Consolidated Case Nos. 13-2723 & 13-6640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, *et al.*; THE CATHOLIC DIOCESE OF NASHVILLE, *et al.*,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

Appeal No. 13-2723 from the United States District Court for the Western District of Michigan, Case No. 1:13-cv-01247, Honorable Gordon J. Quist
&
Appeal No. 13-6640 from the United States District Court for the Middle District of Tennessee, Case No. 3:13-cv-01303, Honorable Todd J. Campbell

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PLAINTIFFS-APPELLANTS' BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

TABLE OF AUTHORITIES
(Cont.)

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Cont.)

Page

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1), Plaintiffs-Appellants submit that oral argument would assist the Court in its adjudication of these issues. The statutory requirements of the Affordable Care Act are complex, and oral argument would assist the panel in its understanding of the effects of the contraceptive-coverage mandate on Plaintiffs-Appellants.

INTRODUCTION

The Government has promulgated a mandate that forces Appellants to violate their religious beliefs by participating in a regulatory scheme to provide their employees with coverage for abortion-inducing products, contraception, sterilization, and related education and counseling. 42 U.S.C. § 300gg-13(a)(4); 78 Fed. Reg. 39,870 (July 2, 2013) (the "Mandate"). Under the Mandate, Appellants must contract with a third party that will provide their employees with coverage for these products and services. Appellants must also sign and submit a form authorizing that third party to provide or procure the mandated coverage and must then take numerous additional steps to maintain the contractual relationship, thus keeping open the pipeline by which the products and services will flow to Appellants' employees. Appellants sincerely believe, and the Government does not dispute, that they cannot take these actions without violating their religious beliefs. The resolution of this case thus turns on the answer to a straightforward question: absent interests of the highest order, can the Government force religious organizations to take actions that violate their sincerely held religious beliefs?

Under the Religious Freedom Restoration Act ("RFRA"), the answer to that question is clearly no. *See* 42 U.S.C. § 2000bb-1 (prohibiting the government from imposing a "substantial burden" on religious exercise unless that burden is the least restrictive means to further a compelling government interest). Indeed, that is

exactly what courts have held in eighteen of the nineteen cases to consider application of the Mandate to non-profits like Appellants[1] and what every appellate court to reach the question has concluded in the for-profit context. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human*

[1] *See Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same)*; Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691 (U.S. Jan. 24, 2014); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius ("RCAW")*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-1276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), *injunction pending appeal denied*, No. 13-3853 (7th Cir. Dec. 30, 2013).

Servs., 733 F.3d 1208 (D.C. Cir. 2013); *Hobby Lobby Stores*, *Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc). These courts have uniformly held that when assessing whether a plaintiff's exercise of religion has been substantially burdened, a court's "only task is to determine whether" "the government has applied substantial pressure on the claimant to violate [his] belief[s]." *Hobby Lobby*, 723 F.3d at 1137. Indeed, they have held that any understanding of substantial burden that looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs," *Korte*, 735 F.3d at 683, is "fundamentally flawed," *Hobby Lobby*, 723 F.3d at 1137; *Gilardi*, 733 F.3d at 1216; *see also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 737 (6th Cir. 2007) (looking to whether "government action place[s] substantial pressure on a religious institution to violate its religious beliefs").

Here, neither the Government nor the courts below dispute that Appellants believe that taking the actions required by the Mandate would violate their religious beliefs. Yet if Appellants refuse to take those actions, they will suffer crippling penalties. That should end the inquiry. After all, coercing believers to act contrary to their sincerely held beliefs is the very definition of a "substantial burden" on religious exercise. *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1218; *Hobby Lobby*, 723 F.3d at 1137; *Living Water*, 258 F. App'x at 737. As a result,

the Mandate is subject to strict scrutiny, which it cannot survive. The district courts' decisions, therefore, should be reversed.

JURISDICTIONAL STATEMENT

The district courts had jurisdiction over Appellants' claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292. The district courts denied Appellants' preliminary injunction motions on December 26, 2013 (Op., CDN-RE65, PageID#1339) and on December 27, 2013 (Op., MCC-RE40, PageID#1329).[2] Appellants filed their notices of interlocutory appeal the same day the district courts issued their opinions. (Notice, MCC-RE42, PageID#1352; Notice, CDN-RE67, PageID#1360.)

STATEMENT OF ISSUES

1. Whether the Mandate violates RFRA by substantially burdening Appellants' exercise of religion.

2. Whether the Mandate violates the Free Exercise Clause by targeting Appellants' refusal to facilitate access to contraceptive coverage.

3. Whether the Mandate violates the First Amendment protection against compelled speech by requiring Appellants to facilitate objectionable counseling and requiring them to certify their opposition to the provision of the objectionable products and services.

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[2] Citations to documents from the record in the Western District of Michigan Case No. 1:13-cv-01247 are "MCC-RE__" and citations to documents from the record in the Middle District of Tennessee Case No. 3:13-cv-01303 are "CDN-RE__."

4. Whether the Mandate violates the First Amendment's guarantee of free speech by prohibiting Appellants from seeking to influence third parties' decisions to provide the objectionable products and services.

5. Whether the Mandate violates the Establishment Clause by discriminating among religious groups and by excessively entangling the Government with religious groups' beliefs and practices.

6. Appeal from the Western District of Michigan: Whether the Mandate violates the Administrative Procedure Act ("APA") by disregarding statutory prohibitions on compelled support for abortion.

7. Appeal from the Western District of Michigan: Whether the Mandate violates the APA due to the failure to conduct notice and comment rulemaking.

STATEMENT OF THE CASE

This is an appeal from the district courts' denials of Appellants' motions seeking preliminary injunctions against the Affordable Care Act's contraceptive coverage Mandate, which forces Appellants to violate their religious beliefs by taking actions that, in their religious judgment, constitute impermissible facilitation of abortion-inducing products, contraception, sterilization, and related education and counseling.

Appellants filed their complaints in November 2013, alleging that the Mandate substantially burdens their exercise of religion in violation of RFRA and the Free Exercise Clause, compels and prohibits speech in violation of the First Amendment, entangles the Government with religion in violation of the Establishment Clause, and violates the APA. (Compl., MCC-RE1, PageID#1;

Compl., CDN-RE1, PageID#1.)[3] Facing enforcement dates as early as January 1, 2014, Appellants moved for preliminary injunctions on November 26, 2013. (Mot., MCC-RE9, PageID#245; Mot., CDN-RE14, PageID#302.)

The Western District of Michigan heard argument on Appellants' motion on December 19, and denied relief on December 27 (Op., MCC-RE40, PageID#1329). The Middle District of Tennessee heard argument on December 23, and denied relief on December 26 (Op., CDN-RE65, PageID#1339). Appellants immediately filed notices of interlocutory appeal (Notice, MCC-RE42, PageID#1352; Notice, CDN-RE67, PageID#1360) and sought injunctions pending appeal, which the district courts either dismissed as moot or denied (Order, MCC-RE48, PageID#1400; Order, CDN-RE70, PageID#1376). The district courts subsequently stayed proceedings during the pendency of this appeal (Order, MCC-RE49, Page ID#1401; Order, CDN-RE73, PageID#1395).

On December 26 and 27, Appellants filed emergency motions for injunctions pending appeal with this Court. On December 31, this Court granted those motions and in early January ordered expedited briefing. On January 13, this Court granted the parties' joint motion to consolidate Case Nos. 13-2723 and 13-6640 and revised the expedited briefing schedule.

[3] Appellants from the Middle District of Tennessee have not asserted a First Amendment claim related to compelled speech and have not moved on claims related to the APA.

STATEMENT OF FACTS

A. The Mandate

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") requires "group health plan[s]" to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). The Government has defined "preventive care and screenings" to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines (last visited Jan. 16, 2014). FDA-approved contraceptive methods and sterilization procedures include intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can induce an abortion. (*See* Comments of U.S. Conference of Catholic Bishops ("USCCB"), Mar. 20, 2013, MCC-RE11-1, PageID#355.) If an employer's health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping employee health coverage likewise subjects employers to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

1. Exemptions from the Mandate

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 ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). Moreover, small employers—those with fewer than fifty employees—are exempt from the penalty for dropping coverage. 26 U.S.C. § 4980H(a). By the Government's own estimates, over 90 million individuals participate in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552–53 (June 17, 2010); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) , *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

Acknowledging the burden the Mandate places on religious exercise, the Government also created an exemption for plans sponsored by so-called "religious employers." That exemption, however, is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8727-28, 8730 (Feb. 15, 2012). For religious entities that do not qualify as a "house of worship," there is no exemption from the Mandate.

Despite sustained criticism from religious groups, the Government refused to expand the "religious employer" exemption. *See* 45 C.F.R. § 147.131(a); 78

Fed. Reg. 8456, 8461 (Feb. 6, 2013) (noting that the Government would continue to "restrict[] the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders"). Instead, the Government devised what it inaptly termed an "accommodation" for non-exempt religious organizations, which went into effect "for plan years beginning on or after January 1, 2014." 78 Fed. Reg. 39,870 (July 2, 2013).

2. The "Accommodation"

To be eligible for the "accommodation," an 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 and wishes to partake of the "accommodation," it must provide the required "self-certification" to its insurance company or (if the organization has a self-insured health plan) to its third party administrator ("TPA"). *Id.*

When an "eligible organization" signs and submits the self-certification form, it triggers an obligation for its insurance company or TPA to provide or arrange "payments for contraceptive services" for beneficiaries who are enrolled in the organization's health plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(c). Absent the

self-certification, neither an insurance company nor a TPA is authorized to provide the payments to said beneficiaries under the accommodation. These "payments for contraceptive services," moreover, are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan. *See* 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).

For self-insured organizations, the self-certification form serves as the official "designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. Indeed, "in the self-insured [context], the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health] plan." (*RCAW*, No. 1:13-cv-0144, Hr'g Tr. (D.D.C. Nov. 22, 2013), MCC-RE26-3, PageID#903.); 29 C.F.R. § 2510.3–16 (stating that the certification is "an instrument under which the plan is operated"). Moreover, the "self-certification notifies the TPA or issuer of their obligations [1] to provide contraceptive-coverage to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain these benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. Once the organization signs and submits the form, it is prohibited from "directly or indirectly, seek[ing] to influence [its] third party administrator's decision" to provide contraceptive coverage, 26 C.F.R. § 54.9815–2713A(b)(iii), nor can it terminate its contractual relationship with the TPA because of the TPA's provision of objectionable

coverage. *See Notre Dame*, 2013 WL 6804773, at *21. Finally, because TPAs are under no obligation "to enter into or remain in a contract with the eligible organization," 78 Fed. Reg. at 39,880, the burden falls on the religious organization to find and contract with a TPA that is willing to provide the objectionable coverage.

In short, under the accommodation, religious organizations must identify and authorize a third party to provide the very coverage they find morally objectionable. "The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *S. Nazarene*, 2013 WL 6804265, at *8–9. "If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* at *8. "If the institution does sign the permission slip, and only if the institution signs the permission slip, the institution's insurer or [TPA] is obligated to provide the free products and services to the plan beneficiary." *Id.*

Before the "accommodation" was finalized, Catholic authorities made clear that it would not actually accommodate Catholic organizations because it would still require them to act in violation of their religious beliefs. As the U.S. Conference of Catholic Bishops pointed out, although the "accommodation" was

designed to "create an appearance of moderation and compromise," in substance it failed to "offer any change in the Administration's earlier stated positions on mandated contraceptive coverage." (Comments of USCCB (May 15, 2012), MCC-RE10-5, PageID#330.) That is because, at the end of the day, "non-exempt religious organizations [would] still be required to provide plans that serve as a conduit for contraceptives and sterilization procedures to their own employees." (*Id.*) While observing that it would be practically impossible to segregate fees and premiums from contraceptive payments given the fungible nature of money, the USCCB also made clear that the issue of payment for contraceptive services was ultimately irrelevant to the religious objection:

> [E]ven if premium dollars of an objecting employer did not actually pay for contraceptives, the plan itself would be functioning as a gateway to such payments. Thus . . . the self-insured plan would serve as a kind of "ticket" for "free" contraceptives. It would be morally objectionable for an employer to provide anyone such a "ticket," even if the ticket costs the employer nothing to provide.

(*Id.*, PageID#341.) Despite this clear statement that the "accommodation" failed to remedy the concerns of Catholic organizations, the Government refused to expand the "religious employer" exemption. Instead, it finalized the "accommodation" and began falsely proclaiming it had reached a compromise that would satisfy religious objections to the Mandate.

B. Appellants[4]

Appellants provide a range of spiritual, charitable, educational, social, and financial services to members of their communities, Catholic and non-Catholic alike.

- Michigan Catholic Conference ("MCC") sponsors a wide range of benefit programs for approximately 827 Catholic institutions in Michigan, providing services to approximately 10,374 participants. Among these institutions are the seven Catholic Dioceses in Michigan and additional non-profit organizations that assist the Dioceses in carrying out their mission. (Compl., MCC-RE1, PageID#2.)

- Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo ("Catholic Charities of Kalamazoo") is a non-profit religious entity that provides services including advocacy, crisis intervention, housing, counseling, and outreach within the Diocese of Kalamazoo. (*Id.*)

- Catholic Diocese of Nashville ("Diocese of Nashville") provides pastoral care and spiritual guidance for approximately 79,000 Catholics and serves individuals in Middle Tennessee through its schools and various charitable programs. (Compl., CDN-RE1, PageID#2-3.)

- Catholic Charities of Tennessee offers a host of social services to thousands in need, without regard to their religion, including serving

[4] Appellants' supporting and supplemental Declarations, cited herein as exemplars, are submitted in support of these appeals and available as follows: Long Decl., MCC-RE11-3, PageID#414; Denny Decl., MCC-RE11-4, PageID#424; Byrnes Decl., MCC-RE11-5, PageID#503; Suppl. Long. Decl., MCC-RE27-2, PageID#923; Suppl. Denny Decl., MCC-RE27-3, PageID#933; Choby Decl., CDN-RE15, PageID#306; Robinson Decl., CDN-RE16, PageID#318; Sinclair Decl., CDN-RE17, PageID#325; Hagey Decl., CDN-RE18, PageID#332; Glascoe Decl., CDN-RE19, PageID#340; Miller Decl., CDN-RE20, PageID#347; Karlovic Decl., CDN-RE21, PageID#353; Galbraith Decl., CDN-RE22, PageID#363.

homeless and runaway children with temporary housing and counseling sessions. (*Id.*, PageID#15.)

- Camp Marymount, Inc. ("Camp Marymount") provides a spiritual summer camp experience for school-age children from the Nashville Diocese and around the world. (*Id.*)

- Mary, Queen of Angels, Inc. ("MQA") provides housing to low-income, elderly individuals and seniors needing care. (*Id.*)

- St. Mary Villa, Inc. ("St. Mary's") provides affordable daycare options to a diverse range of families with parents who are either working or in school. (*Id.*)

- St. Cecilia Congregation (the "Congregation") is a congregation of religious sisters who own and operate multiple Catholic schools on The Dominican Campus in Nashville as well as Saint Rose of Lima Academy in Birmingham, Alabama. (*Id.*)

- Aquinas College educates over 600 students annually, charging tuition well below the average private college in Middle Tennessee, and its School of Nursing is uniquely positioned to respond to the critical shortage of licensed nurses and nursing educators in Tennessee and the United States. (*Id.*)

Despite their avowedly religious missions, aside from MCC, the Catholic Diocese of Nashville, and the Congregation, Appellants do not qualify as "religious employers" under the Mandate.

Appellants offer health insurance to eligible employees through a number of self-insured and fully insured health plans.[5] Appellants' health plans are

[5] Appellants sponsor or participate in the Michigan Catholic Conference Second Amended and Restated Group Health Benefit Plan for Employees (Compl., MCC-RE1, PageID#7) and in the Diocese of Nashville Health Plans (Diocese of Nashville, Catholic Charities of Tennessee, and Camp Marymount), Mary Entities

administered through or provided by a number of third parties, including Blue Cross Blue Shield of Michigan, Express Scripts, and Blue Cross Blue Shield of Tennessee. Appellants' health plans cover approximately 10,374 individuals in Michigan (Long Decl., MCC-RE11-3, PageID#415 ¶ 6) and over 1,200 individuals in Tennessee (Compl., CDN-RE1; PageID#11-30).

As part of the Catholic Church, Appellants believe that life begins at the moment of conception, and that abortion-inducing products, contraception, and sterilization are immoral. (*E.g.*, Karlovic Decl., CDN-RE21, PageID#355-56 ¶¶ 7-8.) Appellants' beliefs likewise require them to avoid "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. (*E.g.*, Byrnes Decl., MCC-RE11-5, PageID#508-09 ¶ 25.) Accordingly, Appellants believe that they may not provide, pay for, and/or facilitate access to coverage for these objectionable products and services, including by contracting with a third party authorized to provide or procure the objectionable coverage for Appellants' employees. (*E.g.*, Karlovic Decl., CDN-RE21, PageID#359-60 ¶¶ 18-22.)

The "accommodation" does not resolve Appellants' religious objections to the Mandate because it requires them to take numerous actions in violation of their

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Health Plan (MQA and St. Mary's), and Dominican Campus Health Plans (the Congregation and Aquinas College) (Compl., CDN-RE1, PageID#7).

religious beliefs. (*E.g.*, Robinson Decl., CDN-RE16, PageID#322-23 ¶¶ 15, 19.) Broadly stated, the "accommodation" requires Appellants to take the affirmative step of providing health insurance through a third party authorized to provide the mandated coverage to employees enrolled in Appellants' health plans. 26 C.F.R. § 54.9815-2713A(a)-(c). Specifically, Appellants must identify and contract with a third party willing to provide the objectionable coverage to Appellants' employees. *Id.* § 54.9815-2713A(b)(2); 78 Fed. Reg. at 39,880. Appellants must then sign and submit a "self-certification" form that enables that third party to provide the objectionable products and services to individuals enrolled in Appellants' health plans, and notifies the third party of its obligations under the accommodation. 26 C.F.R. § 54.9815-2713A(a)-(c); 29 C.F.R. § 2510.3–16. Even after they have taken these steps, Appellants must take numerous additional steps to maintain the arrangements whereby the mandated coverage is provided to their employees. *Infra* Part I.A.1.a. These actions make Appellants an integral part of the delivery of objectionable products and services to their employees, and therefore violate Appellants' sincerely held religious beliefs. (*See, e.g.*, Byrnes Decl., MCC-RE11-5, PageID#506 ¶¶ 12-14; Sinclair Decl., CDN-RE17, PageID#3-4 ¶¶ 327-28.)

As indicated above, the Government *knew* the "accommodation" would not relieve the pressure on Appellants to act contrary to their religious beliefs, because the USCCB repeatedly informed the Government that the now-codified

"accommodation" was inadequate.[6] That concern, however, was ignored. Moreover, it is a cruel irony that the Mandate—promulgated under a statute intended, at least in part, to help the poor and needy—now jeopardizes programs and services designed to help those individuals. For example, Catholic Charities of Kalamazoo, Catholic Charities of Tennessee, and MQA, organizations that provide critical services to the most vulnerable in their communities, may be forced to limit these critical services if they incur the Mandate's draconian fines. (*E.g.*, Denny Decl., MCC-RE11-4, PageID#444-47 ¶¶ 31-38; Sinclair Decl., CDN-RE17, PageID#330 ¶¶ 23-24; Glascoe Decl., CDN-RE19, PageID#345 ¶¶ 22.)

SUMMARY OF ARGUMENT

The Mandate violates RFRA, the first Amendment, and the APA.

1. RFRA prohibits the Government from imposing a "substantial burden" on "any" exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. §§ 2000bb-1, 2000bb-2(4), 2000cc-5(7). As every appellate court to reach the question has concluded, "the substantial-burden test under RFRA focuses primarily on the '*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Korte,* 735 F.3d at 683; *Gilardi*, 733 F.3d at 1216–18 (same); *Hobby Lobby*, 723 F.3d at

[6] *See, e.g.*, Comments of USCCB (Mar. 20, 2013), MCC-RE11-1, PageID#351; Comments of USCCB (May 15, 2012), MCC-RE10-5, PageID#328.

1137–41 (same). "Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Korte*, 735 F.3d at 683. Thus, the nature of the "religious exercise" at issue is irrelevant to the substantial burden analysis. So long as the plaintiff has an "'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do, conflicts with his religion," *id.* (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)), a court's "only task is to determine whether" "the government has applied substantial pressure on the claimant" to act contrary to his faith. *Hobby Lobby*, 723 F.3d at 1137; *Korte*, 735 F.3d at 683–85 (same).[7]

Here, the Government does not dispute that Appellants have an "honest conviction" that they cannot take the actions required under the accommodation without violating their religious beliefs. Among other things, the Mandate requires Appellants to identify and contract with third parties willing to provide the mandated coverage, authorize those parties to provide the objectionable products

[7] Significantly, this is the same standard articulated by this Court in several unpublished opinions. *Hayes v. Tennessee*, 424 F. App'x 546, 555 (6th Cir. 2011) (stating that a substantial burden exists where the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs" (internal quotation marks and citation omitted)); *Coleman v. Governor of Mich.*, 413 F. App'x 866, 875 (6th Cir. 2011) (same); *Barhite v. Caruso*, 377 F. App'x 508, 511 (6th Cir. 2010) (same); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) (same).

and services, notify the third parties of their obligations under the accommodation, and then maintain health plans that will serve as conduits for the delivery of the very products and services to which Appellants object. If Appellants refuse to take any of these actions, they will be unable to comply with the Mandate and will thus incur crippling fines. The Mandate therefore plainly imposes a "substantial burden" on Appellants religious exercise, as courts have held in all but one of the cases considering the regulatory scheme at issue in this litigation. *Supra* note 1.

The district courts reached contrary conclusions only by "look[ing] beyond" Appellants' undisputed representations regarding their religious beliefs. (Op., MCC-RE40, PageID#1340.) Appellants' affidavits establish that they sincerely believe that taking the actions necessary to comply with the Mandate's "accommodation" makes them "complicit in a grave moral wrong" and "undermine[s] their ability to give witness to the moral teachings of [the Catholic] church." *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1216–18 (same); *Hobby Lobby*, 723 F.3d at 1137–41 (same); *infra* Part I.A.1.a. That is a religious judgment, based on Catholic moral principles regarding the permissible degree of cooperation with wrongdoing. But despite Appellants' sincere belief that compliance with the accommodation will render them complicit in a grave moral wrong, the district courts concluded that it "does just the opposite" and that any burden "is too attenuated and speculative to be substantial." (Op., CDN-RE65,

PageID#1346.) According to the district courts, Appellants do not really object to the actions the Mandate requires *of them*, but rather to the actions the Mandate requires *of third parties*. (*Id.*, PageID#1347; Op., MCC-RE40, PageID#1340.)

This foray into "the theology behind Catholic precepts on contraception" was manifestly improper. *Gilardi*, 733 F.3d at 1216. Far from deciding a question of law, the district courts "purport[ed] to resolve the religious question underlying th[ese] case[s]: Does [compliance with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. Both courts ultimately said "no," but "[n]o civil authority can decide that question." *Id.* Indeed, in the face of Appellants' express representations that they could not, consistent with their religious beliefs, take the actions necessary to comply with the accommodation, the only way for the courts to conclude otherwise was to inform Appellants that they "misunderstand their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Such an approach, however, is irreconcilable with the jurisprudence of both this Court and the Supreme Court, which holds that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982) (citation omitted); *Colvin v. Caruso*, 605 F.3d 282, 298 (6th Cir. 2010) (criticizing officials for "'judging for themselves the congruence between plaintiff's beliefs

and Judaism, as [they] understand it'" (citation omitted)). While the Government, and the courts below, may "feel[] that the accommodation sufficiently insulates [Appellants] from the objectionable services, . . . it is not the Court's role to say that plaintiffs are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. The "line" between religiously permissible and impermissible actions is for the church and the individual, not the state, to draw, "and it is not for [courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that Appellants are entitled to relief under RFRA. In short, the Mandate forces Appellants to take actions they believe to be contrary to their religious beliefs. Because no court can second-guess Appellants' religious objection to the actions they are required to take, there can be no doubt that the Mandate imposes a substantial burden on their religious exercise. Accordingly, RFRA requires the Government to show that the Mandate is the least restrictive means of advancing a compelling interest. But as every court to reach the issue has held, the Government cannot meet that standard. Denying a religious exemption for Appellants cannot serve any "compelling" interest because the Government has already exempted countless other employers, ensuring that millions of people will not receive the mandated coverage through their employer health plans. Moreover, the Mandate cannot possibly be described as the "least restrictive means" because

there are many ways to provide free contraception without conscripting religious objectors to participate in the effort.

2. The Mandate also violates the First Amendment's Free Speech and Religion Clauses, and the APA. It violates the Free Exercise Clause by targeting Appellants' religious practices, offering a multitude of exemptions to other employers for non-religious reasons, but denying any exemption that would relieve Appellants' religious hardship. It infringes on Appellants' freedom of speech by requiring them to issue a certification of their beliefs that results in the provision of objectionable products and services to their employees, and by imposing a gag order that prohibits Appellants from speaking out in any way that might directly or indirectly "influence" a TPA's decision to provide or procure the objectionable products and services. It violates the Establishment Clause by creating a state-favored category of "religious employers" based on intrusive judgments about their religious practices, beliefs, and organizational structure. And it violates the APA by disregarding statutory prohibitions on compelled support for abortion and notice and comment rulemaking.

For these reasons, the district courts' judgments should be reversed, and Appellants should be granted injunctive relief.

ARGUMENT

Appellants are entitled to a preliminary injunction because (1) they are likely to succeed on the merits of their claims, (2) they will suffer irreparable harm if the injunction is denied, (3) granting preliminary relief will not result in even greater harm to the nonmoving party, and (4) the public interest is served by an injunction. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *Int'l Res., Inc. v. N.Y. Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991). The district courts' factual and legal conclusions are reviewed *de novo* when constitutional facts are at issue. *Deja Vu,* 274 F.3d at 387. All other factual findings are reviewed for clear error. *Id.*

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. The Mandate Violates RFRA

Under RFRA, the Government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.

§ 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006).[8]

Here, the Mandate "substantially burden[s]" Appellants' exercise of religion because it forces them to violate their sincerely held religious beliefs by taking actions that, in Appellants' religious judgment, impermissibly facilitate the provision of the objectionable coverage. Moreover, the Mandate cannot survive strict scrutiny because numerous exemptions reveal that providing the mandated coverage is not a "compelling" interest, and in any event there are many "le[ss] restrictive means" of providing that coverage.

1. The Mandate Imposes a Substantial Burden on Appellants' Exercise of Religion

Where, as here, sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial pressure" on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216. Under the first step, a court's inquiry is necessarily "limited." *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996). This step "does not permit the court to resolve religious

[8] This Court's prior ruling in *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), has no bearing here, as that case turned on whether for-profit corporations can exercise religious beliefs. *Id.* at 626. There is no dispute that Appellants, all non-profit corporations, exercise religion.

questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 735 F.3d at 685. After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must therefore accept Appellants' description of their religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *Lee*, 455 U.S. at 257 (same). To that end, "[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716).[9]

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683; *Hobby Lobby*, 723 F.3d at 1140. Specifically, it must determine whether the Government is coercing an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, or putting "substantial pressure on [him] to

[9] Under step one, a court may "[c]heck[] for sincerity and religiosity" to "weed out sham claims." *Korte*, 735 F.3d at 683. "These are factual inquires within the court's authority and competence." *Id.* Here, neither the Government nor the courts below contend that Appellants' objections are anything but "sincere and religious in nature." *Id.*

modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717–18; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216–18.

Here, it is clear that the Mandate substantially burdens Appellants' exercise of religion because it coerces them "'to act contrary to their [religious] beliefs.'" *Korte*, 735 F.3d at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Appellants exercise their religion by, *inter alia*, refusing to take certain actions that, in Appellants' religious judgment, cause them to facilitate access to the objectionable products and services in violation of the teachings of the Catholic Church. By threatening Appellants with onerous penalties unless they take precisely those actions that their religious beliefs forbid, the Mandate substantially pressures Appellants to act contrary to their beliefs.

(a) Appellants Exercise Their Religious Beliefs by Refusing to Comply with the Mandate

The "exercise of religion" includes "the performance of (or abstention from) physical acts." *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "*any* exercise of religion . . . whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); 2000cc-5(7)(A) (emphasis added). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674. Here, Appellants exercise their religion by refusing to take certain actions in furtherance of a

regulatory scheme to provide their employees with coverage for abortion-inducing products, contraceptives, sterilization, and related education and counseling.

Most obviously, Appellants believe that submitting the required self-certification violates their religious beliefs, because doing so renders them "complicit in a grave moral wrong" and "undermine[s] their ability to give witness to the moral teachings" of the Catholic Church. *Korte*, 735 F.3d at 683. (*E.g.*, Byrnes Decl., MCC-RE11-5, PageID#506 ¶ 14.) The self-certification form is far more than a simple statement of religious objection to the provision of contraceptive coverage. To the contrary, it "designat[es]" self-insured Appellants' "third party administrator[] as plan administrator and claims administrator for contraceptive benefits," 78 Fed. Reg. at 39,879, serves as "an instrument under which [Appellants' health] plan[s are] operated," 29 C.F.R. § 2510.3–16(b), and "notifies the TPA or issuer of their obligations to provide contraceptive-coverage to [Appellants'] employees [and to inform them] of their ability to obtain those benefits." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *11. In other words, by filing the self-certification, Appellants authorize and enable a third party to provide or procure coverage for the objectionable products and services.

Likewise, Appellants cannot, consistent with their religious beliefs, offer health plans that serve as a conduit for the delivery of the objectionable products and services. Yet upon issuance of the self-certification, that is exactly what

Appellants' health plans become. The objectionable coverage is available to Appellants' employees only by virtue of their enrollment in Appellants' health plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, the Government has conceded that once a self-insured organization provides the certification, "technically, the contraceptive [and other objectionable] coverage is part of the [self-insured organization's health] plan." (*RCAW*, No. 1:13-cv-0144, Hr'g Tr. (D.D.C. Nov. 22, 2013), MCC-RE26-3, PageID#904.) In this regard, the Government's vaunted "accommodation" is materially indistinguishable from the regulation applicable to for-profit entities enjoined in *Korte*, *Gilardi*, and *Hobby Lobby*. Both require employers to offer health plans that cover the objectionable products and services. The only difference is that for Appellants, the coverage is written into their health plans in invisible ink.

But even beyond these actions, once Appellants "turn on the tap" by offering health plans through a third party willing to provide the mandated coverage and self-certifying, they are required to take numerous additional steps to ensure the pipeline for that coverage remains open. Appellants thus also object to taking actions necessary to maintain their health plans in compliance with the accommodation. Among other things, in order to comply with the Mandate, Appellants must:

- Pay premiums or fees to a third party authorized to provide their employees with the objectionable products and services.
- Offer enrollment paperwork for employees to enroll in the plan overseen by a third party authorized to provide the objectionable coverage.
- Send health-plan-enrollment paperwork (or tell employees where to send it) if the plan is overseen by a third party that is authorized to provide the objectionable coverage.
- Identify for a third party which of their employees will participate in the plan, if the third party is authorized to provide the objectionable coverage to those participating employees.
- Refrain from canceling their insurance arrangement with a third party authorized to provide the objectionable products and services.

Appellants are, in short, required to play an integral role in the delivery of objectionable products and services to their employees. Each of the actions or forbearances detailed above constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because, again, Appellants sincerely believe that taking or refraining from these actions would make them "complicit in a grave moral wrong," *Gilardi*, 733 F.3d at 1218, and would "undermine their ability to give witness to the moral teachings" of the Catholic Church. *Korte*, 735 F.3d at 683. In other words, Appellants "ha[ve] an 'honest conviction' that what the government is requiring, prohibiting, or pressuring them to do conflicts with their religio[us beliefs]." *Id.* (quoting *Thomas*, 450 U.S. at 716).

While this religious exercise is slightly different from the religious exercise at issue in the for-profit cases (i.e., *Hobby Lobby*, *Gilardi*, and *Korte*), any attempt to distinguish this case is wholly unavailing because RFRA protects "any exercise of religion." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Thus, the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis. *E.g.*, *Korte*, 735 F.3d at 682–84. A court's only task at this stage is to determine whether the asserted exercise—whatever that may be—is sincere and religious before proceeding to assess the "coercive effect of the governmental pressure on the adherent's religious practice" at step two. *Id.* at 683. Therefore, it is immaterial that the plaintiffs in the for-profit cases exercise their religion by refusing to "purchase the required contraception coverage," *Korte*, 735 F.3d at 668, while Appellants here exercise their religion by refusing to (among other things) sign the self-certification. What matters is that in this case, as in the for-profit cases, "[t]he contraception mandate forces [Appellants] to do what their religion tells them they must not do." *Id.* at 685.

Critically, there is no dispute as to whether Appellants sincerely believe they may not take the specific actions necessary to comply with the "accommodation." Neither the religiosity nor the sincerity of Appellants' beliefs have been questioned by the Government, or by the courts below. *Cf. Korte*, 735 F.3d at 683 (noting that courts can inquire into religiosity and sincerity). That being the case, to determine

whether the Mandate imposes a substantial burden on Appellants' religious exercise, the only question for this Court is whether Appellants face "substantial pressure" to act in violation of their religious beliefs.

(b) The Mandate Places "Substantial Pressure" on Appellants to Violate Their Religious Beliefs

Once Appellants' refusal to take the actions described above is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As held by this Court and every appellate court to analyze the Mandate under RFRA's substantial-burden prong, a substantial burden is "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Korte*, 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718); *Gilardi*, 733 F.3d at 1216 (same); *Hobby Lobby*, 723 F.3d at 1141 (same); *see also Living Water*, 258 F. App'x at 737 (asking whether "government action place[s] substantial pressure on a religious institution to violate its religious beliefs"). In *Yoder*, for example, the Supreme Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes "substantial pressure" on Appellants' religious exercise. Failure to take the actions required under the Mandate subjects

Appellants to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Appellants drop their health plans altogether, they are subject to fines of $2,000 a year per full-time employee after the first thirty employees, *see id.* § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer a crucial healthcare benefit to their employees. (Long Decl., MCC-RE11-3, PageID#420; Robinson Decl., CDN-RE16, PageID#323.)

In short, the Government has put Appellants to a stark choice: violate their religious beliefs or pay crippling fines and suffer other negative consequences. This is the exact choice, and the exact penalties, facing plaintiffs in the for-profit cases. Just as in those cases, "the federal government has placed enormous pressure on [Appellants] to violate their religious beliefs and conform to [the Government's] regulatory mandate. Refusing to comply means ruinous fines, essentially forcing [Appellants] to choose between [onerous penalties] and following the moral teachings of their faith." *Korte*, 735 F.3d at 683–84. In such circumstances, "there can be little doubt that the contraception [M]andate imposes a substantial burden on [Appellants'] religious exercise." *Id.* at 683; *Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." (quoting *Thomas*, 450 U.S. at 718)); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing],"

on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic"). Indeed, in the nonprofit context, the overwhelming majority of courts have come to the same conclusion on facts indistinguishable from the case at hand. *Supra* note 1.

2. The District Court Decisions Are Erroneous

The district courts, however, ignored this straightforward analysis. Rather than assessing whether the Mandate "place[s] substantial pressure on [Appellants] to violate [their] religious beliefs," *Living Water*, 258 F. App'x at 737, the district courts impermissibly arrogated unto themselves the authority to determine whether compliance with the Mandate would actually violate Appellants' beliefs. "[L]ook[ing] beyond," (Op., MCC-RE40, PageID#1341), Appellants' representations that compliance with the Mandate would make them "complicit in a grave moral wrong," *Korte*, 735 F.3d at 683, the district courts proceeded to inform Appellants that they "misunderstand their own religious beliefs," *Lyng*, 485 U.S. at 458. Thus, "despite protestations to the contrary from the religious objectors who brought the lawsuit" (*i.e.*, Appellants), *id.* at 457, the district courts concluded that any burden imposed here is "too attenuated" to merit relief, (Op., MCC-RE40, PageID#1340-41; Op., CDN-RE65, PageID#1347), and that Appellants do not really object to the actions they are required to take, but only to the actions of third parties, (Op., MCC-RE40, PageID#1341; Op., CDN-RE65,

PageID#1347). According to the district courts, Appellants' religious beliefs are safeguarded by the accommodation, which purportedly allows them to "opt out" of the Mandate. (Op., MCC-RE40, PageID#1341; Op., CDN-RE65, PageID#1346)

Those conclusions run directly contrary to Appellants' express representations regarding their religious beliefs, which demonstrate that Appellants sincerely believe participating in the accommodation would violate Catholic teachings regarding material cooperation with wrongdoing and scandal. *Supra* Part I.A.1.a. Under the established law described above, the district courts were required to accept Appellants' description of their own beliefs. As in *Thomas*, Appellants "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable," 450 U.S. at 715; if Appellants interpret the "creeds" of Catholicism to prohibit their compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez v. Comm'r*, 490 U.S. 680, 669 (1989); *Colvin*, 605 F.3d at 298.[10]

[10] To be clear, Appellants are not suggesting (as the district courts seemed to believe) that this Court must accept Appellants' claim that the Mandate imposes a substantial burden on their religious exercise (Op., MCC-RE40, PageID#1337), or that "any" burden on religious exercise violates RFRA, (Op., CDN-RE65, PageID#1346-47). As described above, a court need only accept Appellants' description of their religious beliefs—*i.e.*, that taking the actions required of them by the Mandate violates Catholic doctrine—but it must still proceed to resolve the legal question of whether the Mandate substantially pressures Appellants to violate those beliefs. *See supra* Part I.A.

Thus, the conclusion that a burden is "too attenuated" rests on *religious*, rather than legal, judgment, and has been rejected by every appellate court to consider the issue. As explained by the Seventh Circuit, this line of reasoning "focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act . . . and an employee's decision to use [contraception]." *Korte*, 735 F.3d at 684. To argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to "purport[] to resolve the religious question underlying [this] case[]." *Id.* at 685. But for the reasons described above, "[n]o civil authority can decide that question." *Id.*; *Gilardi*, 733 F.3d at 1217 (rejecting attenuation argument); *Hobby Lobby*, 723 F.3d at 1137 (same).

Indeed, Supreme Court precedent confirms that the district courts' attenuation analysis was improper. For example, in holding that denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his religious exercise, the Court did not question whether working in the factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of his pacifist convictions as a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the

line the plaintiff drew. *Id.* at 715. And in *Lee*, the Court rejected the Government's contention that payment of social security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, the Court readily accepted the Amish plaintiffs' own representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257. "As the Supreme Court accepted the religious belief in *Lee* [and *Thomas*,] so [too] must [this Court] accept [Appellants'] beliefs." *Hobby Lobby*, 723 F.3d at 1141.

For similar reasons, the district courts' conclusion that the accommodation allows Appellants to "opt out" of compliance with the Mandate rests on an impermissible assessment of Appellants' religious beliefs. While the district courts may "feel[] that the accommodation sufficiently insulates [Appellants] from the objectionable services, . . . it is not [a] Court's role to say that [Appellants] are wrong about their religious beliefs." *RCNY*, 2013 WL 6579764, at *14. Whether the accommodation relieves Appellants of moral culpability for their actions (*i.e.*, allows them to "opt out") or makes them "complicit in a grave moral wrong" is "a question of religious conscience for [Appellants] to decide." *Korte*, 735 F.3d at 683, 685; *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). What

the district courts apparently view as mere paperwork—"a one-page form" (Op., MCC-RE40, PageID#1336)—has far more significant implications for Appellants. The district courts might believe "it's just a form," *RCNY*, 2013 WL 6579764, at *13, but for Appellants, submitting that form makes them "complicit in a grave moral wrong" and "undermine[s] their ability to give witness to the moral teachings of [the Catholic] church." *Korte*, 735 F.3d at 683. "It is not for [a] Court to say otherwise." *RCNY*, 2013 WL 6579764, at *14; *id.* at *13 ("There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection.").[11]

[11] The district courts' attempts to analogize compliance with the accommodation to the payment of wages or to a juror asking to be recused from a death penalty case underscores that they were engaging in moral, not legal, analysis. (Op., MCC-RE40, PageID#1339; Op., CDN-RE65, PageID#1347). The question of whether one action (*i.e.*, paying wages that may be used to purchase contraceptives) is morally indistinguishable from another (*i.e.*, providing access to "payments" for certain service) is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1141–42. Indeed, even if the line drawn by Appellants was "unreasonable," it would not be for a court to second guess that line. *Thomas*, 450 U.S. at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate tanks). But in any case, the line here is eminently reasonable. For example, employees may use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary belongs to the employee, and the employer has no input into its use. But when an employer complies with the Mandate, it ensures that its employees are furnished with a health plan "coupon" that can only be redeemed for contraceptives—as often as the employee chooses, for as long as the employment relationship lasts. The employer is thus made part of, and complicit in, the purchase of products to which it objects, making such action qualitatively different from leaving it to employees to use their paychecks as they see fit.

In any event, the district courts grossly mischaracterize the nature of the actions Appellants must take to comply with the accommodation, beginning with the self-certification. "Submitting the self-certification[] is not simply espousing a belief that [Appellants] hold." *Beaumont*, 2014 WL 31652, at *8. What the lower courts dismissively deem "a one-page form," (Op., MCC-RE40, PageID#1336), constitutes an official "designation of [Appellants'] third party administrator(s) as plan administrators and claims administrators for contraceptive benefits," 78 Fed. Reg. at 39,879, and serves as "the instrument under which [Appellants'] plan[s are] operated," 29 C.F.R. § 2510.3–16. It "tells the TPA or issuer that it must provide [Appellants'] employees . . . free access to emergency contraceptive devices and products [and inform them] of that benefit." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20. Thus, submitting the self-certification does not merely "require [Appellants] to state that they choose to opt out based on their religious beliefs," (Op., MCC-RE40, PageID#1341), it enables a third party to provide the very coverage to which Appellants object. *E.g.*, *Beaumont*, 2014 WL 31652, at *8; *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *20; *Reaching Souls*, 2013 WL 6804259, at *7. This is to say nothing of the numerous additional actions Appellants must take, including identifying and contracting with third parties willing to provide the very services Appellants deem objectionable, and then maintaining those

relationships to ensure contraceptive benefits continue to be offered to their employees. *See supra* Part I.A.1.a.

The district courts' reliance on *Bowen v. Roy*, 476 U.S. 693 (1986) and *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), (*see* Op., MCC-RE40, PageID#1335-36, 1340), is thus misplaced. Those cases stand for nothing more than the proposition that an individual cannot challenge an "activit[y] of [a third party], in which [he] play[ed] *no role*." *Kaemmerling*, 553 F.3d at 679 (emphasis added) (quotation omitted). In *Bowen*, for example, the Supreme Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Court concluded that the appellee could not establish that his religious exercise was substantially burdened because his objection was to the conduct of a third party, namely, to the government's use of a social security number to administer his daughter's public welfare benefits. *Id.* at 700.[12] Likewise, in *Kaemmerling*, the plaintiff did not object to any action he was forced to take, but only "to the

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

government extracting DNA information from . . . specimen[s]" *it already had*. 553 F.3d at 679. The D.C. Circuit thus concluded that Kaemmerling failed to state a RFRA claim because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.*

Here, in contrast, the provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Appellants] play[] no role." *Id.* Whereas Kaemmerling "did not object to what the government forced him to do," Appellants "vigorously object on religious grounds to the act[s] the government requires them to perform, not merely to later acts by third parties." *E. Tex. Baptist Univ.*, 2013 WL 6838893, at *18; *RCNY*, 2013 WL 6579764, at *14–15 (distinguishing *Kaemmerling*); *supra* Part I.A.1.a. Accordingly, unlike in *Kaemmerling* and *Bowen*, Appellants are required, through *their* actions, to play an integral role in the provision of the objectionable products and services to their employees.

Likewise, the district courts were wrong to suggest that Appellants could not prevail because they "are not require[d] to 'modify [their] behavior.'" (Op., MCC-RE40, PageID#1340.) In the first place, it is simply wrong as a factual matter to claim that under the accommodation, Appellants need do no more than "what [they] h[ave] always done." *Id.* For example, in the past, Appellants have always entered a voluntary contractual arrangement barring third parties from providing

the objectionable products and services. (*E.g.*, Long Decl., MCC-RE11-3, PageID#418 ¶ 18.) Now, Appellants must submit a self-certification authorizing those third parties to provide the objectionable products and services. Formerly, Appellants refused to remain in a contractual relationship with a third party that would provide their employees with the objectionable products and services; now, they must maintain such relationships. And where before Appellants would not offer a health plan that served as a vehicle for the delivery of the objectionable products and services, now they must offer just such health plans. All of these newly-required actions or forbearances are deeply objectionable to Appellants in light of their Catholic beliefs. *Supra* Part I.A.1.a.

But more importantly, the district courts' focus on whether Appellants must "modify" their actions misunderstands the substantial burden test. The question is not whether a believer must modify his behavior compared to actions he has taken in the past, but whether he must modify his behavior compared to what he would do if free to follow his religious conscience. Thus, the substantial burden test "focuses primarily on the *intensity of the coercion* applied by the government *to act contrary to [religious] beliefs*." *Korte*, 735 F.3d at 683 (second emphasis added) (citation omitted). In other words, the touchstone of the substantial burden analysis is whether a law "forces [Appellants] to do what their religion tells them they must not do." *Id.* at 685; *see also Thomas*, 450 U.S. at 717 (stating that the

inquiry "begin[s]" with an assessment of whether a law "compel[s] a violation of conscience") (citation omitted); *Sherbert*, 374 U.S. at 404 (same); *Yoder*, 406 U.S. at 218 (same). Here, Appellants' undisputed declarations establish that is exactly what is taking place regardless of whether Appellants' actions bear a superficial resemblance to actions they have taken in the past. *Supra* Part I.A.1.a. Thus even assuming (wrongly) that the accommodation does not force Appellants to "modify" their behavior, the Mandate still violates RFRA. Indeed, it would be a perverse standard that allowed the Government to compel a violation of conscience by "transform[ing] a voluntary act that [Appellants] believe to be consistent with their religious beliefs into a compelled act that they believe forbidden." *RCNY*, 2013 WL 6579764, at *14; *Geneva Coll.*, 2013 WL 6835094, at *13 ("The purpose for which the notification is provided . . . makes all the difference.").[13]

The district courts appear to base their flawed conclusion that Appellants need not modify their behavior on a further parsing of Appellants' religious beliefs.

[13] That Appellants are "free to voice their opposition to the use of contraception services," and to encourage their employees to refrain from using contraceptive services, (Op., CDN-RE65, PageID#1347), does not remedy the RFRA violation. This is not a case where believers merely want to express a religious viewpoint and the government has limited the channels for expression. Rather, Appellants are forced to take actions that violate their religion. *E.g.*, *Thomas*, 450 U.S. at 713–18 (concluding that compelling plaintiff to take action that would violate his pacifist beliefs imposed a substantial burden, without analyzing whether his beliefs could be expressed in other ways, such as participation in antiwar demonstrations). No amount of counter-speech can cure that harm.

Apparently, the district courts determined that for a religious objection to be valid, the religious believer must object to taking the specific action under any and all circumstances. (Op., MCC-RE40, PageID#1338) (emphasizing that Appellants "have no objection to these actions *per se*"); (*id.*, PageID#1339) ("[Appellants] have never asserted that they object to the act of signing a statement attesting to their objection to contraceptives.") Based on that flawed premise, the district courts concluded that Appellants object only to the consequences of the required actions, not to the actions themselves. This is both incorrect and irrelevant. In the first place, Appellants' undisputed declarations state their religious objections to the required actions themselves, not only their consequences. *Supra* Part I.A.1.a. The district courts lack competence to second-guess that religious judgment. *Supra* Part I.A. And in any event, there is no authority for the bizarre notion that RFRA does not protect the religious exercise of plaintiffs who object to taking certain actions because of their consequences. After all, the consequences of an action, or the context in which the action takes place, can be an indispensible part of determining whether the action itself is morally permissible. For example, giving a neighbor a ride to the bank may not, by itself, be morally objectionable, but it would be if one knows that the neighbor intends to rob the bank.

Indeed, the idea that objectors cannot consider the consequences of their actions when stating a religious objection flatly contradicts Supreme Court

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

Finally, Appellants wish to briefly respond to the assertion that this litigation is nothing more than an attempt to "restrain the behavior of a third party" from providing the objectionable products and services to their employees. (Op., MCC-RE40, PageID#1340.) That is simply not true. From the beginning, Appellants' only interest has been to be excluded from the process by which the objectionable products and services are delivered. *Cf. Korte*, 735 F.3d at 684–85 ("[I]t goes without saying that [Appellants] may neither inquire about nor interfere with the private choices of their employees on these subjects. They can and do, however,

object to being forced to provide insurance coverage for these drugs and services in violation of their faith."). If the Government believes all women must be provided with contraceptive services for free, Appellants ask only that the Government not force them to participate in that effort. Indeed, Appellants have suggested as a potential less restrictive means that the Government itself could provide the objectionable services. (Pls.' Mot. for Prelim. Inj., MCC-RE10-2, PageID#298.) The claim that Appellants seek to use RFRA to "restrain the behavior of a third party" from providing their employees with the objectionable products and services is, therefore, a baseless distortion of Appellants' sincerely held religious beliefs.[14]

[14] Despite the district courts' claims (Op., MCC-RE40, PageID#1333; Op., CDN-RE65, PageID#1346), the Mandate substantially burdens the religious exercise of MCC, Catholic Diocese of Nashville, and the Congregation, even though they meet the Mandate's definition of a "religious employer." Those Appellants are substantially burdened by the Mandate because many of their non-exempt affiliates offer health coverage through the exempt Appellants' plan. The exempt Appellants must therefore either facilitate the objectionable coverage by maintaining a health plan through a third party authorized to provide contraceptive benefits to its affiliates' employees, or else decline to extend its health plan to those affiliates. (Byrnes Decl., MCC-RE11-5, PageID#504; Choby Decl., CDN-RE15, PageID#309.) The latter course of action would inhibit Appellants' ability to follow Church teachings, allow Government intrusion on a matter of internal church governance, and have negative economic consequences. (Byrnes Decl., MCC-RE11-5, PageID# 508-10 ¶¶ 23-31; Long Decl., MCC-RE11-3, PageID#418-21 ¶¶ 17-33 Karlovic Decl., CDN-RE21, PageID#357-61 ¶ ¶ 12, 23.)

3. The Mandate Cannot Survive Strict Scrutiny

Because Appellants have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation is the least restrictive means of advancing a compelling governmental interest. *O Centro*, 546 U.S. at 429. As every court to reach the question has concluded, the Mandate cannot satisfy that demanding standard.[15] These cases are directly on point, because they involve the *same* asserted governmental interests—in "public health" and (ii) "equal access to health care services"—and the *same* less restrictive means that are at issue in this case.

(a) The Mandate Does Not Further a Compelling Government Interest

Forcing religious believers to act in violation of their religious conscience cannot be justified unless it will advance a vital interest of the highest order. As the Supreme Court has held, however, "a law cannot be regarded as protecting an

[15] *E.g.*, *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *S. Nazarene Univ. v. Sebelius*, 2013 WL 6804265, at *17-19 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, 2013 WL 6835094, at *14 (W.D. Pa. Dec. 23, 2013); *RCNY*, 2013 WL 6579764, at *16–19; *Zubik*, 2013 WL 6118696, at *28–32; *Beckwith Elec. Co. v. Sebelius*, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Yep v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-6756, slip op. at 2 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297-98.

interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *see also O Centro*, 546 U.S. at 433.

Here, the Government cannot claim a "vital interest" of the "highest order" in refusing to exempt Appellants from the Mandate because the Government has already granted numerous exemptions covering millions of employees through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686 (citation omitted). As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *see also Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222–23. If the Government's interest in forcing employers to provide free contraception were truly compelling enough to override the rights of religious conscience protected by RFRA, then the Government would not have granted so many other exemptions. By doing so, the Government has clearly illustrated that a religious exemption for Appellants would not undermine any vital state interest.

Even if the Government did have a strong interest in enforcing the Mandate as a general matter, RFRA requires the Government to 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. In other words, 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. Rather than asserting generalized interests that are "sweeping" or "broadly formulated," *id.* at 431; *Yoder*, 406 U.S. at 221, the Government must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments of advancing the Government's policy agenda. *O Centro*, 546 U.S. at 430–31; *see also Korte*, 735 F.3d at 685.

The Government has proffered two generalized interests in support of the Mandate: (i) the "promotion of public health" and (ii) "assuring that woman have equal access to health care services." (*E.g.*, Defs.' Br. in Opp., MCC-RE25, PageID#819-20.) "[B]oth interests as articulated by the [G]overnment are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of [G]overnment mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). Such "sketchy and highly abstract" interests cannot be a "compelling" reason for denying a religious exemption, because it is impossible for the Government to "demonstrate a nexus" between those interests and the particular claimants seeking an exemption. *Gilardi*, 733 F.3d at 1220. In short,

"[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686. The Government has not even tried to adduce any evidence that granting an exemption for Appellants in particular, or for religious non-profit employers more generally, would have any appreciable impact on public health or gender equality.

Finally, the Government's interest in denying a religious exemption for Appellants cannot be compelling because, at best, the Mandate would "[f]ill" only a "modest gap" in the availability of contraceptive services. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available for free or reduced cost through various government programs and community clinics, and are covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). That being the case, the Government cannot claim to have "identif[ied] an actual problem in need of solving," *id.* (internal quotation marks and citation omitted), that is sufficiently acute to override Appellants' rights of religious conscience. At best, enforcing the Mandate against objecting religious non-profits would provide a marginal subsidy for contraceptive services that are already quite readily accessible for virtually all employees. But as the Supreme Court has explained, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

(b) The Mandate Is Not the Least Restrictive Means to Achieve the Government's Asserted Interests

In addition to demonstrating a compelling interest, the Government must also show that enforcing the Mandate against religious objectors "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b)(2). Under that test, a statute or regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert*, 374 U.S. at 407. The Government cannot meet that test. Of all the ways to provide free contraception, there is no reason to adopt one that forces religious objectors to play an integral role in the delivery of such products and services, as the Mandate does.

Once again, every circuit court to reach the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[16] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing non-profit religious objectors to provide access to free contraception in violation of their religious conscience. *Korte*, 735 F.3d at 686. Courts have pointed out many alternatives: "The Government could provide

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

the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 2013 WL 6579764, at *18; *see also Korte*, 735 F.3d at 686 (same); *Gilardi*, 733 F.3d at 1222 (same). While Appellants in no way recommend these alternatives, and oppose many of them as a matter of policy, the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no possible justification for forcing Appellants to violate their religious beliefs.

The Government, moreover, cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal) (citation omitted). Here, the Government failed to consider alternatives before deciding to impose the Mandate on religious objectors.

B. The Mandate Violates the Free Exercise Clause

While the Free Exercise Clause does not require heightened scrutiny of laws that are "neutral [and] generally applicable," *Smith*, 494 U.S. at 881, it does require strict scrutiny of laws that disfavor religion. *See Lukumi*, 508 U.S. at 546. Thus, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* As this Court has recognized, "If the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment only if it 'advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Ward v. Polite*, 67 F.3d 727, 738 (2012).

In *Lukumi,* the Supreme Court struck down a municipal ordinance that imposed penalties on "[w]hoever . . . unnecessarily . . . kills any animal." *Id*. at 537 (citation omitted). Although the ordinance was not facially discriminatory, the Court found that its practical effect was to disfavor religious practitioners of Santeria because it allowed exemptions for secular but not for religious reasons. Once the city began allowing exemptions, the Court held that the law was no longer "generally applicable," and the city could not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Id.* at 537 (citation omitted). Likewise, in *Ward*, this Court held that a plaintiff could

succeed on a free-exercise claim if she could prove her allegation that her University had implemented its anti-discrimination policy in a selective manner, "permitting secular exemptions but not religious ones and failing to administer the policy in an even-handed, much less faith-neutral, manner." 667 F.3d at 739; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (Alito, J.) (striking down police-department policy allowing officers to grow beards for medical reasons, but refusing to allow beards for religious reasons).

The same reasoning applies here. The Mandate is not "generally applicable" because it is riddled with exemptions and yet there is no such exemption for *religious* employers like Appellants. *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 435–37 (W.D. Pa. 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-92, 2012 WL 6738489, at *5–6 (E.D. Mo. Dec. 31, 2012). It makes no difference that the Mandate contains an exemption for a narrow subset of religious groups—namely, those that meet the Government's limited definition of a "religious employer." The Free Exercise Clause does not merely require equal treatment for *some* religious entities. The Government must give equal consideration to *all* religious organizations however they choose to exercise their faith. For that reason, the Mandate fails the test of general applicability, and the Government may not "refuse to extend [exemptions] to cases

of 'religious hardship' without compelling reason." *Lukumi,* 508 U.S. at 537.

In addition, the Mandate is not "neutral" because it is specifically targeted at Appellants' religious practice of refusing to facilitate access to or participate in the Government's scheme to provide the objectionable products and services. When the Government promulgated the Mandate, it was acutely aware that any gap in coverage for contraception was due primarily to the religious beliefs and practices of employers such as the Catholic Church. Indeed, the Government itself concedes that 85% of health plans already cover contraception, and it asserts that adding contraception to the remaining 15% is cost-neutral. 75 Fed. Reg. at 41,732. If so, then the only reason why the latter plans would *not* include coverage for the objectionable products and services is a religious or moral objection. But instead of pursuing a wide variety of options for increasing access to those products and services without forcing religious entities like Appellants to participate in the effort, the Government deliberately chose to force religious entities like Appellants to provide, pay for, and/or facilitate access to the objectionable products and services in violation of their sincerely held religious beliefs. [17]

[17] Numerous other facts indicate the Mandate deliberately targets religious objections. As Appellants explained below, Appellee Sebelius asserted at a NARAL Pro-Choice America fundraiser, that "[w]e are in a war," and mocked those who disagree with her position on contraception. (Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011), MCC-RE2-3, PageID#155.) Likewise, the original definition of "preventive service," was promulgated by an Institute of Medicine Committee stacked with individuals who

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

The Mandate violates the First Amendment by prohibiting religious organizations from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713A(b)(iii). This sweeping gag order cannot withstand First Amendment scrutiny. Appellants believe that contraception is contrary to their faith, and speak and act accordingly. The Government has no authority to outlaw such expression. *See RCAW*, 2013 WL 6729515, at *37 (striking down the Mandate's gag order).

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

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strongly disagreed with many Catholic teachings (Compl., MCC-RE1, PageID#19 ¶ 65), causing the Committee's lone dissenter to lament that the Committee's recommendation reflected "subjective determinations filtered through a lens of advocacy." (IOM Report, MCCRE-23-1, PageID#779.) This bias is further underscored by the fact that the Mandate was modeled on a California statute, *see* 77 Fed. Reg. 8726; *compare* 76 Fed. Reg. 46,626, *with* Cal. Health and Safety Code § 1376.25(b)(1), where the chief sponsor made clear that its purpose was to strike a blow against Catholic religious authorities. (Editorial, *Act of Tyranny*, Wash. Times (Mar. 5, 2004), MCC-RE12-5, PageID#585.)

raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). To prevent such censorship, the First Amendment

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

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

The district courts found that the gag order raises no First Amendment concerns because of another provision in the regulations, (Op., MCC-RE40, PageID#1346), which explains that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. That general caveat, however, does not remedy the First Amendment problem with prohibiting Appellants from "influenc[ing]" their TPAs on matters that Appellants regard as having great moral and religious significance. At the very least, the gag order is an overbroad content-based restriction on speech that chills Appellants from engaging in speech in which it would otherwise engage.

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

It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)). Thus, "[a]ny attempt by the government either to compel individuals to express certain views, or to subsidize speech to which they object, is subject to strict scrutiny." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (citation omitted). 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 (1995).

The Mandate violates the First Amendment prohibition on compelled speech in two ways. *First*, it requires Appellants to provide, pay for, and/or facilitate access to the provision of coverage for "counseling" related to the objectionable products and services for their employees. Because Appellants oppose the objectionable products and services, 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 Appellants' religious faith and they routinely counsel men and women against engaging in such

practices. Consequently, forcing Appellants to support "counseling" in favor of such practices, or even to give details about the availability of such practices, imposes a serious burden on their freedom of speech. In short, Appellants should not be forced to act as mouthpieces in the Government's campaign to expand access to the objectionable products and services.

Second, to qualify for the so-called "accommodation," the Mandate requires Appellants to provide a "self-certification" stating their objections to the provision of the objectionable products and services. This "certification" in turn triggers an obligation on the part of Appellants' third parties to provide or procure the objectionable products and services for Appellants' employees. *See Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011); *see also Agency for Int'l Dev.*, 133 S. Ct. at 2326 (striking down requirement that applicants for a government program certify their opposition to prostitution and sex trafficking). Appellants object to this self-certification requirement both because it compels Appellants to engage in speech that triggers provision of the objectionable products and services, and because it deprives Appellants 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. *E.g.*, *Evergreen Ass'n. v. City of N.Y.*, No. 11-2735-CV, 2014 WL 184993, at *12 (2d Cir. Jan. 17, 2014); *Tepeyac v. Montgomery Cnty.*, 779 F. Supp.

2d 456, 459, 462 n.6 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc).

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

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

1. Discrimination Among Religious Groups

The principle of equal treatment among religious groups lies at the core of the Establishment Clause. Just as the Government cannot discriminate among sects or denominations, so too it cannot "discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Because religious liberty encompasses not only the freedom of religious belief, but also the freedom to adopt different practices and institutional structures, official favoritism for certain "types" of religious institutions is just as insidious as favoritism based on creed. 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 disagreed, holding that the state's inspection of the content of a religious organization "is a relationship pregnant with dangers of excessive government direction of churches." *Id.* at 255 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

The district courts held that *Larson* is inapplicable because the law challenged there treated religious denominations differently from one another, while the Mandate discriminates among types of religious organization regardless of denomination. (Op., MCC-RE40, PageID#1346-47; Op., CDN-RE65, PageID#1353-54.) But that is precisely the type of reasoning the Supreme Court rejected in *Larson*, finding that the law in question disadvantaged some forms of religious organization 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." *Larson*, 456 U.S. at 246 n.23 (internal quotation marks and citation omitted). The D.C. Circuit has followed similar reasoning, stating that "an

exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between *kinds* of religious schools." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (emphasis added).

Here, the Mandate violates the principle of religious neutrality by establishing an official category of "religious employer," favoring some types of religious organization over others. The exemption is defined to include only "nonprofit organization[s] described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [of 1986, as amended]." 78 Fed. Reg. at 39,896. 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. at 8461. This definition favors religious denominations that primarily rely on entities that fit more neatly into the traditional categories of "houses of worship" or "religious orders," while disadvantaging groups that are more inclined to exercise their faith through alternative means—including through religious organizations, like Appellants, that express their faith through their educational, charitable, and service missions.

2. Excessive Entanglement

"It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is not only the conclusions that may be reached . . . which may impinge

on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). "Most often, this principle has been expressed in terms of a prohibition of 'excessive entanglement' between religion and government." *Colo. Christian*, 534 F.3d at 1261 (citation omitted). "Properly understood, the doctrine protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits (as here)." *Id.*

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 1343–45 (approving of a religious exemption that would include any nonprofit group that "holds itself out" as religious, but reserving the question of whether groups could be required to show that they are "affiliated with . . . a recognized religious organization").

Here, the Government's criteria for the "religious employer" exemption go far beyond determining bona fide religious status. By its terms, the exemption applies to groups that are "described in section 6033(a)(1) and section

6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." This category includes (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." 78 Fed. Reg. at 8458. The IRS, however, has adopted the following intrusive 14-factor test to determine whether a group meets these criteria, asking 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.

Found. of Human Understanding v. United States, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009).

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, 133 (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*.

F. The Mandate Violates the APA

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

The APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Mandate is "not in accordance with law" because it violates the Weldon Amendment, which states that "[n]one of the funds made available in this Act may be made available [to federal agencies] . . . if such agenc[ies] . . . subject[] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). The Mandate violates the Weldon Amendment because it subjects Appellants to discrimination based on their refusal

to include coverage for abortion-inducing products (such as the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella)) in their health plans.

The district court's conclusion that "federal law does not define [FDA-approved contraceptives] as [abortion-inducing products]" thus "the regulations are not contrary to law" (Op., MCC-RE40, PageID#1349) ignores the fact that the Weldon Amendment does not define the word "abortion" at all, and that under standard medical definitions, some of the Mandate's covered services clearly qualify as "abortion."[18] And that court's suggestion that Appellants' understanding of what constitutes abortion is irrelevant (*id.*) is not consistent with the policy behind the Weldon Amendment and the ACA itself. At the very least, the definition for "abortion" should be determined by the plan provider. The Weldon Amendment, after all, was meant to protect the rights of conscientious objectors who were required to provide or facilitate what they viewed as an abortion. This interpretation is also consistent with the ACA, which itself prohibits compelling "qualified health plans" to cover abortion services and specifically provides that "the issuer" of the plan—not the Government—"shall determine" whether the plan covers abortion. *See* 42 U.S.C. § 18023(b)(1)(A)-(B).

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[18] STEDMAN'S MED. DICT. 4 (27th ed. 2006) (defining "abortion" as the "[e]xpulsion from the uterus of an embryo or fetus [before] viability"); DORLAND'S ILLUS. MED. DICT. 1500 (30th ed. 2003) (defining pregnancy as "the condition of having a developing embryo or fetus in the body, after union of an oocyte and spermatozoon").

2. The Mandate Violates the APA's Notice and Comment Requirements

The Government violated the APA by enacting the HRSA guidelines, *supra* at 7 (the substance of the requirement that Appellants must cover the objectionable products and services), via press release rather than through notice and comment rulemaking or even publication in the Federal Register.[19] That plainly violates the APA. 5 U.S.C. § 553(b).

An agency's "legislative rules" are subject to notice and comment rulemaking procedures under the APA. At its core, a legislative rule is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1978) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). In the context of defining what differentiates legislative rules from merely interpretive statements, this Court has held that "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be [legislative]." *State of Ohio Dep't. of Human Servs. v. U.S. Dep't. of Health & Human Servs.*, 862 F.2d 1228, 1234 (6th Cir. 1988) (internal quotation marks and citation omitted).

[19] Tellingly, the same provision in the ACA under which the guidelines were promulgated, 42 U.S.C. § 300gg-13(a)(3), also requires HRSA to develop "comprehensive guidelines" for *children's* preventive care. *Id.* As with the Mandate, the Government promulgated a rule mirroring that statutory language. *See* 45 C.F.R. § 147.130(a)(1)(iii). But, unlike with the Mandate, the Government published the guidelines governing *children's* preventive services in the Federal Register. *See* 75 Fed. Reg. at 41,740.

Furthermore, "when a statute does not impose a duty on the persons subject to it but instead authorizes . . . an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency." *Hoctor v. USDA*, 82 F.3d 165, 169 (7th Cir. 1996). By setting "standards governing conduct," the agency is legislating, so those standards are "subject to notice and comment procedures." *Farmworkers*, 628 F.2d at 620; *see Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (finding that a Department of Agriculture press release setting forth bid procedures constituted a rule and that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure").

Here, the idea that the HRSA guidelines are clinical recommendations that do not constitute legislative rulemaking under the APA cannot withstand scrutiny. Without the HRSA guidelines, the Mandate has no substance.[20] Indeed, the

[20] The ACA delegated to HHS the authority to enact "comprehensive guidelines." 42 U.S.C. 300gg-13(a). At the time the statute was passed, the guidelines were not developed or published and thus cannot have been incorporated by reference into the Mandate. Subsequently, HRSA delegated to a third party, the Institute of Medicine ("IOM"), the responsibility to define "preventive care services." Within days, HRSA adopted whole-cloth the IOM's recommendations *via* press release, without subjecting the proposed definition that animates the entire Mandate to notice and comment rulemaking. (Compl., MCC-RE1, PageID#19-20; Compl., CDN-RE-1, PageID#33-39.)

determination that Appellants must include coverage for the objectionable products and services is the very heart of the Mandate. Without the guidelines, "there is no legislative basis for [an] enforcement action" for refusing to cover those items. The guidelines thus "necessarily create[] new rights and impose[] new obligations" that must be enacted via notice-and-comment rulemaking. *Hemp*, 333 F.3d at 1088. The ACA authorized HRSA to impose new legal duties upon health plans, and HRSA "created new law, rights [and] duties" when it adopted the IOM's guidelines without notice and comment rulemaking. *State of Ohio*, 862 F.2d at 1234 (quotation omitted). This is a clear violation of the APA.

II. THE REMAINING EQUITABLE FACTORS SUPPORT AN INJUNCTION

Once again, every court to reach the issue has found that if the Mandate violates RFRA, then the equitable factors favor a preliminary injunction. *Supra* note 1. The same is true here. In addition to demonstrating that Appellants are (1) likely to succeed on the merits of their claims, Appellants have also shown (2) that they will suffer irreparable harm if the injunction is denied, (3) that granting preliminary relief will cause substantial harm to others, and (4) that an injunction would serve the public interest. *Deja Vu of Nashville*, 274 F.3d at 400; *Int'l Res.*, 950 F.2d at 302.

In *Korte*, the Government itself conceded that if the Mandate violated RFRA, then the equitable factors favored a preliminary injunction. *See* 735 F.3d at

666. That concession was inevitable because, as the *Korte* opinion ultimately explained, under both RFRA and the First Amendment, "once the moving party establishes a likelihood of success on the merits, [(a)] the balance of harms normally favors granting preliminary injunctive relief [and (b)] injunctions protecting First Amendment freedoms are always in the public interest." *Id.* (citation omitted). "RFRA protects First Amendment free-exercise rights," and "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," *id.* (citation omitted), even if borne for only "minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

Whatever regulatory interests the Government may have, they pale in comparison to the serious harm that will be inflicted on Appellants' religious liberty in the absence of injunctive relief. Because enjoining an unlawful regulation cannot impose any cognizable harm on the Government, "the balance of harms favors protecting the religious-liberty rights of the plaintiffs." *Korte*, 735 F.3d at 659. Moreover, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004). By enacting RFRA, Congress conclusively determined the public interest favors religious liberty over any regulation that cannot satisfy strict scrutiny.

CONCLUSION

The Government has forced Appellants to choose between onerous penalties and violating their religious beliefs. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may a Catholic violate the moral law if in certain circumstances he facilitates or becomes otherwise entangled in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

723 F.3d at 1152 (Gorsuch, J., concurring). Appellants' faith has led them to the conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably Appellants' to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Appellants to cross this line, the Government has substantially burdened Appellants' exercise of religion. As the Mandate cannot satisfy strict scrutiny, the decisions of the district courts should be reversed, and Appellants should be granted injunctive relief.

Respectfully submitted, this the 24th day of January, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Plaintiffs-Appellants' Brief complies with the type volume limitations set out for principal briefs in Federal Rule of Appellate Procedure 32(a)(7)(B) and ordered by this Court on January 13, 2014. The brief, including headings, footnotes, and quotations, contains 16,929 words, as calculated by the Microsoft Word word count function.

Respectfully submitted, this the 24th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 24, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

United States District Court for the W.D. of Mich., Case No. 1:13-cv-01247

Complaint	PageID#1-53
Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011)	PageID#151-155
Plaintiffs' Motion for Preliminary Injunction	PageID#245-248
Plaintiffs' Memorandum in Support	PageID#257-318
Comments of the USCCB (May 15, 2012)	PageID#328-348
Comments of the USCCB (Mar. 20, 2013)	PageID#351-374
Declaration of Paul A. Long	PageID#414-422
Declaration of Frances Denny	PageID#424-501
Declaration of Most Rev. Michael Byrnes, S.T.D.	PageID#503-511
Editorial, Act of Tyranny, Wash. Times (Mar. 5, 2004)	PageID#585-586
Defendants' Combined Memorandum in Opposition	PageID#785-847
RCAW Hr'g Tr. (D.D.C. Nov. 22, 2013)	PageID#903-905
Supplemental Declaration of Paul A. Long	PageID#923-931
Supplemental Declaration of Frances H. Denny	PageID#933-937
Opinion Denying Motion for Preliminary Injunction	PageID#1329-1350
Plaintiffs' Notice of Interlocutory Appeal	PageID#1352-1354
Order Denying Motion for Preliminary Injunction Pending Appeal	PageID#1400
Order Granting Motion to Stay	PageID#1401

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

United States District Court for the M.D. of Tenn., Case No. 3:13-cv-01303

Complaint	PageID#1-70
Plaintiffs' Motion for Preliminary Injunction	PageID#302-305
Declaration of David R. Choby	PageID#306-317
Declaration of Terry Robinson	PageID#318-324
Declaration of William P. Sinclair	PageID#325-331
Declaration of Tommy Hagey	PageID#332-339
Declaration of David I. Glascoe	PageID#340-346
Declaration of Michael J. Miller	PageID#347-352
Declaration of Mother Ann Marie Karlovic, O.P.	PageID#353-362
Declaration of Sister Mary Sarah Galbraith, O.P.	PageID#363-368
Opinion Denying Motion for Preliminary Injunction	PageID#1339-1358
Plaintiffs' Notice of Interlocutory Appeal	PageID#1360-1362
Order Denying Motion for Preliminary Injunction Pending Appeal	PageID#1376
Order Granting Motion to Stay	PageID#1395