D.C. Circuit described the burden in the context of the mandate without the accommodation just last month. *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1217 (2013).

Religious organizations like Catholic University—that offer health insurance to their employees

through an insured group plan—may avail themselves of the accommodation simply by memorializing their objection to the mandate in writing. The insurer is obligated under the rules to exclude the coverage from the University's plan and to provide and pay for the coverage itself, and therefore, as the Court explains in detail below, Catholic University has no grounds for a RFRA claim. Plaintiffs contend that the act of self-certifying – an act that consists of nothing more than plaintiffs' reiteration of their already public objection to participation in the requirements of the mandate—is a substantial burden on the exercise of their religion in and of itself. But that argument so blurs the demarcation between what RFRA prohibits—that is, governmental pressure to modify one's own behavior in a way that would violate one's own beliefs—and what would be an impermissible effort to require others to conduct their affairs in conformance with plaintiffs' beliefs, that it obscures the distinction entirely. RFRA was enacted to shield religious adherents from governmental interference with their own religious exercise and to protect them from being required to perform odious acts themselves. Plaintiffs articulate this distinction clearly: "Plaintiffs simply invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Mot.") at 20 [Dkt # 6-1]. Since the rules that apply in the insured group plan context do not involve that compulsion, they survive the RFRA challenge. RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely based upon religion.

But Thomas Aquinas College is covered by the set of regulations directed towards religious organizations that are self-insured, and unlike all of the other plaintiffs with self-insured plans, Thomas Aquinas College does not offer its employees coverage through a plan offered by the church, which cannot be compelled to comply with the mandate. In the case of a self-insured entity like Thomas Aquinas, the newly enacted regulations fall short of the mark. Since the accommodation imposes a duty upon the religious organization to contract with a willing third- party administrator that will arrange for the payments for contraceptives, they compel the organization to take affirmative steps—to *do* something—that is in conflict with the tenets of its faith. And therefore, defendants are enjoined from enforcing the mandate against Thomas Aquinas College.

RFRA involves the application of a more lenient standard than the one that applies under the First Amendment, though, and all of the plaintiffs have failed to establish any violation of the Free Exercise Clause. The contraceptive coverage law is neutral and generally applicable to all employers, and it does not target religion. Nothing about the regulatory scheme violates the Establishment Clause either. The fact that the Archdiocese, a church, is completely exempt, while the educational and charitable organizations must seek relief through the accommodation does not constitute unlawful discrimination among denominations, and it does not entangle the government in religious affairs.

With one important exception, the law also passes muster under the Free Speech Clause of the First

Amendment. The fact that counseling is included within the set of services to be offered, and the requirement that a religious organization certify its objection to providing contraceptive services to be eligible for the accommodation do not violate the Constitution. But defendants cannot lawfully prohibit a self-insured religious organization from seeking to influence—directly or indirectly—a third-party administrator's decision on whether to remain in a contractual relationship with a plan. That is a content-based restriction on expression that is not justified by the government's proffered interest.

Finally, the Court finds that defendants did not violate the Administrative Procedure Act, that the accommodation and the exemption do not lead to unlawful interference with internal church governance, and that there is no plaintiff that can allege an injury arising out of the challenged interpretation of how the accommodation is to be applied.

BACKGROUND

I. Statutory and Regulatory Background

A. The Affordable Care Act

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), which together make up the Affordable Care Act ("ACA"). 78 Fed. Reg. 39870-01, 39870 (July 2, 2013). The ACA made changes to the existing Public Health Service Act and incorporated those changes into the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code. *Id.*

Two changes made by the ACA are pertinent to this case. The first change is the requirement that employers with more than fifty full-time employees must provide their employees with a health insurance plan that complies with the ACA's minimum essential coverage requirements. 26 U.S.C. § 4980H (2012); *see also* 42 U.S.C. § 300gg-13 (2012). Failure to comply with this provision—often referred to as the "employer mandate" —results in substantial penalties. *See* 26 U.S.C. § 4980H.

The second pertinent change relates to the "essential minimum coverage" that must be offered by an employer's plan. The ACA provides that all insurance plans must cover "preventive care," and specifically, that they "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force," and "(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," an agency within the U.S. Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(1), (4).

B. The Contraceptive Mandate

Pursuant to its delegated authority under ACA section 300gg-13(a)(4), HHS requested that the Institute of Medicine ("IOM")—an organization established by the National Academy of Sciences and funded by Congress—provide recommendations to HHS regarding "what preventive services are

necessary for women's health and well-being and should be considered in the development of comprehensive guidelines for preventive services of women." Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps ("IOM Report") iv, 2, AR 289, 300. After convening a sixteen-member committee, IOM proposed numerous recommendations regarding what preventive services should be covered and how HHS could continue to keep the list up-to-date. *See generally id.* The recommendation most relevant to this case was IOM's suggestion that the definition of "preventive health services" include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" (collectively, "contraceptive services"), which includes diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices. *Id. at* 10, 105, AR 308, 403. After reviewing IOM's recommendations, defendants ultimately adopted the suggestion that the preventive services for which coverage would be required be defined to include all Food and Drug and Administration ("FDA") approved contraceptive services. 78 Fed. Reg. at 39870. That regulation is commonly referred to as "the contraceptive mandate."

In promulgating the initial contraceptive mandate, defendants recognized the potential religious implications and authorized the creation of a religious employer exemption to the contraceptive mandate's requirements. 45 C.F.R. § 147.131(a) (2013); *see also* 78 Fed. Reg. at 39871, 39896. An organization that satisfies the definition of a religious employer derived from the Internal Revenue Code is

wholly exempt from the requirement to cover contraceptive services.[2] 45 C.F.R. § 147.131(a); 78 Fed. Reg. at 39871, 39896. All other employers, including religious organizations that did not meet the definition of a religious employer, were required to comply with the requirements of the contraceptive mandate if they provided a health insurance plan to their employees, regardless of whether they provided the plan voluntarily or because they were subject to the employer mandate.

Religious organizations that did not qualify for the exemption voiced their strong objection to the coverage requirements. In response to their concerns, HHS, the Department of Labor, and the Department of the Treasury (collectively, "the Departments") "issued guidance establishing a temporary safe harbor from enforcement of the contraceptive coverage requirement by the Departments for group

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[2] The religious employer exemption originally defined "religious employer" as one that:

> (1) has the inculcation of religious values as its purpose;
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> (2) primarily employs persons who share its religious tenets;
>
> (3) primarily serves persons who share its religious tenets; and
>
> (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the [Internal Revenue] Code.

78 Fed. Reg. at 39871. The definition has since been altered to state that "a 'religious employer' is 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." 45 C.F.R. § 147.131(a); *see also* 78 Fed. Reg. at 39896.

health plans established or maintained by certain nonprofit organizations with religious objections to contraceptive coverage." 78 Fed. Reg. at 39871. During that safe harbor, the Departments published an advance notice of proposed rulemaking that solicited comments on how to achieve the goal of ensuring "more women broad access to recommended preventive services, including contraceptive services, without cost sharing, while simultaneously protecting certain additional nonprofit religious organizations with religious objections to contraceptive coverage." *Id.* At the end of the comment period, the Departments published proposed regulations at 78 Fed. Reg. 8456 that created what has come to be known as "the accommodation." 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013); *see also* 29 C.F.R. § 2590.715–2713A (2013). On July 2, 2013, the Departments adopted the final version of that accommodation, which is available to all "eligible organizations." *See* 78 Fed. Reg. at 39870-01, 39874; *see also* 29 C.F.R. § 2590.715–2713A.

An organization is considered an "eligible organization" for purposes of the accommodation if it satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity. (3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1)

> through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies.

29 C.F.R. § 2590.715-2713A(a)(1)–(4).

The accommodation then specifies two sets of means by which the employees of an eligible organization will obtain coverage for contraceptive services based upon whether the organization offers health insurance to its employees through a self-insured health plan or a group insured health plan. *See id.* § 2590.715–2713A(b)–(c).

In the group insured context, an eligible organization satisfies its obligations under the contraceptive mandate by providing its insurance issuer ("insurer") with a self-certification form. *Id.* § 2590.715–2713A(c)(1). At that point, the statutory duty to provide the organization's employees with cost-free contraceptive services coverage automatically shifts to the insurer. *Id.* § 2590.715–2713A(c)(2); *see also* 78 Fed. Reg. at 39876. The insurer cannot decline to provide that coverage on the self-certifying organization's behalf, and the insurer must expressly exclude contraceptive services coverage from the self-certifying organization's plan. 29 C.F.R. § 2590.715–2713A(c)(2)(i); *see also* 78 Fed. Reg. at 39876. Furthermore, the insurer is expressly prohibited from passing on the costs of covering contraceptive services to either the self-certifying organization or that organization's employees. 29 C.F.R. § 2590.715–2713A(c)(2)(ii); *see also* 78 Fed. Reg. at 39876.

If an eligible organization is self-insured, the organization that objects to providing contraceptive coverage on religious grounds must provide its "third party administrator that will process claims for any contraceptive services required to be covered . . . with a copy of the self- certification described in paragraph (a)(4) of this section." 29 C.F.R. § 2590.715–2713A(b)(1)(ii). If the third-party administrator agrees to remain in its contractual relationship with the organization or its plan, the self-certifying organization has met its obligation under the contraceptive mandate. *Id.* § 2590.715–2713A(b)(1); *see also* 78 Fed. Reg. at 39879. It is the third-party administrator that must then provide or arrange payments for contraceptive services without "imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization." 29 C.F.R. § 2590.715–2713A(b)(2)(i)–(ii).[3]

The third-party administrator becomes a "plan administrator" under ERISA for purposes of providing the contraceptive coverage, see id. § 2510.3–16(b), and it provides the coverage through the eligible organization's self-insured plan. *See id.* § 2590.715–2713A(b).

But a third-party administrator is permitted to decline to assume responsibility for providing contraceptive services coverage on behalf of a self-certifying organization by cancelling its contract with the eligible organization and declining to serve as

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[3] The "costs of providing or arranging such payments . . . may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee." 29 C.F.R. § 2590.715-2713A(b)(4).

that organization's third-party administrator. *Id.* § 2590.715–2713A(b)(2); *see also* 78 Fed. Reg. at 39879.[4] If the contract is cancelled, the self-certifying organization must either provide the self-certification form to its newly hired third-party administrator, see 29 C.F.R. § 2590.715–2713A(b), or notify the government that it will no longer use a third-party administrator and await further instruction on how it may comply with the contraceptive mandate's requirements. 78 Fed. Reg. at 39880–81.[5]

Regardless of whether a self-certifying organization utilizes an insurer or a third-party administrator, the accommodation requires that notice of the availability of separate payments for contraceptive services be provided to plan participants and beneficiaries contemporaneous with, "but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in [the organization's] group health coverage." 29 C.F.R. § 2590.715-2713A(d). The accommodation relieves a self-certifying religious

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[4] While the preamble to the regulations expresses defendants' intention to implement the regulations on an employer-by-employer, and not a plan-by-plan basis, the regulations themselves do not clearly address how this will operate in practice in the situation where an employer offers its employees coverage under the auspices of a self-insured plan established by another entity that has identified and entered into a contract with the third-party administrator.

[5] At this time, defendants have not specified the procedures that will govern a self-insured eligible organization that does not use a third-party administrator because defendants have not received any information to indicate that any such organization exists. *See* 78 Fed. Reg. at 39880–81.

organization of any responsibility to provide or pay for contraceptive services coverage itself.

II. Procedural and Factual Background

Plaintiffs in this case consist of the Archdiocese, several charitable organizations that are affiliated with the Catholic Church—Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center—and two Catholic institutions of higher education: Catholic University of America and Thomas Aquinas College. Compl. ¶¶ 2, 16–25, 59, 66, 74, 83, 90, 98, 107. They challenge the contraceptive mandate under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, several provisions of the First Amendment to the U.S. Constitution, and the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*, and they argue that the accommodation does not remedy those violations. Compl. ¶¶ 237–339. Pending before this Court are defendants' motion to dismiss, or in the alternative, for summary judgment and plaintiffs' cross-motion for summary judgment. For purposes of deciding this case, the Court will adopt the following undisputed material facts.

The Archdiocese employs approximately 1,825 full-time employees, Supplemental Aff. of the Archdiocese ("Supp. Aff. Archdiocese"), Ex. A to Pls.' Reply ¶ 4 [Dkt. # 33-1], and operates a self-insured health plan that is "recognized under the Employee Retirement Income Security Act as a 'church plan.'" Pls.' Statement of Material Facts ("Pls.' SOF"), Ex. 2 to Pls.' Opp. & Cross-Mot. ¶ 2 [Dkt. # 27-2]. The plan is currently administered by a third-party administrator, National Capital Administrative

Services, Inc. *Id.* Although separately incorporated, Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center are affiliated with the Archdiocese, and they offer their employees health insurance coverage through the Archdiocese's self-insured health plan. *Id.* ¶ 5.

Catholic Academies, Archbishop Carroll, Mary of Nazareth, Catholic Charities, and Victory Housing all employ over fifty full-time employees. Supplemental Aff. of CCA ("Supp. Aff. CCA"), Ex. B to Pls.' Reply ¶ 4 [Dkt. # 33-2]; Supplemental Aff. of ACHS ("Supp. Aff. ACHS"), Ex. C to Pls.' Reply ¶ 4 [Dkt. # 33-3]; Supplemental Aff. of Mary of Nazareth ("Supp. Aff. Mary of Nazareth"), Ex. E to Pls.' Reply ¶ 4 [Dkt. # 33-5]; Supplemental Aff. of Catholic Charities ("Supp. Aff. Catholic Charities"), Ex. F to Pls.' Reply ¶ 4 [Dkt. # 33-6]; Supplemental Aff. of Victory Housing ("Supp. Aff. Victory Housing"), Ex. G to Pls.' Reply ¶ 4 [Dkt. # 33-7]. Don Bosco and the Catholic Information Center employ less than fifty full-time employees. Supplemental Aff. of Don Bosco ("Supp. Aff. Don Bosco"), Ex. D to Pls.' Reply ¶ 4 [Dkt. # 33-4]; Supplemental Aff. of the CIC ("Supp. Aff. CIC"), Ex. H to Pls.' Reply ¶ 4 [Dkt. # 33-8].

The remaining two plaintiffs—Catholic University and Thomas Aquinas—also employ over fifty full-time employees. Supplemental Aff. of CUA ("Supp. Aff. CUA"), Ex. I to Pls.' Reply ¶ 5 [Dkt. # 33-9]; Supplemental Aff. of TAC ("Supp. Aff. TAC"), Ex. J to Pls.' Reply ¶ 5 [Dkt. # 33-10]. Catholic University participates in a group insured plan by offering its students a health insurance plan through AETNA and its employees a health insurance plan through

United Healthcare. Pls.' SOF ¶¶ 29, 31. Thomas Aquinas is self-insured; it offers its employees a health insurance plan through the RETA trust, a self-insurance trust set up by the Catholic bishops of California, and the trust is administered by a third-party administrator, Benefit Allocation Systems. *Id.* ¶ 36. The College's self-insured plan is not a church plan under ERISA. Supp. Aff. TAC ¶ 6.

None of the plaintiffs' health insurance plans qualify for the grandfathered plan exception to the ACA. Pls.' SOF ¶¶ 3, 33, 38. The Archdiocese has identified itself to be covered by the religious employer exemption, Aff. of Archdiocese, Ex. A to Pls.' Mot. ¶ 18 [Dkt. # 6-2], but the remaining plaintiffs have stated that they do not qualify for that exemption. Pls.' SOF ¶¶ 9, 12, 15, 18, 21, 24, 27, 34, 39. They are, however, eligible for the accommodation to the contraceptive mandate. Compl. ¶ 10.

"Plaintiffs are all religious entities that are part of, and/or adhere to the teachings and philosophies of, the Roman Catholic Church." Pls.' SOF ¶ 40. Consequently, they all subscribe to the Roman Catholic belief that it is immoral to engage in conduct that artificially interferes with conception or terminates an existing pregnancy, which includes, but is not limited to, abortion, sterilization, emergency contraception, and other contraceptive products. *Id.* ¶¶ 41, 45–46. It is a tenet of plaintiffs' faith that they not only refrain from using contraception themselves, but that they may not morally assist another in accessing those services. *Id.* ¶ 48. As a result, plaintiffs have "historically excluded coverage for abortion, contraceptives (except

when used for non-contraceptive purposes), sterilization, and related education and counseling" from their health insurance plans, id. ¶ 6; *see also* Aff. of CUA, Ex. I to Pls.' Mot. ¶ 15 [Dkt. # 6-10]; Aff. of TAC, Ex. J to Pls.' Mot. ¶ 13 [Dkt. # 6-11], and they contend that compliance with the contraceptive mandate, even as it has been modified, would violate their religious belief.

STANDARD OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). "[B]ecause subject-matter jurisdiction is 'an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject- matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

"To state a case or controversy under Article III, a plaintiff must establish standing." Ariz. *Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011); *see also* Lujan, 504 U.S. at 560. Standing is a necessary predicate to any exercise of federal

jurisdiction, and if it is lacking, then the dispute is not a proper case or controversy under Article III, and federal courts have no subject-matter jurisdiction to decide the case. *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012). To establish constitutional standing, a plaintiff must demonstrate: (1) that he has suffered an "injury in fact"; (2) that the injury is "fairly traceable" to the challenged action of the defendant; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (internal quotation marks omitted); *see also* Friends of the *Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000). Failure to demonstrate even one of the three requirements will defeat subject-matter jurisdiction. *See Lujan*, 504 U.S. at 561.

When considering a motion to dismiss for lack of jurisdiction for standing, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court "is not limited to the allegations of the complaint." *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); *see also Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

II. Federal Rule of Civil Procedure 56

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted).

To defeat summary judgment, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id. at* 324 (internal quotation marks omitted). The existence of a nongenuine, nonmaterial factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the nonmoving party, and a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id. at* 248; *see also Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party's motion, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (alterations omitted), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

ANALYSIS

I. Plaintiffs' Religious Freedom Restoration Act claims.

The central claim in this case is Count I: plaintiffs' claim that the contraceptive mandate violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, because it "requires Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs." Compl. ¶ 241. It is undisputed that the Church itself – the Archdiocese – is completely exempt from the requirement, and therefore, it is not joined in Count I. It is also part of the background of this case that defendants delayed implementation of the mandate for a year and engaged in a rulemaking process in an effort to address the objections raised by other religious organizations and to alleviate the burden that they identified. Thus, the question presented in this case is whether the accommodation promulgated in July 2013 achieves that aim or whether the mandate, as it has now been modified, imposes a substantial burden on plaintiffs' free exercise of religion.

RFRA provides that the government shall not "substantially burden a person's exercise of religion" unless it can demonstrate that application of the burden to the person: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b).[6]

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[6] Although the Supreme Court found RFRA unconstitutional as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997), the statute still applies to the federal government, *Holy Land Found. for Relief & Dev. v. Ashcroft*,

The prohibition applies even if the burden results from a rule of general applicability. *Id.* § 2000bb-1(a). To successfully mount a RFRA challenge and subject government action to strict scrutiny, a plaintiff must meet the initial burden of establishing that the government has substantially burdened his religious exercise. *Henderson v. Stanton*, 76 F. Supp. 2d 10, 14 (D.D.C. 1999). Only if that predicate has been established will the onus then shift to the government to show that the law or regulation is the least restrictive means to further a compelling interest. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

Plaintiffs have averred that it is a central tenet of their faith that life begins at the moment of conception, and that their religion therefore requires that "they may not provide, pay for, and/or facilitate access to" contraceptive services. Pls.' Mot. at 19; *see also* Pls.' SOF ¶¶ 42–43; Aff. of CCA, Ex. B to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-3]; Aff. of ACHS, Ex. C to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-4]; Aff. of Don Bosco, Ex. D to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-5]; Aff. of Mary of Nazareth, Ex. E to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-6]; Aff. of Catholic Charities, Ex. F to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-7]; Aff. of Victory Housing, Ex. G to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-8]; Aff. of CIC, Ex. H to Pls.' Mot. ¶¶ 7–8 [Dkt. # 6-9]; Aff. of CUA ¶¶ 13–14; Aff. of TAC ¶¶ 11–12. The government does not contest the sincerity of these beliefs. *See* Defs.' Combined Mem. in Opp. to Pls.' Cross-Mot. for Summ. J. & Reply in Supp. of Defs.' Mot. to Dismiss, or in the alt., for Summ. J. ("Defs.' Opp. & Reply") at 4, 7–20 [Dkt. # 31]; *see also* Defs.' Resp. to Pls.' SOF ¶ 43 [Dkt. # 31-

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333 F.3d 156, 166 (D.C. Cir. 2003); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

1]. The Court finds that plaintiffs' religion forbids them from facilitating access to contraceptive services, and that finding of fact serves as the basis for the RFRA analysis.

Plaintiffs contend that the contraceptive mandate imposes a burden on their sincere religious belief because it requires that plaintiffs provide a health insurance plan that includes coverage for contraceptive services and counseling and thereby renders them unable to offer a health insurance plan consistent with their religious beliefs. Pls.' Mot. at 21–24. They argue that the accommodation does not alleviate that burden because, as they put it, they must file a self- certification form that "inexorably leads to provision of the very coverage to which they object," and offer a health insurance plan through which their "employees would receive access to the mandated payments [for contraceptive services] *only* by virtue of their participation in [that] health plan." *Id. at* 20. Also, they complain that, in some circumstances, they must "locate and identify a third party willing to provide the very services they deem objectionable, and . . . enter into a contract with that party that will result in the provision or procurement of those services 'for free.'" *Id.* All of these burdens, plaintiffs state, are substantial, because failure to comply with the requirement of the contraceptive mandate—either by providing the coverage or by self-certifying under the accommodation—results in significant monetary penalties. *Id. at* 22–24; *see also* 26 U.S.C. § 4980H.

Defendants maintain that the accommodation has eliminated the objectionable impact of the mandate and that any remaining burden on plaintiffs'

religious exercise is at most de minimis or too attenuated to be substantial and to trigger strict scrutiny under RFRA. Defs.' Mem. at 11–20. They also argue that all the plaintiffs except Catholic University and Thomas Aquinas lack standing to bring a RFRA challenge. Defs.' Opp. & Reply at 5–7. But if the Court determines that any one plaintiff is substantially burdened by the contraceptive mandate and that it must therefore go on to apply strict scrutiny to the regulatory scheme, defendants concede that the D.C. Circuit's recent holding that the contraceptive mandate does not satisfy strict scrutiny controls this case and is binding on this Court.[7] *See Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1219–24 (D.C. Cir. 2013); Defs.' Opp. & Reply at 17; Mot. Hr'g Tr. 34. As a result, the RFRA analysis here is limited to the question of whether the contraceptive mandate places a substantial burden on plaintiffs' asserted religious exercise.

Congress enacted RFRA in response to the decision in Employment Division, *Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court narrowed what had been its previous delineation of the scope of the protection afforded to religion by the Free Exercise Clause. *See Holy Land Found.*, 333 F.3d at 166. In *Smith*, the Court permitted a law that was neutral towards religion to stand, notwithstanding its impact on a particular plaintiff's religious exercise. 494 U.S. at 890. Thereafter, as Congress expressly stated in the

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[7] Defendants did, however, note objection to the Circuit's decision in *Gilardi*, thereby preserving the issue for appeal. See Defs.' Opp. & Reply at 17; Mot. Hr'g Tr. 34.

findings and declaration of purpose section of the statute, RFRA was enacted "to restore 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 to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1); *see also Holy Land Found.*, 333 F.3d at 166–67. Thus, if the question to resolve is whether plaintiffs have met their burden to establish that the challenged regulations impose a substantial burden on their religious exercise, *Sherbert and Yoder* must be the starting point of the analysis. *See Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 120 (D.D.C. 2012) ("Accordingly, courts look to pre-Smith free exercise jurisprudence in assessing RFRA claims."); *see also Vill. of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006).

In *Sherbert*, a member of the Seventh-Day Adventist Church was fired by her employer for her refusal to work on Saturday, the day on which she observed the Sabbath. 374 U.S. at 399. e was subsequently found to be ineligible for state unemployment benefits on the grounds that she had failed, without good cause, to accept employment that had been offered. *Id. at* 400–01. To resolve her constitutional challenge to the state's decision, the Supreme Court first addressed the question of whether the disqualification imposed a burden on the employee's free exercise of her religion. *Id. at* 403. The Court likened the situation to a fine imposed on the employee for her Saturday worship and stated:

> [I]f the purpose or effect of a law is to impede the observance of one or all religions or is to

> discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

Id. at 404 (citations omitted).

Yoder involved members of the Old Order Amish religion and a member of the Conservative Amish Mennonite Church who declined to send their children to public school after eighth grade and were convicted of violating the state's compulsory attendance laws. 406 U.S. at 207–08. In that case, the Court observed that:

> [T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

Id. at 219. The state did not challenge those findings, but it advanced the position that the state's interest in universal compulsory education was so great that the laws should be enforced notwithstanding the

undisputed religious consequences. *Id.* Thus, the bulk of the opinion is only relevant to the second prong of the RFRA analysis, but the Court did state, in language that appears in plaintiffs' pleadings: "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id. at* 218.

The Supreme Court took up the denial of unemployment benefits again in *Thomas*. 450 U.S. at 707. *Thomas* terminated his employment at a foundry and machinery company when he was transferred from a department that fabricated steel for a range of industrial uses to a department that produced turrets for military tanks. *Id. at* 710. At that time, there were no longer any units at the company that were not involved in the manufacture of armaments, and *Thomas*, a Jehovah's Witness, maintained that participation in the production of weapons for war violated his religious beliefs. *Id. at* 710–11. When the employer declined to lay him off, he quit and was subsequently denied unemployment benefits by the state on the grounds that his departure was not based on good cause. *Id. at* 710–12.

As in *Sherbert*, the state argued that its public welfare legislation did not directly command the employee to violate his conscience, but the Court noted that "the employee was put to a choice between fidelity to religious belief or cessation of work" and therefore "the coercive impact on *Thomas* is

indistinguishable from *Sherbert*." *Id. at* 717. The Court then restated the principle that had been set out in *Sherbert*:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717–18.

In sum, all of the key Supreme Court cases involve individuals who were compelled, under the threat of either punishment or the denial of a benefit, to act: to personally do the very thing that violated their religious beliefs. That means that the issue in this case is whether plaintiffs are being required to "modify their behavior" or perform acts that contravene the tenets of their faith.

Plaintiffs laid out their position in their motion for preliminary injunction:

> Under the original version of the Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for [contraceptive services]. Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan still results in the provision of coverage . . . . In both scenarios, Plaintiffs' actions trigger the provision of "free" contraceptive coverage to their employees in a manner contrary to their beliefs. The provision of

> the objectionable products and services are directly tied to Plaintiffs' insurance policies . . . .

Pls.' Mot. at 10. But plaintiffs have not cited the Court to any binding Supreme Court or Circuit precedent that would call for the invalidation of a law based upon its consequences, that is, when plaintiffs are not being required to pay for or "provide" the services themselves, but rather, the result of compliance with the regulatory steps would be "*the provision of*" the objectionable services by a third party to another third party.

Indeed, the precedent in this Circuit points to the opposite conclusion.

In *Kaemmerling v. Lappin*, the D.C. Circuit explained that a plaintiff cannot satisfy his burden under RFRA if the government regulation requires a third party, and not the plaintiff, to act in a way that violates the plaintiff's religious beliefs. 553 F.3d 669, 679 (D.C. Cir. 2008). In that case, the plaintiff challenged the DNA Act, which directs the Federal Bureau of Prisons ("BOP") to collect tissue or fluid samples from individuals in custody who have been convicted of certain offenses. *Id. at* 673. The BOP then delivers the samples to the FBI for the extraction and analysis of the DNA they contain and the creation of a unique profile for each offender, which is stored in an FBI database. *Id.* Kaemmerling, an Evangelical Christian, moved to enjoin the application of the Act to him because he objected to the distillation and retention of his DNA—"a foundational aspect . . . of God's creative work"—on religious grounds. *Id. at* 674, 678. The court emphasized that the plaintiff did not object to the government's collection of any of the bodily

specimens that contained his DNA—not to the gathering of his hair or skin particles or even the drawing of his blood; rather, plaintiff was only opposed to the government's extraction of the DNA from the sample once it was obtained. *Id. at* 679. Under those circumstances, the court found that the complaint failed to allege a substantial burden that would be cognizable under RFRA:

> Kaemmerling's objection to the DNA Act centers on the government's act of extracting and analyzing his DNA . . . without suggesting that the Act imposes any restriction on what Kaemmerling can believe or do. Like the parents in Bowen, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government to conduct its affairs in conformance with his religion.

Id. at 680; *see also Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (explaining that free exercise of religion does not require "the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family").

The D.C. Circuit emphasized this principle at several points in the *Kaemmerling* opinion:

> The government's extraction . . . of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—*it involves no action or forbearance on his part*, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the

> BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [*him*] to modify his behavior and to violate his beliefs."

Id. at 679 (second alteration in original) (emphases added), quoting *Thomas*, 450 U.S. at 718. And the court made it clear that its application of RFRA derived directly from the Supreme Court precedent that Congress had incorporated into the statute:

> Religious exercise necessarily involves an action or practice, as in *Sherbert*, where the denial of unemployment benefits impeded the observance of the plaintiff's religion by pressuring her to work on Saturday . . . , or in *Yoder*, where the compulsory education law compelled the Amish to perform acts undeniably at odds with fundamental tenets of their religious beliefs. Kaemmerling, in contrast . . . suggests no way in which these governmental acts pressure him to modify his own behavior in any way that would violate his beliefs.

Id. at 679 (alteration, citations, and internal quotation marks omitted).[8]

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[8] The D.C. Circuit has also found a burden to be inconsequential or de minimis on other grounds, such as where the government regulation merely prohibits one of a multitude of methods of exercising religion. *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001); *see also Mead v. Holder*, 766 F. Supp. 2d 16 (D.C. Cir. 2011). In *Henderson* and *Mahoney*, the plaintiffs challenged regulations that prevented individuals from selling t-shirts on the National Mall and regulations that prohibited "chalking" the sidewalk in front of the White House, respectively. 642 F.3d at 1115; 253 F.3d at 13–14. Both sets of plaintiffs argued that these regulations—otherwise neutral to religion—violated RFRA because they prevented plaintiffs from following the religious

It is against this legal backdrop that the Court must analyze plaintiffs' RFRA claim. Have defendants put pressure on plaintiffs to modify their behavior and violate their beliefs? Or does the accommodation alleviate the pressure on them as it was intended to do? Plaintiffs cannot rest their claims on the fact that their employees will still receive access to contraceptives under the accommodation; they must point to conduct that they are obliged to undertake that, in and of itself, violates their religious beliefs.

The Court acknowledges and respects the sincerity of plaintiffs' expression of their religious beliefs, and it emphasizes that its ruling is not predicated in any way upon a failure to accept plaintiffs' articulation of what their faith commands. The Court has no intention of substituting its judgment for that of the affiants on the existence or nature or importance of this aspect of their religion, and nothing in this opinion should be read as an indication of any divergence of opinion on those topics. *See Gilardi*, 733 F.3d at 1216 ("We begin with the peculiar step of explaining what is *not* at issue. This case is not

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requirement that they spread the gospel. *Mahoney*, 642 F.3d at 1120; *Henderson*, 253 F.3d at 15. The D.C. Circuit ruled that neither regulation imposed a substantial burden because the regulations were, at most, "a restriction on one of a multitude of means" by which plaintiffs could exercise their religion and other alternative means were still available. *Henderson*, 253 F.3d at 17; *see also Mahoney*, 642 F.3d at 1121. But the court also specifically noted that neither case posed a situation where "the regulation force[d the plaintiffs] to engage in conduct that their religion forbid" or prevented "them from engaging in conduct their religion require[d]." *Henderson*, 253 F.3d at 16; *see also Mahoney*, 642 F.3d at 1121.

about the sincerity of the [plaintiffs]' religious beliefs, nor does it concern the theology behind Catholic precepts on contraception. The former is unchallenged, while the latter is unchallengeable.").

The Court also recognizes that it is not within its province to assess the centrality of the particular religious tenet involved to plaintiffs' faith or to calibrate where the challenged conduct might fall on a spectrum of objectionable practices: whether it would offend plaintiffs' religious sensibilities or "gravely endanger if not destroy" the exercise of their religious beliefs as in *Yoder*. *See Kaemmerling*, 553 F.3d at 678 ("Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened.").

In sum, the Court is not qualified or authorized to state what Catholicism does or does not prohibit, and it accepts plaintiffs' expressions of their principles on its face. At the same time, there is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept plaintiffs' characterization of the regulatory scheme on its face. Put differently, although the Court is bound to accept the statements in plaintiffs' affidavits that their religious teachings go beyond a ban on the personal use of contraceptives and that "facilitating access" to contraceptive services and products is also inconsistent with Catholicism, the Court may determine whether compliance with the contraceptive mandate and accommodation actually constitutes compelled "facilitation." Interpreting a regulatory

scheme is a secular task that is well within the Court's domain. The D.C. Circuit specifically recognized this point in *Kaemmerling*, when it noted that there is a critical distinction between a plaintiff's unassailable factual recitation of what his religion entails and the court's ultimate finding on whether his religious exercise has been substantially burdened: "Accepting as true the factual allegations that *Kaemmerling*'s beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that *Kaemmerling* does not allege facts sufficient to state a substantial burden . . . ." 553 F.3d at 679.

Plaintiffs' pleadings contain many legal conclusions advanced as facts, and therefore, to resolve the RFRA claims, it is necessary to hone in more closely on the details of the regulations themselves rather than the parties' characterizations of them. Because those regulations affect different plaintiffs differently based upon the type of insurance plan they offer, it is also necessary to take up certain plaintiffs' claims separately. Catholic University covers its employees under a group health plan, which falls under section 2590.715–2713A(c), and Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, Catholic Information Center, and Thomas Aquinas cover their employees through self-insured plans, which are addressed in section 2590.715–2713A(b). Seven of those plaintiffs offer insurance through the exempt Archdiocese's self-insured health plan, and only one plaintiff, Thomas Aquinas, offers its employees a health plan through a self-insured

entity that is not exempt from the mandate itself. The different situations produce different outcomes.

A. The contraceptive mandate does not impose a substantial burden on Catholic University of America's religious exercise.

Of the ten plaintiffs in this case, Catholic University is the only plaintiff that offers its students and employees the option to participate in a group health plan through insurers, specifically AETNA and United Healthcare. Pls.' SOF ¶¶ 29–32. The regulations contain a specific set of rules that deal with organizations insured under a group plan, and in light of the accommodation available in that instance, the contraceptive mandate as modified does not impose a substantial burden on the University's religious belief. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261 (D.D.C. Dec. 19, 2013).

Catholic University has established that its sincerely held religious belief prohibits it from providing or facilitating access to contraceptive services coverage. Aff. of CUA ¶¶ 14–15. The affidavit of Frank Persico explains that Catholicism "teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral." *Id.* ¶ 13. As a result, "[o]ffering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the University." *Id.*

¶ 14. In their joint pleadings, plaintiffs have explained that, although Catholicism does not require them to prevent their employees or students from gaining access to contraceptive services coverage, it does require that they not participate in the provision of that coverage. *See* Pls.' Reply in Supp. of its Cross-Mot. for Summ. J. ("Pls.' Reply") at 4 [Dkt. # 33] ("If the Government believes all women must be provided with free abortion-inducing products, sterilization, and contraceptives, Plaintiffs ask only that the Government not force them to participate in that effort."). The Court finds that, since the accommodation effectively severs an organization that offers its employees or students an insured group health plan from participation in the provision of the contraceptive coverage, it relieves Catholic University of any burden cognizable under RFRA. *See Priests for Life*, No. 13-1261.

Under the terms of the new regulations, a religious organization is eligible for the accommodation once it certifies that: it is a nonprofit entity, it holds itself out as a religious organization, and it opposes providing coverage for some or all of the contraceptive services required to be covered under the mandate. 29 C.F.R. § 2590.715–2713A(a). A group health plan established or maintained by an eligible religious organization complies with the requirement to provide contraceptive coverage "if the eligible organization or group health plan furnishes a copy of the self-certification . . . to each issuer that would otherwise provide such coverage in connection with the group health plan." *Id.* § 2590.715–2713A(c)(1). At that point, "[a] group health insurance issuer that receives a copy of the self-certification . . . with respect to a group health plan

established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage . . . must—

> (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and
>
> (B) Provide separate payments for any contraceptive services required to be covered . . . for plan participants and beneficiaries."

Id. § 2590.715–2713A(c)(2)(i).

What does this mean? Catholic University must identify itself as an organization with religious objections by completing a form that states, as it has repeatedly averred in this litigation, that it objects to the provision of contraceptive services on religious grounds. Then, either the University or its health plan must furnish its insurance issuers—Aetna and United Healthcare—with a copy of the self-certification. That is the extent of what is required from the religious organization. The insurance issuers are obligated under the ACA to provide contraceptive coverage under section 2590.715–2713A(c)(2), and once they receive the self-certification, they must expressly exclude the contraceptive coverage from the healthcare coverage that is being provided in connection with Catholic University's plan and pay for the coverage themselves.[9] *Id.* So, the health insurance plan that

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[9] The statement in Catholic University's affidavit that, under the accommodation, the University "bears the burden of locating and identifying an insurance company willing to provide the

the ACA employer mandate requires the University to provide will not cover contraceptive services. The University has stated in its affidavit that offering a health insurance policy that provides coverage for contraceptive services would be inconsistent with its religious beliefs, but it is no longer required to do so. Under the terms of the accommodation, Catholic University's group health plan that does not include contraceptive services coverage will be in full compliance with the ACA once the University self-certifies that it objects to the provision of that coverage.[10]

Plaintiffs, including Catholic University, maintain that the obligation to self-certify to avail themselves of the accommodation is a burden on religion in and of itself because the act of completing the form "facilitates" or "authorizes" the provision of contraceptive coverage to their students or employees. Pls.' Mot. at 20 ("In other words, the government has effectively made 'no' mean 'yes,' transforming the

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very services it deems objectionable," Aff. of CUA ¶ 17, is not consistent with the regulations, and therefore, it is not a circumstance that can be found to be a burden on the school's religious exercise. Also, because the accommodation explicitly requires the insurer to engage in separate accounting to ensure that none of Catholic University's premiums are used to pay for contraceptive services, 29 C.F.R. § 2590.715–2713A(c)(2)(ii), the Court is not persuaded by the University's argument that the "cost-neutrality" of providing contraceptive services somehow results in its premiums being used to pay for contraceptive services. *See* Pls.' Mot. At 21 n.15.

[10] For the same reasons, the contraceptive mandate does not place Catholic University in a position where it will give rise to "scandal by acting in a way inconsistent with Church teachings." Aff. of CUA ¶ 19.

very act of objecting to the mandated coverage into the authorization to provide such coverage."). But this conclusory characterization of the regulatory scheme is not immune from probing by the Court merely because it has been incorporated into each of the plaintiffs' sworn affidavits. *See*, *e.g.*, Aff. of CUA ¶ 17 ("[P]erversely, it is CUA's self-certification of its religious objection that authorizes provision of the mandated coverage.").

That is not a matter of religious doctrine, and when plaintiffs insist on referring to the self-certification as a "permission slip" in their papers, *see*, *e.g.*, Pls.' Reply at 3, they make it plain that this aspect of their case turns largely upon semantics and not theology.[11]

For one thing, the "authority" to provide contraceptive services to the women who work or study at the institution is not Catholic University's to bestow. Access to contraceptives is guaranteed by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965). As plaintiffs acknowledged in their pleadings, they have "no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else." Pls.' Mot. At 20. And cost-free access to contraceptive services—to women who are covered by a health plan anywhere – has already been guaranteed by the ACA and the implementing regulations. 42 U.S.C. § 300gg-13; 29 C.F.R. § 2590.715–2713. In the insured group plan context, the "authority" for the

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[11] Indeed, in *Priests for Life* v. U.S. Dep't of Health & Human Services, the Catholic plaintiffs conceded that the self-certification was not a burden of their exercise of religion, in and of itself. No. 13-1261, slip op. at 26–27.

insurers to provide that coverage—or more aptly described, their "obligation" to do so—is imposed by the regulatory scheme, and it exists whether Catholic University takes any steps to ensure compliance with the mandate or not. *See* 29 C.F.R. § 2590.715–2713A(c) (listing the obligation of an insurer of a self-certifying organization to provide contraceptive services coverage in mandatory terms). Through its self-certification, the religious organization declares its intention to step out of the process. That cannot be accurately characterized as an act that "facilitates" the employees' access to the services.[12]

Similarly, the University cannot support the legal finding that its religious exercise is burdened with its assertion that contraceptive services "coverage will be made available to CUA's employees only for so long as they remain on the University's plan." Aff. of CUA ¶ 17. The use of the passive voice—"coverage will be made available" —conveys an objection to the consequences of the self-certification, not to the action of certifying itself. Moreover, that factual assertion is belied by the fact that the insurance mandate will follow the school's employees wherever

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[12] Catholic University also argues that it is burdened because, under the contraceptive mandate, it "will be forced to further facilitate access to the mandated coverage by . . . identifying its benefits-eligible employees for the insurance company." Aff. of CUA ¶ 17. In other words, the University states that it still must facilitate access to contraceptive services coverage even if those services are completely separated from its plan because it must provide the insurer with the names of those individuals who are eligible for contraceptive services payments. But the University does not point to any regulation that imposes this duty, and the insurance issuer will have independent records of which employees enrolled for healthcare coverage.

they go, and that all insurance plans are required to provide preventive services—as HRSA has defined them – under the ACA.

Plaintiffs' fundamental complaint is that "[s]hould they choose to certify their objection to the mandated coverage, that action inexorably leads to provision of the very coverage to which they object." Pls.' Mot. at 20. But the law requiring *Kaemmerling* to submit to the taking of blood or tissue samples also led "inexorably" to a result to which he objected, and the D.C. Circuit determined that was not enough to satisfy RFRA. Plaintiffs seek to distinguish *Kaemmerling* by highlighting the Circuit Court's observation that *Kaemmerling* did not object to submitting to the actual collection of the samples. They say, in essence, maybe *Kaemmerling* did not object to the first step that led to the objectionable consequences, but we do. But, in fact, *Kaemmerling* filed his complaint and motion for preliminary injunction to stop the first step from happening: to enjoin the Bureau of Prisons from collecting the sample. *See* Compl. *Kaemmerling v. Lappin*, No. 06-1389 [Dkt. # 1]. He did not simply sue to bar the FBI from extracting and preserving his DNA. Like *Kaemmerling*, the reason that plaintiffs object to the self-certification is that they object to what happens after someone else receives it. The Court is aware that plaintiffs predicate that objection on moral grounds. But if RFRA is applied to reach a religious objection to "bearing witness" to an immoral act by others, in the absence of any requirement that the objector modify his own behavior, then the law is no longer a shield, but it is a sword, and it becomes a tool to deny the equally compelling rights of

thousands of other people. Nothing in RFRA jurisprudence to date takes the law that far.

Like the statute that was challenged in *Kaemmerling*, the regulations here do not "impose any restrictions on what [Catholic University] can believe or do," and it does not impose pressure on the University "to modify [its] behavior and to violate [its] beliefs." 553 F.3d at 679–80. Through the self-certification, the eligible organization raises its hand and says "I object" to participating in the provision of contraceptive services itself, and through the accommodation, the government accedes to its request and assigns the obligation to someone else. RFRA does not reach the results.

This conclusion is entirely consistent with the D.C. Circuit's recent ruling in *Gilardi*. In that case, the Court found that the Catholic owners of a for-profit corporation "are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." 733 F.3d at 1217; *see also Tyndale House*, 904 F. Supp. 2d at 122. But the *Gilardi*s are secular employers who do not qualify for the accommodation and are therefore required to provide and pay for the contraceptive coverage themselves. And a close reading of the *Gilardi* opinion reveals that the case is distinguishable on those grounds.[13]

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[13] In *Tyndale House*, the plaintiffs were secular employers that did not qualify for the accommodation and were therefore required to provide and pay for contraceptive services. In concluding that the contraceptive mandate burdened the plaintiffs' religious exercise, the court emphasized the direct responsibility imposed on the employer to provide the objectionable coverage and the specific financial obligation

In order to determine whether the accommodation alleviates the burden that was recognized in *Gilardi*, one must first distill from the opinion what the court found that burden to be. The court began by reciting the rule that *Kaemmerling* derived from the Supreme Court's opinion in *Thomas*: "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id. at* 1216, quoting *Kaemmerling*, 553 F.3d at 678. The court then responded to an argument that the government is not advancing in this case: that the alleged burden was too remote or attenuated to trigger RFRA because it would only arise at the point when an employee purchased contraceptives or used contraceptive services. *Id.* at 217. The court took issue with that position:

> The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened

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imposed on the plaintiffs to pay for the contraceptives. The court found it significant that Tyndale acted as its own insurer and that "Tyndale itself directly pays for the health care services used by its plan participants." 904 F. Supp. 2d at 123.

For similar reasons, plaintiffs' many citations to *Hobby Lobby*, which is not controlling on this Court in any event, do not help resolve this case. Hobby Lobby is a self-insured, for- profit employer that does not qualify for the accommodation, and the plaintiffs there objected to "participating in, providing access to, paying for, training others to engage in, or otherwise supporting" the use of certain emergency and intrauterine contraceptives they consider to be a form of abortion. *See* 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc), *cert. granted* No. 13-354, 013 WL 5297798 (Nov. 26, 2013).

> when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties.

Id. This passage suggests that the Circuit Court would find a substantial burden if the regulations, as revised, imposed obligations on Catholic University to take affirmative steps to include the objectionable products and services as part of its plans. That is not the case for an employer that offers a group insured plan in any event.[14] But the court's statement more directly addresses the question of when the burden attaches, not what it consists of. It was later in the opinion that the court more specifically described the burden that had been imposed upon the Gilardis that warranted relief under RFRA:

> The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement—procured exclusively by regulatory ukase—is a "compel[led] affirmation of a repugnant belief." That, standing alone, is a cognizable burden on free exercise.

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[14] The accommodation requires insurance issuers to "[e]xpressly exclude contraceptive coverage" from the group health plan. 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A). So even if the D.C. Circuit meant to define the RFRA burden with its shopping cart metaphor, the accommodation differentiates Catholic University from the Gilardis because the University is not required to "fill the basket of goods and services that constitute a healthcare plan" with contraceptive services coverage. *See Gilardi*, 733 F.3d at 1217.

Id. at 1217–18. Finally, the court found that the burden was substantial because the government commands employer compliance with financial penalties, thereby giving the Gilardis a "Hobson's choice:" comply with the mandate and participate in what they believe to be a grave moral wrong, or abide by the tenets of their faith and pay devastating penalties. *Id. at* 1218.

Here, plaintiffs seize upon the Hobson's choice language and the Circuit Court's observation that if the risk of a $14 million fine "is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id.* But the question to be resolved here is not whether an acknowledged burden has been rendered substantial by the threat of financial consequences for noncompliance but whether the compelled conduct imposes a meaningful burden on plaintiff's religious exercise at all.

Unlike the Gilardis, the plaintiff nonprofit religious organizations in this case become eligible for the accommodation as soon as they state that they oppose providing coverage on the basis of their religious beliefs. 29 C.F.R. § 2590.715–2713A(a). This is exactly the opposite of the "compelled affirmation of a repugnant belief" that was at the heart of *Gilardi*, and it is a distinction that cannot be ignored. Furthermore, the accommodation explicitly provides that, "[w]ith respect to payments for contraceptive services, the [insurer] may not impose . . . any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization." *Id.* § 2590.715–2713A(c)(2)(ii). This relief, which was not available to the Gilardis, cuts

off any obligation of the self-certifying organization to pay for the contraceptive services of its employees or students. *Id.* So the case is not governed by *Gilardi*, and it is distinguishable from the decision in this District in *Tyndale House*.[15]

Plaintiffs seem to recognize what the law prohibits, and they put it succinctly in their own pleading: "Plaintiffs' only request has been that they not *themselves* be made the vehicle by which the mandated coverage is delivered." Pls.' Reply at 4. Under the terms of the accommodation, Catholic University has in fact been relieved of any obligation to *itself* be the vehicle by which the coverage is delivered. The Court finds that the University has not met its burden under RFRA to establish a substantial burden on its exercise of religion and thereby trigger the application of strict scrutiny.[16]

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[15] The Court's conclusion can also be squared with *Geneva College v. Sebelius*, 941 F. Supp. 2d 672 (W.D. Pa. 2013), which addressed the contraceptive mandate before the accommodation was promulgated and relied heavily on the fact that the plaintiffs in that case had to arrange and pay for a health insurance plan that included the contraceptive services coverage.

[16] Additionally, for the reasons stated below in footnote 24, the contraceptive mandate does not impose a burden on Catholic University's religious exercise even though it requires that the University's student health insurance plan include coverage for contraceptive services. Not only does the accommodation effectively eliminate any potential facilitation on Catholic University's part, but the fact that the ACA does not mandate the University to provide a student health insurance plan removes the government compulsion necessary to find a RFRA burden. *See* infra note 24.

Defendants are therefore entitled to summary judgment on Catholic University's RFRA claim.[17]

B. The accommodation falls short of relieving the burden on Thomas Aquinas College's religious exercise.

Thomas Aquinas College is a Catholic institution that adheres to the same religious beliefs as Catholic University: that interfering with conception is immoral, and that it is equally wrong to take actions that would facilitate the use of contraceptives by others. Aff. of TAC ¶¶ 12–14. Unlike Catholic University, the College provides benefits on a self-insured basis, and it offers its employees health insurance through the RETA Trust, "which is a self-insurance trust set up by the Catholic bishops of California for the purpose of providing medical coverage consistent with Catholic moral teaching."[18] *Id.* ¶ 8. The self-insurance trust is administered by a third-party administrator, Benefit Allocation System,

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[17] The Court is not basing its holding on the government's argument that the fact that the plaintiffs provide their employees with a salary that might ultimately be used to purchase contraceptive services means that the mandate does not impose its own religious burden. If plaintiffs voice religious objections to providing, paying for, and facilitating contraceptive themselves, but they do not object to paying a salary that could potentially be used for the purchase of contraceptives by the employees, it is not for the Court "to say that the line [plaintiffs] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Thomas*, 450 U.S. at 715.

[18] Thomas Aquinas College's RFRA claim refers only to its employee healthcare plan. It has not asked the Court to address whether the contraceptive mandate imposes a RFRA burden on the school by requiring that any student health insurance plan include contraceptive services coverage.

id., and the parties have informed the Court that, notwithstanding the bishops' involvement, the plan does not constitute a church-sponsored plan under ERISA. Supp. Aff. of TAC ¶ 6.

Under the regulations, a self-insured organization that wishes to avail itself of the accommodation must also certify its eligibility as a religious, nonprofit entity that opposes providing coverage for contraceptive services under 29 C.F.R. § 2590.715–2713A(a)(4). Under section 2590.715-2713A(b), a health plan established or maintained by an eligible organization that provides benefits on a self-insured basis then complies with the mandate to provide contraceptive coverage if:

> (i) The eligible organization or its plan contracts with one or more third party administrators.
>
> (ii) The eligible organization provides each third party administrator . . . with a copy of the self-certification . . . , which shall include notice that –
>
> (A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (B) Obligations of the third party administrator are set forth in [the applicable regulations].
>
> (iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to

> provide or arrange separate payments for contraceptive services . . . and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

29 C.F.R. § 2590.715-2713A(b)(1). If a third-party administrator receives a copy of the self- certification and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services, then *it* is bound to provide or arrange for separate payments for the contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third- party administrator may provide for the payments itself, or it may arrange for an insurance issuer or another entity to do so, but in no event may any cost-sharing, premium, or fee be imposed, directly or indirectly, on the religious organization or its plan. *Id.* § 2590.715-2713A(b)(2)(i)– (ii).

So while this section of the regulations is also designed to accomplish the goal of relieving the religious organization of the burden of providing contraceptive coverage, by transferring that obligation to a substitute and shielding the organization from absorbing the cost in any way, there are several differences between what happens in the case of a self-insured entity and in the insured group health plan scenario. First, neither the ACA nor the accommodation itself imposes a mandatory obligation on the third-party administrator to accept responsibility to provide contraceptive services coverage on behalf of the self-certifying organization. One of the steps required for plan compliance is that the organization or its plan contract with a third-party administrator, and under the terms of the

accommodation, the third-party administrator's obligation to provide contraceptive coverage arises only if it receives a copy of the self-certification "and *agrees to enter* into or *remain in* a contractual relationship with the eligible organization or its plan to provide administrative services for the plan." *See id.* § 2590.715–2713A(b)(2) (emphases added). As a result, if a third-party administrator declines to assume the responsibility to provide coverage for contraceptive services on behalf of the self- certifying religious organization, the third-party administrator can no longer serve in that capacity for the organization's plan, and the organization must either shop around to find a new third-party administrator that will assume responsibility for the coverage or proceed without a third-party administrator and await instructions from the government on how it can otherwise satisfy its obligations. *See id.*; *see also* 78 Fed. Reg. at 39880–81.[19]

Second, the accommodation operates differently in the self-insured context than in the insurer context because, should the third-party administrator agree to assume responsibility for the contraceptive services coverage, the regulations provide that the

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[19] The regulations do not spell this out explicitly, but both parties agree that this is what they will entail. The Court has questions about how this set of provisions will operate in practice in a situation such as the one presented by Thomas Aquinas College, where the third-party administrator may be in a contractual relationship with the plan but not with the eligible organization, and the plan and plan administrator may have religious objections of their own, but the Court has come to its conclusion based on the fact that this obligation to secure a compliant third-party administrator is by all accounts a critical feature of the accommodation for self- insured plans.

self-certification form itself "shall be an instrument under which the plan is operated [and] shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3–16(b); *see also id.* § 2590.715–2713A(b)(1)(ii)(B). In other words, it is "plan administrators" who have the obligation under ERISA to carry out the contraceptive mandate, and unlike health insurance issuers in the insured plan context, the third-party administrator would not have this obligation unless it was conferred on it by law in some way. A religious organization's self-certification provides that the organization will not be acting as the plan administrator for purposes of compliance with the contraceptive mandate, and it directs the third-party administrator to the rules that will govern its responsibilities. *Id.* § 2590.715–2713A(b)(ii).[20]

Finally, in the insurance context, the regulations expressly require insurers to carve out contraceptive services coverage from the self-insured organization's plan. The third-party administrator will be separately arranging for and paying for the coverage, but under the auspices of the plan. As counsel for the government stated at the hearing, "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan, [even though] the responsibility to make the payments . . . is entirely the [third-party administrator's]." Mot. Hr'g Tr. 18.

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[20] In this case, the College does not serve as the ERISA plan administrator in any event. *See* Pl. TAC's Dec. 17, 2013 Resp. to Order of the Ct. [Dkt. # 42].

In evaluating Thomas Aquinas College's RFRA claim, then, the question becomes whether any of these differences are meaningful for purposes of the burden analysis.

In the Court's view, the obligation to take affirmative steps to identify and contract with a willing third-party administrator if the existing third-party administrator declines forces the religious organization to *do* something to accomplish an end that is inimical to its beliefs. This involves the organization in facilitating access to contraceptive services, which the College has averred it cannot do, and it entails the critical element of modifying one's behavior. Therefore, the College has met its burden to identify a burden on religious exercise imposed by the regulations governing self-insured plans.

The Court is less persuaded that the mere fact that the arrangements and payments for the contraceptive coverage arise under the auspices of the organization's healthcare plan is enough to constitute a burden, even if the exclusion of the coverage from an insured group plan makes the government's case stronger in that situation. A court could conclude that, since one of the founders and a Vice President of the College has averred that "[p]roviding health insurance coverage that includes coverage for [contraceptive services] is . . . inconsistent with the core moral and religious beliefs of the College," Aff. of TAC ¶ 12, and a court is bound by law to accept a litigant's sincere statement of his religious beliefs, the Court must base a finding that there is a burden on those grounds. But the fact that the payments are to be made as part of the plan, as

opposed to a separate plan, is a technicality driven by the intricacies of ERISA and the insurance industry and the recognition that the third-party administrator can only advance "payments" and not issue a "policy." Nothing about those details changes the fact that any actions the third-party administrator takes with respect to contraceptive coverage must be completely independent from the eligible organization. The payments are totally separate from and cannot be imposed upon the religious organization, and the third-party administrator can even arrange for an entirely separate insurance issuer to provide the payments. So the argument that the problem arises because the coverage is still being offered under the auspices of the religious organization's plan is difficult to distinguish from the argument the Court has already rejected: that the organization is burdened based upon objectionable consequences, and the Court will not predicate its decision in the College's favor on those grounds.

With respect to the self-certification, an argument can be made there is something qualitatively different about the act of self-certifying in the context of a self-insured entity that is different from the group plan scenario. That cuts both ways. On the one hand, the self-insured organization's certification contains additional language that explicitly cuts itself out of the process: it provides that the organization will not be the plan administrator for purposes of the delivery of the coverage. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A).

But on the other hand, the regulations provide that an eligible organization's self- certification "shall be

an instrument under which the plan is operated" and "shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." *Id.* § 2510.3–16. Defendants explain the practical significance of that regulatory provision:

> [W]hen a [third-party administrator] receives a copy of the self- certification from an eligible employer that sponsors a self-insured group health plan, that [third-party administrator] becomes an ERISA Section 3(16) plan administrator and claims administrator for the purpose of providing the separate payments for contraceptive services. Thus, the contraceptive coverage requirements can be enforced against such [third- party administrators] through defendant Department of Labor's ERISA enforcement authority.

Defs.' Opp. & Reply at 6 (citations omitted). One could argue, then, that when *Thomas* Aquinas College files its self-certification, it will be taking more of an affirmative step to help secure women's access to contraceptive services than Catholic University will be, and therefore, the Court should find that it is acting in a manner that is inconsistent with its religious beliefs.

The Court sees the differences in the nature of the self-certification to be, again, primarily a problem of consequences. What the religious organization is being asked to *do* is the same: to express its religious objection. That action eliminates any obligation to provide or pay for contraceptive services, and then it is the regulations that operate to assign the obligation to someone else and to give the self-

certification its legal import. In other words, defendants have done it, not the College. While the contraceptive coverage may still be under the broad roof of one health plan that is being offered, the government has assigned a new plan administrator the job of offering entirely separate shelter for that purpose under its own umbrella. So unless the religious organization has been forced to run around with the umbrella and find the person to hold it, hasn't the accommodation succeeded in granting plaintiffs' "*only* request . . . that they not *themselves* be made the vehicle by which the mandated coverage is delivered?" *See* Pls.' Reply at 4 (first emphasis added).

It is helpful to remember that, despite plaintiffs' reliance on *Gilardi*, the *Gilardi* court was not concerned with results. It did not hold that the Gilardi's rights were violated because their employees would receive access to contraception by virtue of their participation in the Gilardis' plan or even because contraceptive services would be included in the plan. That question was not presented. What animated the court was its observation that the mandate—without the accommodation—"demands that owners like the Gilardis *meaningfully approve and endorse* the inclusion of contraceptive coverage in their companies' employer-provided plans." *Gilardi*, 733 F.3d at 1217–18 (emphasis added). If the third-party administrator accepts the obligation, and there is no obligation placed upon the religious organization to secure another, these circumstances have also been eliminated by the accommodation in the self-insured context. Once again, there is no compelled affirmation of a repugnant belief.

But the operative word in that sentence is "if." If the third-party administrator declines to serve, a series of duties and obligations will fall to the religious organization. If the third-party administrator stays in the contractual relationship but fails to carry out its obligations, then the College's self-certification may be the tool which gives the government its ERISA enforcement authority. Looking at section 2590.715-2713A(b) as a whole, the Court finds that Thomas Aquinas has met its burden to show that the mandate, even as revised by the accommodation, imposes a burden on its religious exercise. Since that burden comes upon pain of substantial financial penalties, *see* 26 U.S.C. § 4980H, the Court must find it to be substantial. *Gilardi*, 733 F.3d at 1218.

Once the Court determines that the regulations impose a substantial burden on plaintiff's religious exercise, it must go on to decide whether the application of the burden is in furtherance of a compelling interest and whether it is the least restrictive means of furthering that interest. Defendants have conceded that the *Gilardi* decision requires the Court to find that contraceptive mandate does not survive strict scrutiny,[21] thus the Court

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[21] *Gilardi* addressed the burden imposed by the mandate itself on an employer that could not avail itself of the accommodation, and the Court found that the interests identified by the government were not sufficiently compelling, but even if they were, the mandate was not narrowly tailored to achieve those goals. 733 F.3d at 1219–24. For all of the reasons set out in this section of the opinion, the Court is not certain that the application of strict scrutiny would lead to the same conclusion in the context of weighing the acts required of a religious organization under the accommodation against the

concludes that Thomas Aquinas College is entitled to summary judgment on its RFRA claim.

C. The remaining plaintiffs do not have standing to raise a RFRA claim.

The rest of the plaintiffs—Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center (collectively, the "church plan plaintiffs")—provide their employees with health insurance through the Archdiocese's self-insured health plan. Pls.' SOF ¶ 5. The government contends that, therefore, they do not have standing to bring a RFRA challenge to the contraceptive mandate, and it has raised a significant jurisdictional concern. While this Court, like the court in the Eastern District of New York, is troubled by defendants' delay in appreciating the implications of their own regulations, *see Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 U.S. Dist. LEXIS 176432 (E.D.N.Y. Dec. 13, 2013), that circumstance does not alter the fact that they are correct.

The government's authority to enforce a third-party administrator's obligation to provide contraceptive services coverage on behalf of a self-certifying organization under the accommodation is derived from ERISA. It is ERISA that accords the government authority to penalize any third-party administrator that undertakes to pay for the coverage by remaining in its contractual relationship

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government's interests, and it believes that the less restrictive means test would not be governed by the analysis in *Gilardi* since that Court was not assessing the provisions in the accommodation.

with the self-certifying organization but then fails to make the necessary payments or arrangements. *See* 29 C.F.R. § 2510.3–16(b); Mot. Hr'g Tr. 31. Thus, ERISA is essential to the accommodation's regulatory scheme. It is well-settled, though, that church plans—such as the plan maintained by the Archdiocese—are explicitly exempt from the requirements of ERISA. 29 U.S.C. § 1003(b)(2) (2012). The government therefore has no authority to enforce the third-party administrator obligations under the accommodation against the administrator of a church plan. Defs.' Opp. & Reply at 5–7.

Based on this regulatory framework, defendants argue that the church plan plaintiffs do not have standing. The church plan plaintiffs are self-insured under the Archdiocese's plan, that plan constitutes a church plan under ERISA, and the government lacks authority to require the Archdiocese's third-party administrator to provide contraceptive services coverage on behalf of the church plan plaintiffs, even if they furnish their self-certifications. As a result, defendants argue, the church plan plaintiffs have not alleged an actionable injury: they may object to facilitating access to contraceptive services, but the facts indicate that they will not actually be facilitating access to contraceptive services by offering a health insurance plan or by self- certifying under the accommodation because, once they self-certify, there is no imminent risk that their third-party administrator will provide the objectionable coverage, and the government cannot force it to do so. *Id.* The Court agrees.

To satisfy the injury-in-fact requirement of standing, a plaintiff must suffer an invasion of a

legally protected interest that is both (a) concrete and particularized and (b) actual or imminent. *Lujan*, 504 U.S. at 560. An injury that is merely conjectural or hypothetical does not suffice. *Id.* Here, the church plan plaintiffs allege the same burden under RFRA as Catholic University and Thomas Aquinas College: that requiring them to facilitate access to contraceptive services violates their sincerely held religious belief. In other words, as they cast their RFRA claim, plaintiffs' claimed injury arises when the provision of contraceptive coverage has been facilitated by their actions and their beliefs have thereby been violated. Although the church plan plaintiffs are self-insured, and they are under the same obligation as Thomas Aquinas to self-certify and to transmit the form to the third-party administrator, that conduct does not give rise to a concrete, actual or imminent, cognizable injury in fact when it is performed by the church plan plaintiffs because there is no reason to believe that anything will happen after that.

For example, the church plan plaintiffs have not shown that they are injured by the requirement in the ACA that they provide a health insurance plan that includes access to contraceptive services because there is no indication in the record that the coverage under their plan—the Archdiocese plan—is going to change. *See* Pls.' Submission in Resp. to Order at 12–13 [Dkt. # 39].[22] In response to specific questions

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[22] Plaintiffs argue that the accommodation itself is mandatory on its face and that, for purposes of standing, the Court should assume that its third-party administrator will comply "with its legal obligations as stated in the federal regulations" regardless of whether ERISA applies. Pls.' Submission in Resp. to Order at

from the Court on this topic, the government has unequivocally stated that the church plan plaintiffs will be in full compliance with the mandate if they provide the self-certification to the third-party administrator of their plan under section 2590.715–2713A(b)(1)(ii) and abide by the provisions of section 2590.715– 2713A(b)(1)(iii).[23] Defs.' Resp. to Ct. Order at 1–3 [Dkt. # 40].

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12. Although there are some contexts in which the "possibility that third parties may violate the law is too speculative to defeat standing," *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994), this is not one of those situations. The government has conceded that, under the accommodation, a church plan third-party administrator has *no* legal obligation to provide contraceptive services and may remain in its contractual relationship with the church plan plaintiffs even if it declines to provide that coverage. Given the representations contained in the Archdiocese's affidavit concerning the manner in which it intends to operate its plan, it is reasonable to infer that the Archdiocese's third-party administrator will decline to assume additional responsibilities to provide coverage or to actually provide that coverage when it has been told by the enforcing agency that it has no legal duty to do so.

[23] 29 C.F.R. § 2590.715–2713A(b)(1) provides that a group health plan "established or maintained by" an eligible organization that provides benefits on a self-insured basis complies with the contraceptive mandate if the eligible religious organization "or its plan" contracts with a third-party administrator, and the eligible organization provides the self-certification to the third- party administrator. The church plan plaintiffs question whether they are obligated to do anything under this provision because they have not "established or maintained" the plan—it is the Archdiocese's plan. Joint Submission in Resp. to Order at 1–2, 5 [Dkt. # 36]. Based on the authority cited by plaintiffs on this point, the Court concludes that the church plan plaintiffs have "established or maintained" the Archdiocese plan for purposes of this section. *See Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1265 (11th Cir. 2004);

> QUESTION BY THE COURT: If the church plan "plaintiffs submit the self-certification to the third-party administrator of the church plan pursuant to section [2590.715–2713A(b)(1)(ii)], would those plaintiffs then be in full compliance with the regulatory regime provided that they do not violate section [2590.715–2713A(b)(1)(iii)]?"
>
> DEFENDANTS: "Assuming that they do not violate section [2590.715– 2713A(b)(1)(iii)], and that they maintain the self-certification form and make it available for examination upon request, then the self-certifying non-Archdiocese plaintiffs who cover their employees under the church plan . . . would be in full compliance with the regulatory regime."

Id. at 1 (citation omitted).

Moreover, the self-certification alone is not enough to enable the church plan plaintiffs' employees to obtain payments for the contraceptive services: the third-party administrator must assume that responsibility. In the context of the Archdiocese plan, there is no reason to believe that is an actual, imminent possibility. *See* Aff. of Archdiocese ¶ 15 ("Consistent with Catholic teaching, the Archdiocese has historically excluded coverage for abortion [and] contraceptives (except when used for non-contraceptive purposes) . . . ."). And the government has made it clear that plaintiffs will not be obliged to

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Peckham v. Gem State Mut. of Utah, 964 F.2d 1043, 1049 (10th Cir. 1992). If the Court and the government are incorrect about that and the church plan plaintiffs have not "established or maintained" the plan that they expressly aver they offer to their employees, then they clearly would not have standing to bring an action challenging this provision.

shop for another one. *See* Defs.' Resp. to Ct. Order at 3 ("If the non-Archdiocese plaintiffs submit the self-certification to the [third-party administrator ("TPA")] of the Archdiocese's self-insured church plan, and the TPA does not agree to provide or arrange for payment for contraceptive services, then the non-Archdiocese plaintiffs are not required to identify another TPA to perform that function."). Instead, in the context of the church plan, ERISA enforcement is lacking, and the government can neither require the third- party administrator of a church plan to end its contractual relationship for failing to assume responsibility for contraceptive services coverage nor penalize the third-party administrator that assumes the responsibility if it fails to actually provide that coverage.

Finally, there is no concern in this context that, by requiring the church plan plaintiffs to file a self-certification form, the government is compelling those plaintiffs to transform their contractual relationship with their third-party administrator or to provide the instrument that will serve as the legal authority to enforce the third-party administrator's obligations under the accommodation. A church plan is not subject to ERISA, 29 U.S.C. § 1003(b)(2); therefore, a third-party administrator of a church plan cannot be transformed into an ERISA plan administrator just because the self-certification is filed. The church plan plaintiffs have not alleged an injury in fact that will flow from filing the self-certification form because that form has no effect other than to relieve their burden to provide contraceptive services coverage. Therefore, the church plan plaintiffs lack standing to bring the RFRA claim in Count I.

But even if one were to conclude that the church plan plaintiffs have standing to press their RFRA claim because they are still obligated to complete the self-certification form, they have not met their burden to establish that there is a RFRA burden on their religious exercise. Since the regulatory obligation to provide a health insurance plan and to self-certify a religious objection does not compel the church plan plaintiffs to provide contraceptive coverage or to facilitate the delivery of that coverage contrary to their principles, the Court concludes that neither the contraceptive mandate nor the accommodation places a burden on the church plan plaintiffs' religious exercise.[24]

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[24] There are additional grounds why, even if the Court found that the church plan plaintiffs sufficiently alleged an injury to satisfy standing, Catholic Information Center and Don Bosco do not have a successful RFRA claim. Unlike the other plaintiffs, Catholic Information Center and Don Bosco have less than fifty employees and are not subject to the employer mandate. Supp. Aff. CIC ¶ 4; Supp. Aff. Don Bosco ¶ 4. So, they provide health insurance to their employees on a voluntary basis. Although employers who provide health insurance voluntarily must still comply with the contraceptive mandate and face penalties for failure to do so, *see* 42 U.S.C. § 300gg-13(a); Mot. Hr'g Tr. 36, plaintiffs simply are not in the same position as those subject to the employer mandate because they can choose to not provide health insurance in order to exercise their religious belief of not facilitating access to contraceptive services. Any potential penalty resulting from that decision—such as difficulty recruiting employees without offering a health insurance plan—is the product of the conditions of the marketplace and is not imposed by the government. It therefore cannot be said that Catholic Information Center and Don Bosco suffer a cognizable RFRA burden because they are not in a position where the *government* is placing pressure on them to violate their religious beliefs in order to avoid a *government* imposed penalty.

The Court will grant defendants' motion to dismiss the church plan plaintiffs' RFRA

claims for lack of standing.

II. Defendants are entitled to summary judgment on the Free Exercise Clause claim in Count II.[25]

The Free Exercise Clause of the U.S. Constitution provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The Supreme Court has made clear that this constitutional right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[26] *Smith*, 494 U.S. at 879 (internal quotation marks omitted); *see also Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940) ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."). The Court must apply strict scrutiny only when a law is either not neutral or not generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

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[25] In this section, "plaintiffs" refers only to Catholic University and Thomas Aquinas because the remaining plaintiffs do not have standing to argue that the contraceptive mandate violates the Free Exercise Clause. *See supra* section I.C.

[26] It was this articulation of the Constitution's religious protection that prompted Congress to bring religion back into the equation with RFRA. *See Holy Land Found.*, 333 F.3d at 166–67. RFRA is statutory, however, and therefore has no bearing on the claims asserted under the Free Exercise Clause.

When assessing whether a law is neutral and generally applicable, the two inquiries tend to overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

Here, plaintiffs argue that the contraceptive mandate violates the Free Exercise Clause because it is neither neutral towards religion nor generally applicable because it is subject to numerous exceptions. Compl. ¶¶ 252–68; *see also* Pls.' Mot. at 29–32. The Court disagrees.

A. The contraceptive mandate is neutral.

A law is not neutral if it targets religious beliefs because of their religious nature or "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. A discriminatory object may be present on the face of the challenged provision when the text "refers to a religious practice without a secular meaning discernable from the language or context." *Id.* For example, *Lukumi* involved a city ordinance that prohibited animal sacrifice and the Supreme Court noted that the use of words such as "sacrifice" or "ritual"—which are religious in origin—might suggest that the city's ordinance is discriminatory on its face. *Id.* at 533–34. A discriminatory object may also exist where the challenged provision, in operation, targets religious practice in general, or certain religions' practices specifically, for unfavorable treatment. *Id.* at 534 (noting that the Free Exercise Clause also "'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs'").

Here, plaintiffs do not argue that the text of the contraceptive mandate is facially discriminatory, and the Court finds nothing in the language of the contraceptive mandate that would suggest that it is not neutral towards religion. *See id.* at 531. Instead, plaintiffs assert that the law is not neutral because "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." Pls.' Mot. at 31. None of plaintiffs' arguments relate to the actual effects of the contraceptive mandate or suggest that, as applied, the contraceptive mandate only burdens—and thus targets—religion. Because a lack of neutrality towards religion must be evident in the practical effects of the challenged provision—not just in what a party claims was in the minds of those who influenced or promulgated it—and because the contraceptive mandate does not operate to single out religion in general, or any religions specifically, for unfavorable treatment, it is neutral for purposes of the First Amendment.

Indeed, the availability of a religious employer exemption that completely exempts the Catholic Church from the requirements of the contraceptive mandate cuts against the conclusion that the contraceptive mandate was specifically designed to oppress those of the Catholic faith as plaintiffs suggest. *See id.* The Church employs over 2,100 individuals in the District of Columbia alone. *See* Aff. of Archdiocese ¶ 8.

Moreover, the contraceptive mandate applies equally to religious and nonreligious employers. It does not operate, as the Supreme Court put it in

Lukumi, so "that almost the only conduct subject to [the ordinances was] the religious exercise" of a specific church. 508 U.S. at 535. All employers that offer a healthcare plan—whether they do so voluntarily or by virtue of the ACA, and whether they are religious or nonreligious—must include cost-free coverage of a range of preventive services, including contraceptive services, in their plans.[27] This makes the law neutral. *See Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (noting that the point system FCC used to award noncommercial education broadcast licenses was neutral because "the rule on its face appear[ed] also to disadvantage nonreligious centralized broadcasting networks" and therefore did not place a burden "on religious organizations 'but almost no others'").

The fact that many nonreligious employers may have provided coverage for contraceptive services prior to the contraceptive mandate does not change

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[27] That some employers may be exempt from this requirement because they qualify for the "grandfathered-plan exemption" does not change the conclusion that the contraceptive mandate imposes an equal burden on religious and nonreligious employers. Not only is the grandfathered-plan exemption of temporary duration and therefore only allows qualifying plans to avoid compliance with the contraceptive mandate for a limited time, the grandfathered-plan exemption is available to both religious and nonreligious employers equally. It therefore does not operate to impermissibly target religion for unfavorable treatment. *See Am. Family Ass'n*, 365 F.3d at 1171 (noting that any discrimination against decentralized organizations in the FCC's point system was felt by both religious and nonreligious employers and any "differential impact . . . on . . . religion [was] neither . . . severe and targeted nor so unrelated to the FCC's legitimate regulatory interests as to be a religious gerrymander").

the analysis. The contraceptive mandate imposes a new burden on employers who already provide contraceptive services coverage—they must now provide contraceptive services coverage for free—and it eliminates the right of those employers to change their mind. Because the practical effect of the contraceptive mandate is to treat religious and nonreligious employers the same, that weighs in favor of finding the provision to be neutral towards religion.

The finding of neutrality is also supported by the fact that the mandate's requirements are closely related to its stated goals.[28] *See Lukumi*, 508 U.S. at 538. The final rules state that the purpose of the contraceptive mandate is to facilitate access to cost-free contraceptive services, which defendants have determined will help to improve the health of women and newborn children, decrease healthcare coverage cost disparities among women and men, and foster great equality for women in the workplace. 78 Fed. Reg. at 39872–73, 39887. Whether or not one agrees that access to cost-free contraceptive services will

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[28] Although the D.C. Circuit found that the government's interests in public health and equal access to healthcare for women are not compelling interests and that the contraceptive mandate is not narrowly tailored to achieve those interests, *Gilardi*, 733 F.3d at 1219–24, those interests may still serve as evidence of neutrality in this case because the Court is concerned not with whether the contraceptive mandate survives strict scrutiny, but with whether the stated goals are so unrelated to the regulatory mechanism as to raise suspicions that an otherwise neutral regulation has more sinister purposes. For the reasons provided in this section, the Court is convinced the contraceptive mandate has no ill intent toward religion or the Catholic Church.

actually produce those desired outcomes, the contraceptive mandate's requirements are aimed at promoting those asserted interests and are not so unrelated as to arouse suspicion. *Cf. Lukumi*, 508 U.S. at 538–39 (expressing concern that ordinances banning animal sacrifice prohibited more religious conduct than was necessary to prevent improper disposal of animal remains or to prevent animal cruelty). Thus, the contraceptive mandate is neutral in its practical effect, and it is related to its specified, neutral regulatory interests.

Plaintiffs point to statements by defendant Sebelius and by a key supporter of California's contraception statute, and they allege that there was a pro-choice bias on the part of the IOM committee. *See* Pls.' Mot. at 31–32. But those circumstances do not necessarily reflect hostility towards Catholicism.[29] And even though—if it can be shown

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[29] The statutory scheme itself suggests that Congress may have contemplated that HRSA's guidelines would include contraceptive services coverage. HRSA's statutory authority is derived from 42 U.S.C. § 300gg-13(a), which calls for coverage for preventive services, but then specifically directs HRSA to enumerate recommended preventive services for women. 42 U.S.C. § 300gg-13(a)(4). Paragraph (1) of that section requires coverage of "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." *Id.* § 300gg-13(a)(1). Because many women- only preventive services, such as breast cancer screening, breastfeeding counseling, and cervical cancer screening, already fall within paragraph (1), *see* USPSTF A and B Recommendations, U.S. Preventive Services Task Force, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited December 3, 2013), one could conclude that Congress had other women-only preventive services—such as contraceptive services—in mind. This further

to exist—the subjective intent of the drafters may create an inference that the object of a law is not neutral towards religion, *Lukumi*, 508 U.S. at 533, that inference is weakened when the law does not operate in a nonneutral way.[30] *See id.* at 558 (Scalia, J., concurring) ("The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . . ."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *see also id.* at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (applying the same principle in the regulatory context). The Court therefore finds that the contraceptive mandate is neutral towards religion.[31]

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reduces the likelihood that the regulation was specifically designed to target adherents of the Catholic faith.

[30] Defendant Sebelius's use of sarcasm on the one occasion cited was, at most, insensitive, and the statement of the California legislator who played no role in the adoption of the rule does not bear on this case at all.

[31] Despite plaintiffs' arguments to the contrary, the contraceptive mandate does not single out Catholicism for unfavorable treatment while leaving all other religions unaffected. It is undisputed that the exemption is available to the Catholic Church, and that the availability of the exemption for the religious-affiliated organizations turns on the nature of those organizations and not the church with which they are affiliated.

B. The contraceptive mandate is generally applicable.

Plaintiffs argue that the contraceptive mandate is not generally applicable because there are exemptions to its requirements, Pls.' Mot. at 30, and they quote the sentence in *Lukumi*, which states: "[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." 508 U.S. at 537, quoting *Smith*, 494 U.S. at 884 (internal quotation marks omitted). But the requirement of general applicability is not the same thing as requiring a regulation to be universally applicable. *See Gillette v. United States.*, 401 U.S. 437 (1971).

First of all, the quoted language is taken from the Supreme Court's neutrality discussion in *Lukumi*. Although inquiries into a regulation's neutrality and general applicability tend to overlap, *Lukumi*, 508 U.S. at 531, the observation appears to recognize that the application of statutory or regulatory discretion to exempt all secular objectors, leaving the rule to be enforced against a religious group only, would undermine its neutrality. *Id.* at 537 (explaining that the government exercised its discretion to determine which animal killings were necessary and therefore exempt in a way that "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons").

But here, none of the exemptions to the contraceptive mandate are individualized, and none of the exemptions require the government to exercise its discretion in a way that would allow it to

"devalue[] religious reasons for [not providing contraceptive services coverage] by judging them to be of lesser import than nonreligious reasons." *See id.* All of the exemptions are available regardless of an employer's religious leanings, and an employer's ability to qualify for an exemption is not based on any subjective determination by the government. *See Am. Family Ass'n*, 365 F.3d at 1171 ("Even setting aside that nonreligious organizations also face burdens from the rule, the burden the point system foists on religious organizations is relatively modest" because "[t]here is nothing inherently related to religion in the point system's criteria"). Indeed, the availability of both the religious employer exemption and the accommodation for nonprofit religious organizations demonstrates that the government is not devaluing religious concerns, but rather, it is making efforts to accommodate them.[32]

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[32] The Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) —even if it were binding on this Court—does not compel a contrary conclusion. In that case, the court addressed whether a police department's decision to deny a religious exemption to its no beard policy violated the Free Exercise Clause and determined that the policy was subject to heightened scrutiny because it was not generally applicable. *Id.* at 365. But, the court did not simply look at the police department's beard policy, spot a secular exemption, and automatically decide that heightened scrutiny applied. Instead, the existence of a nonreligious exemption for medical reasons gave the court pause because the nonreligious exemption would undermine the stated goal of having uniform police uniforms to the same extent as if the department allowed a religious exemption to that policy. *Id.* at 366. Consequently, providing an exemption for medical reasons but not for religious reasons aroused suspicion that the government was making "a value judgment in favor of secular motivations, but not religious motivations." *Id.* However, the

The Court in *Lukumi* acknowledged that it did "not define with precision the standard used to evaluate whether a prohibition is of general application," but it indicated that the inquiry should focus on whether the challenged provision is so underinclusive that it raises suspicions as to whether it was actually designed to promote the proffered government interests. 508 U.S. at 543.

Here, the cited exceptions do not give rise to that sort of underinclusiveness. The grandfathered-plan exemption and the small employer exemption are not specific exemptions to the contraceptive mandate; instead, they are general exemptions to mandate that employers comply with all of the ACA's new essential minimum coverage requirements. These exemptions to the employer mandate do not tend to show that the government has created so many specific exemptions to the contraceptive rules to counteract their efficacy in promoting public health and women's equality.[33] Similarly, the one-year safe harbor delaying enforcement of the contraceptive mandate is irrelevant when considering whether the

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court was not troubled by the existence of an exemption for undercover police officers because undercover officers are not held out as police to the public, which means that their appearance did not undermine uniformity in police appearance. *Id.* Here, the only permanent exemption to the contraceptive mandate is an exemption that respects religion.

[33] Moreover, to the extent that these exemptions are relevant to the general applicability inquiry, they do not cut against a finding of general applicability because the grandfathered plan exemption is of limited duration and the small employers exemption does not exempt a small employer who voluntarily chooses to provide health insurance from the contraceptive mandate.

contraceptive mandate is underinclusive. The safe harbor was temporary and it will expire next month, thereby eliminating any potential underinclusiveness caused by that "exemption."

The only specific exemption to the contraceptive mandate – and therefore the only potential source of underinclusiveness—is the religious employer exemption established by 45 C.F.R. § 147.131(a). The existence of a religious employer exemption, however, does not give rise to the kind of underinclusiveness that concerned the Supreme Court. *See Lukumi*, 508 U.S. at 543 (finding underinclusiveness where the ordinances "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does"). It is true that the definition of religious employer includes some religious organizations and not others, but the purpose of the narrow definition was to narrow the group of employees who would be carved out of the law. *See* 78 Fed. Reg. at 39874 (explaining that defendants adopted a narrow definition of religious employer because it allowed them to respect religious objections to contraceptive services "in a way that [did] not undermine the governmental interests furthered by the contraceptive coverage requirement" because "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection [to contraceptive services], and who would therefore be less likely than other people to use contraceptive services"). In other words, the religious employer exemption was drafted narrowly in order to prevent the contraceptive mandate from being underinclusive.

The Court finds, then, that the contraceptive mandate is generally applicable because none of its exemptions create the type of individualized value assessment or underinclusiveness that warrants a contrary finding. Since the contraceptive mandate is both neutral and generally applicable, strict scrutiny is not triggered, and defendants are entitled to summary judgment on Count II, plaintiffs' Free Exercise Clause claim.[34]

III. Defendants are entitled to summary judgment on plaintiffs' compelled speech claims in Count III.[35]

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[34] In their motion for preliminary injunction, plaintiffs cite *Smith* and briefly discuss the language in that case that has been used to create a sort of hybrid theory of constitutional rights that would trigger the application of heightened scrutiny. Pls.' Mot. at 32. It is not clear, however, from plaintiffs' motion—or its subsequent motions that do not mention the hybrid theory—whether plaintiffs intend to assert a separate claim under the hybrid rights theory. To the extent that this was their intention, the Court finds that a hybrid rights claim must also fail. In the D.C. Circuit, the hybrid rights theory may only trigger strict scrutiny where at least one of the two asserted constitutional claims is viable. *Henderson*, 253 F.3d at 19 (noting that at least one claim must be viable because the laws of mathematics teach us that "zero plus zero equals zero"). As explained throughout this opinion, plaintiffs' only viable constitutional claim is a narrow count that does not go to the contraceptive mandate, but only challenges the ban on attempts to influence a third-party administrator. *See infra* section IV. As this claim is extremely narrow and does not overlap with plaintiffs' other constitutional claims, the Court declines to use the hybrid theory to trigger strict scrutiny in this case.

[35] The Archdiocese is completely exempt from the contraceptive mandate and therefore cannot assert a compelled speech claim.

The First Amendment Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It protects not only "the right to speak freely," but also "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It therefore offers protection to parties subject to government compelled speech, permitting them in certain situations to remain silent. See, *e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Here, plaintiffs claim that the contraceptive mandate unconstitutionally compels them to speak in two ways: first, plaintiffs assert that the contraceptive mandate violates the First Amendment because it compels them to provide, pay for, and facilitate access to counseling in favor of the use of contraceptive services, which they do not support. Compl. ¶¶ 269–83; *see also* Pls.' Mot. at 33. Second, plaintiffs assert that the accommodation, in conjunction with the contraceptive mandate, compels them to engage in speech—the self-certification form—that simultaneously results in the provision of contraceptive services to which they object while depriving them of the freedom to speak on the issue of abortion and contraception on their own terms. *Id.* Although at bottom both claims deal with the constitutionality of compelled speech, they differ enough to warrant separate treatment because the former addresses the government's ability to compel a party to support third-party speech whereas the latter alleges an imposition on these plaintiffs.

Neither aspect of the regulations offends the First Amendment.

A. Providing access to counseling about contraceptive services through plaintiffs' healthcare plan does not violate plaintiffs' free speech rights.[36]

Plaintiffs assert that the contraceptive mandate violates their free speech rights because it compels them to provide, pay for,[37] and facilitate access to

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[36] To the extent that Catholic University asserts this argument as part of its compelled speech claim, the argument fails because the contraceptive mandate does not require the University to offer a health plan that includes contraceptive services coverage. *See* 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A). Similarly, the facts do not support the argument that the church plan plaintiffs are compelled to provide access to counseling about contraceptive services because there is no indication that the coverage will be provided to their employees. *See* supra section I.C. The only remaining plaintiff is Thomas Aquinas.

[37] Throughout their briefs, plaintiffs imply that the contraceptive mandate requires them to pay for their employees' contraceptive services. That characterization is inaccurate in light of the accommodation, for which all plaintiffs admittedly qualify. Compl. ¶ 10. Under the accommodation, eligible organizations—including plaintiffs—are not required to pay for contraceptive services. 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(A), (b)(2), (c)(2). Moreover, the regulations explicitly prohibit insurers or third-party administrators from passing the cost of those services through to the employer. *Id.* § 2590.715–2713A(b)(2), (c)(2); 78 Fed. Reg. at 39877, 39879. The regulations provide for separate accounting of the money used to pay for contraceptive services in order to ensure that plaintiffs' fear that their other insurance premiums would suspiciously increase does not come to fruition. 29 C.F.R. § 2590.715–2713A(d); 78 Fed. Reg. at 39877, 39879. Thus, there can be no argument that the contraceptive mandate and the accommodation violate plaintiffs' free speech rights by requiring

counseling that encourages, promotes, or facilitates the use of contraceptive services. Compl. ¶ 275; *see also* Pls.' Mot. at 33. More specifically, they complain that, by compelling them to provide a health insurance plan that covers third-party counseling on the topic of contraceptive services, the contraceptive mandate forces plaintiffs to facilitate third-party speech in "*favor* of such practices" and therefore violates plaintiffs' free speech rights by forcing them to "speak" in a manner inconsistent with their beliefs. Pls.' Mot. at 33 (emphasis in original).

The Court notes at the outset that the definition of preventive services incorporated into the mandate includes "patient education and counseling for all women with reproductive capacity," and not advocacy "in favor of" anything, so plaintiffs' characterization is not entirely accurate. *See* Women's Preventive Services Guidelines, HRSA, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 12, 2013). But assuming that, in some circumstances, information and counseling about contraception could also include advice, encouragement, or instructions, the Court will consider this claim on its merits. Since plaintiffs are not obliged to personally deliver the counseling,[38]

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them to subsidize third-party speech that has a content to which they object.

[38] This is not a case where plaintiffs are being asked to personally convey a third-party or government message. *See Pacific Gas*, 475 U.S. at 20–21; *Tornillo*, 418 U.S. at 258. They are not disseminating counseling regarding the use of contraceptive services by handing out or posting pre-made materials, and they are not engaging in the counseling themselves. In fact, the regulations take pains to ensure that plaintiffs are in no way involved in the dissemination of

their claim is best understood as an objection to forced accommodation of third-party speech.

The government violates the First Amendment when it compels "one speaker to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63 ("Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message."); *see also Pacific Gas & Elec. Co v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion); *Tornillo*, 418 U.S. at 258. This is so because such governmental compulsion would deprive the compelled speaker of "the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) ("[O]ne who chooses to speak may also decide 'what not to say.'").

In *Rumsfeld v. FAIR*, the Supreme Court concluded that a law requiring law schools to provide military recruiters with equal access to their students by "hosting" the recruiters did not violate the schools' free speech rights. 547 U.S. at 61–68. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, however, the Supreme Court reached the opposite conclusion, finding that a Massachusetts law that, in effect, "require[d] private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey," violated the parade

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material regarding the coverage of contraceptive services. 29 C.F.R. § 2590.715–2713A(d); 78 Fed. Reg. at 39876, 39880. Consequently, cases like *Pacific Gas* and *Tornillo* are distinguishable and do not govern this case.

organizers' First Amendment free speech rights. 515 U.S. at 559.

In each case, the Court called for the same initial showing: (1) that the objecting party itself was engaged in speech and (2) that accommodating the third-party speech would alter the message of the objecting party's speech. *FAIR*, 547 U.S. at 63; *Hurley*, 515 U.S. at 576–77; *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). Without satisfying this essential element, the Court suggested that there could be no compelled accommodation claim: "The compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63.

The second factor considered by the Court in *FAIR* and *Hurley* was whether there was a risk that the third party's objectionable speech might be attributed to the objecting host speaker. *FAIR*, 547 U.S. at 65; *Hurley*, 515 U.S. at 575; *see also Turner Broad.*, 512 U.S. at 655; *PruneYard*, 447 U.S. at 87. And the third factor considered by the Court was whether, as applied, the provision compelling a host speaker to accommodate the other's speech had any legitimate, nonspeech related purpose. *Hurley*, 515 U.S. at 578.

Here, there is no evidence that the contraceptive mandate unconstitutionally requires plaintiffs to accommodate objectionable third-party speech. Plaintiffs are not engaging in speech or inherently expressive conduct when they provide their

employees with health insurance.[39] *See FAIR*, 547 U.S. at 64 (noting that "accommodating the military's message [did] not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions"). So plaintiffs' compelled-accommodation claim is missing the first essential element: plaintiffs' own speech is not being used as the vehicle through which a third- party's speech is communicated. *See FAIR*, 547 U.S. at 63; *Hurley*, 515 U.S. at 576; *PruneYard*, 447 U.S. at 87; *see also Hurley*, 515 U.S. at 568, 572 (noting that "parades are . . . a form of expression, not just motion," and that "every participating unit [in the parade] affects the message conveyed by the private organizers"). Therefore, the compelled-accommodation claim in Count III fails.

Moreover, even if plaintiffs were engaging in speech that could be altered by the availability of

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[39] The conduct compelled by the employer mandate and contraceptive mandate is the provision of health insurance to eligible employees that contains coverage for contraceptive services. Although the First Amendment's protections extend to inherently expressive conduct, *see*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989), providing health insurance is not inherently expressive and is therefore not First Amendment speech. No insurance provider intends "to convey a particularized message" by providing insurance, and there is virtually no likelihood "that the message would be understood [as communicating a particular stance] by those who viewed it." *Id.*; *see also FAIR*, 547 U.S. at 64 (finding no third-party speech accommodation problem because "a law school's decision to allow recruiters on campus is not inherently expressive" and instead is made to facilitate recruitment and "assist their students in obtaining jobs," not express a point of view). Consequently, this case does not involve speech or inherently expressive conduct.

counseling for women about contraceptive services, any compelled accommodation of that counseling is not constitutionally problematic. First, it is unlikely that any objectionable third-party counseling would be attributed to plaintiffs simply because access to that counseling was obtained through an employer-provided health insurance plan. The Catholic Church is widely known to oppose the use of contraceptive services, and as plaintiffs assert, their faith is central to everything they do. *See* Aff. of CCA ¶¶ 7, 14; Aff. of ACHS ¶¶ 7, 14; Aff. of Don Bosco ¶¶ 7, 14; Aff. of Mary of Nazareth ¶¶ 7, 14; Aff. of Catholic Charities ¶¶ 7, 14; Aff. of ACHS ¶¶ 7, 14; Aff. of Victory Housing ¶¶ 7, 14; Aff. of CIC ¶¶ 7, 14; Aff. of CUA ¶ 13; Aff. of TAC ¶ 11. Second, the contraceptive mandate has a legitimate, nonspeech-related purpose of providing women with access to preventive services to improve the health of women and newborn children, and it is devoid of any purpose to target speech. Plaintiffs remain completely free to espouse their beliefs against the use of contraception as well as to encourage their employees not to utilize those services.[40] So plaintiffs' free speech claim is

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[40] Plaintiffs argue that the freedom to express their beliefs outside the regulatory scheme does not alleviate the compelled speech problem in this case. Pls.' Opp. & Cross-Mot. at 36. Although this Court recognizes that the freedom to express views in another context will not prevent all compelled speech from being constitutionally suspect, the Supreme Court has recognized that it is a factor that can be considered in determining whether there is a Free Speech Clause violation. *FAIR*, 547 U.S. at 65 (finding no free speech violation because the law schools remained free to say what they wished about the military's objectionable policies); *PruneYard*, 447 U.S. at 87 (noting that the mall owners remained free to express their own ideas).

also missing the other hallmarks of unconstitutional accommodation claims. The Court therefore concludes that any requirement placed on plaintiffs to accommodate the speech of third-party healthcare professionals does not interfere with plaintiffs' speech and therefore does not violate plaintiffs' First Amendment rights.[41]

B. The self-certification form does not violate plaintiffs' free speech rights.

Plaintiffs also argue that requiring them to file a self-certification form in order to invoke the protections of the accommodation amounts to compelled speech in violation of their free speech rights. Compl. ¶ 276; Pls.' Mot. at 33. First, they state that the self-certification requirement forces them "to engage in speech that triggers the provision of products and services to which they object," Pls.' Opp. & Cross-Mot. at 37, and second, "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." Pls.' Mot. at

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[41] This conclusion is not weakened by plaintiffs' argument that requiring them to accommodate the speech of third-party counselors regarding the use of contraception violates their free speech rights because it forces them to "affirm in one breath that which they deny in the next." Pls.' Opp. & Cross-Mot. at 36, quoting *Pacific Gas*, 475 U.S. at 15–16. Plaintiffs are not affirming anything: offering health insurance that includes coverage for contraceptive services counseling is not speech. Moreover, under the terms of the accommodation, neither Catholic University, the Archdiocese, nor any of the church plan plaintiffs would be providing these services as part of their plans. To the extent that they are referring to the self-certification form, the Court addresses that argument below.

33–34. Neither argument, however, supports plaintiffs' claim that the accommodation's self-certification requirement violates the Free Speech Clause.

1. *Requiring plaintiffs to file a self-certification form that ultimately results in the provision of contraceptive services coverage does not violate plaintiffs' free speech rights.*[42]

Plaintiffs point to the consequences of the self-certification form and argue that requiring them to file the form is compelled speech because it makes their speech the "trigger" for the provision of contraceptive services. *Id.* at 33. To support this consequence-based argument, they direct this Court's attention to the Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *See* Pls.' Opp. & Cross-Mot. At 37. Plaintiffs' reliance on *Bennett* is misplaced.

In *Bennett*, the Supreme Court addressed the constitutionality of an Arizona law that gave publicly financed political candidates matching funds for every dollar donated to, or spent on behalf of, a privately funded candidate. 131 S. Ct. at 2813. The Court concluded that "the matching funds provision 'impose[d] an unprecedented penalty on any candidate who robustly exercise[d] [his] First Amendment right[s]'" by creating a situation where,

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[42] To the extent that the church plan plaintiffs assert this argument as part of their compelled speech claim, the argument fails because there is no indication that filing the self-certification form will result in the provision of contraceptive services coverage to the church plan plaintiffs' employees. *See* supra section I.C. As a result, "plaintiffs" in this subsection refers only to Catholic University and Thomas Aquinas College.

simply by engaging in free speech, the privately funded candidate guaranteed that his or her opponent would receive a cash subsidy from the state of Arizona. *Id.* at 2818, quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008) (second and third alterations in original). In other words, the Court determined that the law created a "trigger effect" by which a privately funded candidate's speech was penalized, thus resulting in a chilling effect on that political speech. *Id.* at 2824. Consequently, the Court determined that strict scrutiny should apply even though the challenged law did not fit into the typical compelled speech or subsidized speech fact pattern. *Id.*

The contraceptive mandate, the accommodation, and the self-certification form do not create a similar penalty in this case. In *Bennett*, the publicly funded candidate was only entitled to matching funds if the privately funded candidate expressed himself by expending his own funds, so the privately funded candidate's speech was the actual trigger for payment, and the Court's concern was that his speech would therefore be inhibited. *Id.* at 2821. Here, the self-certification form is not the actual trigger for coverage of contraceptive services, and there is no speech of the plaintiffs that is being chilled. Instead, the source of the contraceptive services coverage is the ACA itself, which mandates that all health insurance plans that are not exempt must include cost-free coverage for women's preventive services. *See* 42 U.S.C. § 300gg-13(a)(4). This statutory right to contraceptive services coverage exists and attaches prior to and independent of any speech by an employer; any speech associated with the self-certification form is merely designed to relieve the religious employer of any obligation to fund the

services itself and to transfer the burden of providing the coverage.[43] Since there is nothing about the consequences of filing the self-certification form that chills or inhibits plaintiffs' speech, the situation in this case is a far cry from the one in Bennett.

2. *Compelling plaintiffs to state their religious objections to the provision of contraceptive services coverage does not violate plaintiffs' free speech rights.*

In addition to their consequences-based argument, plaintiffs assert that the self- certification form is unconstitutionally compelled speech "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." Pls.' Mot. at 33–34. In other words, plaintiffs argue that the self-certification form is speech, that it is compelled because they must file the form in order to receive the benefits of the accommodation, and that it violates their free speech rights because they should

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[43] It makes no difference to this Court's analysis that plaintiffs may block access to contraceptive services coverage by not filing the self-certification form—and therefore not engaging in speech—and by agreeing instead to pay the applicable penalties. Once again, the underlying statutory right to coverage for contraceptive services remains in existence despite plaintiffs' choice of whether to "speak;" regardless of whether the self-certification form is filed, plaintiffs' employees are entitled to cost-free contraceptive services coverage and plaintiff will either have to provide that coverage, pay penalties, or file the self-certification form. Consequently, this is simply not a case where some expressive act by plaintiffs is the absolute and only trigger for consequences that are inimical to their interests as in *Bennett*.

be able to decide when to speak and when to stay silent. Although it is well-settled that the Free Speech Clause protects the freedom to speak as well as the freedom to remain silent, *Barnette*, 319 U.S. at 633–34; *see also Wooley*, 430 U.S. at 714, the Court concludes that the self-certification form requirement does not violate plaintiffs' rights.

Under the regulations, the self-certification form must include the following information: (1) that the self-certifying organization "opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections;" (2) that the organization "is organized and operates as a nonprofit;" and (3) that the organization "holds itself out as a religious organization." 29 C.F.R. § 2590.715–2713A(a). Plaintiffs do not object to the content of these statements; instead, as discussed above, they object that the consequence of these statements is the provision of coverage for contraceptive services by others. Pls.' Mot. at 9; *see also* Compl. ¶ 276 ("The U.S. Government Mandate would compel Plaintiffs to issue a certification of their beliefs that, in turn, would result in the provision of objectionable products and services to Plaintiffs' employees.").

Since it is undisputed that, to the extent the form transmits any content at all, it accurately reflects plaintiffs' beliefs, the First Amendment is not implicated. The Supreme Court has explicitly stated that a compelled speech claim involves a situation where "an individual is obliged personally to express a message he *disagrees* with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544

U.S. 550, 557 (2005) (emphasis added); *see also FAIR*, 547 U.S. at 62; *Turner Broad.*, 512 U.S. at 641. And a review of other compelled speech precedent further demonstrates that the free speech clause has been historically invoked to protect against compelling an individual from speaking or endorsing a message with which the speaker disagrees. *See*, *e.g.*, *Wooley*, 430 U.S. at 715 (finding a free speech violation where a state law compelled an individual to display a license plate motto that articulated an "ideological point of view [the plaintiff found] unacceptable"); *Barnette*, 319 U.S. at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").

The self-certification does not require plaintiffs to say anything with which they disagree; instead, it merely asks them to asset that they have a religious objection to the provision of contraceptive services—a statement that is entirely consistent with their beliefs. *See* 29 C.F.R. § 2590.715–2713A(a). The self-certification form does not contain a government-preferred message, and it does not force plaintiffs to serve as a mouthpiece to spread adherence to the government's ideological goals.[44] *See Johanns*, 544 U.S. at 557. The self-certification form is simply part of a regulatory scheme that requires plaintiffs to

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[44] *Evergreen Ass'n v. City of New York* and *Centro Tepeyac v. Montgomery County* are distinguishable on that ground because the regulations in those cases required the plaintiffs to present a government-preferred message. 801 F. Supp. 2d 197, 201 (S.D.N.Y. 2011); 779 F. Supp. 2d 456, 458–59 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012).

state their objections on the record in order to be exempted from the regulations. *See FAIR*, 547 U.S. at 62 (finding that the Solomon Amendment did not raise free speech concerns because any compelled speech was merely incidental to the regulation of conduct). Viewed in this context, the self-certification form is no different than requiring conscientious objectors to state their objections to war in order to be excused from the draft or requiring nonprofit organizations to fill out a form to apply for section 501(c)(3) tax-exempt status. Therefore, the Court concludes that requiring plaintiffs to file the self-certification form does not violate their free speech rights, and defendants are entitled to summary judgment on Count III.

IV. Plaintiffs are entitled to summary judgment on their claim that the accommodation places an unconstitutional restriction on their free speech rights in Count IV.[45]

Plaintiffs also argue that defendants violated their free speech rights by enacting what plaintiffs hyperbolically refer to as a "gag order" as part of the accommodation. Compl. ¶¶ 284–88. The challenged provision applies only to organizations that are self-insured and use third-party administrators, and it provides that, once an organization self-certifies under the accommodation, it "must not, directly or indirectly, seek to interfere with a third-party

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[45] Catholic University does not have standing to challenge this provision because it offers health insurance through a group health plan maintained by an insurer. *See* Aff. of CUA ¶¶ 8, 10. The Archdiocese also does not have standing to bring this claim because it is entirely exempt from the contraceptive mandate. *See* Aff. of Archdiocese ¶ 18.

administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." [46] 29 C.F.R. § 2590.715–2713A(b)(1)(iii).

Plaintiffs do not challenge the constitutionality of the first half of the provision, which prohibits the eligible organization from interfering with a third-party administrator's provision of the contraceptive services coverage. But they are concerned with the broad scope of the second part of the provision, which provides that a religious organization may not "directly or indirectly" influence the third-party administrator's decision as to whether it will agree to remain in a contractual relationship with the organization and assume the responsibility to provide the coverage. The Court finds that the regulation imposes a content-based limit on the religious organizations involved that directly burdens, chills, and inhibits their free speech. [47] *See Ward v. Rock*

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[46] There is no complementary provision for organizations participating in group health insurance plans because an insurer has an automatic obligation to provide coverage upon receipt of a self-certification form, unlike a third-party administrator who may ultimately decide to not enter into, or remain in, a contractual relationship with a self-certifying organization. Compare 29 C.F.R. § 2590.715–2713A(b)(2), *with id.* § 2590.7152713A(c)(2).

[47] Although on its face the regulation does not limit its prohibition only to speech seeking to dissuade the third-party administrator from providing coverage for contraceptive services, viewed in the regulatory context, there is no question that this is a content-based restriction. The restriction on speech only

Against Racism, 491 U.S. 781, 791 (1989) (noting that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys"). This type of restriction on speech is "'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009), quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

To satisfy strict scrutiny, a law or regulation must further a compelling interest, and it must be narrowly tailored to achieve that interest. *Bennett*, 131 S. Ct. at 2817; *FEC v. Wis. Right to Life*, 551 U.S. 449, 464 (2007). The Court may not consider any potential interest that may support the challenged provision; instead, the Court's strict scrutiny analysis is limited to the interests proffered by the

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arises after an eligible organization self-certifies that it objects to the provision of contraceptive services and effectively shifts the burden of providing those services—or at least creates a decision as to whether the third-party administrator will accept the burden to provide those services—onto the third-party administrator. *See* 29 C.F.R. § 2590.715–2713A(b)(1)(iii). As a result, the only organizations subject to the restriction on speech are those organizations that have already specifically stated that they object to the provision of contraceptive services. Thus, any argument that the restriction—at bottom—equally applies to speech that seeks to influence third-party administrators to cover contraceptive services, and not just speech that seeks to discourage that coverage, is frivolous. A party who self-certifies that it objects for religious reasons to providing coverage for contraceptive services simply will not turn around and try to encourage a third-party administrator to provide that coverage.

government. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978) (noting that "the burden is on the government to show the existence of [a compelling] interest").

Here, defendants argue that the speech restriction is meant to prevent a self-certifying organization from using its economic power to coerce a third-party administrator into declining to assume responsibility for providing contraceptive services coverage to the organization's employees. Defs.' Mem. at 36. This interest against economic coercion was deemed compelling in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–19 (1969). But the provision does not survive strict scrutiny because it does not simply ban threats or coercion, and it is not narrowly tailored or the least restrictive means to achieve the government's interest.

The ban contained in the provision—that self-certifying organizations "must not, directly or indirectly, seek to influence the third party administrator's decision"—is broader than it needs to be to serve the proffered interest: it restricts not only economic coercion but also any attempt to calmly discuss the moral implications of providing contraception with a third-party administrator. A rule that prohibits more expression than is needed to advance the government's goal is not narrowly tailored.[48]

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[48] Moreover, it is not clear whether the interest against economic coercion is actually compelling in this context. Under the current regulatory framework, a self-certifying organization has no incentive to threaten to cut ties with a third-party administrator because, if the pressure is successful, the organization simply becomes obliged to find another third-party

The Court therefore finds that the portion of 29 C.F.R. § 2590.715–2713A(b)(1)(iii) that provides that an eligible organization "must not, directly or indirectly, seek to influence the third- party administrator's decision to make . . . arrangements" for contraceptive services coverage violates the Free Speech Clause since it is not narrowly tailored to achieve the government's asserted compelling interest. Plaintiffs are entitled to summary judgment on Count IV.

V. Plaintiffs' First Amendment Establishment Clause claims asserted in Count V fail.[49]

The First Amendment Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Plaintiffs claim that this clause has been violated in two ways: (1) the religious employer exemption creates an impermissible denominational preference; and (2) the religious employer exemption results in

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administrator to provide that coverage, or it must operate its self-insured plan on its own. Mot. Hr'g Tr. 13–14. It is also not clear that the challenged speech restriction is related to the stated interest in preventing economic coercion because, if the third-party administrator decides on its own—free from coercion—that it does not want to assume the responsibility of providing contraceptive coverage, the regulations provide that the third-party administrator must terminate its contractual relationship with the self-certifying organization. *See* 29 C.F.R. § 2590.715–2713A(b)(2). In other words, the economic consequence for the third-party administrator is the same whether the religious organization has applied pressure or not.

[49] In this section, "plaintiffs" refers only to Catholic University and Thomas Aquinas College. The Archdiocese qualifies for the religious employer exemption and the church plan plaintiffs are, in essence, completely exempt as well. *See supra* section I.C.

excessive entanglement between the government and the Catholic Church. Compl. ¶¶ 289–96; *see also* Pls.' Mot. at 35–38.

A. The religious employer exemption does not amount to denominational discrimination.

Plaintiffs claim that the religious employer exemption violates the Establishment Clause because it creates a preference for one type of religious organization over another. Compl. ¶ 293. They argue that, when the regulations define "religious employer" to include only houses of worship, they disfavor all other types of religious organizations, such as charities or schools. Citing *Larson v. Valente*, 456 U.S. 228 (1982), plaintiffs argue that this preferential treatment is subject to strict scrutiny. Pls.' Mot. at 35–36.

Under *Larson*, the reviewing court must first determine "whether the law facially differentiates among religions." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989). If the answer is yes, then the law is subject to strict scrutiny. *Id.* If the answer is no, the reviewing court must apply *Larson's* second step, which requires the court to evaluate the challenged law under the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court finds that the religious employer exemption does not facially discriminate among religions, so strict scrutiny does not apply. In addition, the regulation satisfies the three-prong *Lemon* test.

1. *The religious employer exemption is not subject to strict scrutiny because it does not facially discriminate among religions*.

A law facially discriminates among religions when it treats similarly situated religious organizations differently, resulting in benefits to some religious denominations but not to others. *See Larson*, 456 U.S. at 246 & n.23; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008). The law need not explicitly state a preference for one religion over the other; facial discrimination exists so long as the law treats similarly situated religious organizations differently.[50] *Larson*, 456 U.S. at 246 n.23.

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[50] Actual discrimination among religions is necessary to find facial discrimination; disparate impact alone is not enough. For example, in *Hernandez v. Commissioner of Internal Revenue*, the Supreme Court held that section 170 of the Internal Revenue Code of 1954 ("IRC"), 26 U.S.C. § 170, was not facially discriminatory despite its disparate treatment of religious activities. 490 U.S. at 695–96. The plaintiffs in that case challenged the constitutionality of section 170, which creates a tax deduction for charitable contributions, on the grounds that it violated the Establishment Clause because the IRS's decision to define charitable contribution as a contribution or gift, but not a transfer for consideration, meant that members of the Church of Scientology could not deduct the "fixed donations" they paid in order to receive services known as "auditing" or "training." *Id.* at 685. These fixed donations made up the bulk of the Church's revenue. *Id.* Although the definition of charitable contributions had a disproportionate effect on the members of the Church of Scientology, the Court found that section 170 did not facially discriminate among religions because the line drawn "between deductible and nondeductible payments to statutorily qualified organizations [did] not differentiate among sects." *Id.* at 695. In other words, section 170 did not facially discriminate because the disparate treatment resulting from the statute arose from the way the IRS defined charitable contributions and not from the IRS explicitly deciding which religious organizations would benefit from the deductions and which would not. *Id.*

For example, in *Larson*, the Supreme Court held that a law that subjected only those religious organizations that received over fifty percent of their charitable donations from nonmembers to disclosure requirements facially discriminated among religions. *Id.* at 246–47. The Court explained that, unlike cases where a statute had merely a "'disparate impact' upon different religious organizations," the statute at issue in *Larson* made "explicit and deliberate distinctions between different religious organizations" because "the provision 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, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand." *Id.* at 246 n.23, quoting *Valente v. Larson*, 637 F.2d 562, 566 (8th Cir. 1981). Different treatment of the same type of religious organization—in *Larson*, houses of worship—amounted to facial discrimination among religious denominations and therefore resulted in the discrimination that was subject to strict scrutiny. *Id. at* 246–47.

Similarly, in *Colorado Christian University v. Weaver*, the Tenth Circuit found that Colorado's scholarship program facially discriminated among religions. 534 F.3d at 1256. Under the scholarship program, institutions of higher education—including many religious schools—were entitled to receive scholarship money for qualifying students. *Id.* at 1250. But the statute exempted from the definition of institution of higher education "any college that [was] 'pervasively sectarian' as a matter of state law."

Id. As a result, certain religious schools—such as a Catholic school and a Methodist school—were eligible to receive scholarship money while other schools—such as a nondenominational school and a Buddhist school—were not eligible. *Id.* at 1258. The court concluded that the law facially discriminated among religions because it provided aid to some sectarian schools while excluding others as "pervasively sectarian." *Id.* at 1256. In other words, the statute facially discriminated among religions when it explicitly treated religious schools of different denominations differently.

Here, plaintiffs argue that the religious employer exemption amounts to denominational discrimination for two reasons. First, they object that the religious employer exemption treats religious organizations differently based on how they are structured or organized: Catholic houses of worship are exempt whereas Catholic educational and charitable organizations are not. Pls.' Mot. at 36; Pls.' Opp. & Cross-Mot. at 38–39. Second, they make the claim that the religious employer exemption unfairly discriminates against Catholics in particular because, unlike "denominations that exercise religion principally through 'churches, synagogues, mosques, and other houses of worship, and religious orders,'" Catholics like plaintiffs "also exercise their religion through schools, health care facilities, charitable organizations, and other ministries." Pls.' Reply at 21 (emphasis in original); *see also* Pls.' Mot. at 36.

Plaintiffs' first argument—that the Establishment Clause prohibits distinctions among different types of organizations affiliated with the same faith—finds no support in Establishment Clause case law. In *Larson*,

the Supreme Court repeatedly spoke in terms of *denominational* discrimination or discrimination *among religions*, not structural discrimination:

- "The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." 456 U.S. at 244 (emphasis added).
- "[N]o State can 'pass laws which aid one religion' or that 'prefer one *religion* over another.' " *Id.* at 246 (emphases added) (citation omitted).
- "This principle of *denominational* neutrality has been restated on many occasions." *Id.* (emphasis added).
- "[T]he government must be neutral when it comes to competition between *sects*." *Id.* (emphasis added) (citation omitted).
- "The First Amendment mandates governmental neutrality between *religion* and *religion*." *Id.* (emphases added) (citation omitted).
- "[W]hen we are presented with a state law granting a *denominational* preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* (emphasis added).
- "The fifty percent rule of § 309.515, subd. 1(b), clearly grants *denominational* preferences of the sort consistently and firmly deprecated in our precedents." *Id.* (emphasis added).

The Court's focus on denominational discrimination or discrimination among religions derives directly from the history and purpose of the Establishment

Clause. *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970) (noting that, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity" that resulted in the establishment of one state church and the suppression of all others). So plaintiffs have failed to state a violation of the Establishment Clause on these grounds.[51]

The Court also rejects plaintiffs' second argument that the religious employer exemption amounts to denominational discrimination because it accords special treatment to religions that primarily exercise their faith through houses of worship, while discriminating against religions—such as Catholicism—that also practice their religion through charitable and educational efforts. Putting aside the fact that plaintiffs offer no evidence to support their uninformed suggestion that there is something unique about Catholics because good deeds and teaching others are intrinsic to their faith, plaintiffs' claim fails because it is essentially their first argument dressed in new clothes: that the religious employer exemption discriminates against those plaintiffs that are organized as charities and not as houses of worship. Even if it is true that Catholicism

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[51] The Tenth Circuit's decision in *Weaver* is entirely consistent with this Court's decision because, at bottom, the issue present in that case was that Colorado's scholarship statute took a similar type of religious organization—in that case, religious schools—and treated them differently based on whether they were merely sectarian or "pervasively sectarian." 534 F.3d at 1250. Here, all religious charities are ineligible for the religious employer exemption.

is one of the religions that exercises its faith through charitable and educational works, that fact does not transform what might be an effect on Catholicism and those other religions into discrimination among religions.

Since the religious employer exemption is available to religious employers of all denominations, including the Archdiocese, it does not facially discriminate among religions, and strict scrutiny does not apply to plaintiffs' denominational discrimination claim. Instead, the Court must analyze the claim under the Lemon three-prong test. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987), quoting *Larson*, 456 U.S. at 252 ("[L]aws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*," and "where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, [there is] no justification for applying strict scrutiny to a statute that passes the Lemon test.").

2. *The religious employer exemption is valid under* Lemon.

In *Lemon v. Kurtzman*, the Supreme Court created a three-prong Establishment Clause test based on factors that it "gleaned from [its prior] cases." 403 U.S. at 612. The first prong provides that "the statute must have a secular legislative purpose." *Id.* The second prong requires that the statute's "principal or primary effect must be one that neither advances nor inhibits religion." *Id.* And the third prong states that "the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 613, quoting *Walz*, 397 U.S. at 674. The

religious employer exemption to the contraceptive mandate satisfies each prong.

The religious employer exemption has a secular legislative purpose even though it explicitly refers to religion. "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. It does not require a law's purpose "be unrelated to religion," id., or "that the government show a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Instead, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to . . . carry out their religious missions." *Amos*, 483 U.S. at 329, 335 (finding that section 702 of the Civil Rights Act of 1964, which "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion," had a secular purpose under *Lemon*'s first prong).

Here, the religious employer exemption is meant to alleviate the burden imposed on religious employers so that they may "carry out their religious mission." As discussed above, there is no indication that defendants created the religious employer exemption in an effort to disfavor any particular religion; the religious employer exemption is available to all houses of worship, religious sects, and integrated auxiliaries that qualify under the tax code regardless of their religious denomination. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii); 45 C.F.R. § 147.131(a). Thus, the religious employer exemption satisfies Lemon's

first prong. *See Hernandez*, 490 U.S. at 696 (finding that section 170 of the IRC had a secular purpose because it was not "born of animus to religion in general or Scientology in particular").

It also satisfies *Lemon*'s second prong. "For a law to have forbidden 'effects' under Lemon, it must be fair to say that the *government itself* has advanced religion through its own activities and influence," not simply that the law puts religious organizations in a position where they are now better able to advance their own purposes. *Amos*, 483 U.S. at 336–37 (finding that, although religious employers were better able to promote their religion if they could discriminate based on religion with respect to their employees, the law's primary effect neither advanced nor inhibited religion because the government took no action to do so). Additionally, "a statute primarily having a secular effect does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Hernandez*, 490 U.S. at 696, quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

Here, the religious employer exemption has a principal or primary effect that neither advances nor inhibits religion. Although it relieves certain religious employers of the obligation to provide their employees with access to coverage for contraceptive services, and thus arguably aids their ability to advance a religious purpose, it is the religious employer that actually invokes the exemption and takes the steps towards fulfilling its religious goal. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (allowing a State to provide a sign language interpreter to a deaf student attending a

Catholic school because, even though the interpreter aided religious instruction, the fact that the IDEA made an interpreter available to all students regardless of what school they attend meant that the interpreter's presence in a sectarian school was the "result of the private decision of individual parents" and could not "be attributed to state decisionmaking"). Moreover, the limited scope of the religious employer exemption and the government's implementation of an accommodation that will enable employees of many religious organizations to obtain coverage for contraceptive services demonstrate that the government has not taken steps to promote religious views.

Finally, the religious employer exemption satisfies *Lemon*'s third prong because it does not result in unlawful entanglement. "Interaction between church and state is inevitable;" therefore an "[e]ntanglement must be excessive before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Here, the exemption does not entail any sort of continuing or invasive relationship between the government and a religious employer, such as where the government investigates a party's religious belief to determine if it is "sufficiently religious." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342–43 (D.C. Cir. 2002). Eligibility for the religious employer exemption is based solely on the organizational structure of a party and is determined through reliance on IRC section 6033(a)(3)(A)(i) or (iii). *See* 45 C.F.R. § 147.131(a).

The religious employer exemption also does not create an ongoing or problematic relationship between church and state because, once an employer

qualifies for the exemption, the matter is finished, and there is no need for any monitoring of that organization. *Cf. Agostini*, 521 U.S. at 233–34 (finding that, despite the ongoing relationship between church and state, there was no excessive entanglement problem with Title I's provision of funds to inner-city private schools); Hernandez, 490 U.S. at 696–97 (explaining that "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring . . . between secular and religious bodies, does not of itself violate the nonentanglement command") (citations and internal quotation marks omitted). So there is no basis to find that the religious employer exemption fosters excessive entanglement between the government and religion, and defendants are therefore entitled to summary judgment on plaintiffs' denominational discrimination claim in Count V.

B. Plaintiffs do not have standing to argue that the IRS's fourteen-factor test violates the Establishment Clause.

Plaintiffs claim that the religious employer exemption violates the Establishment Clause because it defines a "religious employer" by reference to section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which the Internal Revenue Service ("IRS") sometimes implements through reference to a nonexhaustive list of fourteen factors when determining whether the applicant organization is a house of worship or other qualifying organization. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. According to plaintiffs, it is the probing nature of the fourteen-factor test that fosters

excessive entanglement between the government and religious employers. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. Defendants respond that, to the extent that plaintiffs' Establishment Clause claim rests on the constitutionality of a nonbinding, nonexhaustive list of factors found in the Internal Revenue Manual that has not yet been applied to any plaintiff in this case, it is not ripe and must be dismissed. Defs.' Mem. at 39–40.

The Court agrees that plaintiffs' Establishment Clause challenge to the definition of religious employer is not justiciable at this time, either for lack of ripeness or lack of the cognizable injury necessary to give rise to standing. As discussed above, the injury prong of standing requires plaintiffs to establish that they have a concrete and personalized injury that is either actual or imminent. *Lujan*, 504 U.S. at 560. Here, plaintiffs' excessive entanglement claim rests on the notion that application of the fourteen-factor test could involve an invasive inquiry into their religious beliefs, giving rise to a constitutional injury. Pls.' Mot. at 37–38; Pls.' Opp. & Cross-Mot. at 39–41. But plaintiffs have not actually suffered that injury, and there is no imminent risk that they will. As defendants note, all plaintiffs in this case have matter-of-factly self-identified as being eligible or not eligible for the religious employer exemption.[52] Aff. of Archdiocese

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[52] The Court also finds it telling that plaintiffs have not previously challenged the fourteen- factor test as it underlies 26 U.S.C. § 6033, which excuses certain nonprofit religious employers from the requirement to file a tax return. At the motions hearing, plaintiffs claimed that there has been no such challenge in the past because the consequences of not being eligible under section 6033(a)(1)(A)(i), (iii) were not as severe as

¶ 18; Aff. of CCA ¶ 6; Aff. of ACHS ¶ 6; Aff. of Don Bosco ¶ 6; Aff. Of Mary of Nazareth ¶ 6; Aff. of Catholic Charities ¶ 6; Aff. of Victory Housing ¶ 6; Aff. of CIC ¶ 6; Aff. of CUA ¶ 6; Aff. of TAC ¶ 6. The government does not dispute any of those assertions.

Plaintiffs point out that the government or an individual may someday bring an action challenging their self-identification in which the fourteen-factor test might be applied. But this is a highly speculative proposition. Plaintiffs would have to change their minds and claim that they qualify for the religious employer exemption; the government or a private party would have to disagree; and the government or the court would have to choose to apply the fourteen-factor test to resolve the dispute, instead of relying upon case law interpreting the statute or the plain language of the statute itself.

Plaintiffs have presented no grounds to believe that this chain of events would unfold. First, it is difficult to imagine that plaintiffs do not already know whether or not they are an organization listed in section 6033(a)(1)(A)(i), (iii) because they need to know this information to determine whether they are required to file a tax return despite their tax exempt status. Second, it is easily determined, and all plaintiffs in this case readily admit, that they are

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they are when that section is used to determine whether an organization is exempt from the contraceptive mandate. *See* Mot. Hr'g Tr. 89–91. Although that may be true from plaintiffs' point of view, it has no bearing on plaintiffs' excessive entanglement claim because, if the fourteen factors are unconstitutionally intrusive, they would be unconstitutionally intrusive regardless of whether the result was being exempt from a tax filing or being exempt from the contraceptive mandate.

charitable organizations, not houses of worship, and that they are separately incorporated from the Roman Catholic Church, see supra section V.A., so it is unlikely that the government or any court would need to invoke the fourteen-factor test or expend any effort whatsoever examining their religious beliefs. Third, plaintiffs have already self-identified as qualifying or not qualifying, and the only plaintiff that has self-identified as qualifying for the religious employer exemption at this point is the Archdiocese, which is undisputedly a church within the plain meaning of the exemption. *See* Aff. of Archdiocese ¶ 18. Since plaintiffs have not suffered an injury-in-fact and this claim is not ripe, they lack standing to bring their excessive entanglement challenge to the fourteen-factor test.[53] The Court will therefore dismiss the excessive entanglement challenge in Count V.

VI. Defendants are entitled to summary judgment on plaintiffs' Internal Church Governance claim in Count VI.

Plaintiffs argue that the contraceptive mandate violates both the Free Exercise Clause and the Establishment Clause of the First Amendment because it interferes with the internal governance of the Roman Catholic Church and its religious affiliates. Compl. ¶¶ 297–312; *see also* Pls.' Mot. at 38–40. It is true that the Supreme Court has recognized that the religion clauses of the First Amendment provide special protection to a religious

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[53] Because plaintiffs cannot satisfy the injury-in-fact requirement, there is no need for the Court to address the causation and redressability prongs of standing. *See Lujan*, 504 U.S. at 560–61.

organization's right to internally govern itself without interference from the government, *see*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), but the operation of the exemption and the accommodation does not violate that principle.

Plaintiffs claim that the religious employer exemption to the mandate essentially divides the Catholic Church into two parts—a religious wing that is eligible for the exemption and a charitable and educational wing that is not. They say that this limits the Church's ability to supervise its religious affiliates to ensure that they are complying with its teachings, but they are referring to just one particular aspect of that relationship: the fact that a number of plaintiffs insure their employees through the Archdiocese's self-insured health plan. Pls.' Mot. at 39–40. Specifically, plaintiffs voice the concern that the contraceptive mandate disrupts this internal insurance arrangement by putting the Archdiocese in a position where it must choose between continuing to sponsor its affiliates' plans, which must include contraceptive services coverage, or dropping those affiliates from the plan, subjecting the affiliates to fines unless they contract for the objectionable coverage on their own. But that is not how the regulations operate, and the Archdiocese is not in a position where it must make that decision. So, assuming that this count even alleges an injury-in-fact, defendants are entitled to summary judgment on Count VI.

The government has assured the Court that it has no power to require the third-party administrator of the Archdiocese's plan to provide contraceptive

services on behalf of the church plan plaintiffs, and there is no indication that the Archdiocese's third-party administrator will assume that responsibility voluntarily. As defendants stated in response to the Court's questions on this issue:

> The third party administrator (TPA) of the Archdiocese's self-insured church plan is not bound to provide or arrange for payments under section [2590.715–2713A(b)(2)]. As explained in defendants' earlier briefing, the government's authority to require TPAs to make such payments derives from ERISA, and church plans are specifically excluded from regulation under ERISA. Self-certification remains a requirement that the non- Archdiocese plaintiffs must satisfy if they wish to be considered "eligible organization[s]" and thereby comply with the regulations, but the regulations do not require a self-insured church plan or any [third-party administrator] of the plan to make payments for contraceptive services for plan participants and beneficiaries.

Defs.' Resp. to Ct. Order at 2–3 (second alternation in original) (citations omitted); *see also supra* section I.C. The government also concedes that, regardless of whether or *not* the Archdiocese's third-party administrator provides the coverage, the church plan plaintiffs "are not required to identify another [third-party administrator] to perform that function," and the Archdiocese's third-party administrator may still remain in its position:

> QUESTION BY THE COURT: If the church plan plaintiffs "submit the self-certification to the third-party administrator of the Archdiocese plan, and the third-party administrator does not agree to

> provide or arrange for payment for contraceptive services for [those] plaintiffs' employees, may that third-party administrator remain in its contractual relationship with the Archdiocese as the administrator of the church plan? Are the self-certifying organizations permitted to continue to provide coverage to their employees through that plan? May the third-party administrator continue to serve as the third-party administrator for the self-certifying organization?"
>
> DEFENDANTS: "Yes to all."

Defs.' Resp. to Ct. Order at 3. Thus, the regulations do not interfere with the Archdiocese's management of its plan according to the tenets of its faith or its decision to invite its affiliates to offer health insurance through the same plan.

VII. Defendants are entitled to summary judgment on plaintiffs' APA contrary to law claim in Count VII.[54]

Plaintiffs argue that the contraceptive mandate violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*[55] Compl. ¶¶ 313–26; *see also* Pls.' Mot. at 40–41. They direct this Court's attention to the Weldon Amendment and the ACA's 42 U.S.C. § 18118(c), and argue that the contraceptive mandate

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[54] "Plaintiffs" refers only to Catholic University and Thomas Aquinas College. The Archdiocese is completely exempt and it is entirely speculative that the church plan plaintiffs' employees will actually receive coverage for the objected-to contraceptive services.

[55] The APA directs that this Court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

is contrary to those laws because it includes coverage for emergency contraceptives, which—according to plaintiffs—are a form of abortion. Pls.' Mot. at 40. The burden is on plaintiffs to show that the law they challenge is not in accordance with the law, *Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002), and plaintiffs have not met that burden in this case.

A. The contraceptive mandate is consistent with the Weldon Amendment.

The Weldon Amendment is an appropriations rider that restricts a government agency's funding if that agency "subjects 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. Plaintiffs argue that the contraceptive mandate discriminates against plaintiffs based on their refusal to cover emergency contraceptives, such as "Plan B" or "ella," which they contend induce abortions. Pls.' Mot. at 40. Defendants argue, based on the FDA's long-standing view, that emergency contraceptives act as contraceptives, not abortions, and they are therefore not within the prohibition of the Weldon Amendment. Defs.' Mem. at 42–44. So, the parties' dispute on this issue boils down to whether the word "abortion," used but not defined by the Weldon Amendment, includes emergency contraceptives.

But the Court does not need to wade into this blend of science and theology and decide whether emergency contraceptives are "abortion-inducing"

products or simply contraceptives in order to find that the mandate is consistent with the Weldon Amendment. Although both parties agree that plaintiffs are among the healthcare entities to which the Weldon Amendment refers, there is no indication that the contraceptive mandate discriminates against them because they do not provide, pay for, provide coverage of, or refer for abortions. It is undisputed that the Archdiocese is completely exempt from the contraceptive services coverage requirement and that all other plaintiffs are eligible for the accommodation. Aff. of Archdiocese ¶ 18; Compl. ¶ 10. Once an eligible organization seeks the accommodation, it no longer has any responsibility to "provide, pay for, provide coverage of, or refer" for *any* contraceptive services, let alone emergency contraceptives. 29 C.F.R. § 2590.715-2713A(a), (b), (c). That responsibility shifts to a willing third-party administrator or group insurer, and any penalty the eligible organization faces for failing to provide for the required services evaporates. *Id.* With the elimination of the penalty for failing to provide coverage for contraceptive services, the accommodation eliminates any potential discrimination against plaintiffs for exercising their religious views and makes it irrelevant whether the word "abortion," as used in the Weldon Amendment, includes emergency contraceptives or not. Plaintiffs therefore fail to meet their burden to show that the contraceptive mandate—as applied to them—is contrary to law.

B. The contraceptive mandate is not contrary to 42 U.S.C. § 18118(c).

Plaintiffs also argue that the contraceptive mandate is contrary to section 18118(c) of the ACA, which states that no provision in title 42 "shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan." 42 U.S.C. § 18118(c); *see also* Compl. ¶ 323; Pls.' Mot. at 40. Plaintiffs contend that the contraceptive mandate contravenes this provision because it effectively prohibits Catholic University from offering a student health insurance plan since the University's religious beliefs prohibit it from facilitating access to contraceptive services coverage through that healthcare plan.[56] Compl. ¶ 323; *see also* Pls.' Mot. at 40–41. The Court disagrees.

First, plaintiffs make no attempt to meet their burden to establish that the contraceptive mandate is contrary to section 18118(c). In their motion for a preliminary injunction, they summarily state that the contraceptive mandate "has the effect of prohibiting CUA from offering a student health-insurance plan, since such plan would have to provide access to coverage to which CUA objects based on its sincerely-held religious beliefs," Pls.' Mot. at 41, and they briefly repeat that notion in their reply brief. Pls.' Reply at 23. They do not mention section 18118(c) in their combined opposition and cross-motion for summary judgment, *see* Pls.' Opp. & Cross-Mot. at 43–44, so the Court could consider that claim to be waived.

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[56] It is only Catholic University, then, that has standing to press this claim.

In any event, the contraceptive mandate does not "prohibit" Catholic University from covering its students or "force" it to provide a student healthcare plan that includes coverage for contraceptive services: the accommodation effectively severs the tie between the University's healthcare plan and the provision of that coverage once the self-certification form is filed. *See supra* section I.A.

Moreover—even if the provision of contraceptive services was not completely severed from Catholic University's student health insurance plan—the Court would still conclude that the contraceptive mandate is consistent with section 18118(c). As defendants explain—and plaintiffs fail to refute—section 18118(c) was promulgated in order to render certain requirements of the Public Health Services Act and the ACA inapplicable to student health insurance programs, such as provisions that would allow students to remain indefinitely on the school's healthcare plan (even after graduation) and provisions that would allow nonstudents to enroll, because application of those requirements to student health insurance plans would make the provision of that plan economically unfeasible. Defs.' Mem. at 43–44. By contrast, the contraceptive mandate, as modified by the accommodation, does not have the direct effect of making it impossible for an organization of higher education to provide a student health insurance plan. With this argument left uncontested, the Court finds that the contraceptive mandate is consistent with 42 U.S.C. § 18118(c). Defendants are therefore entitled to summary judgment on Count VII.

VIII. Plaintiffs do not have standing to bring the APA erroneous interpretation claim in Count VIII.[57]

Plaintiffs contend that defendants violated the APA when they erroneously interpreted the religious employer exemption to apply on an employer-by-employer basis, rather than a plan- by-plan basis. Compl. ¶¶ 327–39; *see also* Pls.' Mot. at 41–43. They challenge the statement in the preamble to the new accommodation regulations that states: "[t]he final regulations continue to provide that the availability of the exemption or an accommodation be determined on an employer-by-employer basis, which the Departments continue to believe best balances the interests of religious employers and eligible organizations and those of employees and their dependents." 78 Fed. Reg. at 39886.

Plaintiffs claim they are injured by this interpretation because, if the exemption applied on a plan-by-plan basis, all of the church plan plaintiffs would be exempt along with the Archdiocese that sponsors their plan, and they would not be required to engage in actions that they claim would facilitate access to contraceptive services in violation of their religious beliefs. *See* Pls.' Mot. at 41–43. But, as the

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[57] In this section, "plaintiffs" refers only to the church plan plaintiffs. Catholic University and Thomas Aquinas College do not have standing to challenge the government's interpretation of the religious employer exemption as applying on an employer-by-employer basis because they do not participate in a multi-employer health plan and therefore are not injured by that interpretation. The Archdiocese also does not have standing to bring this claim because it is exempt under the contraceptive mandate.

Court explained above, given the manner that the accommodation operates, the church plan plaintiffs are not required to perform any acts that would facilitate access to those services. Once the church plan plaintiffs certify their opposition to contraceptive coverage to the Archdiocese's third-party administrator, their plans will be in compliance with the mandate. Defs.' Resp. to Ct. Order at 3. There will be no obligation placed on the third-party administrator that can be enforced under ERISA, and the church plan plaintiffs will not have to contract with another. *Id.* As a result, the church plan plaintiffs attain relief from the contraceptive mandate via the accommodation, and they have not shown that they are injured by defendants' interpretation of the religious employer exemption. Without a cognizable injury that is fairly traceable to defendants' conduct, the church plan plaintiffs lack standing to bring their APA claim. *Lujan*, 504 U.S. at 560–61. The Court will therefore dismiss Count VIII.[58]

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[58] The Court also notes that, in this claim, plaintiffs are taking issue with a statement of agency policy or intent that is contained in the preamble to the accommodation regulations, but not a regulation itself, and plaintiffs have not identified any situation in which the interpretation has actually been applied or enforced to any of their detriment. While the government has explained what it meant to accomplish by reading its regulations in this matter, it is unclear to the Court how this will operate in practice, particularly since the obligation to offer employees a healthcare insurance plan (the "employer mandate") is imposed on employers, but the obligation to include coverage for contraceptive services (the "contraceptive mandate") is imposed by law on the plans.

CONCLUSION

For the reasons stated above, the Court will grant defendants' motion for summary judgment with respect to Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII, and the Court will therefore deny plaintiffs' cross-motion for summary judgment with respect to those counts. The Court will grant defendants' motion to dismiss the church plan plaintiffs' RFRA claims in Count I, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction. Plaintiffs' cross-motion for summary judgment on those counts is therefore moot. Finally, the Court will grant Thomas Aquinas College's cross-motion for summary judgment on its RFRA claim in Count I and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV, and it will therefore deny defendants' motion for summary judgment with respect to those counts. A separate order will issue.

/s/ Amy B Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: December 20, 2013

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	)	
Plaintiff,	)	
v.	)	Civil Action No. 13-1441 (ABJ)
KATHLEEN SEBELIUS, Secretary, U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs the Roman Catholic Archbishop of Washington ("the Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., Catholic

University of America, and Thomas Aquinas College brought this action against defendants Kathleen Sebelius, the Secretary of Health and Human Services; Thomas Perez, the Secretary of Labor; Jacob Lew, the Secretary of the Treasury; the U.S. Department of Health and Human Services; the U.S. Department of Labor; and the U.S. Department of the Treasury. They allege that the contraceptive mandate, even as it has been modified through the accommodation, violates the Religious Freedom Restoration Act ("RFRA") as applied to them and the Free Exercise Clause, the Free Speech Clause, and the Establishment Clause of the First Amendment to the U.S. Constitution. They also allege that defendants violated the Administrative Procedure Act and advanced an erroneous interpretation of the religious employer exemption to the mandate when they adopted the contraceptive mandate in its final form. On December 20, 2013, this Court issued its final appealable Order [Dkt. # 47], granting summary judgment in favor of defendants on plaintiff Catholic University's RFRA claim in Count I, and all of the plaintiffs' Free Exercise claims in Count II, compelled speech claims in Count III, denominational preference claims in Count V, internal church governance claims in Count VI, and APA contrary to law claims in Count VII. The Court dismissed the RFRA claims in Count I advanced by the seven plaintiffs who are covered under the Archdiocese's healthcare plan, and all of the plaintiffs' Establishment Clause challenges to the IRS factors in Count V and APA erroneous interpretation claims in Count VIII for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Finally, the Court granted plaintiff Thomas Aquinas College's

cross-motion for summary judgment on its RFRA claim in Count I, and all of the plaintiffs' cross-motions for summary judgment on their Free Speech claims asserted in Count IV.

Plaintiffs have appealed the part of the Order that grants defendants' motions for summary judgment and motions to dismiss, and they now move this Court to enjoin defendants from implementing or enforcing the contraceptive mandate and accommodation against them pursuant to Federal Rule of Civil Procedure 62(c). Pls.' Mot. for Inj. Pending Appeal ("Pls.' Mot.") [Dkt. # 49]. The motion is filed on behalf of "plaintiffs" collectively, even though the opinion makes clear differentiations among them based upon the nature of their health insurance plans and the regulations that apply to each.[1]

An injunction pending appeal is an extraordinary remedy. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). It is "an intrusion into the ordinary process of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). Instead, an injunction is an exercise of judicial discretion, and whether to grant it depends upon the specific circumstances of the case. *Id. at* 433. The moving party bears the burden of

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[1] For example, the Court entered summary judgment in favor of plaintiff Thomas Aquinas College on its RFRA claim, so the Court assumes that the use of the word "plaintiffs" in the motion for an injunction pending appeal is not meant to include the College.

justifying why the court should grant this extraordinary remedy. *Id. at* 433–34.

> A court must consider four factors in reviewing the motion:
>
> (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[2]

Id. at 434. The first two factors are the most critical. *Id.* The moving party must make a strong showing on at least one of them and some showing on the other. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011), citing Cuomo, 772 F.2d at 974. So, the movant's failure to make any showing of irreparable harm is grounds for refusing to grant a stay, even if the other three factors merit relief. *Nken*, 556 U.S. at 434 ("[S]imply showing some possibility of irreparable injury . . . fails to satisfy the second factor.") (internal quotation marks and citations omitted); *see also Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 22 (2008) (rejecting the premise that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction

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[2] Cuomo and Nken actually concerned motions for stays pending appeal, rather than injunctions pending appeal. However courts apply the same test for a stay or injunction pending appeal, which "substantial[ly] overlap[s]" with, but is not the same as, the test for a preliminary injunction. *Nken*, 556 U.S. at 434; *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005).

may be entered based only on a 'possibility' of irreparable harm").

Plaintiffs fail to meet their burden to establish that they are entitled to an injunction pending appeal. First, the Court notes that it dismissed the claims brought by seven of the plaintiffs—Catholic Academies, Archbishop Carroll, Don Bosco, Mary of Nazareth, Catholic Charities, Victory Housing, and the Catholic Information Center (collectively, the "church plan plaintiffs")—for lack of jurisdiction because their asserted injury was so speculative that it defeated standing. In the absence of jurisdiction over their claims, the Court lacks the power to enter an injunction pending appeal on behalf of the church plan plaintiffs. The lack of injury also undermines any claim of irreparable harm.[3]

Second, the Court rejects Catholic University's argument that it is entitled to an injunction pending appeal in this case. While the University did have standing to press its RFRA claim, and the Court recognizes the sensitivity of the issues it raised, its

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[3] Even if the Court has jurisdiction to enter an injunction pending appeal on behalf of the church plan plaintiffs, the injunction is not warranted. Since the church plan plaintiffs offer their employees coverage under the Archdiocese's plan, which is managed in conformity with Catholic principles, and since the government has informed the Court that it has no authority to enforce the contraceptive mandate against the plan's third-party administrator, it is highly speculative and not at all likely that the church plan plaintiffs' self-certification would actually lead to the provision of contraceptive services to its employees. So they cannot demonstrate that there is a substantial likelihood that they will succeed on the merits or that they would be irreparably injured if they are required to comply with the mandate prior to resolution of this appeal.

motion for an injunction pending appeal does not proffer any new information to support a finding that the University is likely to succeed on the merits of its claim. Instead, Catholic University states: "For all the reasons advanced in Plaintiffs prior filings and argument before the Court on November 22, 2013, (1) Plaintiffs are likely to succeed on the merits of their Religious Freedom Restoration Act claim." Pls.' Mot. at 1. That is not sufficient to satisfy the burden to show that an injunction pending appeal is warranted. *See Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 847 (D.D.C. 1996) (noting that the movant did not "allege any change in circumstances or novel argument that leads the Court to conclude that they bear a substantial chance of success on appeal"); *Abrams v. Comm'ns Workers of Am.*, 702 F. Supp. 920, 925 (D.D.C. 1988) (denying a motion for an injunction pending appeal where the movant merely restated grounds for relief that were previously rejected), *aff'd*, 884 F.2d 628 (D.C. Cir. 1989).

Moreover, there is no indication that Catholic University will be irreparably injured absent an injunction. Plaintiffs argue that an injunction is necessary because, without one, "irreparable harm . . . will befall Plaintiffs in only ten days if they are forced to choose between taking actions that violate their religious beliefs or paying onerous penalties." Pls.' Mot. at 2. That statement is not accurate with respect to the only plaintiff left standing: Catholic University. Compliance with the contraceptive mandate must occur "by the beginning of the next plan year on or after January 1, 2014." Compl. ¶ 227. Catholic University's next plan year begins on August 14 for its students and December 1 for its employees; this means that the University has

almost eight months to litigate its appeal before it will be required to take any action that complies with the contraceptive mandate. Thus, the University fails to show that it will be irreparably injured absent an injunction pending appeal in this case. Given plaintiffs' failure to meet the first two elements, an injunction is not warranted. *See Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("We believe that analysis of the second factor disposes of these motions and, therefore, address only whether the petitioners have demonstrated that in the absence of a stay, they will suffer irreparable harm."); *see also Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are most critical.").

It is therefore ORDERED that plaintiffs' motion for an injunction pending appeal is denied.

/s/ Amy B Jackson
AMY BERMAN JACKSON
United States District Judge

DATE: December 23, 2013

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5368 September Term, 2013
1:13-cv-01261-EGS

Filed On: December 31, 2013

Priests For Life, et al.,
Appellants
v.
United States Department of Health and Human Services, et al.,
Appellees

No. 13-5371
1:13-cv-01441-ABJ

Roman Catholic Archbishop of Washington, et al.,
Appellants
Thomas Aquinas College,
Appellee
v.
Kathleen Sebelius, et al.,
Appellees

BEFORE: Henderson, Tatel*, and Brown, Circuit Judges

* Judge Tatel would deny the emergency motions for injunction pending appeal for the reasons in the attached statement.

ORDER

Upon consideration of the emergency motion for injunction pending appeal in No. 13-5368, the response, the reply, and the Rule 28(j) letters; the emergency motion for injunction pending appeal in No. 13-5371, the response, the reply, and the Rule 28(j) letters, it is

ORDERED that the motions for injunction pending appeal be granted. Appellants have satisfied the requirements for an injunction pending appeal. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); *D.C. Circuit Handbook of Practice and Internal Procedures* 33 (2013). Appellees are enjoined from enforcing against appellants the contraceptive services requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and related regulations pending further order of the court. It is

FURTHER ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that appellants in these consolidated cases show cause by January 14, 2014, why they should not be required to file one joint opening brief limited to 14,000 words and one joint reply brief limited to 7,000 words. The parties are reminded that the court looks with extreme disfavor on repetitious submissions and will where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide *detailed* justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word

allotment must specify the word allotment necessary for each issue.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Timothy A. Ralls
Deputy Clerk

TATEL, *Circuit Judge*: Appellants challenge a section of the Affordable Care Act that requires certain religious organizations to "self certify" their religious objections to the provision of contraceptive services in order to escape the Act's requirement that they provide such services to their employees. Because I believe that Appellants are unlikely to prevail on their claim that the challenged provision imposes a "substantial burden" under the Religious Freedom Restoration Act (RFRA), I would deny their application for an injunction pending appeal. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (denying injunction pending appeal); *University of Notre Dame v. Sebelius*, No. 13-1540 (7th Cir. Dec. 30, 2013) (same). Simply put, far from imposing a "substantial burden" on Appellants' religious freedom, the challenged provision allows Appellants to avoid having to do something that would substantially burden their religious freedom.

Of course, if Appellants were correct that the challenged provision requires them to engage in acts that "affirmatively authorize" and "trigger[]" contraceptive coverage, PFL Mot. 2, 7, then I would

agree that we should grant an injunction pending appeal. 42 U.S.C § 2000bb-1(a)-(b); *Gilardi v. Department of Health and Human Services*, No. 13-5069, slip op. at 21–23 (D.C. Cir. Nov. 1, 2013). But that is not how the challenged provision operates. As the government points out, the Affordable Care Act requires employers and insurers to provide health plans that include contraceptive coverage. *See* 29 C.F.R. 2590.715–2713(a)(1)(iv); PFL Opp. 3–5. Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not *because* Appellants self-certify. Insofar as Appellants argue that they are burdened by authorizing their third-party administrator to provide contraceptive coverage, the government has conceded that the contraceptive mandate cannot be enforced against third-party administrators of church plans, and Appellants have provided no reason for us to believe that the Catholic Archdiocese of Washington's plan, Appellants' third-party administrator, will provide such coverage. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441, slip op. at 46–51 (D.D.C. Dec. 20, 2013); *see also Little Sisters of the Poor Home for the Aged* at 2–3. In other words, it was Congress that "authorized" insurers to provide contraceptive coverage to Appellants' employees—services those employees will receive regardless of whether Appellants self-certify.

Appellants also argue that they are burdened simply by participating in a "scheme" in which contraceptive services are provided. *See* PFL Reply 4; Archbishop Reply 6. Although we must accept

Appellants' assertion that the scheme itself violates their religious beliefs, we need not accept their legal conclusion that their purported involvement in that scheme qualifies as a substantial burden under RFRA. *Cf. Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("Accepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened—we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise."). Appellants' participation is limited to complying with an administrative procedure that establishes that they are, in effect, exempt from the very requirements they find offensive. *See id.* at 678 ("An inconsequential or de minimis burden on religious practice does not rise to [the level of a substantial burden under RFRA], nor does a burden on activity unimportant to the adherent's religious scheme."). At bottom, then, Appellants' religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required Appellants themselves to take. But Appellants have no right to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Religious organizations are required to file many forms with the government, such as applications for tax exemptions, even though they may have religious objections to a whole host of government policies and programs. Nothing in RFRA empowers such organizations to leverage their own

minimal interaction with the government to force the government to act in conformance with their religious beliefs—however sincerely held.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,	)	
Plaintiffs,	)	
v.	)	Docket No.: CV 13-1441
KATHLEEN SEBELIUS, et al.,	)	Washington, DC 10:05 a.m., Friday November 22, 2013
Defendants.	)	

REPORTER'S OFFICIAL TRANSCRIPT OF MOTIONS HEARING BEFORE THE HONORABLE AMY BERMAN JACKSON UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: NOEL J. FRANCISCO, ESQ.
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U.S. Department of Justice
20 Massachusetts Avenue, NW
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(202) 616-2035

The Court Reporter: CHANTAL M. GENEUS, RPR, CRR
Certified Realtime Reporter
Registered Professional Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

* * *

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monetary penalties, yes. But I mean, I think all I would say, again, is that we're not raising that particular argument that the Court is articulating.

THE COURT: All right. Well, we've talked about this at the micro level, but I want to step back and just look at the big picture for a second.

If the whole purpose behind the mandate is to facilitate greater access to preventive services for all the many good reasons you enumerate, how do you respond to plaintiffs' argument, then, that this regulation forces them to facilitate access to contraception, and, thereby, it compels them to do something that their religion forbids? Have you really cut them out of the process completely with really cut them out of the process completely with this accommodation?

MR. PRUSKI: Well, we understand the plaintiffs believe that participating in the accommodation requires facilitation of contraceptive coverage and that that's a violation of their religious beliefs. We don't question that. We're not asking Your Honor to question that either.

But courts, nevertheless, have an obligation in determining whether there's a substantial burden to look at the way the law operates in practice from an objective perspective, and a case like *Kaemmerling* or

* * *

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effort that the government has made to substantially accommodate religious organizations.

We have not raised the argument that Your Honor is suggesting in our briefs. I don't think the Court is necessarily precluded from making that determination.

In our reply brief, the government did note that we were not advancing the compelling interest and

restrictive means arguments that we had raised earlier in light of *Gilardi*, and we want to preserve those arguments, of course.

THE COURT: Well, I guess my question to you is: Everyone has said that with respect to the burden and whether it governs or not, *Gilardi* is limited to the facts that were before *Gilardi*.

Why isn't that true with respect to where we are now?

MR. PRUSKI: May I take one moment, Your Honor?

THE COURT: Yes.

(Discussion held off the record.)

MR. PRUSKI: So, Your Honor, I think we would have to concede that, as to compelling interests, that the *Gilardi* opinion does reject the arguments that we've made in this case. And, again,

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we want to preserve them. We don't agree with the *Gilardi* decision, of course, but as things stand in the circuit right now, we think that our compelling interests arguments are foreclosed by *Gilardi*.

THE COURT: And it has to be compelling interests and narrowly tailored?

MR. PRUSKI: Yes. It's not an either/or, correct.

THE COURT: All right.

I think those are really the questions I had for you. If you have anything else that you want to say in response to their argument, briefly...

MR. PRUSKI: Thank you, Your Honor.

The one very brief point which Your Honor asked about whether motive is relevant to the neutrality and general applicability analysis, and Mr. Francisco cited the *Lukumi* case.

Actually, the *Lukumi* case suggests actually the opposite. Only two members of the Court signed on the section of opinion that goes into looking at motive, so I just wanted to make that clear to the Court.

If there are no further questions, thank you, Your Honor.

THE COURT: I don't think so. I'm going to

* *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,	)	
Plaintiff,	)	
v.	)	Case 1:13-cv-01441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

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

The challenged regulations also do not impose a substantial burden on plaintiffs' religious exercise because any burden is indirect and too attenuated to be substantial. *See* Defs.' Mem. at 18-20. The ultimate decision of whether to use contraception "rests not with [the employer], but with [the] employees." *Conestoga*, 917 F. Supp. 2d at 414-15; *see e.g.*, *Autocam*, 2012 WL 6845677, at *6 ("The

incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs."). Moreover, even if the challenged regulations were deemed to impose a substantial burden on plaintiff's religious exercise, the regulations satisfy strict scrutiny because they are narrowly tailored to serve compelling governmental interests in public health and gender equality. *See* Defs.' Mem. at 20-29. Defendants recognize that a divided panel of the D.C. Circuit rejected these arguments in *Gilardi*, and that this Court is bound by that decision. Defendants raise the arguments here merely to preserve them for appeal.

B. The Regulations Do Not Violate the Free Exercise Clause

Nearly every court to have considered a free exercise challenge to the contraceptive- coverage regulations has rejected it, concluding that the regulations are neutral and generally applicable.[11] This Court should do the same.

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[11] *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 13-cv-11379, 2013 WL 1340719, at *5 (E.D. Mich. Apr. 3, 2013); *Eden Foods*, 2013 WL 1190001, at *4-*5; *Conestoga*, 917 F. Supp. 2d at 409-10; *Grote*, 914 F. Supp. 2d at 952-53; *Autocam*, 2012 WL 6845677, at *5; *Korte*, 912 F. Supp. 2d at 744-47; *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1289-90 (W.D. Okla. 2012), rev'd on other grounds, 723 F.3d 1114; O'Brien, 894 F. Supp. 2d at 1160-62; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006) (rejecting similar challenge to state law); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81-87 (Cal. 2004) (same). *But see Sharpe Holdings, Inc. v. HHS*, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012);

Plaintiffs contend that the regulations are not generally applicable because they contain exceptions for certain objectively defined categories of entities, like grandfathered plans and religious employers. But, as defendants pointed out in their opening brief, courts have made clear that such categorical exceptions do not negate general applicability. *See* Defs.' Mem. at 31

* * *

Geneva Coll. v. Sebelius, No. 2:12– v–00207, 2013 WL 838238, at *24-26 (W.D. Pa. Mar. 6, 2013).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. ____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Marguerite Conley, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the Executive Director of The Consortium of Catholic Academies of the Archdiocese of Washington, Inc ("CCA" or the "Consortium"). I have been in that position since June 2010.

3. I am very familiar with the Consortium's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. CCA is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Hyattsville, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

5. CCA employs approximately 119 teachers and staff.

6. I have been informed that CCA does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. CCA is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-

inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Consortium.

9. Accordingly, though CCA provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, the Consortium's employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by CCA to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to CCA's sincere religious beliefs..

11. The so-called "accommodation" does not resolve CCA's religious objection. The Mandate, even in its revised form, forces CCA to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, CCA's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of CCA's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on CCA (or the Archdiocese, through whose plan CCA provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is CCA's self-

certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to CCA's employees only for so long as they remain on CCA's plan, and CCA (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying CCA's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, CCA is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, CCA bears a particular responsibility to witness to the Church's teachings. CCA bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were the Consortium to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, CCA would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to the Consortium's beliefs even in the event that CCA does not directly fund the objectionable products and services. Of course, any use of the Consortium's funds to provide the mandated products and services would only exacerbate the violation of CCA's religious beliefs.

14. CCA's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of

objectionable drugs and services-would inhibit CCA's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding the Consortium's ability to offer and provide health benefits undermines CCA's ability to retain and recruit employees and students. Were CCA to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on CCA to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

_____
Marguerite Conley

STATE OF INSERT) Maryland
COUNTY OF) Calvert
INSERT

Sworn to and subscribed before me this 19th day of _____, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Marguerite Conley, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as the Executive Director of The Consortium of Catholic Academies of the Archdiocese of Washington, Inc ("CCA" or the "Consortium"). I have been in that position since June 2010.

3. I am very familiar with the Consortium's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. CCA has 89 full-time employees. It is thus my understanding that it is subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), require CCA to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to CCA's sincere religious beliefs..

6. Among other things, CCA's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of CCA's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls-- en CCA (or the Archdiocese, through whose plan CCA provides insurance) to locate and identity a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is CCA's self- certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to CCA's employees only for so long as they remain on CCA's plan, and CCA (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, among other things, identifying CCA's benefits-eligible employees for the

third party administrator. Ultimately, under both the original and final versions of the Mandate, CCA is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires CCA to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide CCA's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide CCA's employees or beneficiaries with payments for products and services that CCA cannot provide directly and that the third party administrator cannot provide unless CCA submits both the mandated authorization and related information about CCA's employees. CCA's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of CCA's religious beliefs is further exacerbated by the regulation that

prohibits CCA from "directly or indirectly, seek[ing] to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, CCA is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to CCA's employees or beneficiaries.

FURTHER AFFIANT SAYETH NOT.

_____
Marguerite Conley

STATE OF INSERT) Maryland
COUNTY OF) Anne Arundel
INSERT

Sworn to and subscribed before me this 12th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF ARCHBISHOP CARROLL HIGH SCHOOL

I, Mary Elizabeth Blaufuss, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the President/CEO of Archbishop Carroll High School. ("ACHS"). I have been the school's CEO since October 2012. Since 2006, I had been Vice- Principal for Academic Affairs at ACHS.

3. I am very familiar with ACHS's mission, religious beliefs, and health insurance policy. The

facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. ACHS is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

5. ACHS has seventy employees.

6. I have been informed that ACHS does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. ACHS is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of ACHS.

9. Accordingly, though ACHS provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling

from its health plan. Currently, ACHS employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by ACHS to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to ACHS's sincere religious beliefs..

11. The so-called "accommodation" does not resolve ACHS's religious objection. The Mandate, even in its revised form, forces ACHS to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, ACHS's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of ACHS's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on ACHS (or the Archdiocese, through whose plan ACHS provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is ACHS's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to ACHS's employees only for so long as they remain on ACHS's plan, and ACHS (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying ACHS's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate,

ACHS is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, ACHS bears a particular responsibility to witness to the Church's teachings. ACHS bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were ACHS to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, ACHS would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to ACHS's beliefs even in the event that ACHS does not directly fund the objectionable products and services. Of course, any use of ACHS's funds to provide the mandated products and services would only exacerbate the violation of ACHS's religious beliefs.

14. ACHS's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of objectionable drugs and services-would inhibit ACHS's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding the school's ability to offer and provide health benefits undermines ACHS's ability to retain and recruit employees and students. Were ACHS to stop offering health benefits, it would be at

a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on ACHS to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

Marguerite Conley

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before me this 18th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF ARCHBISHOP CARROLL HIGH SCHOOL

I, Mary Elizabeth Blaufuss, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as the President of Archbishop Carroll High School. ("ACHS"). I have been so employed since October 2012. Since 2006, I had been Vice-Principal for Academic Affairs at ACHS.

3. I am very familiar with ACHS's mission, religious beliefs, and health insurance policy. The

facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. ACHS has 66 full-time employees. It is thus my understanding that it is subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), require ACHS to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to ACHS's sincere religious beliefs.

6. Among other things, ACHS's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of ACHS's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on ACHS (or the Archdiocese, through whose plan ACHS provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is ACHS's self- certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to ACHS's employees only for so long as they remain on ACHS's plan, and ACHS (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, among other things, identifying ACHS's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate,

ACHS is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires ACHS to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide ACHS's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide ACHS's employees or beneficiaries with payments for products and services that ACHS cannot provide directly and that the third party administrator cannot provide unless ACHS submits both the mandated authorization and related information about ACHS's employees. ACHS's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of ACHS's religious beliefs is further exacerbated by the regulation that prohibits ACHS from "directly or indirectly, seek[ing]

to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, ACHS is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to ACHS's employees or beneficiaries.

FURTHER AFFIANT SAYETH NOT.

Mary Elizabeth Blaufuss

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before me this 12th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF DON BOSCO CRISTO REY HIGH SCHOOL OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Reverend Steve Shafran, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as President of Don Bosco Cristo Rey High School, Inc. I have

been so employed since July 1, 2006.

3. I am very familiar with Don Bosco's mission, religious beliefs, and health insurance policy. The

facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Don Bosco is a nonprofit corporation incorporated in Maryland. Its principal place of business is in Takoma Park, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501 (c)(3) of the Internal Revenue Code.

5. Don Bosco has 51 employees.

6. I have been informed that Don Bosco does not appear to qualify as an entity described in section 6033(a)(3)(A){i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. Don Bosco is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of Don Bosco.

9. Accordingly, though Don Bosco provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling

from its health plan. Currently, Don Bosco's employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by Don Bosco to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Don Bosco's sincere religious beliefs.

11. The so-called "accommodation" does not resolve Don Bosco's religious objection. The Mandate, even in its revised form, forces Don Bosco to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Don Bosco's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Don Bosco's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Don Bosco (or the Archdiocese, through whose plan Don Bosco provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Don Bosco's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Don Bosco's employees only for so long as they remain on Don Bosco's plan, and Don Bosco (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying Don Bosco's benefits-eligible employees for the third party administrator. Ultimately, under

both the original and final versions of the Mandate, Don Bosco is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, Don Bosco bears a particular responsibility to witness to the Church's teachings. Don Bosco bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Don Bosco to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Don Bosco would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to Don Bosco's beliefs even in the event that Don Bosco does not directly fund the objectionable products and services. Of course, any use of Don Bosco's funds to provide the mandated products and services would only exacerbate the violation of Don Bosco's religious beliefs.

14. Don Bosco's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of objectionable drugs and services-would inhibit Don Bosco's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding Don Bosco's ability to offer and provide health benefits undermines Don Bosco's ability to retain and recruit employees. Were Don

Bosco to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on Don Bosco to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s Fr. Steve Shafran
President

STATE OF INSERT) Maryland
COUNTY OF INSERT) Calvert

Sworn to and subscribed before me this 20th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF DON BOSCO CRISTO REY HIGH SCHOOL OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Reverend Steve Shafran, being-duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as President of Don Bosco Cristo Rey High School, Inc. I have been so employed since July 1, 2006.

3. I am very familiar with Don Bosco's mission, religious beliefs, and health insurance policy. The

facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Don Bosco has 49 full-time equivalent employees. It is thus my understanding that it is not subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees. Since it does provide health insurance to its employees, however, my understanding is that it is required to provide coverage for abortion-inducing products, sterilization, contraception, and related counseling or pay a fine of $100 a day per affected beneficiary.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), thus require Don Bosco to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Don Bosco's sincere religious beliefs.

6. Among other things, Don Bosco's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Don Bosco's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Don Bosco (or the Archdiocese through whose plan Don Bosco provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Don Bosco's certification of its religious objection that authorizes provision of the mandated coverage. This

coverage will be made available to Don Bosco's employees only for so long as they remain on Don Bosco's plan, and Don Bosco (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by among other things, identifying Don Bosco's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Don Bosco is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its. employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self..insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires Don Bosco to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide Don Bosco's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide Don Bosco's employees or beneficiaries with payments for products and services that Don Bosco cannot provide directly and that the third party administrator not to provide unless Don Bosco submits both the mandated authorization and related information about Don Bosco's employees. Don Bosco's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes

a third-party administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of Don Bosco's religious beliefs is further exacerbated by the regulation that prohibits Don Bosco from "directly or indirectly, seeking to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement. Don Bosco is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to Don Bosco's employees or beneficiaries.

9. Furthermore, as I noted in my prior affidavit, potential liability for significant fines and uncertainty regarding Don Bosco's ability to offer and provide health benefits undermines Don Bosco's. ability to retain and recruit employees. Were Don Bosco to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate. Indeed, the failure to offer health insurance would be ruinous, as it would make it impossible to attract qualified faculty and staff.

FURTHER AFFIANT SAYETH NOT.

/s. Fr. Steve Shafran
Rev. Steve Shafran

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before me this 12th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF MARY OF NAZARETH ROMAN CATHOLIC ELEMENTARY SCHOOL, INC.

I, Michael Friel, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as Principal of Mary of Nazareth Roman Catholic Elementary School. I have been so employed since '2003.

3. I am very familiar with Mary of Nazareth's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me,

and if I were called upon to testify to them, I could and would competently do so.

4. Mary of Nazareth is a nonprofit-corporation incorporated in Maryland. Its principal place of business is in Darnestown, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

5. Mary of Nazareth has 44 employees.

6. I have been informed that Mary of Nazareth does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. Mary of Nazareth is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of Mary of Nazareth.

9. Accordingly, though Mary of Nazareth provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related

education and counseling from its health plan. Currently, Mary of Nazareth's employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by Mary of Nazareth to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Mary of Nazareth's sincere religious beliefs.

11. The so-called "accommodation" does not resolve Mary of Nazareth's religious objection. The Mandate, even in its revised form, forces Mary of Nazareth to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Mary of Nazareth's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Mary of Nazareth's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Mary of Nazareth (or the Archdiocese, through whose plan Mary of Nazareth provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Mary of Nazareth's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Mary of Nazareth's employees only for so long as they remain on Mary of Nazareth's plan, and Mary of Nazareth (or the Archdiocese) will be forced to further facilitate

access to the mandated coverage by, inter alia, identifying Mary of Nazareth's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Mary of Nazareth is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, Mary of Nazareth bears a particular responsibility to witness to the Church's teachings. Mary of Nazareth bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Mary of Nazareth to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Mary of Nazareth would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to Mary of Nazareth's beliefs even in the event that Mary of Nazareth does not directly fund the objectionable products and services. Of course, any use of Mary of Nazareth's funds to provide the mandated products and services would only exacerbate the violation of Mary of Nazareth's religious beliefs.

14. Mary of Nazareth's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-.in order to avoid the provision of objectionable drugs and services-would

inhibit Mary of Nazareth's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding Mary of Nazareth's ability to offer and provide health benefits undermines Mary of Nazareth's ability to retain and recruit employees. Were Mary of Nazareth to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on Mary of Nazareth to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ Michael Friel
9/18/13

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before more this 18th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF MARY OF NAZARETH ROMAN CATHOLIC ELEMENTARY SCHOOL, INC.

I, Michael Friel, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as Principal of Mary of Nazareth Roman Catholic Elementary School. I have been so employed since 2003.

3. I am very familiar with Mary of Nazareth's mission, religious beliefs, and health insurance policy.

The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Mary of Nazareth has 54.15 full-time equivalent employees (this includes 37 full- time employees and 17.15 full-time equivalents). It is thus my understanding that it is subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), require Mary of Nazareth to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Mary of Nazareth's sincere religious beliefs.

6. Among other things, Mary of Nazareth's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Mary of Nazareth's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Mary of Nazareth (or the Archdiocese, through whose plan Mary of Nazareth provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Mary of Nazareth's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Mary of Nazareth's employees only for so long as they remain on Mary of Nazareth's plan, and Mary of Nazareth

(or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, among other things, identifying Mary of Nazareth's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Mary of Nazareth is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires Mary of Nazareth to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide Mary of Nazareth's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide Mary of Nazareth's employees or beneficiaries with payments for products and services that Mary of Nazareth cannot provide directly and that the third party administrator cannot provide unless Mary of Nazareth submits both the mandated authorization and related information about Mary of Nazareth's employees. Mary of Nazareth's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party

administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of Mary of Nazareth's religious beliefs is further exacerbated by the regulation that prohibits Mary of Nazareth from "directly or indirectly, seek[ing] to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, Mary of Nazareth is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to Mary of Nazareth's employees or beneficiaries.

FURTHER AFFIANT SAYETH NOT.

/s/ Michael J. Friel
Michael Friel

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before more this 12th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON

I, Rev. Msgr. John Enzler, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the President and CEO at Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). I have been so employed since July 2011.

3. I am very familiar with Catholic Charities' mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my

personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Catholic Charities is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

5. Catholic Charities has approximately 890 employees.

6. I have been informed that Catholic Charities does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. Catholic Charities is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of Catholic Charities.

9. Accordingly, though Catholic Charities' provides health insurance to its employees, it has historically excluded coverage for abortion,

contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, Catholic Charities' employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by Catholic Charities to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Catholic Charities' sincere religious beliefs.

11. The so-called "accommodation" does not resolve Catholic Charities' religious objection. The Mandate, even in its revised form, forces Catholic Charities to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Catholic Charities' employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Catholic Charities' decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Catholic Charities (or the Archdiocese, through whose plan Catholic Charities provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Catholic Charities' self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Catholic Charities' employees only for so long as they remain

on Catholic Charities' plan, and Catholic Charities (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying Catholic Charities' benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Catholic Charities is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, Catholic Charities bears a particular responsibility to witness to the Church's teachings. Catholic Charities bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Catholic Charities to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Catholic Charities would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to Catholic Charities' beliefs even in the event that Catholic Charities does not directly fund the objectionable products and services. Of course, any use of Catholic Charities' funds to provide the mandated products and services would only exacerbate the violation of Catholic Charities' religious beliefs.

14. Catholic Charities' provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the

provision of objectionable drugs and services-would inhibit Catholic Charities' ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding Catholic Charities' ability to offer and provide health benefits undermines Catholic Charities' ability to retain and recruit employees. Were Catholic Charities to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on Catholic Charities to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ John J. Enzler
Rev. Msgr. John Enzler

District of Columbia)
COUNTY OF)
INSERT

Sworn to and subscribed before more this 19th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1441-ABJ
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON

I, Rev. Msgr. John Enzler, being duly sworn, declare and state as follows:

I. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as the President and CEO at Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). I have been so employed since July 2011.

3. I am very familiar with Catholic Charities' mission, religious belief, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Catholic Charities has 687 full-time employees. It is thus my understanding that it is subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), require Catholic Charities to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Catholic Charities' sincere religious belief.

6. Among other things, Catholic Charities' employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Catholic Charities' decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Catholic Charities (or the Archdiocese, through whose plan Catholic Charities provides insurance) to locate and identify a third patty willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Catholic Charities' self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Catholic Charities' employees only for so long as they remain on Catholic Charities' plan, and Catholic Charities

(or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, among other things, identifying Catholic Charities' benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Catholic Charities is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires Catholic Charities to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide Catholic Charities' employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide Catholic Charities' employees or beneficiaries with payments for products and services that Catholic Charities cannot provide directly and that the third party administrator cannot provide unless Catholic Charities submits both the mandated authorization and related information about Catholic Charities' employees. Catholic Charities' sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party

administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of Catholic Charities' religious beliefs is further exacerbated by the regulation that prohibits Catholic Charities from "directly or indirectly, seek[ing] to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, Catholic Charities is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to Catholic Charities' employees or beneficiaries.

FURTHER AFFIANT SAYETH NOT.

/s/ John J. Enzler
Rev. Msgr. John Enzler

STATE OF INSERT)
COUNTY OF)
INSERT

Sworn to and subscribed before more this 11th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF VICTORY HOUSING, INC.

I, James A. Brown, Jr., being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as President of Victory Housing, Inc. I have been so employed since 1991.

3. I am very familiar with Victory Housing's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify them, I could and would competently do so.

4. Victory Housing is a nonprofit corporation incorporated in Maryland. Its principal place of business is in Rockville, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

5. Victory Housing has approximately 184 employees.

6. I have been informed that Victory Housing does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. Victory Housing is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of Victory Housing.

9. Accordingly, though Victory Housing provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, Victory Housing's employees are offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by Victory Housing to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Victory Housing's sincere religious beliefs.

11. The so-called "accommodation" does not resolve Victory Housing's religious objection. The Mandate, even in its revised form, forces Victory Housing to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, Victory Housing's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Victory Housing's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Victory Housing (or the Archdiocese, through whose plan Victory Housing provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Victory Housing's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Victory Housing's employees only for so long as they remain on Victory Housing's plan, and Victory Housing (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying Victory Housing's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, Victory Housing is forced, in violation of its sincerely

held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, Victory Housing bears a particular responsibility to witness to the Church's teachings. Victory Housing bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Victory Housing to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, Victory Housing would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to Victory Housing's beliefs even in the event that Victory Housing does not directly fund the objectionable products and services. Of course, any use of Victory Housing's funds to provide the mandated products and services would only exacerbate the violation of Victory Housing's religious beliefs.

14. Victory Housing's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of objectionable drugs and services--would inhibit Victory Housing's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding Victory Housing's ability to offer and provide health benefits undermines Victory Housing's ability to retain and recruit employees.

Were Victory Housing to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on Victory Housing to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ James A. Brown, Jr.
James A. Brown, Jr.

STATE OF MARYLAND)
COUNTY OF MONTGOMERY)

Sworn to and subscribed before more this 18th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF VICTORY HOUSING, INC.

I, James A. Brown, Jr., being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as President of Victory Housing, Inc. I have been so employed since 1991.

3. I am very familiar with Victory Housing's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me,

and if I were called upon to testify to them, I could and would competently do so.

4. Victory Housing has 89 full-time employees. It is thus my understanding that it is subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), require Victory Housing to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to Victory Housing's sincere religious beliefs..

6 Among other things, Victory Housing's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of Victory Housing's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on Victory Housing (or the Archdiocese, through whose plan Victory Housing provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is Victory Housing's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to Victory Housing's employees only for so long as they remain on Victory Housing's plan, and Victory Housing (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, among other things, identifying Victory Housing's benefits-eligible employees for the third party administrator.

Ultimately, under both the original and final versions of the Mandate, Victory Housing is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires Victory Housing to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide Victory Housing's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide Victory Housing's employees or beneficiaries with payments for products and services that Victory Housing cannot provide directly and that the third party administrator cannot provide unless Victory Housing submits both the mandated authorization and related information about Victory Housing's employees. Victory Housing's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of Victory Housing's religious beliefs is further exacerbated by the regulation that prohibits Victory Housing from "directly or indirectly, seek[ing] to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, Victory Housing is barred from, for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to Victory Housing's employees or beneficiaries.

FURTHER AFFIANT SAYETH NOT.

/s/ James A. Brown, Jr.
James A. Brown, Jr.

STATE OF MARYLAND)
COUNTY OF MONTGOMERY)

Sworn to and subscribed before more this 18th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF CATHOLIC INFORMATION CENTER, INC.

I, Reverend Anne A. Panula, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as Director of the Catholic Information Center. I have been so employed since 2007.

3. I am very familiar with CIC's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I

were called upon to testify to them, I could and would competently do so.

4. CIC is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501 (c)(3) of the Internal Revenue Code

5. CIC has approximately 9 employees.

6. I have been informed that CIC does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not qualify as a "religious employer."

7. CIC is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of CIC.

9. Accordingly, though CIC provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, CIC's employees are

offered health insurance through the Archdiocese of Washington's health plan.

10. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by CIC to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to CIC's sincere religious beliefs.

11. The so-called "accommodation" does not resolve CIC's religious objection. The Mandate, even in its revised form, forces ClC to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, CIC's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of CIC's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on CIC (or the Archdiocese, through whose plan CIC provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is CIC's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to CIC's employees only for so long as they remain on CIC's plan, and CIC (or the Archdiocese) will be forced to further facilitate access to the mandated coverage by, inter alia, identifying CIC's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, CIC is forced, in violation of its sincerely held religious beliefs, to

participate in a scheme that provides its employees with access to contraceptive benefits.

12. Moreover, as a Catholic entity, CIC bears a particular responsibility to witness to the Church's teachings. CIC bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were CIC to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, CIC would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

13. Compliance with the Mandate would be contrary to CIC's beliefs even in the event that CIC does not directly fund the objectionable products and services. Of course, any use of CIC's funds to provide the mandated products and services would only exacerbate the violation of CIC's religious beliefs.

14. CIC's provision of health benefits to. its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of objectionable drugs and services-would inhibit CIC's ability to follow this teaching.

15. Potential liability for significant fines and uncertainty regarding CIC's ability to offer and provide health benefits undermines CIC's ability to retain and recruit employees. Were ere to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

16. Significant fines and other negative consequences that would flow from a refusal to

provide access to the objectionable products and services place substantial pressure on CIC to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ (Rev.) Anne Panula
Director, Catholic
Information Center (CIC)

DISTRICT OF COLUMBIA

Sworn to and subscribed before more this 20th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT OF CATHOLIC INFORMATION CENTER, INC.

I, Reverend Anne A. Panula being duly sworn declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Judgment and Motion for Summary Judgment in the above-captioned matter.

2. I am employed as Director of the Catholic Information Center ("CIC"). I have been so employed since 2007.

3. I am very familiar with CIC's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal

knowledge and information available to me, and if I were called upon to testify to them, could and would competently do so.

4. CIC has 3 full-time employees. It is thus my understanding that it is not subject to the Affordable Care Act's mandate that large employers provide health insurance plans to their employees. Since it does provide health insurance to its employees, however, my understanding is that it is required to provide coverage for abortion-inducing products, sterilization, contraception, and related counseling or pay a fine of $100 a day per affected beneficiary.

5. As explained in my initial affidavit, the regulations at issue in this lawsuit (the "Mandate"), thus require CIC to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to CIC's sincere religious beliefs.

6. Among other things, CIC's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of CIC's decision to provide health coverage. Because third party administrators are under no obligation to participate in the accommodation, the burden falls on CIC (or the Archdiocese, through whose plan ere provides insurance) to locate and identify a third party willing to provide the very services it deems objectionable. Once such an organization is located perversely, it is CIC's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to CIC's employees only for so long as they remain on CIC's plan, and ere (or the Archdiocese) will be forced to further facilitate access to the mandated coverage

by, among other things, identifying CIC's benefits-eligible employees for the third party administrator. Ultimately, under both the original and final versions of the Mandate, CIC is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

7. I understand that the Government has argued that it lacks the regulatory authority to require the third party administrators of self-insured church plans to make separate payments for contraceptive services for participants and beneficiaries in such plans. Even if this is true, the Mandate still requires CIC to act contrary to its sincerely held religious beliefs. Absent the certification, the third party administrator is not authorized to provide CIC's employees or beneficiaries with payments for the objectionable products and services. The certification, however, provides that authorization. It is therefore a "permission slip" for the third party administrator to provide CIC's employees or beneficiaries with payments for products and services that CIC cannot provide directly and that the third party administrator cannot provide unless CIC submits both the mandated authorization and related, information about CIC's employees. CIC's sincerely held religious beliefs, however, not only prohibit it from providing payments and/or coverage for abortion-inducing products, contraception, sterilization, and related counseling, but also from providing a certification that authorizes a third-party administrator to do so-even if the third party administrator ultimately has the discretion not to provide such payments and/or coverage.

8. This forced violation of CIC's religious beliefs is further exacerbated by the regulation that prohibits CIC from "directly or indirectly, seek[ing]to interfere with a third party administrator's arrangements to provide or arrange separate payments for. contraceptive services for participants or beneficiaries, [or], directly or indirectly, seek[ing] to influence the third party administrator's decision to make any such arrangements." Under this latter requirement, CIC is barred from., for example, directing the third party administrator that, notwithstanding the certification, the third party administrator may not provide the objectionable payments and/or coverage to CIC's employees or beneficiaries.

9. Furthermore, as I noted in my prior affidavit, potential liability for significant fines and uncertainty regarding CIC's ability to offer and provide health benefits undermines CIC's ability to retain and recruit employ. Were CIC to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate. Indeed. the failure to offer health insurance would be ruinous, as it would make it Impossible to attract qualified staff.

FURTHER AFFIANT SAYETH NOT.

/s/ Anne Panula
Reverend Anne A. Panula

STATE OF INSERT) Maryland
COUNTY OF INSERT) Anne Arundel

Sworn to and subscribed before more this 12th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF THE CATHOLIC UNIVERSITY OF AMERICA

I, Frank G. Persico, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the Chief of Staff and Vice President for University Relations at The Catholic University of America (hereinafter "CUA" or "University"). I have been so employed in this capacity, under different titles, since 2000 and have worked for the University in a variety of executive capacities, including as dean of students, executive

director of alumni relations and associate dean of the University's law school since 1974.

3. As Chief of Staff and Vice President for University Relations, I am responsible for or aware of most aspects of the University's day-to-day operations, I coordinate the senior staff, and personally advise the University president.

4. I am very familiar with CUA's mission, religious beliefs, and health insurance policies. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

5. CUA is a nonprofit Washington, D.C., corporation with its principal place of business in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

6. I have been informed that CUA does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code and that it therefore does not quality as a "religious employer."

7. CUA maintains a regular (full-time) faculty of 437 members and an additional 417 temporary faculty members. CUA employs about 923 staff members.

8. CUA's employees are offered health care plans provided by United Healthcare.

9. The plan year for CUA's employer health plan begins on December l.

10. CUA makes available to its students a health plan provided by Aetna.

11. The plan year for CUA's student health plan begins on August 14.

12. The health plans offered by CUA to its employees do not meet the Affordable Care Act's definition of a "grandfathered" plan. CUA has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it believes its plans are grandfathered health plans within the meaning of section 1251 of the Affordable Care Act.

13. CUA adheres to the teachings and philosophies of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

14. Offering a health insurance policy that provides coverage for or facilitates access to abortion--inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the University.

15. Accordingly, though CUA provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non- contraceptive purposes), sterilization, and related education and counseling from its health plans.

16. The regulations at issue in this lawsuit (the "Mandate"), however, require health insurance policies provided by the University to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling in a manner contrary to CUA's sincere religious beliefs.

17. The so-called "accommodation" does not resolve CUA's religious objection. The Mandate, even in its revised form, forces the University to take actions that facilitate access to products and services antithetical to the Catholic faith. Among other things, the University's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of CUA's decision to provide health coverage. CUA also bears the burden of locating and identifying an insurance company willing to provide the very services it deems objectionable. Once such an organization is located, perversely, it is CUA's self-certification of its religious objection that authorizes provision of the mandated coverage. This coverage will be made available to CUA's employees only for so long as they remain on the University's plan, and the University will be forced to further facilitate access to the mandated coverage by, among other things, identifying its benefits-eligible employees for the insurance company. Ultimately, under both the original and final versions of the Mandate, CUA is forced, in violation of its sincerely held religious beliefs, to participate in a scheme that provides its employees with access to contraceptive benefits.

18. For similar reasons, facilitating access to abortion-inducing products, artificial contraception,

medical sterilization procedures, and related counseling through its student health- care plan in the manner required by the Mandate would also violate CUA's sincerely held religious beliefs.

19. Moreover, as a Catholic entity, CUA bears a particular responsibility to witness to the Church's teachings. CUA bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of health insurance. Were the University to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, CUA would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

20. Compliance with the Mandate would be contrary to CUA's beliefs even in the event that the University did not directly fund the objectionable products and services. Of course, any use of CUA's funds to provide the mandated products and services would only exacerbate the violation of the University's religious beliefs.

21. Potential liability for significant fines and uncertainty regarding the University's ability to offer and provide health benefits undermines CUA's ability to retain and recruit employees and students. Were CUA to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

22. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on CUA to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ Frank Persico
Frank G. Persico

DISTRICT OF COLUMBIA
/s/ Susan M Weir

Sworn to and subscribed before more this 19th day of November, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. _____
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Jane G. Belford, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter.

2. I serve as the Chancellor of the Archdiocese of Washington (the "Archdiocese"). I have been so employed in this capacity since 2001.

3. The Chancellor of a diocese/archdiocese is a canonical position that is appointed by a decree of the Archbishop. Chancellor is the highest ecclesiastical or decision-making position a lay person can hold in

the church. Under canon law, the principal duty of the Chancellor is to ensure that the acts and instruments of the diocese are drawn up and faithfully recorded, authenticated and safeguarded. The Chancellor's writing or signature establishes authenticity for such acts and instruments.

4. In the Archdiocese of Washington, the Chancellor has been assigned additional duties by the Archbishop. The Chancellor is designated in the bylaws of every affiliated archdiocesan corporation as one of the three corporate members of that corporation, who, by law, have certain reserved powers that are exercised over every archdiocesan affiliated corporation with regard to their mission, governance, operations, and Catholic identity.

5. Apart from these canonical roles and responsibilities, I also serve as senior legal advisor to the Archdiocese of Washington and provide advice and counsel in all aspects of the Church's civil operations. I report directly to the Archbishop of Washington, Cardinal Donald Wuerl.

6. As Chancellor, I am very familiar with the Archdiocese's mission and religious beliefs. I also am very familiar with the Archdiocese's self-insured health plan. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

7. The Archdiocese is a nonprofit corporation sole, incorporated by Congress in 1948. It is considered to be a Washington, D.C., corporation; its principal place of business is in Hyattsville, Maryland. It is organized exclusively for charitable, religious, and

educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

8. The Archdiocese has approximately 2,100 benefits-eligible employees.

9. The Archdiocese is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Archdiocese.

10. Offering a health insurance plan that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Archdiocese.

11. The Archdiocese operates a self-insured health plan, recognized under the Employee Retirement Income Security Act as a "church plan." The Archdiocese's plan is administered by a third party administrator, National Capital Administrative Services, Inc.

12. The Archdiocese's self-insured health plan does not meet the Affordable Care Act's definition of a "grandfathered" plan. The Archdiocese has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act.

13. The plan year for the Archdiocese begins on January 1.

14. The Archdiocesan plan includes the employees of archdiocesan-affiliated ministries such as Plaintiffs Archbishop Carroll High School, the Consortium of Catholic Academies, Don Bosco Cristo Rey High School, Mary of Nazareth Roman Catholic Elementary School, Catholic Charities, Victory Housing, and the Catholic Information Center. Although separately incorporated, these affiliated ministries of education and social service are integral to the exercise of our Catholic faith, participate directly in the Church's mission to minister to God's people, especially the poor and those in need, and are required to remain faithful to the Church's teachings and beliefs.

15. Consistent with Catholic teaching, the Archdiocese has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its church plan.

16. Consistent with the requirements of canon law, the Archdiocese ensures that its separately incorporated ministries remain faithful to the teachings of the Catholic Church. In order to maintain this communion, the Archbishop, the Moderator of the Curia (a canonical position reserved for clergy), and the Chancellor serve as the corporate members of each of these affiliated entities and exercise certain reserved powers such as oversight and authentication of each corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. These powers assist the Archdiocese in fulfilling its duty before God to protect the integrity of the Catholic faith as believed and practiced within

the local Church, most especially in its affiliated religious corporations.

17. The regulations at issue in this lawsuit (the "Mandate"), require employers, on pain of substantial and ruinous financial penalties, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through their employer health-care plan.

18. Though the Archdiocese meets the Mandate's definition of a religious employer and is thus exempt from facilitating access to the mandated products and services for its own employees, this exemption does not apply to the employees of our affiliated ministries, such as Plaintiffs Archbishop Carroll High School, the Consortium of Catholic Academies, Don Bosco Cristo Rey High School, Mary of Nazareth Roman Catholic Elementary School, Catholic Charities, Victory Housing, and the Catholic Information Center, that participate in the Archdiocese's health plan. They are not exempt from the Mandate.

19. The Mandate thus forces the Archdiocese to either (1) sponsor a plan that will provide the employees of its non-exempt, affiliate ministries with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to these ministries, subjecting them to massive fines if they do not contract with another insurance provider that will provide the objectionable coverage. The first option forces the Archdiocese to act contrary to its sincerely-held religious beliefs. The second option compels the Archdiocese to submit to the government's interference with its structure and internal

operations by accepting a construct that divides churches from their ministries.

20. Moreover, as a Catholic entity, the Archdiocese bears a particular responsibility to witness to the Church's teachings. The Archdiocese bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance.

21. Taking action that would trigger the provision of the objectionable products and services for the employees of its affiliated entities would be contrary to the Archdiocese's beliefs even in the event that the Archdiocese does not directly fund the objectionable coverage. Of course, any use of the Archdiocese's funds to provide the mandated products and services would only exacerbate the violation of the Archdiocese's religious beliefs.

22. The Archdiocese's provision of health benefits to its employees reflects the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. To drop health care benefits-in order to avoid the provision of objectionable drugs and services-would inhibit the Archdiocese's ability to follow this teaching.

23. Potential liability for significant fines and uncertainty regarding the Archdiocese's ability to offer and provide health benefits undermines Archdiocese's ability to retain and recruit employees. Were the Archdiocese to stop offering health benefits, it would be at a competitive disadvantage to institutions who do not have religious objections to the Mandate.

24. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services place substantial pressure on the Archdiocese to violate its sincerely held religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ Jane G. Belford
Jane G. Belford

STATE OF MARYLAND)
COUNTY OF Calvert)

Sworn to and subscribed before more this 20th day of September, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA,	)	Civil Action No. 12-cv-00815
Plaintiffs,	)	
v.	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR;	)	

and U.S. DEPARTMENT OF TREASURY,	)
	)
	)
Defendants.	)
	)
	)
	)

AFFIDAVIT OF THE CATHOLIC UNIVERSITY OF AMERICA

I, Frank G. Persico, being duly sworn, declare and state as follows:

I. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Chief of Staff and Vice President for University Relations at The Catholic University of America (hereinafter "Catholic" or "University"). I have been so employed in this capacity, under different titles, since 2000 and have worked for the University in a variety of executive capacities, including as dean of students, executive director of alumni relations and associate dean of the university's law school since 1974.

3. As Chief of Staff, I am responsible for or aware of most aspects of the University's day-to-clay operations, I coordinate the senior staff, and personally advise the University president.

4. I am very familiar with the University's mission and all aspects of the process by which Catholic University sets its budget for each fiscal year, and with the state of its finances. I sit on the University's Budget Committee. The facts set forth

herein are based upon my personal knowledge and information available to me as Chief of Staff, and if I were called upon to testify to them, I could and would competently do so.

5. The U.S. Government Mandate (the "Mandate") has put Catholic University in an impossible position. Under the Mandate, the University is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs.

6. The Catholic University of America cannot gain the benefit of the religious employer exemption, described above, and to even attempt to do so would contravene the University's commitment to serve people of all faiths. It employs approximately 426 full-time faculty members and an additional 417 temporary faculty members. Catholic University employs over 1,147 staff members. Although our full-time faculty is approximately 55% Catholic, the University does not inquire into the religious beliefs of staff members either before or after hiring (and does not currently have the technology to track such information), and so does not know how many of its employees are Catholic.

7. Catholic University is therefore faced with three untenable options: 1) to continue to provide health insurance to employees but refuse to provide the mandated contraception, sterilization, and abortion-inducing drugs and pay a massive penalty, 2)

cease health insurance coverage for employees altogether and pay a massive penalty, or 3) comply with the Mandate in contravention of Catholic University's institutional values and the values of the Catholic faith.

8. The first option would expose the University to massive fines that will start to accrue on January 1, 2014-the start date of the first plan year to which the Mandate will apply. Thus, the University's budget for the fiscal year beginning on May 1, 2013 would have to account for payments of any such fines required by the Mandate. If the University continues to offer health coverage to its employees, but refuses to offer the mandated coverage for contraceptives, sterilization, and abortion-inducing drugs, it will face fines of $100 per day per individual insured on its employee plan. Because approximately 1,710 individuals are eligible to be insured[1] on Catholic University's employee health plan, this fine would amount to approximately $62.4 million, annually, for as long as Catholic is subject to the Mandate. The University's current annual budget is approximately $220 million, so it cannot possibly pay such a fine-which would constitute approximately 28% of its entire budget.

9. Likewise, the second option (cease health insurance coverage for employees altogether) would also expose the University to massive fines starting January 1, 2014. In particular, if Catholic decides to discontinue its employee health insurance coverage altogether, the University will face fines of $2,000 per

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[1] The total of eligible individuals includes dependents, so this is a larger number than the number of employees.

benefits-eligible employee, beyond the first 30, per year. Because the University has approximately 1,381 benefits-eligible employees, it has calculated that its fines for failing to provide an employee health plan will amount to approximately $2.7 million annually, for as long as it is subject to the Mandate.

10. The $2.7 million annual fine is not the only cost that must be factored into the budgeting process in the event Catholic University elects to cancel its health plan. In an effort to avoid a mass exodus of employees, the University would have to increase employee salaries so that employees could purchase their own health insurance. Catholic would have to survey current pay levels and increase employee pay to above the market rate in order to enable employees to purchase health insurance. As discussed more fully below, the survey would be a time-consuming process, and the salary increases would escalate the University's labor costs significantly, because different sectors of the University are at different levels of market competitiveness. An additional cost at the level of magnitude of these fines would greatly harm the University's competitive position.

11. Catholic University's fiscal year begins on May 1. Under normal circumstances, the process of preparing a budget begins approximately seven months prior to the start of a new fiscal year. Thus, for the May l, 2013 fiscal year-the first fiscal year in which the University would be subject to the fines discussed above-the budgeting process normally would begin October 2012. The University's Budget Committee typically makes recommendations to the University President. Once the President approves the budget, the Vice President for Finance and

Treasurer presents it to the Board's Finance Committee, which reviews the budget in detail. The Finance Committee normally makes recommendations regarding tuition increases to the University's Board in December and submits a final proposed operating and capital budget to the Board in March.

12. This budgeting process would become significantly more complicated if Catholic were forced to pay substantial fines or taxes to the government or to compensate its employees for the loss of benefits. To ensure its fiscal integrity, the University's budget process is strictly defined and regulated; consequently, any deviation from the process—including to pay unforeseen costs during the fiscal year—would be highly irregular and require consultation and approval by the committees and the Board, as described in paragraph 11. It would have to make dramatic, short-term changes to be able to pay the fine. For instance, many University employees are currently paid below-market wages. Catholic University would have to analyze each job code and analyze positions and groups of positions in enough detail to determine whether a pay adjustment was appropriate. The University is not staffed to conduct this type of analysis, so it will need to hire a consultant to assist with the project, producing another direct financial loss.

13. Once the market adjustment analysis was complete, Catholic would have to determine how much it will increase each employee's pay above market in order to compensate for the loss of medical benefits. This will take time. And, regardless of the ultimate salary increases, the University will likely

have a difficult time hiring and retaining employees because they will have to deal individually with health insurance companies instead of being part of a collective group—a fact that will put them at a significant competitive disadvantage and likely result in higher costs to each employee and correspondingly higher labor costs for the University. The ability to offer and provide health benefits to current and prospective employees is crucial to retaining existing employees and recruiting new ones. In my experience, employees and job applicants can be as concerned about health benefits as they are about salary. Consequently, any uncertainty regarding Catholic's ability to offer a competitive health care package will undermine its ability to recruit new faculty and staff and retain existing ones. The Mandate, however, is currently creating just such uncertainty, because it means that the University cannot confidently forecast the way that it will meet the health insurance needs of its current and prospective employees.. This puts CUA at a significant competitive disadvantage in its ability to recruit and retain employees.

14. Absorbing a $2.7 million annual fine along with the costs of increased salaries to offset not having a health plan could require massive cuts in University programs and the elimination of jobs. Indeed, the $2.7 million fine is more than Catholic's budgets for certain of its colleges. A determination of which programs and positions to cut can only be made after significant deliberation and analysis, and likely require revisions of the time tables or priorities associated with implementing the University's recently developed Strategic Plan and ultimately require consultation with or approval by the Board of

Trustees. This analysis would take time and may require creating a reserve in anticipation of having to pay the fine, all of which would be part of the budgeting process. Another option, of course, would be to increase tuition to cover these costs, but that would directly undermine the University's competitiveness in the higher education marketplace.

15. The third option (comply with the Mandate) is untenable. The University is committed to following the teachings of the Catholic Church. As such, the University opposes providing insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling. To provide such coverage would be an affront to the University's institutional values and the values of the Catholic faith.

16. I understand that the Government has stated that it will finalize a change to the Mandate by August l, 2013. But even if true, this will not alleviate the current burdens on the University to plan for and anticipate the fines.

17. The accommodations suggested in the Government's Advanced Notice of Proposed Rulemaking ("ANPRM") will not alter the core requirement of the Mandate that forces the Catholic University of America to provide, pay for, or facilitate the provision of abortifacients, sterilization, and contraception, in contravention of Catholic doctrine to which the University adheres.

18. The only concrete proposal contained in the ANPRM would require our insurance issuer, United Healthcare, to provide those services, free of charge, to our covered employees and their beneficiaries. By paying premiums to the issuer, the University will

indirectly pay for these "free" services. The University will also be facilitating the provision of these services since the objectionable coverage will be triggered by Catholic's health insurance plan. The University also is currently evaluating, for its own business reasons, whether to self-insure, in accordance with the trend of educational institutions of similar size. The Mandate would discourage the University from making what might otherwise be a wise business decision because the University, even with a third party administrator, would be the effective agent of and revenue source for abortifacients, sterilization, and contraception for its employees.

19. Under the ANPRM proposed accommodations, Catholic University will thus be forced, whether it continues with conventional insurance or self-insures, to facilitate the provision of abortifacients, sterilization, and contraception by providing both the insurer relationship and the employment through which its employees will have access to health care coverage and, thus, coverage for the services at issue. Consequently, the existence of the ANPRM does not in any way ameliorate the foregoing existing harms that the Mandate is currently imposing on the University.

20. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations adds additional complexity to the University's budget process. The Government has suggested that it may finalize an altered rule by August 1, 2013. But long before that date, the University must begin to plan for the payment of the enormous fines that will apply if it is ultimately

forced to choose noncompliance with the government requirement, and to make a decision whether to continue to offer insurance, and to plan for the consequences of such a decision.

21. The Catholic University of America therefore cannot wait until August 1, 2013, to begin planning to pay the fines required by the Mandate on the hope that the Government will solve the problem, for if the Government does not solve the problem, the University will have insufficient time to undertake all of the steps, discussed above, necessary to implement the only viable options available to it under the Mandate. The proposals contained in the ANPRM would not alleviate the burden on the University's religious beliefs.

FURTHER AFFIANT SAYETH NOT.

/s/ Frank G. Persico
Frank G. Persico

District of Columbia)
)
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Sworn to and subscribed before more this 27th day of August, 2012

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, *et al.*, *Plaintiffs*,	)	Civ. No. 13-1441 (ABJ)
v.	)	**CIVIL NOTICE OF APPEAL**
KATHLEEN SEBELIUS, *et al.*, *Defendants.*	)	

PLAINTIFFS' CIVIL NOTICE OF APPEAL

Notice is hereby given this 21st day of December, 2013, that plaintiffs the Roman Catholic Archbishop of Washington, the Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc., Mary of Nazareth Roman Catholic Elementary School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., Victory Housing, Inc., the Catholic Information Center, Inc., and the Catholic University of America hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this court entered on the 20th day of December, 2013, in favor of defendants Kathleen Sebelius; U.S. Department of Health and Human Services; Jacob Lew; U.S.

Department of the Treasury; Thomas Perez; and U.S. Department of Labor against said plaintiffs.

December 21, 2013

Respectfully submitted,

/s/ Noel J. Francisco

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APPENDIX G

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the

first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance

coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for

and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense

under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and

Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans—(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise

provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for

contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance

coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan

coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the

plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver

items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in

paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required

to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—

(1) A group health plan established or maintained by an eligible organizations that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) with a copy of the self-

certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3–16 of this chapter and § 2590.715–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-

certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible

organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation

with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services.

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has

in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described

in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is 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.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized

to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan

participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.