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**
KATHLEEN SEBELIUS, *et al.*,	:	**Hon. Amy Berman Jackson**
Defendants.	:	**ELECTRONICALLY FILED**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

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Plaintiffs—the Roman Catholic Archbishop of Washington (the "Archdiocese"), the Consortium of Catholic Academies of the Archdiocese of Washington, Inc. ("CCA"), Archbishop Carroll High School, Inc. ("ACHS), Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc. ("Don Bosco"), Mary of Nazareth Roman Catholic Elementary School, Inc. ("Mary of Nazareth"), Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"), Victory Housing, Inc. ("Victory Housing"), the Catholic Information Center, Inc. ("CIC"), the Catholic University of America ("CUA"), and Thomas Aquinas College ("TAC")—submit this memorandum of law in support of their motion for preliminary injunction against enforcement of a Government mandate that would require them to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling in violation of their sincerely held religious beliefs.

INTRODUCTION

Plaintiffs are part of the Roman Catholic Church. As such, they believe 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. Accordingly, Plaintiffs believe that they may not provide, pay for, and/or facilitate access to abortion, sterilization, or artificial contraception. The Government, however, has promulgated regulations that coerce Plaintiffs into violating this sincerely-held religious belief by requiring them, through their employer health-care plans, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling (the "Mandate"). The Mandate contains a narrow exemption for entities that meet the Government's definition of a "religious employer." But despite repeated pleas from the religious community, the exemption remains strictly limited

to "houses of worship and religious orders." It thus excludes numerous Catholic organizations that fulfill the Church's religious mission through service to the poor, sick, and others in need.

More specifically, the Mandate divides religious institutions like the Catholic Church into two wings: a "religious" wing, which is limited to "houses of worship and religious orders," and a "charitable" wing, which, in the Government's view, provides *secular* services. According to the Government, only the former is a "religious employer." But this artificial division ignores the reality that many religious groups, including the Catholic Church, engage in charity as an *exercise of religion.* As Pope Emeritus Benedict XVI stated, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Yet by excluding Catholic charitable organizations from the category of exempt "religious employers," the Mandate forces a substantial part of the Catholic Church to act contrary to its sincerely-held religious beliefs.

The Government claims that its recent revisions to the Mandate address the concerns of religious organizations. They most emphatically do not. Indeed, the Government *knew* these revisions would not resolve Plaintiffs' concerns, because Plaintiffs and likeminded organizations repeatedly informed the Government that the now codified proposals were inadequate.[1] Like its predecessors, this iteration of the Mandate narrowly defines "religious employers" so as to exclude Catholic charitable and educational organizations, including Plaintiffs Catholic Charities, ACHS, CCA, Don Bosco, Mary of Nazareth, Victory Housing, CIC, CUA, and TAC. The so-called "accommodation" for these "non-religious employers," moreover, is illusory: it

[1] *See, e.g.*, Compl. ¶ 166 (citing affidavits); 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 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.

seeks to address fundamental religious objections through accounting gimmicks and legal fictions. Indeed, this version of the Mandate appears to be worse than the original draft, since it eliminates an important prior protection that allowed "religious employers" (like the Archdiocese) to shield their affiliated religious organizations from operation of the Mandate by including such organizations in their insurance plans. The Government's revisions, therefore, increase the number of religious organizations subject to the Mandate.

Needless to say, this sort of oppressive governmental action is irreconcilable with RFRA, the First Amendment, and other federal law. *First*, under RFRA, the Government may not impose a substantial burden on Plaintiffs' exercise of religion without showing that it is the least restrictive means to advance a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. Here, however, the Government cannot possibly show that it has a compelling interest in forcing Plaintiffs to violate their sincerely-held religious beliefs, since the Government excludes tens of millions of individuals around the country from the operation of the Mandate through a series of exemptions. There is no compelling interest in forcing the Mandate on the remaining small band of employers that seek a similar exemption on the basis of religious hardship. In any event, the Mandate is not even arguably narrowly tailored to the Government's asserted interests because the Government could easily advance its goals without commandeering Plaintiffs as the vehicle for delivering the objectionable products and services to their employees and students.

Second, the Mandate violates the First Amendment's Free Speech and Religion Clauses. It infringes on Plaintiffs' freedom of speech by requiring them to facilitate "counseling" for abortion, contraception, and sterilization—all of which Plaintiffs strongly oppose. It violates the Free Exercise Clause by deliberately targeting Plaintiffs' religious practices, offering a multitude of exemptions for *non-religious* reasons, but denying any exemption that would relieve

Plaintiffs' *religious* hardship. It violates the Establishment Clause by creating a state-favored category of "religious employers," preferring some religious groups to others based on intrusive judgments about their practices, beliefs, and organizational structures. And it violates the First Amendment's protection of church autonomy, driving a wedge between the charitable and educational arms of the Church through its definition of "religious employer."

Finally, the Mandate violates the APA, because it contravenes the clear terms of at least two federal statutes. Under the Weldon Amendment, federal agencies may not impose penalties on employers for refusing to include abortion coverage in their health-care plan. And yet the Mandate does exactly that by penalizing Plaintiffs for failing to provide coverage for abortion-inducing products. Similarly, the Affordable Care Act states that none of its provisions may be implemented in a way that prohibits a college or university from offering a student health plan. The Mandate does so by making objectionable coverage a mandatory component of all insurance plans, thereby effectively prohibiting Catholic schools from offering insurance to their students.

In sum, there is no legal justification for Defendants' gratuitous intrusion on Plaintiffs' religious freedom. With the Mandate now finalized and enforcement set to begin on January 1, 2014, absent an injunction, Plaintiffs will soon be forced to decide between violating their religious beliefs or violating the law—the epitome of irreparable harm. Accordingly, Plaintiffs respectfully request a preliminary injunction to preserve the status quo while this Court adjudicates this vital question of religious liberty.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Affordable Care Act") requires employer "group health plans" to include insurance coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). Congress

did not define "preventive care," instead delegating that duty to a division of the Department of Health and Human Services ("HHS"). *See id.* § 300gg-13(a)(4). HHS, in turn, delegated the task to the Institute of Medicine ("IOM"), which recommended that "preventive care" for women be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for [all] women with reproductive capacity." IOM, Clinical Preventive Services for Women: Closing the Gaps 164–65 (2011). HHS subsequently adopted that definition. *See* HHS, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines. Included in the category of mandatory FDA-approved contraceptives are products such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or ella), which can induce an abortion.

Consequently, under the definition of "preventive care," the Mandate requires health plans to cover abortion-inducing products, contraception, sterilization, and related counseling. 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 certain 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, the Act "specifically exempts all firms that have fewer than 50 employees—96 percent of all firms in the United States or 5.8 million out of 6 million total firms—from any employer responsibility requirements [one of the mechanisms to enforce the Mandate]. These 5.8 million firms employ nearly 34 million workers."[2] *See* 26 U.S.C. §

[2] WhiteHouse.gov, The Affordable Care Act Increases Choice and Saving Money for Small Business at 1, http://www.whitehouse.gov/files/documents/health_reform_for_small_ businesses.pdf (last visited Aug. 29, 2013).

4980H(a) (exempting small employers from penalties for failure to provide health coverage). By one estimate, the Government has exempted "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012).

The Government, however, has steadfastly refused to allow a similar exemption for religious organizations, save for a small number of organizations that qualify under the Mandate's unprecedentedly narrow definition of "religious employer." Originally, the "religious employer" exemption was available only to organizations that met all of the following four 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"; and "(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." 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011). As the Government explained, this was intended "to provide for a religious accommodation that respects" only "the unique relationship between a house of worship and its employees in ministerial positions." *See id.* at 46,623.

The narrowness of the exemption set off a firestorm of intense criticism from religious groups that were suddenly faced with the choice of either violating their religious beliefs or else disobeying the Mandate and incurring serious penalties. As Cardinal Wuerl wrote, "Never before has the government contested that institutions like Archbishop Carroll High School or Catholic University are religious. Who would? But HHS's conception of what constitutes the practice of religion is so narrow that even Mother Teresa would not have qualified." But despite the public outcry, the Government refused to reconsider its position and finalized the narrow religious exemption "without change." 77 Fed. Reg. 8,725, 8,727–28, 8,730 (Feb. 15, 2012). At

the same time, the Government announced that it would offer "a one-year safe harbor from enforcement" for non-exempt religious organizations until August 1, 2013. *Id*. at 8728. As noted by Cardinal Timothy Dolan, the "safe harbor" effectively gave religious groups "a year to figure out how to violate [their] consciences."

Five weeks later, however, under continuing public pressure, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM"). The ANPRM did not revoke the Mandate, but rather set forth "possible approaches" the Government believed would be adequate to "accommodate" the persistent flow of religious objections. 77 Fed. Reg. 16,501, 16,507 (Mar. 21, 2012). After careful examination, Plaintiffs and other religious groups explained that the "possible approaches" in the ANPRM would not relieve the burden on their religious freedom.[3]

Nevertheless, the Government issued a Notice of Proposed Rulemaking ("NPRM"), adopting the ANPRM's proposals. 78 Fed. Reg. 8456 (Feb. 6, 2013). The NPRM once again encountered strenuous opposition, including over 400,000 comments largely reiterating the previous objections.[4] Despite this opposition, the Government issued a final rule that adopts substantially all of the NPRM's proposals without significant change and applies to plan years beginning on and after January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013) ("Final Rule").

The Final Rule made three changes to the Mandate, none of which relieve the unlawful burdens imposed on Plaintiffs and other religious organizations. Indeed, one of them appears to significantly increase the number of religious organizations subject to the Mandate.

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[3] *See, e.g.,* Comments of U.S. Conference of Catholic Bishops at 3 (May 15, 2012) ("[The ANPRM] create[s] an appearance of moderation and compromise, [but fails to] offer any change in the Administration's earlier stated positions on mandated contraceptive coverage"), *available at* www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

[4] *See, e.g.,* Comments of U.S. Conference of Catholic Bishops, *supra* note 1, at 3 (pointing out that "the 'accommodation' still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage"); Comments of Archdiocese of Washington, *supra* note 1, at 2 ("[T]he NPRM proposes to . . . substantially *narrow*[] the number of religious entities who may seek shelter under the already impermissibly cramped definition of 'religious employer,' and, therefore, is significantly worse than existing law.").

First, the Final Rule made what the Government concedes to be a non-substantive, cosmetic change to the "religious employer" exemption. In particular, it eliminated the first three prongs of the prior test to define a "religious employer" as simply "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. at 39,896 (codified at 45 C.F.R. § 147.131(a)). As the Government admitted, this new definition does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. at 8,461. Instead, it continues to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* Religious organizations that have a broader mission are still not, in the Government's view, "religious employers."

Second, the Final Rule appears to increase the burden imposed on religious organizations by significantly expanding the number of religious organizations subject to the Mandate. The Government's initial interpretation of the "religious employer" exemption provided that if a nonexempt religious organization "provided health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. at 16,502. For example, Plaintiff Archdiocese operates a self-insurance plan that covers not only itself, but also ACHS, CCA, Don Bosco, Mary of Nazareth, Victory Housing, CIC, Catholic Charities, and other Catholic organizations. Under the Government's initial interpretation of the religious employer exemption, if the Archdiocese was an exempt "religious employer" (as it clearly is under the Final Rule), then these other entities received the benefit of that exemption.

The Final Rule, however, eliminates this safeguard, providing instead that "each employer [must] independently meet the definition of religious employer . . . to avail itself of the exemption." 78 Fed. Reg. at 39,886. Moreover, since ACHS, Don Bosco, Mary of Nazareth, CCA, Victory Housing, CIC, and Catholic Charities are part of the Archdiocese's self-insurance plan, the Archdiocese is now required to either (1) sponsor a plan that will provide the employees of these organizations with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to these organizations, 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.

Third, the Final Rule establishes an illusory "accommodation" for certain nonexempt objecting religious entities deemed "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services," (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization," and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If an organization meets these criteria, it must provide the required "self-certification" to its insurance issuer or (if the organization self-insures) to its third-party administrator. That very self-certification, however, has the perverse effect of requiring the insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for the objecting organization's employees. *See* 78 Fed. Reg. at 39,892–93 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The health insurance issuer or third-party administrator

must notify the eligible organization's employees of the availability of these "payments" "contemporaneous with . . . but separate from" materials the eligible organization distributes in connection with its health plan. 78 Fed. Reg. at 39,876. They must also provide the mandated payments "in a manner consistent" with provision of covered health benefits. *Id.* at 39,876–77.

Notably, third-party administrators are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880, so the burden falls on the objecting organization to find and identify a third-party administrator who is willing to provide the very coverage they find objectionable. Eligible organizations are flatly prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A.

This so-called "accommodation" fails to resolve Plaintiffs' religious objections. 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 abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan *still* results in the provision of coverage—now in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related counseling should they self-certify. 26 C.F.R. § 54.9816-2713A(b)-(c). 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, as the objectionable "payments" are available only "so long as [employees] are enrolled in [the organization's] health plan. *See* 29 C.F.R. § 2590.715-2713; 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).

Needless to say, this shell game does not address Plaintiffs' fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Government. As noted above, well before it finalized the revised Mandate, the Government was repeatedly informed that its so-called "accommodation" would not relieve the burden on Plaintiffs' religious beliefs. *See supra* note 1. Nonetheless, despite its representations to this and other courts that it was making a good-faith effort to address the religious objections of Plaintiffs and likeminded organizations, *see, e.g.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012), the Government proceeded to finalize a proposal that it knew would do no such thing. As before, the Government's unlawful Mandate coerces Plaintiffs, through threats of crippling fines and other pressure, into serving as the conduit for delivering contraception, abortion-inducing products, sterilization, and related counseling to their employees, contrary to their sincerely held religious beliefs.

II. PLAINTIFFS' BACKGROUND

Plaintiffs are part of the Catholic Church and, as such, sincerely believe they have a religious duty to provide educational, spiritual, and charitable services to individuals of all faiths. Plaintiffs exercise this religious belief by offering a host of charitable and educational services to individuals, including the most poor and vulnerable in society. (Compl. ¶¶ 37–141.)

Just as sincerely, Plaintiffs believe that life begins at the moment of conception, and that certain "preventive" services that interfere with the transmission of life are immoral. (*Id.* ¶¶ 4, 195–99.) Accordingly, Plaintiffs believe they may not provide, pay for, and/or facilitate access

to contraception, sterilization, abortion, or related counseling in the manner required by the Mandate. [5] (*Id.* ¶¶ 195–208.)

Historically, Plaintiffs have exercised this religious belief by excluding coverage for such services from their health plans in a manner consistent with Catholic teaching.[6] (*Id.* ¶¶ 49, 60, 68, 76, 85, 94, 102, 110, 121, 123, 138.) The Archdiocese operates a self-insured health plan that includes not only its own employees, but also the employees of Plaintiffs CCA, ACHS, Don Bosco, Mary of Nazareth, Victory Housing, CIC, Catholic Charities, and other Catholic organizations.[7] (*Id.* ¶¶ 47–48.) The plan is administered by National Capital Administrative Services, Inc. The next plan year begins on January 1, 2014.[8] (*Id.* ¶¶ 50, 52.) CUA's employees are offered health care plans provided by United Healthcare, and its students are offered insurance through AETNA. CUA's employee plan year begins on December 1, and its student plan year begins on August 14.[9] (*Id.* ¶¶ 121–24.) TAC offers its employees a health plan through the RETA Trust, a self-insurance trust set up by the Catholic bishops of California. The third-party administrator for the RETA Trust is Benefit Allocation Systems. TAC's plan year begins on July 1.[10] (*Id.* ¶¶ 138–40.) None of Plaintiffs' plans are grandfathered plans within the meaning of the Affordable Care Act. [11] (*Id.* ¶¶ 51, 125, 141.) While the Archdiocese

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[5] *See* Ex. A, Affidavit of the Archdiocese ("Belford Aff.") ¶¶ 9–10; Ex. B, Affidavit of CCA ("Conley Aff.") ¶¶ 7–14; Ex. C, Affidavit of ACHS ("Blaufuss Aff.") ¶¶ 7–14; Ex. D, Affidavit of Don Bosco ("Shafran Aff.") ¶¶ 7–14; Ex. E, Affidavit of Mary of Nazareth ("Friel Aff.") ¶¶ 7–14; Ex. F, Affidavit of Catholic Charities ("Enzler Aff.") ¶¶ 7–14; Ex. G, Affidavit of Victory Housing ("Brown Aff.") ¶¶ 7–14; Ex. H, Affidavit of CIC ("Panula Aff.") ¶¶ 7–14; Ex. I, Affidavit of CUA ("Persico Aff.") ¶¶ 13–20; Ex. J, Affidavit of TAC ("DeLuca Aff.") ¶¶ 11–17.

[6] Belford Aff. ¶ 15; Persico Aff. ¶ 15; DeLuca Aff. ¶ 13.

[7] Belford Aff. ¶ 14.

[8] *Id.* ¶¶ 11, 13;

[9] Persico Aff. ¶¶ 8–11;

[10] DeLuca Aff. ¶¶ 8–9.

[11] Belford Aff. ¶ 12; Persico Aff. ¶ 12; DeLuca Aff. ¶ 10.

appears to qualify as a "religious employer" for purposes of the final regulation (*id.* ¶ 12), the remaining Plaintiffs do not (*id.* ¶¶ 58, 67, 75, 84, 93, 101, 109, 120, 137).[12]

To safeguard their religious beliefs, Plaintiffs originally filed suit shortly after the initial version of the Mandate was finalized. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-0815, 2013 BL 19768 (D.D.C. Jan. 25, 2013). Relying on the Government's promise that "'the regulations [would] never be enforced in their present form'" and that the Government would amend the Mandate "'in an effort to accommodate religious organizations with religious objections to contraceptive coverage,'" *id.* at *4–5 (quoting Defs.' Supp. Br. at 4, *Archbishop*, 2013 BL 19768 (Dkt. # 38)), this Court dismissed that suit on ripeness grounds, *id.* The U.S. Court of Appeals for the District of Columbia Circuit subsequently dismissed Plaintiffs' appeal as moot in light of the revised Mandate. *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5091 (D.C. Cir. Sept. 6, 2013) (Dkt. # 24).

The amended Mandate fails to address Plaintiffs' fundamental religious objection to facilitating access to the objectionable products and services. Plaintiffs, therefore, were left with little choice but to file suit challenging the new regulations. *Archbishop*, 2013 BL 19768, at *5 (indicating that the ripeness dismissal did not bar a new suit). In light of the impending enforcement of the Mandate, Plaintiffs now seek injunctive relief from this Court.

ARGUMENT

In evaluating a motion for a preliminary injunction, "the district court must balance four factors: (1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest." *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). The rules and

[12] Belford Aff. ¶ 18; Conley Aff. ¶ 6; Blaufuss Aff. ¶ 6; Shafran Aff. ¶ 6; Friel Aff. ¶ 6; Enzler Aff. ¶ 6; Brown Aff. ¶ 6; Panula Aff. ¶ 6; Persico Aff. ¶ 6; DeLuca Aff. ¶ 2.

accepted practice ordinarily require expedited resolution by the Court when a preliminary injunction is sought. *See* LCvR 65.1(d). A preliminary injunction, moreover, is especially appropriate where, as here, it would "preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 317, 322 (D.C. Cir. 2006) (citation omitted). Here, a preliminary injunction is warranted because Plaintiffs meet all four factors for interim relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are likely to succeed on the merits of all of their claims, including that the Mandate: (1) violates RFRA because it substantially burdens Plaintiffs' exercise of religion without being the least restrictive means to achieve a compelling government interest (Compl. Count I, ¶¶ 234–48); (2) violates the Free Exercise Clause because it is not neutral and generally applicable (*id.* Count II, ¶¶ 249–65); (3) violates the First Amendment prohibition on compelled speech because it forces Plaintiffs to facilitate "counseling" that contradicts their religious viewpoint (*id.* Count IV, ¶¶ 266–80); (4) violates the First Amendment protection of the freedom of speech by imposing a gag order that prohibits Plaintiffs from attempting to "influence" a third-party administrator's decision to provide or procure contraceptive services (*id.* Count IV, ¶¶ 281–85); (5) violates the Establishment Clause because it establishes an official category of Government-favored "religious employers," which excludes some religious groups based on intrusive judgments regarding their beliefs, practices, and organizational structure (*id.* Count V, ¶¶ 286–93); (6) violates the Religion Clauses because it interferes with Plaintiffs' internal church governance (*id.* Count VI, ¶¶ 294–309); (7) violates the APA by disregarding prohibitions on compelled support for abortion and interference with student health plans (*id.* Count VII, ¶¶ 310–22); and (8) has been erroneously interpreted by the Government (*id.* Count VII, ¶¶ 323–35).

A. The Mandate Violates RFRA

Under RFRA, the Federal Government is prohibited from "substantially burden[ing] a

person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). Thus, once Plaintiffs demonstrate a substantial burden, the Government bears the burden of proving that application of the Mandate to Plaintiffs furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 423, 428. Here, the Government cannot make such a showing.

In response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress passed RFRA "to restore and codify the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and . . . guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb; *O Centro*, 546 U.S. at 430–31. RFRA's legislative history confirms that it was enacted to prevent the type of regulation codified in the Mandate. For example, Nadine Strossen, then-President of the American Civil Liberties Union, testified in support of RFRA's enactment in order to safeguard "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. On the Judiciary,* 102d Cong. 174, 192 (1992) (Statement of Nadine Strossen, President, Am. Civ. Liberties Union); *see also* 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that post-*Smith*, a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" and that RFRA provides "an opportunity to correct th[is] injustice[]"); *id.* at 4660 (statement of Rep.

Green) (noting that RFRA was intended to prevent the Government from being able to "enact laws that force a person to participate in actions that violate their religious beliefs").

Here, the Mandate cannot possibly survive scrutiny under RFRA because: (1) it substantially burdens Plaintiffs' exercise of religion; (2) the Government has no compelling interest in imposing this burden; and (3) the Mandate is not the least restrictive means of achieving the Government's interest. This is precisely why courts have issued preliminary injunctions in the majority of cases brought by *for-profit* companies challenging the Mandate.[13] It follows that *non-profit religious charities* such as Plaintiffs are entitled to similar relief.

1. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires courts to (1) identify the particular exercise of religion at issue and then (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 678–79 (D.C. Cir. 2008) (distinguishing between the exercise of religion and the

[13] *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc); *Gilardi v. U.S. Dep't of Health & Human Servs*., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt.# 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Briscoe v. Sebelius*, No. 13-cv-00285 (D. Colo. Sept. 6, 2013) (Dkt. # 49); *Willis Law v. Sebelius*, No. 1:13-cv-01124 (D.D.C. Aug. 23, 2013) (Dkt. # 11); *Bindon v. Sebelius*, No. 1:13-cv-01207-EGS (D.D.C. Aug. 14, 2013); *Ozinga v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-03292 (N.D. Ill. July 16, 2013) (Dkt. # 25); *SMA, LLC v. Sebelius*, No. 13-cv-01375 (D. Minn. July 8, 2013) (Dkt. # 14); *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498 (M.D. Fla. June 25, 2013); *Johnson Welded Prods. v. Sebelius*, No. 1:13-cv-00609 (D.D.C. May 24, 2013) (Dkt. # 8); *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013); *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21); *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036 (W.D. Mo. Feb. 28, 2013) (Dkt. #9); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. # 50); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012); *Newland*, 881 F. Supp. 2d 1287.

burden on that religious exercise); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (applying this two-part test under RLUIPA, RFRA's sister statute); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"). Here, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do precisely what their religion forbids: impermissibly facilitate access to abortion-inducing products, contraception, sterilization, and related counseling.

(i) "Exercise of Religion"

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Because "[r]eligious exercise necessarily involves an action or practice," *Kaemmerling*, 553 F.3d at 679, RFRA protects "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877. The protected category of religious exercise includes any act or practice that is "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted).

Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, courts must accept plaintiffs' description of their beliefs and practices, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also United States v. Lee*, 455 U.S. 252, 257 (1982) (same); *Hobby Lobby*, 723 F.3d at 1137 (deeming "any inquiry into the

theological merit of the belief in question" "fundamentally flawed"); *Koger*, 523 F.3d at 797 (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

"Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Thus, "[r]epeatedly and in many different contexts," the Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. 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. Instead, in keeping with the deference owed to private claims of religious belief, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). By necessity this is a modest inquiry, restrained by the need to avoid excessive entanglement in religion. *See Jolly*, 76 F.3d at 476. The purpose of the sincerity inquiry is simply to screen out manipulative claims based on sham beliefs that can be readily identified as such—as in the case of a high-school student who proclaims a religious objection to Math. Courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715.

"While it is a delicate task to evaluate religious *sincerity* without questioning religious *verity*, . . . free exercise doctrine is based upon the premise that courts are capable of distinguishing between these two questions." *Jolly*, 76 F.3d at 476. By screening claims for religious sincerity, and by allowing the Government to impose burdens that are truly necessary to

serve a compelling interest, courts can apply RFRA to grant bona fide religious exemptions without "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Yoder*, 406 U.S. at 216. On the basis of this approach, the Supreme Court has repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U. S. 709, 722 (2005)).

Here, there can be no doubt that Plaintiffs' refusal to comply with the Mandate is a protected exercise of religion under RFRA. *Smith*, 494 U.S. at 877. It is undisputed that Plaintiffs have a sincerely held religious belief that they may not provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, or related counseling, including by contracting with an insurance company or third-party administrator that will provide or procure the objectionable products and services for Plaintiffs' students and employees upon Plaintiffs' self-certification. While courts are bound to accept Plaintiffs' description of their beliefs without resort to any independent religious authority, here the sincerity of Plaintiffs' beliefs is buttressed by repeated confirmations from the U.S. Conference of Catholic Bishops as well as the Archdiocese of Washington, the highest authority on Catholic doctrine in Washington, D.C. *See, e.g.*, *supra* note 1. These authoritative statements of Catholic belief make it clear that Plaintiffs' objection is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.

Nor do Plaintiffs seek to impose their religious beliefs on anyone else, or "to require the government itself to conduct its affairs in conformance with [their] religion." *Kaemmerling*, 553 F.3d at 680. On the contrary, Plaintiffs recognize that notwithstanding their religious objections,

they have no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else. Plaintiffs simply invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. And despite the Final Rule's oft-repeated declaration that Plaintiffs will not be required to "contract, arrange, pay, or refer for [contraceptive] coverage," *see, e.g.*, 78 Fed. Reg. at 39,872, there can be no doubt the Mandate requires Plaintiffs to act to facilitate provision of these services. Among other things, Plaintiffs must locate and identify a third party willing to provide the very services they deem objectionable, and they must then enter into a contract with that party that will result in the provision or procurement of those services "for free." Should they choose to certify their objection to the mandated coverage, that action inexorably leads to provision of the very coverage to which they object, and in the case of self-insured entities, legally "designat[es]" the third party administrator as the agent responsible for providing contraceptive benefits on Plaintiffs' behalf. 78 Fed. Reg. at 39,879. In other words, the Government has effectively made "no" mean "yes," transforming the very act of objecting to the mandated coverage into the authorization to provide such coverage. This, of course, is to say nothing of the fact that Plaintiffs' employees would receive access to the mandated payments *only* by virtue of their participation in the health plan Plaintiffs choose to offer, 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B) (indicating that payments are available *only* "so long as" Plaintiffs' employees remain on Plaintiffs' insurance plan"), and that Plaintiffs' insurance issuer or third party administrator would only know who was entitled to receive contraceptive "payments" because Plaintiffs gave them a list of their benefits-eligible employees, *cf.* 78 Fed. Reg. at 39,876 (indicating that notice of the availability of "payments" must be made "contemporaneous with . . . but separate from" any application or other materials Plaintiffs

distribute in connection with their health plans).[14] Accordingly, to claim after all this that Plaintiffs are not forced to "contract" or "arrange" for contraceptive coverage is the proverbial "argument only a lawyer could love." In any case, what matters for purposes of RFRA is that Plaintiffs sincerely believe that such actions violate their religious beliefs. By forcing Plaintiffs to take such actions, the Mandate is a straightforward effort to "force [Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).[15]

(ii) "Substantial Burden"

Once Plaintiffs' refusal to facilitate contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, a federal law "substantially burdens" an exercise of religion if it compels "acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218, or "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 716–18; *Kaemmerling*, 553 F.3d at 678 (same); *see also Hobby Lobby*, 723 F.3d at

[14] *See* Belford Aff. ¶¶ 9–10; Conley Aff. ¶¶ 7–14; Blaufuss Aff. ¶¶ 7–14; Shafran Aff. ¶¶ 7–14; Friel Aff. ¶¶ 7–14; Enzler Aff. ¶¶ 7–14; Brown Aff. ¶¶ 7–14; Panula Aff. ¶¶ 7–14; Persico Aff. ¶¶ 13–20; DeLuca Aff. ¶¶ 11–17.

[15] Because Plaintiffs object to taking actions required by the Mandate that facilitate access the objectionable products and services, it is irrelevant whether the Mandate also forces them to directly subsidize these products and services. *See, e.g.,* 26 C.F.R. § 54.9816-2713A(c)(2)(ii);78 Fed. Reg. at 8463. But in any event, Plaintiffs will almost certainly be required to subsidize the objectionable products and services, thereby exacerbating the violation of their religious beliefs. The Government asserts that the "accommodation" will be "cost neutral" because the cost to the insurance company of providing "free" products and services will be offset by, among other things, "fewer childbirths" that result from the use of contraception, sterilization, abortion-inducing products, and related counseling, 78 Fed. Reg. at 8463. But even if true, the fact remains that the premiums previously going toward childbirths will now be used to provide the objectionable products and services necessary to obtain that reduction in childbirths. *See* Affidavit of Prof. Scott E. Harrington at 5–6, Ex. 1 to Comments of the Diocese of Pittsburgh (Apr. 8, 2013) (hereinafter, "Harrington Aff.") (noting that "any 'cost savings' from fewer childbirths would be the result of providing contraceptive coverage to which the religious organizations object"); *id.* at 5 ("The premiums paid by eligible religious organizations to issuers . . . remain the source of funding for separately provided individual coverage to employees."), *available at* http://www.becketfund.org/wp-content/uploads/2013/04/Diocese-of-Pittsburgh-4-8-13.pdf. In any event, the Government's cost-neutrality assumption is implausible, since it depends on the dubious assumption that the cost of contraception will be offset by "lower costs from improvements in women's health and fewer childbirths," 78 Fed. Reg. at 8463, which in turn depends on the assumption that the Mandate will induce large numbers of women who do not currently use contraception to begin doing so. The Government, however, has adduced no evidence in support of those implausible assumptions. *See* Harrington Aff. at 4 (demonstrating why the assumptions are likely incorrect).

1137 (confirming that the substantial burden inquiry looks to "*the intensity of the coercion* applied by the government to act contrary to [one's] beliefs"). In *Yoder*, for example, the Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. Likewise, in *Thomas*, the Court held that 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 Plaintiffs' free exercise of religion. If Plaintiffs refuse to facilitate the objectionable products and services through their health plans, they could be subject to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). And if Plaintiffs seek to exit the insurance market altogether, they could be subject to annual fines of $2,000 per full-time employee after the first thirty employees, *see id.* § 4980H(a), (c)(1), and/or significant competitive disadvantages in the ability to retain and recruit employees, *cf. Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 3071481, at *9–10 (W.D. Pa. June 18, 2013) (forcing plaintiff to drop a student health plan is a substantial burden). For CUA's student health plans, the University must facilitate access to the mandated products and services or forego providing student health insurance altogether, inhibiting their ability to recruit and retain students. *See* 45 C.F.R. § 147.131(f). These penalties, which could involve millions of dollars in fines as well as other negative consequences, clearly impose the type of pressure that qualifies as a substantial burden—far outweighing, for example, the $5 fine at issue in *Yoder*. There can be no doubt that the threat of such penalties compels Plaintiffs to do exactly what their religion forbids.

In the face of such coercion, numerous courts, including the D.C. Circuit, have awarded preliminary relief to for-profit companies challenging the Mandate. *See, e.g.*, *Gilardi v. U.S.*

Dep't of Health & Human Servs., No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. No. 24) (granting an injunction pending appeal). The Seventh Circuit, for example, granted injunctions pending appeal in two cases challenging the Mandate because those plaintiffs had demonstrated a likelihood of success on their RFRA claim. In *Korte v. Sebelius*, the court ruled that plaintiffs "would have to violate their religious beliefs to operate their company in compliance with [the Mandate]." 2012 WL 6757353, at *3. In light of the penalties for non-compliance, the court held that plaintiffs "established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise." *Id*. at *4. In a companion case, the court found the Mandate posed an even greater threat to the Catholic employers' religious liberties because there the plaintiffs operated a self-insured health plan. *See Grote*, 708 F.3d at 854.[16] The Tenth Circuit, sitting *en banc*, likewise recently held that a for-profit religious organization was likely to succeed on the merits of a RFRA claim. The court emphasized the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 723 F.3d at 1141. The same is true here.

It is no answer to claim that some of the Plaintiffs, unlike the *Hobby Lobby* litigants and other for-profit corporations, may be eligible for the Government's so-called "accommodation." For purposes of the RFRA analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious beliefs. *Id*. at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). As described above, there can be no question that, notwithstanding the "accommodation," Plaintiffs are coerced into taking actions

[16] *See also Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (injunction pending appeal); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same).

that violate their sincerely held religious beliefs. *See supra* Part I.A.1(i). These sincere religious beliefs are entitled to no less protection from Government coercion than the similar religious beliefs at issue in *Hobby Lobby*, *Gilardi*, *Korte*, and *Grote*.

In sum, the Mandate leaves no way for Plaintiffs to continue their current operations in a manner consistent with their sincerely held religious beliefs. Instead it forces them to abandon their beliefs by facilitating access to objectionable products and services, or violate the law and face severe consequences. The Mandate thus substantially burdens Plaintiffs' religious exercise.

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

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must have a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31; *Tyndale*, 904 F. Supp. 2d at 119–20. The Government cannot begin to meet this standard.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297–98. Here, the Government cannot claim an interest of the "highest order" where it exempts "tens of millions of people" from the Mandate

through various exemptions. *Hobby Lobby*, 723 F.3d at 1143. For example, the Government cannot plausibly maintain that Plaintiffs' employees must be covered by the Mandate when it exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "if you like your plan, you can keep it."[17] An interest is hardly compelling if it can be trumped by political expediency. Such broad exemptions "completely undermine[] any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 904 F. Supp. 2d at 123.

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety because the Act already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.* Likewise, "everything the Government says" about its interests in requiring Plaintiffs to facilitate access to the mandated products and services "applies in equal measure" to entities that meet the Mandate's definition of "religious employer," as well as the numerous other entities that are

[17] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/ 06/20100614e.html.

exempt from the Mandate for non-religious reasons.

Likewise, the Government's recent announcement of a one-year delay in the enforcement of 26 U.S.C. § 4980H[18]—which imposes annual fines of $2,000 per employee on certain large employers for failure to provide group health insurance—confirms that the interests at stake are not compelling. The Congressional Budget Office ("CBO") estimates that because of this delay, "roughly 1 million fewer people are expected to be enrolled in employment-based coverage in 2014." The CBO further reports that "roughly half [of those individuals] will be uninsured," while "the others will obtain coverage through the exchanges" or other government programs.[19] The fact that the Government was willing to delay enforcement of these penalties, even though it knew such action would result in hundreds of thousands of additional women losing access to the mandated coverage in 2014, demonstrates yet again that it is not pursuing interests "of the highest order."[20]

The Government's interest also cannot be compelling where the Government has failed to "identify an actual problem in need of solving," *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal quotation marks and citation omitted). By the Government's own admission, at best, the Mandate would "[f]ill[]" only a "modest gap" in contraceptive coverage. *Id.* at 2741. Indeed, the Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010); Statement by U.S. Department of

[18] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, Treasury Notes (July 2, 2013), http://go.usa.gov/jKeH.

[19] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Representative Paul Ryan, Chairman, Committee on the Budget at 4 (July 30, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/files/2013/07/EmployerPenalties-RyanLtr.pdf

[20] This delay also means that hundreds of thousands of additional women will receive health coverage through the exchanges, rather than from their employers, showing that the Mandate can be achieved through means other than coercing the employer. *See infra* Part I.A.3.

Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs. gov/news/ press/2012pres/01/20120120a.html. Any interest in closing that "modest gap" cannot be compelling, as the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

Finally, even assuming there were "an actual problem," the Government cannot show that applying the Mandate to Plaintiffs is "actually necessary to the solution." *Id.* at 2738. The Government claims that increased access to contraception will increase contraceptive use, but the Government cannot rely on its "predictive judgment" and "ambiguous proof will not suffice." *Id.* at 2738–39. In fact, recent scholarship indicates that a modest increase in *coverage* for contraception is unlikely to have any significant impact on effective contraceptive *use*, "because the group of women with the highest unintended pregnancy rates (the poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception," and "because women have a true variety of reasons for not using contraception that the law cannot mitigate or satisfy simply by attempting to increase access to contraception by making it 'free.'" Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013). In such circumstances, the Government cannot claim to have identified a compelling interest, much less that its proposed solution will further that compelling interest in any meaningful way.

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

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). 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.'" *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

The "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). "Because this burden is placed on the Government, it must be the party to make this comparison." *Id*. The government cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (explaining that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003))).

Here, the Government has myriad ways to achieve its asserted interests without conscripting plaintiffs to violate their religious beliefs. Plaintiffs in no way recommend these alternatives, and, indeed, oppose many of them as a matter of policy. But the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services itself; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Plaintiffs to comply with

the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (i.e., Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299.[21] The Government's failure to consider these alternatives is fatal, as strict scrutiny requires a "serious, good faith consideration" of workable alternatives. *Grutter*, 539 U.S. at 339.

B. The Mandate Violates the Free Exercise Clause

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

In *Lukumi*, for example, the Supreme Court invalidated a municipal ordinance that imposed penalties on "whoever unnecessarily kills any animal." *Id*. at 537. Although the ordinance was not facially discriminatory, the Court found that its practical effect was to disfavor adherents of Santeria, a religion involving animal sacrifice, because it allowed exemptions for

[21] *See, e.g.*, *Beckwith*, 2013 WL 3297498, at *18 n.16 ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan*, 2013 WL 1014026, at *11 ("[T]he Government has not established its means as necessarily being the least restrictive."); *Newland*, 881 F. Supp. 2d at 1299 (concluding that the Mandate is not narrowly tailored in light of "the existence of government programs similar to Plaintiffs' proposed alternative").

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

The same reasoning applies here. As described above, the Mandate is not "generally applicable" because it is riddled with exemptions. *See Geneva Coll.*, 2013 WL 838238, at *26–28; *Sharpe Holdings*, 2012 WL 6738489, at *5–6. The Government has exempted millions of individuals for reasons of political and administrative expediency, and it has recently exempted hundreds of thousands more. *See supra* Part I.A.2. It makes no difference that one of the exemptions applies to a narrow subset of religious groups—namely, those that meet the Government's cramped definition of "religious employers." The Free Exercise Clause does not merely require equal treatment for *some* religious groups. Because it offers exemptions on secular grounds for millions of individuals, the Government must give equal consideration to *all* claimants who seek similar exemptions on religious grounds. In short, because the Mandate fails the test of general applicability, the Government may not "refuse to extend [exemptions] to cases of 'religious hardship' without compelling reason." *Lukumi*, 508 U.S. at 537–38.

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

The record, moreover, establishes that the Mandate was part of a conscious political strategy to marginalize and delegitimize Plaintiffs' religious views on contraception by holding them up for ridicule on the national stage. For example, at a NARAL Pro-Choice America fundraiser, Defendant Sebelius stated: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely affordable contraceptive services? Not so much." (Compl. ¶ 215). Likewise, the original definition of "preventive service" was promulgated by an Institute of Medicine Committee that was stacked with individuals who, like Defendant Sebelius, strongly disagreed with many Catholic teachings, causing the Committee's lone dissenter to lament that the Committee's recommendation reflected the other members' "subjective determinations filtered through a lens of advocacy." (*Id.* ¶¶ 152–56; *see also* IOM, *supra*, at 232.) This anti-religious bias is further confirmed by the fact that it was directly modeled on a California statute, *see* 77 Fed. Reg. at 8726 (explaining that the federal Mandate

was modeled on state law); *compare* 76 Fed. Reg. at 46,626, *with* Cal. Health and Safety Code § 1376.25(b)(1), whose chief legislative sponsor made clear that its purpose was to strike a blow against Catholic religious authorities: "'59 percent of all Catholic women of childbearing age practice contraception.'" "'[88] percent of Catholics believe . . . that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.'"[22] Thus, not only the "real operation" but also the intended effect of the Mandate is to target and suppress Plaintiffs' religious practices. *Lukumi*, 508 U.S. at 533–35.

Finally, the Mandate is subject to strict scrutiny because it implicates the "hybrid" rights of religious believers. In *Smith*, the Supreme Court noted that the Free Exercise Clause can serve to "reinforce[]" other constitutional protections, such as freedom of speech and association, which are particularly important when religious beliefs and practices are at stake. 494 U.S. at 881. The present case illustrates why. In order to carry out their religious mission, Plaintiffs must enjoy the freedom to speak and to associate in religious schools and charities without being forced to violate their core beliefs. The Mandate denies them this freedom by effectively prohibiting them from forming schools and charities unless they (a) provide or facilitate access to contraception, and (b) sponsor Government speech in the form of contraceptive "counseling."

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

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957–58 (D.C.

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

Cir. 2013). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (citations omitted). The protection against compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Plaintiffs to provide, pay for, and/or facilitate access to "counseling" related to abortion-inducing products, contraception, and sterilization for their employees. Because Plaintiffs oppose abortion and contraception, they strongly object to providing any support for "counseling" that encourages, promotes, or facilitates such practices. Indeed, opposition to abortion and contraception is an important part of the religious message that Plaintiffs preach, and they routinely counsel men and women against engaging in such practices. Consequently, forcing Plaintiffs to facilitate "counseling" in *favor* of such practices imposes a serious burden on their freedom of speech.

Second, in order to qualify for the so-called "accommodation," the Mandate requires Plaintiffs to provide a "certification" stating their objection to the provision of abortion-inducing products, contraception, sterilization, and related counseling. This "certification" in turn triggers an obligation on the part of Plaintiffs' third-party administrator or insurance provider to offer the objectionable products and services to Plaintiffs' employees. Plaintiffs object to this certification requirement both because it compels them to engage in speech that triggers provision of the objectionable products and services, and because it deprives them of the freedom to speak on the issue of abortion and contraception on their own terms, at a time and place of their own

choosing, outside of the confines of the Government's regulatory scheme. *See, e.g.*, *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011) (striking down law requiring pregnancy centers to issue disclaimers that they did not provide abortion-related services); *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 468 (D. Md. 2011) (enjoining enforcement of law requiring pregnancy centers to post notice "encourag[ing] women who are or may be pregnant to consult with a licensed health care provider"), *aff'd* No. 11-1314, 11-1336, 2013 BL 178838 (4th Cir. July 03, 2013) (en banc).

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

At the very core of the First Amendment is the right of private groups to speak out on matters of moral, religious, and political concern. Time and again, the Supreme Court has reaffirmed that the constitutional freedom of speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the imposition of "content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment "remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

The Mandate violates this basic principle by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to

provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A. This sweeping gag order cannot withstand First Amendment scrutiny. Plaintiffs believe that contraception is immoral, and by expressing that conviction they routinely seek to "influence" or persuade their fellow citizens of that view. The Government has no authority to outlaw such expression.

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

The "religious employer" exemption violates the Establishment Clause of the First Amendment in two ways.

1. Discrimination Among Religious Groups

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

For example, in *Larson v. Valente*, 456 U.S. 228 (1982), the Supreme Court struck down a Minnesota law imposing special registration requirements on any religious organization that did not "receive[] more than half of [its] total contributions from members or affiliated organizations." *Id.* at 231–32. The state defended the law on the ground that it was facially neutral and merely had a disparate impact on some religious groups. The Court, however, rejected that argument, finding that the law discriminated among denominations by privileging

"well-established churches that have achieved strong but not total financial support from their members," while disadvantaging "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.* at 246 n.23. The D.C. Circuit has followed similar reasoning, stating that "an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between *kinds* of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (emphasis added).

Here, the Mandate violates this principle of neutrality by establishing an official category of "religious employer" that favors some denominations and religious organizations over others. The exemption is defined to include only "nonprofit organization[s] 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." As the Government has explained, those provisions of the tax code include only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8461. This definition plainly favors religious denominations that primarily rely on traditional categories of "houses of worship" or "religious orders" to carry out their ministry, while disadvantaging groups that exercise their religious faith through alternative means—including through organizations, like Plaintiffs Catholic Charities, ACHS, CCA, Don Bosco, Mary of Nazareth, Victory Housing, CIC, CUA, and TAC, which express their faith through charitable and educational services.

2. Excessive Entanglement

"It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v.*

Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colorado Christian*, 534 F.3d at 1261 (citing *Agostini v. Felton*, 521 U.S. 203 (1997)). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits." *Id.*

In determining eligibility for a religious exemption, the Government may not ask intrusive questions designed to determine whether a group is "*sufficiently* religious," *Univ. of Great Falls*, 278 F.3d at 1343, or even whether the group has a "substantial religious character," *id.* at 1344. Rather, any inquiry into a group's eligibility for a religious exemption must be limited to determining whether the group is a "bona fide religious institution[]." *Id.* at 1343–44.

Here, the Government's criteria for the "religious employer" exemption go far beyond the line of determining bona fide religious status. By its terms, the exemption applies to groups that are "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." This category includes (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." The IRS, moreover, has adopted an intrusive fourteen-factor test to determine whether a group meets these criteria. *See Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009). The fourteen criteria ask whether a religious group has "(1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a

literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for the religious instruction of the young; and (14) schools for the preparation of its ministers." *Id.*

Not only do these factors favor some religious groups over others, but they do so on the basis of intrusive judgments regarding beliefs, practices, and organizational structures. For example, evaluating whether a group has "a distinct religious history" or "ecclesiastical government" favors long-established and formally organized religious groups. Likewise, probing into whether a group has "a recognized creed and form of worship" requires the Government to determine what qualifies as a "creed" or "worship." In such circumstances, the Government cannot escape being "cast in the role of arbiter of [an] essentially religious dispute." *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977). If there is any dispute as to what constitutes "worship," the Government should not be the one to resolve it. Indeed, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id*. at 133.

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

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

oppressive civil laws," the Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring).

Here, the Mandate violates this principle by artificially splitting the Catholic Church in two and preventing the Church from exercising supervisory authority over its constituent institutions in a way that ensures compliance with Church teachings. In particular, the "religious employer" definition treats the Catholic Church as having two wings—a religious one and a charitable one—and treats only the former as a "religious employer." In fact, however, the Church's religious and charitable arms are one and the same: by refusing to recognize the Church's charitable functions as part of a single, integrated whole, the Mandate directly interferes with the unified structure of the Catholic Church.

The Mandate, moreover, compounds this error by interfering with the Church hierarchy's ability to ensure that subordinate institutions, including various charitable and educational ministries, adhere to Church teaching through participation in a single insurance plan. Such an arrangement is currently in place in Washington, D.C., where the Archdiocese makes its self-insured health plan available to the employees of its religious affiliates, including CCA, ACHS, Don Bosco, Mary of Nazareth, Victory Housing, CIC, and Catholic Charities. By serving as the insurance provider for these affiliates, the Archdiocese can directly ensure that these organizations offer their employees health plans that are in all ways consistent with Catholic beliefs. The Mandate disrupts this internal arrangement by forcing the Archdiocese to either sponsor a plan that will provide the employees of these organizations with access to "free" abortion-inducing products, contraception, sterilization, and related counseling, or expel its affiliates from the Archdiocese's self-insurance plan, thereby subjecting these organizations to

massive fines unless they enter into a different contract for the objectionable coverage. Either way, the Mandate directly undermines the Archdiocese's ability to ensure that its religious affiliates remain faithful to Church teaching. (Belford Aff. ¶¶ 14–19).

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

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Mandate is "not in accordance with law" in at least two respects.

First, the Weldon Amendment states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government 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 (2011). The same statute defines "health care entity" to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2). Here, the Mandate violates the Weldon Amendment because it subjects Plaintiffs to discrimination based on their refusal to include coverage for abortion-inducing products (such as the morning-after pill or ella) in their "health insurance plan[s]."

Second, the Affordable Care Act states that "[n]othing in this title (or an amendment made by this title) shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan . . . ." 42 U.S.C. § 18118(c). This provision prohibits any law that has the effect of barring an institution of higher education from offering a student

health plan. *See* 76 Fed. Reg. 7767, 7769 (Feb. 11, 2011). The requirement that student health plans include or facilitate coverage for abortion-inducing products, sterilization, contraception, and related counseling, however, 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.

H. The Government Has Erroneously Interpreted the Mandate

Finally, even if the Mandate were to survive scrutiny, the Government has erroneously interpreted it in a manner that improperly increases the number of organizations subject to the Mandate. The Government's original interpretation of the Mandate indicated that if a nonexempt religious organization "provided health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. at 16,502. When issuing the Final Rule, however, Defendants rejected this "plan-based approach" and adopted an "employer-by-employer approach" whereby "each employer [must] independently meet the definition of religious employer . . . in order to avail itself of the exemption." 78 Fed. Reg. at 39,886. This flawed interpretation, which prevents the Archdiocese's affiliates from obtaining the benefit of the exemption through participation in the plan established and maintained by the Archdiocese, is inconsistent with the text of the Mandate, contradicts the Government's prior construction, and creates serious constitutional difficulties. Accordingly, it is entitled to no deference and should be rejected.

To be sure, an agency's interpretation of its own regulation is normally entitled to deference unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). "But *Auer* deference is warranted only when the language of the

regulation is ambiguous," *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), and it cannot shield an agency's attempt "to overcome the regulation's obvious meaning." *Id.*; *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003) ("If the regulation is unambiguous, then what is known as *Seminole Rock* deference does not apply, and the regulation's plain language, not the agency's interpretation, controls."). In the case at hand, the Government's interpretation is flatly inconsistent with the unambiguous text of the Mandate. That language explicitly exempts "*group health plan*[*s*] established or maintained by . . . religious employer[s] (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer)" from "any requirement to cover contraceptive services." 45 C.F.R. § 147.131(a) (emphasis added). An employer-based approach thus contradicts the plain text of the regulation, which discusses "group health plan[s]," not individual employers. So long as the plan is "established or maintained by a religious employer," it is not bound by "any requirement to cover contraceptive services." *Id.*

Even assuming the Government's newly minted interpretation was not in conflict with the plain text of the regulation, *Auer* "deference is . . . unwarranted . . . when the agency's interpretation conflicts with a prior interpretation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *cf. Watt v. Alaska*, 451 U.S. 259, 273 (1981) ("The Department's current interpretation [of a statute], being in conflict with its initial position, is entitled to considerably less deference."); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (indicating that the Court has "declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency"). As noted above, the Government's initial interpretation of the Mandate was that plans sponsored by exempt religious employers would not be required to provide contraceptive

services, even for employees of non-exempt employers included in the plan. 77 Fed. Reg. at 16,502. The Government's change of course is entitled to no deference from this Court.

The venerable canon of constitutional avoidance also counsels against the Government's interpretation. "When the validity of [a regulation] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [courts] will first ascertain whether a construction of the [regulation] is fairly possible by which the question may be avoided." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465–66 (1989); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). For the reasons outlined above, construing the Mandate as proposed by the Government raises serious constitutional questions, not the least of which include whether the construction substantially burdens the exercise of religion or impermissibly intrudes in matters of internal church governance. These questions, however, can be mitigated by adopting an interpretation of the regulation that allows religiously affiliated entities—such as Plaintiffs Catholic Charities, ACHS, Don Bosco, CCA, Mary of Nazareth, Victory Housing, and CIC—to obtain the benefit of the exemption by participating in an exempt group health plan, such as the one established and maintained by the Archdiocese.

II. PLAINTIFFS ARE SUFFERING ONGOING IRREPARABLE HARM

"It is well settled that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Tyndale*, 904 F. Supp. 2d at 129 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Id.* (citing *O Centro Espirita Beneficente Uniao Do*

Vegetal v. Ashcroft, 389 F.3d 973, 995 (10th Cir. 2004) (per curiam).

Here, the forced violation of Plaintiffs' faith is the epitome of irreparable injury. Absent an injunction, the Government will begin enforcing the Mandate against Plaintiffs well before the final resolution of this case. Thus, every moment that passes without relief inflicts an ongoing, cumulative harm to Plaintiffs' religious freedoms, confronting them with the impossible choice of violating their religious beliefs or violating the law. Because this is not the type of harm that can later be remedied by monetary damages, the injury is irreparable. *See, e.g.*, *Int'l Ass'n of Machinists v. Nat'l Mediation Bd.*, 374 F. Supp. 2d 135, 142 (D.D.C. 2005).

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

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

Indeed, any claim of harm to the Government is fatally undermined by the fact that it has acquiesced in preliminary injunctive relief in several other cases challenging the Mandate.[23] The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). In short, especially when balanced against the

[23] *See, e.g.*, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-0036 (W.D. Mo. Feb. 28, 2013)) (Dkt. # 9); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12); *Bick Holding, Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 18).

irreparable injury to Plaintiffs should the Mandate be enforced, any harm the Government might claim from a injunction is *de minimis*.

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010.

Here the public interest in a preliminary injunction is especially high because the enforcement of the Mandate undermines the well-being of Plaintiffs' charitable and educational activities, which serve thousands of needy individuals. If the Government goes ahead with the enforcement of the Mandate, Plaintiffs may be forced to pay ruinous fines or restructure their operations, leaving a gap in the network of critical social services relied on by so many in their communities. By contrast, no public harm would come from simply preserving the status quo pending further litigation. Even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization—a highly dubious assumption—these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' request for a preliminary injunction. Plaintiffs respectfully request that the Court adjudicate this motion on an expedited basis and enter an injunction exempting Plaintiffs from application of, enforcement of, and compliance with the Mandate.

Respectfully submitted, this the 24 day of September, 2013.

By: */s/* Noel J. Francisco

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 24, 2013, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record.

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