IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,

Plaintiffs-Appellees,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; CATHOLIC CHARITIES OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; SAINT ANNE HOME & RETIREMENT COMMUNITY OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC; UNIVERSITY OF SAINT FRANCIS; and OUR SUNDAY VISITOR, INC.,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Indiana
No. 12-cv-459 (DeGuilio, J.) and No. 12-cv-159 (DeGuilio, J.)

BRIEF FOR THE APPELLANTS

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INTRODUCTION

These appeals present the same issue that this Court addressed in *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014).[1] Plaintiffs challenge regulations that establish minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive-health coverage. Plaintiffs acknowledge, however, that they are not required to provide contraceptive coverage. Plaintiffs either are automatically exempt from the coverage requirement, or may opt out of it by informing their insurance issuer or third party administrator that they are eligible for a religious accommodation set out in the regulations and therefore are not required "to contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

Plaintiffs do not object to informing insurance issuers or third party administrators of their decision not to provide contraceptive coverage. They object, instead, to requirements imposed not on themselves, but on insurance issuers and third party administrators. In the case of an insured plan, when an eligible organization elects not to provide contraceptive coverage for religious reasons, the insurance company that issues the policy for that organization's employees is required to provide separate payments for contraceptive services for the employees. *See* 45 C.F.R. § 147.131(c)(2)(i)(B), (c)(2)(ii), and (f). In the case of a self-insured plan, these

[1] The plaintiff in *Notre Dame* has filed a petition for rehearing en banc, which is currently pending before this Court.

requirements must be met by the third party administrator that administers the plan. *See* 29 C.F.R. § 2590.715-2713A(b)(3). In all cases, the organization eligible for a religious accommodation does not administer this coverage and does not bear any direct or indirect costs of the coverage.

Although plaintiffs are thus free to opt out of providing contraceptive coverage, they nevertheless claim that the challenged regulations impermissibly burden their exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). In *Notre Dame*, this Court considered the same claim and held that the claim is not a basis for a preliminary injunction. The preliminary injunctions in these cases were entered before this Court issued its decision in *Notre Dame* and should be vacated in light of this Court's decision.

As the *Notre Dame* decision reflects, plaintiffs cannot transform their right, as eligible organizations, *not* to provide coverage into a substantial burden by characterizing their decision to opt out as "facilitating" the provision of contraceptive coverage by third parties. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of providing such coverage. *Notre Dame*, 743 F.3d at 554 ("Federal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services."). Third parties provide coverage as a result of legal obligations imposed by

the government. Plaintiffs are "free to opt out of providing the coverage [themselves], but [they] can't stop anyone else from providing it." *University of Notre Dame* v. *Sebelius*, _ F. Supp. 2d. _, 2013 WL 6804773, at *1 (N.D. Ind. Dec. 20, 2013), *aff'd*, 743 F.3d 547 (7th Cir. 2014).

STATEMENT OF JURISDICTION

Plaintiffs in these consolidated appeals invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, 2202 and 42 U.S.C. § 2000bb-1. In both cases, the district court granted plaintiffs' motions for preliminary injunctions on December 27, 2013, A35-36, A74-75, and defendants filed timely notices of appeal on February 24, 2014, GS Doc. 91, DFW Doc. 123.[2] This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether regulations that allow plaintiffs to opt out of providing contraceptive coverage violate plaintiffs' rights under the Religious Freedom Restoration Act.

STATEMENT OF THE CASE

A. Regulatory Background

1. Congress has long regulated employer-sponsored group health plans. In 2010, the Patient Protection and Affordable Care Act established certain additional

[2] Citations to the documents in the Appendix are "A_." Citations to the documents in the Separate Appendix are "SA_." Citations to the Record on Appeal in *Grace Schools* are "GS Doc. _." Citations to the Record on Appeal in *Diocese of Fort Wayne-South Bend* are "DFW Doc. _."

minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and the individual health insurance markets. The Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage to cover four categories of recommended preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA") (a component of the Department of Health and Human Services ("HHS")). *Id.* § 300gg-13(a)(4).

HHS requested the assistance of the Institute of Medicine in developing such comprehensive guidelines for preventive services for women. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). Experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines," developed a list of services "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 2-3 (2011). These included the "full range" of "contraceptive methods" approved by the Food and Drug Administration, *id.* at 10; *see id.* at 102-110, which the Institute found can greatly decrease the risk of unwanted

pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women. *See id.* at 102-107.

Consistent with those recommendations, the HRSA guidelines include "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health care provider. 77 Fed. Reg. at 8725 (quoting the guidelines). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. § 147.130(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (Treasury).

2. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)).

When the initial final regulations were issued, the Departments announced, in response to religious objections raised by some commenters, that they would develop "'changes to these final regulations that would meet two goals'—providing

contraceptive coverage without cost-sharing to covered individuals and accommodating the religious objections of [additional] non-profit organizations[.]" *Wheaton College* v. *Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting 77 Fed. Reg. at 8727).

After notice and comment rulemaking, the Departments published the current regulations, challenged here, in July 2013. *See* 78 Fed. Reg. 39,879, 39,874-39,886 (July 2, 2013); 45 C.F.R. § 147.131(b) (HHS); 29 C.F.R. § 2590.715-2713A(a) (Labor); 26 C.F.R. § 54.9815-2713A(a) (Treasury). The regulations provide religion-related accommodations for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

E.g., 45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75.

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. To be relieved of these obligations, it need only complete a form stating that it is an eligible organization and provide a copy to its insurance issuer or third party administrator. *See id.* at 39,874-75; *see, e.g.*, 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1).

If an eligible organization chooses not to provide contraceptive coverage, the plan's participants and beneficiaries will generally have access to contraceptive coverage without cost sharing through alternative mechanisms established by the regulations.

When an eligible organization that chooses not to provide contraceptive coverage has an "insured" plan, the health insurance company that issues the policy for that organization is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. *See* 45 C.F.R. § 147.131(c)(2).[3] The insurance issuer may not impose any premium, fee, or other

[3] An employer is said to have an "insured" plan if it contracts with an insurance company that bears the financial risk of paying health insurance claims. An employer is said to have a "self-insured" plan if it bears the financial risk of paying claims. Many self-insured employers use insurance companies or other third parties to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims. In that context, the insurance company or other third party is called a third party administrator or TPA. Employers may be regarded as self-insured even if they purchase a separate insurance policy (known as reinsurance or "stop loss" coverage), which is not a form of health

Continued on next page.

charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *See id.* § 147.131(c)(2)(ii), (f). The insurance issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* § 147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

When an eligible organization that chooses not to provide contraceptive coverage has a "self-insured" plan, the regulations generally require the third party administrator to provide or arrange separate payments for contraceptive services for plan participants and beneficiaries. 29 C.F.R. § 2590.715- 2713A(b)(2). "The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." *Id.* § 2590.715- 2713A(b)(1)(ii)(A). The regulations bar the third party administrator from imposing any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to payments for contraceptive services. *Id.* § 2590.715-2713A(b)(2). The third party administrator may seek reimbursement for payments for contraceptive services from the federal

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insurance, to protect themselves against unusually high claims costs. *See generally* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 6 (2008).

government through an adjustment to federally-facilitated Exchange user fees. *Id.* § 2590.715-2713A(b)(3); *see* 45 C.F.R. § 156.50(d).

Regardless of the type of plan, an eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries of the availability of these separate payments made by third parties. Instead, the health insurance issuer or third party administrator itself provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. 45 C.F.R. § 147.131(d); 29 C.F.R. § 2590.715-2713A(d). That notice must make clear that the eligible organization is neither administering nor funding the contraceptive benefits. *Ibid.*

B. Factual Background and Prior Proceedings

These appeals arise out of two cases heard before the same district court.

1. The plaintiffs in *Grace Schools* are two non-profit schools—Grace Schools and Biola University, Inc.—each of which is concededly eligible for the accommodations described above. SA5-12, 26. Grace Schools offers health coverage to approximately 168 employees and 307 dependents through a self-insured health plan, and offers separate health coverage to its students through an insurance plan issued by Gallagher Koster. SA8-9. Biola University offers health coverage to its approximately 850 employees and their dependents through insurance plans issued by Kaiser Permanente and Blue Cross Blue Shield, and offers separate health coverage to its students through an insurance plan issued by United Health Care. SA13-14.

The plaintiffs in *Diocese of Fort Wayne-South Bend* are (1) the Diocese of Fort Wayne-South Bend ("the Diocese"), which is a religious employer that is exempt from the contraceptive-coverage provision and that offers health coverage under a self-insured plan (the Diocesan Health Plan) to its own employees and to employees of affiliated Catholic organizations, SA56, 65; (2) Catholic Charities of the Diocese of Fort Wayne-South Bend, which offers health coverage under the Diocesan Health Plan to its 36 full-time employees, SA65-67; (3) Saint Anne Home, which offers health coverage under a self-insured plan to approximately 220 employees, SA67-70; (4) Franciscan Alliance, Inc., which offers health coverage to its approximately 18,000 employees through insurers such as Blue Cross Blue Shield and through self-insured health plans, SA70-74; (5) Specialty Physicians, which offers health coverage through insurer Blue Cross Blue Shield to approximately 317 employees, SA74-76; (6) Saint Francis University, which offers health coverage under a self-insured plan to approximately 346 employees, SA76-81; and (7) Our Sunday Visitor, which offers health coverage under a self-insured plan to approximately 317 employees, SA81-83. Other than the Diocese, which as a religious employer is exempt from the contraceptive-coverage provision, all of plaintiffs are concededly eligible for the accommodations described above. SA54-56. The Diocesan Health Plan has grandfathered status and is thus not currently subject to the contraceptive-coverage provision. SA64.

Plaintiffs contend that the religious accommodations set out above violate their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless the application of that burden is the least restrictive means to advance a compelling governmental interest. Plaintiffs argue that opting out of the coverage requirement substantially burdens their religious exercise under RFRA because doing so "facilitate[s] access to objectionable products," SA103, and "trigger[s] their insurance issuer or third-party administrator to provide" those products, SA30.[4]

2. In parallel opinions both issued on December 27, 2013, the district court granted plaintiffs' motions for preliminary injunctions. A1-36 (*Grace Schools*); A37-75 (*Diocese of Fort Wayne-South Bend*). The district court held that plaintiffs had demonstrated that the religious accommodation imposes a "substantial burden" on their exercise of religion under RFRA. It relied on *Korte* v. *Sebelius*, 735 F. 3d 654 (7th Cir. 2013), despite "acknowledg[ing] that the burden on [plaintiffs] to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs." A20; A58-59. The court held that, under *Korte*, the accommodation could not satisfy RFRA's compelling-interest test. A26-31; A65-70. The district court further held that plaintiffs had satisfied the remaining requirements for preliminary relief. A31-35; A70-74.

[4] While plaintiffs have alleged additional statutory and constitutional violations, the district court reached only plaintiffs' RFRA claims.

SUMMARY OF ARGUMENT

These consolidated appeals present the same issue that this Court addressed in *University of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014). Here, as in *Notre Dame*, plaintiffs are not required to provide contraceptive coverage to their employees or students. They are either exempt from the requirement altogether or, as eligible religious organizations, may opt out of the coverage requirement by completing a form and providing a copy to their health insurance issuer or third party administrator. They object to opting out on the ground that, once they have done so, third parties will separately provide payments for contraceptive services without cost to or involvement by plaintiffs. In *Notre Dame*, this Court held that this claim did not provide a basis for a preliminary injunction. For the same reasons, the preliminary injunctions in these cases should be vacated.

As this Court concluded in *Notre Dame*, the requirements that federal law places on insurance companies and third party administrators do not "substantially burden" plaintiffs' exercise of religion within the meaning of the Religious Freedom Restoration Act. Plaintiffs cannot convert their opt-out right into a substantial burden by characterizing the opt-out as "facilitating" the provision of contraceptive coverage by others. Eligible organizations that opt out do not "facilitate" the provision of contraceptive coverage by third parties, just as they do not "facilitate" the federal government's reimbursement of third party administrators for the cost of

providing such coverage. If third parties step in and provide coverage, they do so as a result of legal obligations or the availability of reimbursements from the government.

Even if the accommodation were subject to RFRA's compelling-interest test, plaintiffs' claim would fail because the accommodation furthers the government's compelling interest in its ability to accommodate religious concerns in this and other schemes. Accepting plaintiffs' position—that even an opt-out provision substantially burdens the exercise of religion—would render the government unable to accommodate religious concerns and would impair the government's operations.

STANDARD OF REVIEW

The grant of a request for a preliminary injunction is reviewed for abuse of discretion. *E. St. Louis Laborers' Local 100* v. *Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005). A district court abuses its discretion by granting a preliminary injunction based on an error of law. *Ibid.*

ARGUMENT

THE CHALLENGED REGULATIONS DO NOT IMPERMISSIBLY BURDEN PLAINTIFFS' EXERCISE OF RELIGION UNDER RFRA.

A. The Challenged Accommodations, Which Allow Plaintiffs to Opt Out of Providing Contraceptive Coverage, Do Not Substantially Burden Plaintiffs' Religious Exercise Under RFRA.

1. Plaintiffs are permitted to opt out of providing such coverage.

Congress enacted RFRA to restore the state of Free Exercise law that prevailed prior to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4),

(5), and (b)(1). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

The initial version of RFRA prohibited the government from imposing any "burden" on free exercise. Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see ibid.*(statement of Sen. Hatch). *See also Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) ("[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement.") (emphasis added). Consistent with RFRA's restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same). Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction.").

None of the plaintiffs here is required to provide contraceptive coverage. The Diocese is automatically exempt from the contraceptive coverage provision because it falls into the long established category in the Internal Revenue Code for churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.131(a) (cross-referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). And both the Diocese and Catholic Charities offer health coverage through the Diocesan Health Plan, which is not currently subject to the contraceptive-coverage provision because it is a grandfathered plan. 42 U.S.C. § 18011.

The remaining plaintiffs concede that they satisfy the criteria for the religious accommodations under which they do not have to provide contraceptive coverage. *See* 45 C.F.R. § 147.131(b), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1). To opt out of this coverage requirement, plaintiffs need only complete a form stating that they are eligible and provide a copy to their insurance issuer or third party administrator. *See* 78 Fed. Reg. 39,870-01, 39,874-75 (July 2, 2013); *see, e.g.*, 45 C.F.R. § 147.131(c)(1); 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1), (c)(1); *see also Michigan Catholic Conference* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6838707, *7 (W.D. Mich. Dec. 27, 2013), *appeal pending*, No. 13-2723 (6th Cir.) (eligible organizations need only "attest to [their] religious beliefs and step aside"). Indeed, plaintiffs presumably would need to inform their insurers and third party administrators of their objection even if they were automatically exempt from the coverage requirement, to ensure that they would not

be contracting, arranging, paying, or referring for such coverage. *Univ. of Notre Dame* v. *Sebelius*, _ F. Supp. 2d _, 2013 WL 6804773, *8, *aff'd*, 743 F.3d 547 (7th Cir. 2014).[5]

2. Plaintiffs object to requirements imposed on third parties, not on themselves.

In *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 554-559 (7th Cir. 2014), this Court rejected the same claims raised by the plaintiffs in this case. It affirmed the denial of a preliminary injunction, because, "'[a]t bottom, . . . [plaintiffs'] religious objections are to the government's independent actions in mandating contraceptive coverage, not to any action that the government has required [plaintiffs] themselves to take.'" *Id.* at 559 (quoting *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, and *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (Tatel, J., dissenting from grant of an injunction pending appeal)).

The responsibilities that the regulations place on insurance issuers and third party administrators require no action by any plaintiff. Plaintiffs will not "contract, arrange, pay, or refer" for contraceptive coverage, 78 Fed. Reg. at 39,874, and the regulations bar insurance issuers and third party administrators from passing along any costs, directly or indirectly, with respect to payments for contraceptive services. *See* 45 C.F.R. § 147.131(c)(2)(ii) (insured plans) ("With respect to payments for

[5] The district court acknowledged that at least some of the plaintiffs, "prior to the ACA's enactment, . . . had notified their insurers/TPAs that objectionable services were to be excluded from their health plans." A59-60; *see also* A21-22 (noting lack of evidence as to whether Grace Schools or Biola University had provided such notices prior to enactment of the ACA).

contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries."); 29 C.F.R. § 2590.715-2713A(b)(2)(i) and (ii) (same for self-insured plans); *see also* 45 C.F.R. § 147.131(c)(2)(i)(A) (separate coverage must be "[e]xpressly exclude[d] . . . from the group health insurance coverage provided in connection with [plaintiffs'] group health plan[s]"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) ("Obligations of the third party administrator" are imposed by regulation, and the employer does "not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services.").

Insurance issuers and third party administrators—rather than the eligible organizations—must notify plan participants and beneficiaries of the availability of separate payments for contraceptive services, and "[t]he notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services[.]" 45 C.F.R. § 147.131(d) (insured plans); 29 C.F.R. § 2590.715-2713A(d) (same for self-insured plans).

Plaintiffs do not contend that their religious exercise is burdened by completing a form that states that they are religious non-profit organizations with religious objections to providing contraceptive coverage. Their objection is instead that federal

law requires insurers and third party administrators to provide coverage after plaintiffs declare that they will not provide coverage themselves. *See* SA27 (objecting that self-certification "would trigger the insurer's obligation" to provide contraceptive coverage); SA98 (objecting that "[a] religious organization's self-certification, therefore, is a trigger and but-for cause of the objectionable coverage").

In *Notre Dame,* this Court considered the argument that self-certification "'triggers' [third parties'] coverage of the contraception costs," and rejected it. *See* 743 F.3d at 554-557. Plaintiffs are not "triggering" third parties to perform duties established by federal law any more than they are "triggering" the United States to reimburse the third party administrator for its payments on behalf of individuals availing themselves of contraceptive coverage. Ordinarily, health insurance issuers and third party administrators make payments for all covered health services. If, after an eligible employer opts out, an insurance issuer or third party administrator makes separate payments due to an obligation imposed by the government or the availability of reimbursement by the government, employees and students will receive coverage for contraceptive services *despite* plaintiffs' religious objections, not *because* of them.

In plaintiffs' view, it is immaterial whether they are required to offer and pay for contraceptive coverage or whether they may decline to do so. On this reasoning, a conscientious objector could object not only to his own military service, but also to opting out, on the theory that his opt-out would "'trigger' the drafting of a replacement who was not a conscientious objector." *Notre Dame*, 743 F.3d at 556.

"That seems a fantastic suggestion," yet, "confronted with this hypothetical at the oral argument" in *Notre Dame*, the plaintiff's counsel "acknowledged its applicability and said that drafting a replacement indeed would substantially burden the [conscientious objector's] religion." *Ibid.* Similarly, on plaintiffs' reasoning here, the plaintiff in *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), could have demanded not only that he not make weapons but also that he not *opt out* of doing so, because someone else would then take his place on the assembly line.[6]

Nothing in the cases on which plaintiffs rely, or in the pre-*Smith* case law that RFRA restored, supports the contention that opting out of an obligation may itself be deemed a substantial burden if someone else will take the objector's place. *See, e.g.*, *Notre Dame*, 743 F.3d at 557 (noting the "novelty of [the] claim—not for the

[6] Instead of opting out of contraceptive coverage, plaintiffs also could choose to discontinue offering health coverage. In that scenario, plaintiffs' employees and students could purchase health insurance, which covers all essential health benefits including contraceptive benefits, on exchanges where many may qualify for subsidies. *See* 26 U.S.C. § 36B. It is not clear whether plaintiffs believe that this too would constitute "facilitating" contraceptive coverage; but it also would not constitute the kind of burden that is "substantial" under RFRA. This is yet another means by which plaintiffs could avoid providing the coverage to which they object. *See Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 303-305 (1985) (option to compensate employees by furnishing room and board obviates religious objection to paying cash wages). In that scenario, with respect to their employees, plaintiffs would save the cost of providing health coverage and instead may be subject to a tax of $2,000 per full-time employee (Catholic Charities presumably would not be subject to any tax because it has only 36 employees). *See* 26 U.S.C. § 4980H(a) and (c)(1). Even were the expense greater, a burden is not substantial when it merely "operates so as to make the practice of [plaintiffs'] religious beliefs more expensive" or inconvenient. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). With respect to their students, plaintiffs would not be subject to any tax for not offering health coverage.

exemption . . . but for the right to have it without having to ask for it"); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013) (emphasizing that the plaintiff corporations "are asking for relief from a regulatory mandate that coerces *them* to pay for something—insurance coverage for contraception") (court's emphasis); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710-712 (1981) (explaining that the plaintiff was substantially burdened because he was not able to opt out of the job in which he was "engaged directly in the production of weapons"); *see also Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting the plaintiffs' claim that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges to which they objected, on the ground that the plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Senate Report 12 (expressly stating that RFRA was not intended to "change the law" as articulated in *Tilton*)[7]; *Kaemmerling* v. *Lappin*, 553 F.3d 669, 673-674, 678-679 (D.C. Cir. 2008) (rejecting RFRA challenge to requirement that prisoner give tissue sample on which

[7] Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen*, *supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of the plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249.

DNA analysis would later be carried out because the prisoner did not object in and of itself to bodily violation of giving sample but only to the government's later extracting DNA information).

Unlike the plaintiffs in cases like *Korte*, the plaintiffs here need not "contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections. 78 Fed. Reg. at 39,874. They "need not place contraceptive coverage into 'the basket of goods and services" provided to employees and students. *Priests for Life* v. *U.S. Dep't of Health & Human Servs.* __ F. Supp. 2d __, No. 13-cv-1261, 2013 WL 6672400, at *10 (D.D.C. Dec. 19. 2013) (quoting *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *cert. petn. pending*, No. 13-567). Indeed, the district court in *Notre Dame* observed that this Court emphasized this distinction in *Korte*, "when it stated that the lack of an exemption or accommodation for the for-profit plaintiffs was 'notabl[e],' suggesting that the case might well have come out differently had the *Korte* plaintiffs had access to the accommodation now available to [eligible organizations]." *Notre Dame*, _ F. Supp. 2d _, 2013 WL 6804773, *9 (quoting *Korte*, 735 F.3d at 662). And this Court directly addressed this issue in *Notre Dame*, where it concluded that nothing in *Korte* supported the plaintiff's challenge to the accommodations. 743 F.3d at 558 ("Notre Dame can derive no support from our decision in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), heavily cited in the university's briefs.").

3. Plaintiffs' analysis disregards the burdens placed on plan participants and beneficiaries if plaintiffs' position were accepted.

Plaintiffs assert that, for purposes of RFRA, their exercise of religion is burdened by the provision of health care coverage to their employees and students by the government through insurers and third party administrators. Plaintiffs (and the district court) erroneously assume that the RFRA inquiry should evaluate the nature of the asserted burden placed on their exercise of religion without regard to the burden on third parties that would result from accepting their position. In their view, it is immaterial whether an employer's assertion of a right under RFRA would deprive its employees or its students of health care coverage.

That approach is at odds with the pre-*Smith* jurisprudence incorporated by RFRA and with both of the free-exercise decisions cited in RFRA itself, *see* 42 U.S.C. § 2000bb(b)(1), which emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court accepted the free exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." *Id.* at 409. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was

only a "minimal difference between what the State would require and what the Amish already accept." *Id.* at 235-236; *see id.* at 222. Moreover, the Court in *Yoder* emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. *See id.* at 231-232. And, in *United States* v. *Lee,* 455 U.S. 252 (1982), the Court's rejection of the employer's free-exercise claim relied on the fact that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," who would be denied the benefits to which they were entitled by federal law. *Id.* at 261.

RFRA is not properly interpreted to create tension with the approach of these pre-*Smith* cases.[8] Indeed, the Supreme Court has stressed that in "[p]roperly applying" the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which was modeled on RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" *Cutter* v. *Wilkinson*, 544 U.S. 709,

[8] The types of accommodations cited in the debates prior to enactment of RFRA did not impose substantial costs or burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (citing as examples of contemplated accommodations ensuring burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it" and precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (contemplated accommodations include allowing parents to home school their children, allowing individuals to volunteer at nursing homes, and allowing families to decline autopsies). Such accommodations do not require third parties to forfeit federal protections or benefits to which they are entitled.

720 (2005).[9] *Cf. Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80 (1977) (Title VII's reasonable-accommodation requirement does not entitle employee to a religious accommodation that would come at the expense of other employees).

4. It is the province of this Court to consider whether regulations that allow plaintiffs to decline to provide contraceptive coverage "substantially" burden their exercise of religion under RFRA.

Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g., Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," but the law "recognize[s] such a distinction"); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar); *Kaemmerling*, 553 F.3d at 679 ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

Although a court accepts a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as a

[9] For this reason, *Cutter* rejected an Establishment Clause challenge to RLUIPA. Indeed, the Supreme Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-711 (1985) (holding that a statute requiring an employer to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause).

legal matter, that burden is "substantial" under RFRA. Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that the case, any person would be able not only to declare a sincerely held religious belief but also to demand absolute deference to its assessment of what constitutes a substantial burden on that belief.

The district court erred by accepting (A22) not only that plaintiffs' religious beliefs are sincere but *also* that the challenged right to opt out creates a "substantial" burden on their "exercise of religion" as contemplated by RFRA. This approach does not accord with settled law that "substantiality—like compelling governmental interest—is for the court to decide." *Notre Dame*, 743 F.3d at 558 ("Otherwise there would have been no need for Congress in [RFRA] to prefix 'substantial' to 'burden.'"); *see, e.g.*, *Bowen*, 476 U.S. at 701 n.6; *Lyng*, 485 U.S. at 448; *Kaemmerling*, 553 F.3d at 679; *Mahoney*, 642 F.3d at 1121; *see* 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (explaining addition of the "substantial burden" requirement); *see also Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 248-249.

In short, while this Court does not scrutinize the sincerity of plaintiffs' religious beliefs, it properly determines whether the challenged regulations impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free-exercise law. Plaintiffs may decline to provide contraceptive coverage without facing any penalties. RFRA does not allow plaintiffs to block the government and third parties from making payments for contraceptive services.

B. Plaintiffs' Claims Would Fail Even If the Accommodations Were Subject to RFRA's Compelling-Interest Test.

Plaintiffs' claims would fail even if the accommodations were subject to RFRA's compelling-interest test. In *Korte*, this Court held that the interests in public health and gender equality did not justify the requirement that employer-sponsored plans cover contraception. 735 F.3d at 685-687. As the Court is aware, the question at issue in *Korte* is pending before the Supreme Court. We respectfully submit that its analysis of these two compelling interests is incorrect for the reasons set out in the government's Supreme Court briefs, but we recognize that *Korte* controls at this juncture with respect to the plans offered by for-profit corporations.

At issue in this case, however, are a far narrower set of regulations, which allow plaintiffs to opt out of providing contraceptive coverage and then provide that third parties will make or arrange separate payments. Plaintiffs' extraordinarily broad argument is that religious objectors may object not only to *their* complying with legal obligations but also to the fact that only if they decline to comply will the government pursue its policy objectives in another way.

The government's ability to accommodate religious concerns in this and other schemes depends on its ability to ask that religious objectors who do not belong to a pre-defined class (such as the "religious employer" exemption defined by reference to the Internal Revenue Code) certify that they are entitled to the religious exception. *See Notre Dame*, 743 F.3d at 557 ("The novelty of [plaintiff's] claim—not for the

exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis."). It also depends on the government's ability to fill the gaps created by the accommodations. Plaintiffs' analysis, by contrast, asserts that it is insufficient to permit an objector to opt out of an objectionable requirement; the government may not shift plaintiffs' obligations to a third party but must instead fundamentally restructure its programs or their objectives. As the Supreme Court admonished in its pre-*Smith* decisions, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699. Plaintiffs' reasoning would fundamentally undermine the means by which the government accommodates religious concerns and would impair the government's operations.

CONCLUSION

The preliminary injunctions should be reversed.

Respectfully submitted,

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MAY 2014

CIRCUIT RULE 30(d) STATEMENT

I hereby certify that the Appendix and Separate Appendix to this brief contain all the material required by Circuit Rules 30(a) and (b).

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,805 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.,

Plaintiffs-Appellees,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; CATHOLIC CHARITIES OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; SAINT ANNE HOME & RETIREMENT COMMUNITY OF THE DIOCESE OF FORT WAYNE-SOUTH BEND, INC.; FRANCISCAN ALLIANCE, INC.; SPECIALTY PHYSICIANS OF ILLINOIS, LLC; UNIVERSITY OF SAINT FRANCIS; and OUR SUNDAY VISITOR, INC.,

Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Indiana
No. 12-cv-459 (DeGuilio, J.) and No. 12-cv-159 (DeGuilio, J.)

APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GRACE SCHOOLS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:12-CV-459 JD
	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

Memorandum Opinion and Order

Plaintiffs Grace Schools (hereinafter, "Grace") and Biola University, Inc. (hereinafter, "Biola") have filed their first amended verified complaint [DE 54] seeking declaratory and injunctive relief claiming that the government defendants have violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq*., the First Amendment of the Constitution of the United States, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*., by enacting the "contraception mandate" which requires certain employers to provide coverage for contraception and sterilization procedures in their employee health care plans on a no-cost-sharing basis, or face stiff financial penalties and the risk of enforcement actions for the failure to do so. Although the defendants have since moved to dismiss the amended complaint and the parties have sought summary judgment on the various claims presented [DE 60; DE 69], the Court focuses only on plaintiffs' request for injunctive relief and defendants' objection thereto,[1] in an effort to prevent the possibility of any unjust enforcement of

[1]The Court previously advised the parties as to how this complex litigation would proceed [DE 57] and the parties have filed their briefs consistent with the Court's scheduling order [DE 52]. The Court has also carefully considered the supplemental notices of authority

the contraception mandate against plaintiffs come the first of the year.[2]

For the reasons that follow, plaintiffs have shown that their RFRA claim stands a reasonable likelihood of success on the merits, that irreparable harm will result without adequate remedy absent an injunction, and that the balance of harms favor protecting the religious-liberty rights of the plaintiffs. As such, the Court enters a preliminary injunction barring enforcement of the contraception mandate against Grace and Biola.

I. Background

The Contraception Mandate

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg–13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg–13(a)(4). The HRSA, an agency of the U.S. Department of Health and Human Services (HHS), then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to provide the government with independent expert advice on matters of public health. After

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and responses filed by counsel, along with the amicus curiae briefs filed by counsel for the Liberty, Life and Law Foundation, the American Civil Liberties Union, the American Center for Law & Justice, and Regent University.

[2]Grace's employee health care plan begins on January 1, 2014, while Biola's employee health care plan begins shortly thereafter on April 1, 2014 [DE 54 at ¶ 179], and their student plans begin in the Summer of 2014. *Id*. at ¶ 181.

reviewing the type of preventive services necessary for women's health and well-being, the IOM recommended that the following preventive services be required for coverage: annual well-woman visits; screening for gestational diabetes and breast-feeding support, supplies, and counseling; human papillomavirus screening; screening and counseling for sexually transmitted infections and human immune-deficiency virus; screening and counseling for interpersonal and domestic violence; and contraceptive education, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 9, 2013). Based on the IOM's recommendations, the HRSA issued comprehensive guidelines requiring coverage of (among other things) "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling[3] for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well–Being, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 9, 2013). These include hormonal methods such as oral contraceptives (the pill), implants and injections, barrier methods, intrauterine devices, and emergency oral contraceptives (Plan B and Ella).[4] *See* FDA, Birth

[3]The defendants clarify that this requirement does not indicate that such education and counseling need necessarily be 'in support of' certain contraception services or contraception in general.

[4]As the government points out, the list of FDA approved contraceptive methods does not include abortion, however, the terms "abortifacients" or "abortion inducing drugs" as used throughout this opinion refers to plaintiffs' characterization of contraception that artificially interferes with life and conception in violation of their religious beliefs.

Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (lasted visited Dec. 9, 2013). On February 15, 2012, HHS published final regulations incorporating the HRSA guidelines. 77 Fed. Reg. 8725 (Feb. 15, 2012). The agency made the mandate effective in the first plan year on or after August 1, 2012, *see* 45 C.F.R. § 147.130(b)(1), however, a temporary enforcement safe harbor for nonexempt nonprofit religious organizations that objected to covering contraceptive services was also created, making the mandate effective in the first plan year on or after August 1, 2013 for those qualifying organizations who did not meet the religious employer exemption. 77 Fed. Reg. 8728-29. The government then undertook new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered[5] nonprofit religious organizations with religious objections to covering contraceptive services. *Id*.

On March 21, 2012, the government issued an Advance Notice of Proposed Rulemaking that stated it was part of the government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). On February 1, 2013, the government issued a Notice of Proposed Rulemaking (NPRM), setting forth a proposal that stated it was to "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified

[5]"Grandfathered" plans are those health plans that do not need to comply with the ACA's coverage requirements because they were in existence when the ACA was adopted and did not make certain changes to the terms of the plan. 42 U.S.C. § 18011. The purpose of grandfathering plans was to allow individuals to maintain their current health insurance plan, to reduce short term disruptions in the market, and to ease the transition to market reforms that phase in over time. *See* 75 Fed. Reg.. 34,546 (June 17, 2010). The number of grandfathered plans is expected to decline over time.

because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). On June 28, 2013, the government issued final rules adopting and/or modifying the proposals in the NPRM. *See* 78 Fed. Reg. 39,870. The regulations challenged here (the "final rules") include the new regulations issued by the government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering contraceptive services. *See* 78 Fed. Reg. 39,870.

The final rules state that they "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed. Reg. 39,871. Under the new definition, an exempt "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 78 Fed. Reg. 39,874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. 39,874 (citing 78 Fed. Reg. 8461). The 2013 final rules' amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after

August 1, 2013. *See id.* at 39,871.

The 2013 final rules also included an "accommodation" regarding the contraceptive coverage requirement for group health plans, as well as student health plans, established or maintained by "eligible organizations." 78 Fed. Reg. 39,874–80; 45 C.F.R. § 147.131(b)-(f). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,874. To be relieved of the obligations that otherwise apply to non-grandfathered, nonexempt employers, the 2013 final rules require that an eligible organization complete a self certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id.* at 39,878–79. In the case of an organization with an insured group health insurance issuer, upon receipt of the self certification, the organization's health insurance issuer must provide separate payments to plan participants and beneficiaries for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or

beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,875–77. The government expects that its insurers will have options to achieve cost neutrality, including by way of cost savings from improvements in women's health and fewer pregnancies, and by including the cost of contraceptive services as an administrative cost that is spread across the issuer's entire risk pool (excluding plans established or maintained by eligible organizations). *Id*. at 39,877-78. In the case of an organization with a self-insured group health plan, upon receipt of the self certification, the organization's TPA is designated as plan administrator and claims administrator for purposes of providing or arranging separate payments for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,879–80. Under the 2013 final rules, costs incurred by TPAs relating to the coverage of contraception services for employees and students of eligible organizations can be reimbursed through an adjustment to Federally-Facilitated Exchange user fees. *See* 78 Fed. Reg. 39,880. The contraceptive services provided are directly tied to the employer's insurance policy, and are available only so long as the employees/students are enrolled in the organization's health plan. 45 C.F.R. § 147.131(c). The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. 39,872.

Ultimately, several exemptions from the ACA's coverage requirements have survived the law's revisions, including exemptions for smaller employers—those with fewer than fifty full time employees, 26 U.S.C. § 4980H, and employer health plans that are grandfathered, 42 U.S.C. § 18011. In addition, religious employers meeting the narrow definition of religious employer are exempted from the contraceptive coverage requirement. 45 C.F.R. § 147.131(a). A

noncomplying employer who does not meet an exemption will face large fines, specifically, $2,000 per year per full time employee (less 30 employees) for not providing insurance meeting the coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the coverage required by the contraception mandate, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

As detailed below, Grace and Biola do not meet any of these exemptions; rather, they meet the "accommodation" created for nonprofit religiously affiliated employers, which the Seventh Circuit has characterized as "an attempted workaround whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (Rovner, J., dissenting). The plaintiffs argue that compliance with the contraception mandate, even via the accommodation, violates their religious exercise rights.

The Plaintiffs

The presidents of Grace Schools and Biola University, Inc. have verified the facts applicable to their claims and request for injunctive relief [DE 54][6]. Both Grace and Biola are not for profit Christ-centered institutions of higher learning. *Id*. at ¶¶ 2, 10-11. To fulfill their religious commitments and duties in a Christ-centered educational context, plaintiffs promote the spiritual and physical well-being and health of their employees and students, which includes the provision of health insurance to their employees and students. *Id*. at ¶¶ 43, 68.

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[6]The verified complaint serves as the equivalent of an affidavit and, unless specifically noted herein, the defendants do not contest these facts, which are admitted for preliminary injunction purposes. *See IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 542 (7th Cir. 1998). In addition, no hearing was necessary given the controversy was controlled by the undisputed facts detailed in this order.

Grace College and Seminary, located in Winona Lake, Indiana, was founded in 1937 and has a mission to be "an evangelical Christian community of higher education which applies biblical values in strengthening character, sharpening competence, and preparing for service" and pursues its mission through biblically-based programs and services founded in the historic Fellowship of Grace Brethren Churches [DE 54 at ¶¶ 21, 24, 26]. Grace embraces Christian core values, its students, administration, faculty, and staff aim together to make Christ preeminent in all things, *id*. at ¶¶ 22-23, and Grace has a "Covenant of Faith" that is consistent with the beliefs of the Fellowship of Grace Brethren Churches which affirms biblical truth and God's grace. *Id*. at ¶¶ 25, 27. Members of Grace's Board of Trustees, which governs the College, must subscribe annually to the Covenant of Faith, and Grace draws its faculty, staff, and administration from among those who profess the Covenant of Faith. *Id*. at ¶¶ 27-28. Although Grace does not require student membership in the Grace Brethren denomination, it does require a profession of faith as a prerequisite for student admission and students are expected to adhere to the standards set forth in the Grace community and lifestyle statement. *Id*. at ¶ 29. Through its Fall 2013 "Statement on Community Expectations for Faculty and Staff," members of the Grace community agree to uphold the standards of the community, which in pertinent part states:

> Grace Schools values the worth and dignity of human life as expressed through the fruit of the Spirit. Having been made in the image of God, those who live and work at the institution express like faith and are expected to respect and uphold life-affirming practices that distinguish our faith community from other institutions of higher education, particularly for those who are vulnerable members of society. Consistent with the views of the Fellowship of Grace Brethren Churches, Grace Schools believes that human life is worthy of respect and protection at all stages from the time of conception. The sanctity of human life is established by creation (Genesis 1:26-27), social protection (Genesis 9:6) and redemption (John 3:16).

[DE 54 at ¶¶ 36-37]. Further, the Fellowship of Grace Brethren Churches believes that human

life is worthy of protection and respect at all stages from the time of conception (or fertilization), and Grace has the religious view that the procurement, participation in, facilitation of, or payment for abortion (including abortion-causing drugs) violates the Sixth Commandment and is inconsistent with the dignity conferred by God on creatures made in His image. *Id*. at ¶¶ 32-35.

Consistent with its religious commitments, Grace provides a self-insured group plan for its employees, acting as its own insurer but working with a third-party claims administrator [DE 54 at ¶ 44]. Under the terms of Grace's plan for its employees, coverage excludes abortifacient drugs, however, the employee plan does include a variety of contraceptive methods that Grace does not consider to be morally objectionable. *Id*. at ¶¶ 46-47. In addition, Grace requires all registered residential students to have health insurance, and if a student does not submit proof of coverage, Grace will enroll the student in a health insurance plan issued by Gallagher Koster and bill enrolled students for the cost of the coverage. *Id*. at ¶ 50. Grace's student plan does not include coverage for abortifacient drugs and related counseling to which it morally objects. *Id*.

Grace currently has approximately 457 employees and 3,100 students [DE 54 at ¶¶ 30-31]. Approximately 168 employees are enrolled in Grace's group health plan, along with approximately 307 dependents. *Id*. at ¶ 45. In the 2013-2014 school year, approximately 60 students enrolled in the student insurance plan facilitated by Grace. *Id*. at ¶ 50.

Biola University, located in La Mirada, California, was founded in 1908 as the Bible Institute of Los Angeles and has a mission to provide biblically or Christ-centered education, scholarship and service—equipping men and women in mind and character to impact the world for the Lord Jesus Christ [DE 54 at ¶¶ 51-52, 55, 57-60]. Biola's vision is to be an exemplary Christian university and believes that all it does should be Christ-centered. *Id*. at ¶¶ 53, 55.

Biola also believes that God uses its faculty, staff, students, and alumni to accomplish God's plans, and draws its faculty, staff, and students from among those who profess faith in Christ. *Id*. at ¶¶ 56, 61.

Biola's "Doctrinal Statement" declares that "[t]he Bible is clear in its teaching on the sanctity of life. Life begins at conception. We reject the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia because it is unbiblical and contrary to God's will. Life is precious and in God's hands." [DE 54 at ¶ 65]. The Biola Employee Handbook, in a section entitled "Standard of Conduct," states in part as follows: "Consistent with the example and command of Jesus Christ, we believe that life within a Christian community must be lived to the glory of God, with love for God and for our neighbors . . .[t]o this end, members of the Biola community are not to engage in activities that Scripture forbids. Such activities include . . . the destruction or termination of innocent human life through human intervention in any form after conception including, but not limited to, abortion, infanticide or euthanasia." *Id*. at ¶ 66. In addition, Biola's undergraduate Student Handbook provides in relevant part: "The University wants to assist those involved in unplanned pregnancy while at Biola to consider the options available to them within the Christian moral framework. These include marriage of the parents, single parenthood, or offering the child for adoption. Because the Bible is clear in its teaching on the sanctity of human life, life begins at conception; we abhor the destruction of innocent life through abortion on demand. Student Development stands ready to help those involved to cope effectively with the complexity of needs that a crisis pregnancy presents." *Id*. at ¶ 67.

Biola offers two medical insurance plans to regular employees who work at least 30

hours per week, for at least ten months of the year—one plan is through Kaiser, while the other is through Blue Shield [DE 54 at ¶¶ 69-70]. Biola has approximately 856 full time, benefit-eligible employees, and approximately 1,835 individuals are covered under its two employee health insurance plans. *Id*. at ¶ 71.

Prior to April 1, 2012, the former Anthem Blue Cross plan and the Kaiser plan did cover all FDA-approved contraceptives, but the inclusion of abortion-inducing drugs was neither knowing nor intentional on Biola's part. *Id*. at ¶¶ 73, 75. Since April 1, 2012, the Blue Shield plan has not covered abortion-inducing drugs, but it does provide coverage of other drugs characterized by the FDA as "contraceptives." *Id*. at ¶ 74. Also since April 1, 2012, the Kaiser plan has not covered any contraceptives, but employees can receive coverage of non-abortifacient prescription contraceptive drugs through Script Care, a pharmacy benefits manager. *Id*. at ¶ 75.

Biola requires its students to have health insurance coverage and facilitates health insurance through United Health Care for its students who are not otherwise covered by health insurance [DE 54 at ¶ 76]. While Biola does not indicate the number of students enrolled in its health plan, it currently has approximately 6,323 students. Biola University, Five Year Enrollment Summary 2009-2013 Summary, http://www.biola.edu/registrar/research_reporting/5_year_enrollment/5_Year_Enrollment_Summary.pdf (last visited Dec. 15, 2013). Students who enroll in the plan pay the premium to Biola and then Biola remits payment to the carrier on behalf of the students [DE 54 at ¶ 76]. Ella and Plan B are excluded from this plan. *Id*.

Although Grace and Biola were protected by the safe harbor which was extended through the end of 2013, their employee and student health plans must comply with the contraception

mandate thereafter, *id.* at ¶¶ 48, 116-18, 150, 179, 181, 275, because plaintiffs do not meet the religious employer exemption and their health plans are not grandfathered. *Id*. at ¶¶ 3, 49, 72, 143-144. Specifically, Grace's employee and student health plans are subject to the contraception mandate on January 1, 2014 and July 25, 2014, respectively, and Biola's employee and student health plans are subject to the mandate on April 1, 2014 and August 1, 2014, respectively. *Id*. at ¶¶ 48, 179, 181. However, the plaintiffs are eligible for the accommodation. *Id*. at ¶ 148.

As plaintiffs profess their religious beliefs, compliance with the accommodation violates their free exercise rights because it forces the plaintiffs to obtain insurance and certify a form that specifically requires an issuer or TPA to provide coverage for the objectionable contraceptive services as a direct consequence of the health benefits provided by the plaintiffs [DE 54 at ¶¶ 5, 133] (claiming that the accommodation forces plaintiffs to deliberately provide health insurance that will trigger[7] access to abortion inducing drugs and related education and counseling). In other words, by invoking the accommodation and executing the self certification, plaintiffs would initiate the insurance coverage of morally objectionable contraceptive services [DE 54 at ¶¶ 152-55]. And by issuing the self certification, the plaintiffs would be identifying their participating employees and students to the TPA/issuer for the distinct purpose of enabling the government's scheme to facilitate free access to abortifacient services, to which plaintiffs would have to continue to play a central role in facilitating. *Id*. at ¶¶ 156-63.

[7]Defendants dispute that the regulations require plaintiffs to "trigger" or "facilitate" the provision of contraceptive services to which plaintiffs object; however, defendants acknowledge that this is plaintiffs' characterization of what the mandate requires of them were the plaintiffs to complete the self-certification form and provide a copy of it to their issuer/TPA.

The government contends that even prior to the ACA's passage, Grace and Biola would have had to provide notice to their issuers/TPAs indicating that their insurance plans should exclude coverage for objectionable contraceptive services. However, the government makes the contention without providing any evidence of what type of notice was previously given by plaintiffs to their insurers/TPAs, if any, for the *exclusion* of particular services.

Plaintiffs contend that they strongly believe that God has condemned the intentional destruction of innocent human life and, as a matter of religious conviction, it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion or the use of drugs that can (and do) destroy human life in the womb—which the accommodation permits. *Id*. at ¶¶ 2, 175-78. On the other hand, refusing to offer insurance (which plaintiffs allege transgresses their religious duty to provide for the well-being of their employees and students) or refusing to comply with the contraception mandate, would cause them to face enormous fines that would financially devastate their operations and undermine their mission. *Id*. at ¶¶ 7, 179-81.

Plaintiffs also represent that rather than imposing the burden of the accommodation upon them, there are alternative mechanisms through which the government could provide access to the objectionable contraceptive services [DE 54 at ¶¶ 189-92]. For instance, plaintiffs argue that the government could provide contraceptive services through direct government payments, or through tax deductions, refunds or credits. *Id*. at ¶¶ 191-93. Moreover, plaintiffs argue that the government's interests in pursuing the mandate can hardly be compelling or pursued by the least restrictive means where it has excluded millions of employers from the ACA's requirements, including those employers who are grandfathered, 42 U.S.C. § 18011, or have fewer than 50

employees, 26 U.S.C. § 4980H; and where the government has included an exemption from the contraception mandate for those deemed religious employers, 45 C.F.R. § 147.131(a). *Id*. at ¶¶ 194-202. Plaintiffs argue that these broad exemptions further demonstrate that they could also be exempted from the requirements of the contraception mandate without measurably undermining any sufficiently important governmental interest served by the mandate. *Id*. at ¶ 195.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Ezell*, 651 F.3d at 694. This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.[8] *See Planned Parenthood*, 699 F.3d at 972. The aim is to minimize the costs of a wrong decision. *See Stuller*,

[8]As an aside, the government noted an objection to applying the sliding scale approach, arguing that the approach is inconsistent with the Supreme Court's holding in *Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008) requiring a plaintiff to show all of the preliminary injunction factors. But the government also recognized that the undersigned is nonetheless bound to apply the Seventh Circuit's sliding scale approach to an injunction. In fact, the Seventh Circuit has recently determined that its sliding scale approach is "a variant of, though consistent with, the Supreme Court's recent formulations of the standard . . ." *Planned Parenthood of Wisc., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596 (7th Cir. Dec. 20, 2013) (citing *Winter*, 555 U.S. at 20).

Inc. v. Steak N Shake Enters., Inc., 695 F.3d 676, 678 (7th Cir. 2012).

The appropriateness of a preliminary injunction in this case rests on plaintiffs' RFRA claim and presents the following issues: does the contraception mandate and accommodation provided substantially burden the religious exercise rights of the plaintiffs, and if so, has the government discharged its burden of justifying its regulations under strict scrutiny. Here, plaintiffs have shown some likelihood of success on the merits of their RFRA claim, that no adequate remedy at law exists, and that they will suffer irreparable harm without an injunction. And, a weighing of the injunction equities and consideration of the public interest also strongly supports issuance of an injunction at this stage of the litigation.

III. Analysis

To begin, for purposes of determining whether a preliminary injunction is appropriate in the instant case, no one questions that the issues presented based on the 2013 final rules are ripe for ruling, that the threat of financial penalty and other enforcement action is sufficient to establish the plaintiffs' standing to challenge the accommodation, and that plaintiffs—nonprofit religious organizations—exercise religion in the sense that their activities are religiously motivated. The Court will thus consider the appropriateness of injunctive relief in the instant case.

Success on the Merits of the RFRA Claim

The RFRA prohibits the federal government from placing substantial burdens on "a person's exercise of religion," 42 U.S.C. § 2000bb–1(a), unless it can demonstrate that applying the burden is "in furtherance of a compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest," *id*. § 2000bb–1(b). RFRA creates a

broad statutory right to case-specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test. *Korte*, 735 F.3d at 671-72 (reasoning that with RFRA, Congress expressly required accommodation rather than neutrality) (citation and quotation marks omitted). RFRA is structured as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Id*. at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)).

Once a RFRA claimant makes a *prima facie* case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny. *Id.* (citing *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006)). "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . .". *Id*. (citing *O Centro Espirita*, 546 U.S. at 430). Thus, in RFRA litigation, as in First Amendment litigation, "the burdens at the preliminary injunction stage track the burdens at trial." *Id*. (citing *O Centro Espirita*, 546 U.S. at 429).

1. Substantial Burden

While neither the United States Supreme Court nor any Circuit Courts have had the opportunity to consider whether the contraception mandate creates a substantial burden on a non-secular, nonprofit organization's religious exercise rights given the "accommodation" created for

eligible organizations,[9] the Seventh Circuit recently discussed in *Korte* the substantial burden analysis in the context of RFRA:

> Recall that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisc. v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526 (1972). But a burden on religious exercise also arises when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 (1981); *see also Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Construing the parallel provision in RLUIPA, we have held that a law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The same understanding applies to RFRA claims.
>
> Importantly, the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious

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[9]In fact, not many district courts have had the opportunity to consider this question relative to nonprofit religious organizations, and their conclusions vary. Three courts have upheld the accommodation. *See Catholic Diocese of Nashville v. Sebelius,* No. 3:13-01303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) (Simon, C.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013). While the other courts have found the accommodation to pose a substantial burden. *See Geneva College v. Sebelius,* No. 12-0207 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *see also Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (drawing a distinction between self insured and group insured plans and granting a preliminary injunction only with respect to a self insured plaintiff despite the fact that all eligible organizations are confronted with the self certification process created by the accommodation).

> obligations. *See United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982); *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. It 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. *Id.*; *see also id.* at 715, 101 S.Ct. 1425 ("Thomas drew a [religious] line, and it is not for us to say that the line he drew was an unreasonable one.").
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> Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. *Cf. United States v. Seeger*, 380 U.S. 163, 184–86, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (military-conscription exemption applies only to objections based on sincerely held religious beliefs as opposed to philosophical views or a personal moral code). These are factual inquiries within the court's authority and competence. But we agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the "intensity of the coercion applied by the government to act contrary to [religious] beliefs." *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 114, 1137 (10th Cir. 2013). 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 682-83. With these principles in mind, the Seventh Circuit determined, in relevant part, that it was a substantial burden on the for profit company plaintiffs and their owners to require them to *purchase or provide* the required contraception coverage (or self-insure for these services). *Korte*, 735 F.3d at 668.

In the instant case, the government defendants posit that *Korte* and other similar for profit plaintiff cases, *see, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), are distinguishable because the burden on Grace and Biola to comply with the accommodation is merely de minimus where plaintiffs would barely have to modify their behavior by complying with the purely administrative self certification requirement which should take a matter of

minutes. Moreover, the government believes that any burden cast upon Grace and Biola is too attenuated to constitute a substantial burden.

The Court acknowledges that the burden on Grace and Biola to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs. Simply put, Grace and Biola are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections, 78 Fed. Reg. 39,874. Rather the plaintiffs must complete a self certification form stating that each is an eligible organization which objects to providing the contraceptive coverage on religious grounds and provide a copy of that self certification to its issuer or TPA, so that the payment for the services can then be provided or arranged for by the issuer or TPA at no cost to Grace or Biola. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39,874-75. But even so, the Court cannot agree with the government that Biola and Grace have not shown at least some reasonable likelihood of success on the merits relative to the showing of a substantial burden as defined in *Korte.*

According to the Seventh Circuit, the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice. *Korte*, 735 F.3d at 683; *see Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *Gilardi*, 733 F.3d at 1217-18 (" . . . the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a

penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong."). And in this case, the government defendants concede that plaintiffs' religious beliefs are sincerely held. In fact, the only evidence before the Court—plaintiffs' undisputed affirmations—indicate that their beliefs are indeed sincere and religious in nature. Therefore, the government rests its argument on its belief that plaintiffs cannot establish a substantial burden on plaintiffs' religious exercise rights where the regulations do not, according to the government, require the plaintiffs to modify their religious behavior.

Grace and Biola have established that the accommodation compels them to facilitate and serve as the conduit through which objectionable contraceptive products and services are ultimately provided to their employees and students, in violation of their unquestionably sincerely held religious beliefs. And prior to the ACA's enactment, no evidence establishes that Grace and Biola previously discussed or provided a similar notice to their insurers/TPAs indicating that contraceptive services (specifically) were to be excluded from their health plans. In fact, given the religiously affiliated nature of the plaintiffs and their public stance on abortion and contraception, it is just as likely that those services would not have required any discussion, let alone a self certification, prior to their purchasing insurance coverage. *Cf. University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) ("In sum, the certification merely denotes Notre Dame's refusal to provide contraceptive care—a statement that is entirely consistent with what Notre Dame has told its TPA in the past . . . [and so, the holding] isn't that a compelled action is de minimis. It's that no action is being compelled at all because the action would be taken [by Notre Dame] even if no contraception requirement applied.").

But even if the plaintiffs previously informed their insurers/TPAs not to provide coverage for objectionable contraceptive services, the government's argument relative to the de minimus nature of any burden created by the accommodation is too narrow of a focus. The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees and students (to comply with their own religious tenants and to avoid the ACA's fines for failing to meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs). Thus, although plaintiffs avoid paying for the services, the compulsion to offer group health insurance results in their direct facilitation of insurance coverage and the potential use of contraceptive services by their employees and students, services which plaintiffs morally oppose. That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs. Ultimately, the plaintiffs would be forced to modify their behavior *and* violate their religious beliefs by either giving up their health insurance plans or by providing insurance but taking critical steps to facilitate another's extension of the objectionable coverage. *See Korte*, 735 F.3d at 682-83; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (citing *Thomas*, 450 U.S. at 718). And, their failure to comply with insurance requirements or provide contraceptive services results in

enormous penalties that would be financially detrimental to their operations. In short, the government's accommodation results in the plaintiffs violating their sincerely held religious beliefs, as well as the choice between conformity with the ACA's requirements or face substantial fines. *See Korte*, 735 F.3d at 683; *see also Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (DE 45 at 16) ("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. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary."). Thus, given the nature of the analysis utilized, the undersigned believes that *Korte* may logically be extended to conclude that the completion and submission of the self certification is an alteration in plaintiffs' behavior such that it constitutes a substantial burden under RFRA. *See University of Notre Dame*, No. 3:13-cv-1276-PPS-CAN ("Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA"); *see also Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013) ("although the 'accommodation' legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and

counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs."). Given *Korte's* guidance, the lack of mandatory authority on the precise issue at hand, and the divergence of case holdings demonstrating the difficulty of the issue and the uncertainty of the ultimate decision on the merits, the Court believes that plaintiffs have shown at least some reasonable likelihood of success on the merits relative to the substantial burden analysis. And even if that likelihood was just more than slight, the balance of harms could support injunctive relief.[10]

Before concluding the substantial burden analysis, the undersigned would be remiss if it didn't acknowledge the government's alternative argument, that any burden on plaintiffs' religious exercise is too attenuated to render it substantial. In summary, the government believes that because plaintiffs are not required to actually contract or pay for contraceptive coverage any burden is too attenuated to be substantial because plaintiffs are separated by a series of events that must occur before the objectionable contraceptive services would be utilized. Specifically, after receiving the certification from plaintiffs, the TPA or issuer would actually pay for or arrange payment for the contraceptive services should employees and students independently decide to even use those services.

Similarly, in *Korte*, the government argued that the contraception mandate's burden was

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[10]*See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) ("Once the district court determined that [plaintiff's] likelihood of success on the merits of its claim was slight, it required [plaintiff] to make a proportionately stronger showing that the balance of harms was in its favor.") (citing *Accord Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

insubstantial because any use of contraceptive services could not be attributed to the corporate plaintiffs or their owners since the provision of the contraceptive coverage was several steps removed from an employee's independent determination to use contraception. *See Korte*, 735 F.3d at 684. However, the Seventh Circuit's majority opinion reasoned that the government's attenuation argument is equivalent to improperly asking whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' religion]." *Id*. at 685.[11] But, "[n]o civil authority can decide that question". *Id.*; *see Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14 ("The Government feels that the accommodation sufficiently insulates the plaintiffs from the objectionable services, . . . [but] it is not the Court's role to say that plaintiffs are wrong about their religious beliefs."); *see also Hobby Lobby*, 723 F.3d at 1142 (the 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).

Here, no one questions that among the plaintiffs' religious tenets is that life begins at conception and that providing all FDA approved contraceptive service violates those tenets. And so it follows that plaintiffs object to deliberately providing health insurance that will trigger access to objectionable contraceptive services and related education and counseling. By completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees and students will eventually secure access to free contraceptive services. In their minds, this makes them complicit in the

[11]Judge Rovner understood the majority to be rejecting any assessment on how direct or attenuated the burden imposed on the plaintiff's religious practices may be. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting).

provision and use of such services. Again, the government does not contest the sincerity of these beliefs. Because Grace and Biola hold these honest religious convictions and because failing to comply with the law will result in heavy financial penalties and the risk of enforcement actions (which will significantly impact their ability to provide religious services), *id*. at 683, plaintiffs have shown that the contraception mandate and accommodation constitute a substantial burden on their religious exercise. As a result, the government must justify its regulations under the compelling interest test.

2. Least Restrictive Means and Compelling Government Interest

RFRA requires the government to demonstrate that applying the contraception mandate and its accommodation are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Again, the Court follows the precedent set forth in *Korte*, in applying the appropriate test in this context. In fact, the government has since conceded that the recent decision in *Korte* forecloses its arguments that the regulations satisfy strict scrutiny, even in this context [DE 81 at 2, fn. 1]. Regardless, the Court will conduct an analysis for completeness of the record.

Consistent with *Korte*, the Supreme Court has instructed courts to look beyond "broadly formulated interests justifying the general applicability of government mandates" and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Korte*, 735 F.3d at 685 (citing *O Centro Espirita*, 546 U.S. at 431). In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening these claimants. *Id*.

The compelling-interest test generally requires a "high degree of necessity." *Id*. (citing

Brown v. Entm't Merchs. Ass'n, — U.S. — , 131 S.Ct. 2729, 2741 (2011)). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Id*. (citing *Brown*, 131 S.Ct. at 2738). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. (citing *Yoder*, 406 U.S. at 215). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .". *Id.* (citing *Sherbert*, 374 U.S. at 406). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Korte*, 735 F.3d at 686 (citing *Sherbert*, 374 U.S. at 403). Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (7th Cir. 1993)).

Similar to the interests claimed by the government in *Korte*, the government identified two legitimate public interests in the instant case, improving the health of women and newborn children and equalizing the provision of preventive care for women and men so that women can participate in the workforce and society on an "equal playing field with men." The government (prior to the issuance of *Korte*) had argued that the contraception mandate and the accommodation furthers these interests in a narrowly tailored fashion by not requiring nonprofit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The Court agrees that the government's stated interests are indeed important, and for the sake of argument (and a thorough analysis) will assume they are even compelling. However, the

government has not shown that the contraception mandate employs the least restrictive means of furthering the government's interests, because strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest. *Korte*, 735 F.3d at 686.

As discussed, the regulatory scheme exempts or excludes certain employers from the contraception mandate and does not apply the ACA's requirements to employers with grandfathered plans or those with less than 50 employees. Since the government grants so many exceptions already, it cannot legitimately argue that its regulations are narrowly tailored, nor can they argue against exempting these plaintiffs, amounting to less than 2,000 covered people (or 1,500 eligible employees and a combined student population of less than 10,000). *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222 ("underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation"). Also, there is nothing to suggest the ACA would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement. *See Gilardi*, 733 F.3d at 1223-24.

Further, the government's reason for creating the religious employer exemption in particular was that houses of worship and their integrated auxiliaries are more likely than other employers to employ people of the same faith who share the same objection to contraceptive coverage, and who would be less likely than others to use contraceptive services even if such services were covered. *See* 78 Fed. Reg. 39,874. However, *these* plaintiffs have indicated that their employees and students are expected to uphold the universities' standards in treating human life as worthy of respect and protection at all stages from the time of conception and are

expected to avoid a Sixth Commandment violation by procuring, participating in, facilitating, or paying for objectionable contraceptive services. Thus, *these* plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as "religious employers." And yet, *these* plaintiffs have not received the same exemption as "religious employers" from having to facilitate or initiate the provision of objectionable contraceptive services, merely because they are not organized and operated as a nonprofit entity referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986—a basis which has nothing to do with the government's stated interests for imposing the requirements of the contraception mandate. *See Zubik*, 2013 WL 6118696 at *29 (noting that the religious employer exemption was not predicated on the government's stated interests). And so again, even assuming the government's interests are compelling, there is no basis indicating the government would be unable to enforce its legislation simply because these plaintiffs could avoid compliance with the contraception mandate.

Finally, there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights. Pre-*Korte*, the government maintained that the accommodation provides the least restrictive means because the self certification requires the plaintiffs to act just as they would without the mandate—by informing their TPAs or insurers that coverage should not include certain contraceptive services. But the argument falls short. First, there is no evidence that plaintiffs so informed their TPA/insurers to exclude such services prior to the ACA. Second, the government has made exemptions from the coverage requirements for other employers without requiring the same form of self certification (and resulting consequences), despite the fact that plaintiffs share

the same legitimate claim to the free exercise of religion as those exempted as religious employers. Third, the self certification process created in the accommodation essentially transforms a voluntary act that plaintiffs may have utilized to ensure that the objectionable services are not provided, consistent with their religious beliefs, into a compelled act that they sincerely believe provides and promotes conduct that is forbidden by their religious beliefs. *See Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14. And so the nature of the act itself has changed, not merely the consequences of that act.

And as identified in *Korte* and as offered by plaintiffs in the instant action, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. For instance, the government can provide a "public option" for contraception insurance; it can give tax incentives or grants to contraception suppliers to provide these medications and services at no cost to consumers; and it can give tax incentives to consumers of contraception and sterilization services—all without requiring plaintiffs to self certify their religious objections to the contraception mandate and thereby directly facilitate access to objectionable contraceptive services to be arranged or paid for by third parties. Simply because these options may make it more difficult for the government to administer the regulations in a manner that would achieve the government's stated interests, greater efficacy does not equate to the least restrictive means. *See Zubik*, 2013 WL 6118696 at *23. And as the government has conceded in the instant case, *Korte* has recently made clear that its regulations fail the strict scrutiny analysis.

Bearing in mind that at this stage the court need not be certain about the outcome of the case to grant a preliminary injunction, the Court concludes the plaintiffs have shown some

reasonable likelihood of success on the merits relative to their RFRA claim. *See S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) ("The case is before us on an appeal from the grant of a preliminary injunction, and as is too familiar to require citation such a grant is proper even if the district judge is uncertain about the defendant's liability.").

Adequate Remedy at Law and Irreparable Harm

Although the claim is statutory, RFRA protects First Amendment free-exercise rights, and "in First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor.'" *Korte*, 735 F.3d at 666 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Village of Washington Park, Ill*., 378 F.3d 613, 620 (7th Cir. 2004))). "This is because the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury . . .'. " *Korte*, 735 F.3d at 666 (citing *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). Furthermore, injunctions are especially appropriate in the context of first amendment violations because the "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (citing *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)).

In the instant case, Grace must decide by December 31, 2013 whether or not to provide insurance coverage and sign the self certification with respect to its employee health plan, and less than three months later Biola must also make the same decisions. Should plaintiffs fail to comply with the insurance coverage requirements of the ACA and its contraception mandate, the plaintiffs face financially devastating fines and enforcement actions. Thus, plaintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the

merits of the plaintiffs' claims without the relief of a preliminary injunction. Given that plaintiffs' religious exercise rights are at stake in the immediate future, that a loss of these freedoms for even a minimal period of time unquestionably constitutes irreparable injury which cannot be prevented or fully rectified by waiting for a final judgment, *see Elrod*, 427 U.S. at 373; *Anderson v. U.S.F. Logistics (IMS), Inc.*, 274 F.3d 470, 478 (7th Cir. 2011), and that injunctions are designed to offer relief when legal remedies are inadequate to protect the parties' rights, *see Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 397 (7th Cir. 1984) (Swygert, J., dissenting), the Court concludes that these factors weigh strongly in favor of granting the requested relief.

Weighing the Equities and Public Interest

In weighing the equities, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). To do so, the court compares the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted. *Id*. (citing *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). We evaluate these harms using a sliding scale approach. *Id*. (citing *Ty, Inc.*, 237 F.3d at 895). The more likely it is that plaintiffs will win their case on the merits, the less the balance of harms need weigh in their favor. *Id*. (citations omitted). Conversely, if it is very unlikely that plaintiffs will win on the merits, the balance of harms need weigh much more in plaintiffs' favor. *Id*. (citations omitted). When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the

preliminary injunction on nonparties to the litigation. *Id*. (other citations omitted). This analysis is "'subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100 (citations omitted).

As the Court has previously detailed herein, the harm likely to be caused the plaintiffs without an injunction is imminent and irreparable, whereas the government likely faces no risk of harm, let alone irreparable harm, if the preliminary injunction is granted. The Court agrees with the district court's comments in *Zubik*, in that the combined nationwide total of the millions of Americans whose employers fall within some type of exclusion, exemption, or plan grandfathered from the ACA and contraception mandate's requirements demonstrates that the government will not be harmed in any significant way by the exclusion of these few plaintiffs. *Zubik*, 2013 WL 6118696 at *34; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, *10 (W.D. Pa. June 18, 2013) ("tens of millions of individuals . . . remain unaffected by the mandate's requirements"). Moreover, the government has itself delayed the enforcement of the contraception mandate by initially granting a safe harbor from its enforcement and agreeing to injunctions in other cases involving challenges to the mandate.

Additionally, granting the preliminary injunction furthers the public interest. While it is true that employees and students of the plaintiffs will face an economic burden not shared by employees and students of organizations that cover all of the contraceptive methods imposed by the mandate, plaintiffs have already established that their employees and students were not only informed of the universities' religious stance regarding contraception and abortion, but they were on notice of the universities' expectation that its employees and students would promote the

universities' religious views and community standards by refraining from the procurement, participation in, facilitation of, or payment for objectionable contraceptive services. [12] With that said, the plaintiffs' employees/students and the public is best served if the plaintiffs can continue to provide needed (and expected) educational services, and the needed (and expected) insurance coverage to its employees and students, without the threat of substantial fines for noncompliance with the contraception mandate and its accommodation. Moreover, injunctions protecting First Amendment freedoms are always in the public interest, *see Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and the Court sees no reason to make an exception here.

The Court would also note that Grace and Biola quickly filed an amended complaint and sought an injunction after the 2013 final rules were passed. Thus, there has been no delay in their pursuit of a preliminary inunction. *See Ty, Inc.*, 237 F.3d at 903 (a delay in pursuing a preliminary injunction may raise questions regarding irreparable harm.) Additionally, Grace and Biola have established that their employees and students were made aware of the universities' expectation that they were to promote the universities' religious views and community standards by refraining from the procurement of, participation in, facilitation of, or payment for objectionable contraceptive services. Thus, it cannot be said that there was any expectation that the universities would ever facilitate access to all FDA approved contraceptive services for its employees and students. Undoubtedly, the balance of harms in this case weighs heavily in plaintiffs' favor, enough so that any weakness in the merits of their case is overcome, thereby making injunctive relief appropriate to maintain the status quo until a decision on the

[12]The government contends that not every employee and student of the plaintiffs share the plaintiffs' religious objections to certain contraceptive services. And while this *may* very well be true, it does not negate the fact that said employees and students were aware of the universities' expectations with respect to their use of contraceptive services.

merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 783 (7th Cir. 2011) ("The preliminary injunction, after all, is often seen as a way to maintain the status quo until merits issues can be resolved at trial. By moving too quickly to the underlying merits, the district court required too much of the plaintiffs . . .").

IV. Conclusion

Accordingly, it is hereby ORDERED that plaintiffs Grace Schools and Biola University, Inc.'s motion for a preliminary injunction [DE 55] based upon the uncontested and verified allegations of their first amended complaint [DE 54] is GRANTED, and as a result, defendants, their agents, servants, officers, employees, representatives, and all persons in active concert or participation with them are hereby ENJOINED from:

> Applying or enforcing against Plaintiffs Grace Schools and Biola University, Inc. or their employee or student health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling.

It is further ORDERED that plaintiffs shall not be required to post bond; however, should circumstances change prior to the Court's making a determination on the merits of the case, including new developments in the law, which may make the preliminary injunction or its terms no longer appropriate, then counsel are free to file a motion seeking a modification or vacatur of

the injunction.

SO ORDERED.

ENTERED: December 27, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-159 JD
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

Memorandum Opinion and Order

Plaintiffs Diocese of Fort Wayne-South Bend, Inc. ("Diocese"), Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc. ("Catholic Charities"), Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc. ("Saint Anne Home"), Franciscan Alliance, Inc. ("Franciscan"), Specialized Physicians of Illinois, LLC ("Specialty Physicians"), University of Saint Francis ("University"), and Our Sunday Visitor, Inc. ("Our Sunday Visitor") (collectively "plaintiffs"), have filed their first amended verified complaint [DE 73] seeking declaratory and injunctive relief claiming that the government defendants have violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, the First Amendment of the Constitution of the United States, and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, by enacting the "contraception mandate" which requires certain employers to provide coverage for contraception and sterilization procedures in their employee health care plans on a no-cost-sharing basis, or face stiff financial penalties and the risk of enforcement actions for the failure to do so. Although the defendants have since moved to dismiss the amended complaint and the parties have sought summary judgment on the various

claims presented [DE 85; DE 95], the Court focuses only on plaintiffs' request for injunctive relief and defendants' objection thereto,[1] in an effort to prevent the possibility of any unjust enforcement of the contraception mandate against plaintiffs come the first of the year.

For the reasons that follow, plaintiffs have shown that their RFRA claim stands a reasonable likelihood of success on the merits, that irreparable harm will result without adequate remedy absent an injunction, and that the balance of harms favor protecting the religious-liberty rights of the plaintiffs. As such, the Court enters a preliminary injunction barring enforcement of the contraception mandate against plaintiffs.

I. Background

The Contraception Mandate

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg–13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg–13(a)(4). The HRSA, an agency of the U.S. Department of Health and Human Services (HHS), then delegated the task of developing appropriate preventive-services guidelines to the Institute of Medicine (IOM), an arm of the National Academy of Sciences funded by Congress to

[1]The Court has also carefully considered the supplemental notices of authority and responses filed by counsel, along with the amicus curiae briefs filed by counsel for the American Civil Liberties Union and the American Center for Law & Justice along with 79 Members of the United States Congress.

provide the government with independent expert advice on matters of public health. After reviewing the type of preventive services necessary for women's health and well-being, the IOM recommended that the following preventive services be required for coverage: annual well-woman visits; screening for gestational diabetes and breast-feeding support, supplies, and counseling; human papillomavirus screening; screening and counseling for sexually transmitted infections and human immune-deficiency virus; screening and counseling for interpersonal and domestic violence; and contraceptive education, methods, and services so that women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes. *See* IOM, Clinical Preventive Services for Women: Closing the Gaps, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx (last visited Dec. 9, 2013). Based on the IOM's recommendations, the HRSA issued comprehensive guidelines requiring coverage of (among other things) "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling[2] for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well–Being, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 9, 2013). These include hormonal methods such as oral contraceptives (the pill), implants and injections, barrier methods, intrauterine devices, and emergency oral contraceptives (Plan B and Ella).[3] *See* FDA, Birth

[2]The defendants clarify that this requirement does not indicate that such education and counseling need necessarily be 'in support of' certain contraception services or contraception in general.

[3]As the government points out, the list of FDA approved contraceptive methods does not include abortion, however, the terms "abortifacients" or "abortion inducing drugs" as used throughout this opinion refers to plaintiffs' characterization of contraception that artificially

Control: Medicines To Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (lasted visited Dec. 9, 2013). On February 15, 2012, HHS published final regulations incorporating the HRSA guidelines. 77 Fed. Reg. 8725 (Feb. 15, 2012). The agency made the mandate effective in the first plan year on or after August 1, 2012, *see* 45 C.F.R. § 147.130(b)(1), however, a temporary enforcement safe harbor for nonexempt nonprofit religious organizations that objected to covering contraceptive services was also created, making the mandate effective in the first plan year on or after August 1, 2013 for those qualifying organizations who did not meet the religious employer exemption. 77 Fed. Reg. 8728-29. The government then undertook new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered[4] nonprofit religious organizations with religious objections to covering contraceptive services. *Id*.

On March 21, 2012, the government issued an Advance Notice of Proposed Rulemaking that stated it was part of the government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012). On February 1, 2013, the government issued a Notice of Proposed Rulemaking (NPRM), setting forth a proposal that stated it was to "amend the criteria for the religious

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interferes with life and conception in violation of their religious beliefs.

[4]"Grandfathered" plans are those health plans that do not need to comply with the ACA's coverage requirements because they were in existence when the ACA was adopted and did not make certain changes to the terms of the plan. 42 U.S.C. § 18011. The purpose of grandfathering plans was to allow individuals to maintain their current health insurance plan, to reduce short term disruptions in the market, and to ease the transition to market reforms that phase in over time. *See* 75 Fed. Reg.. 34,546 (June 17, 2010). The number of grandfathered plans is expected to decline over time.

employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). On June 28, 2013, the government issued final rules adopting and/or modifying the proposals in the NPRM. *See* 78 Fed. Reg. 39,870. The regulations challenged here (the "final rules") include the new regulations issued by the government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering contraceptive services. *See* 78 Fed. Reg. 39,870.

The final rules state that they "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed. Reg. 39,871. Under the new definition, an exempt "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 78 Fed. Reg. 39,874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. 39,874 (citing 78 Fed. Reg. 8461). The 2013 final rules' amendments to the religious employer exemption apply

to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See id.* at 39,871.

The 2013 final rules also included an "accommodation" regarding the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. 39,874–80; 45 C.F.R. § 147.131(b)-(f). An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. 39,874. To be relieved of the obligations that otherwise apply to non-grandfathered, nonexempt employers, the 2013 final rules require that an eligible organization complete a self certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id.* at 39,878–79. In the case of an organization with an insured group health insurance issuer, upon receipt of the self certification, the organization's health insurance issuer must provide separate payments to plan participants and beneficiaries for

contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,875–77. The government expects that its insurers will have options to achieve cost neutrality, including by way of cost savings from improvements in women's health and fewer pregnancies, and by including the cost of contraceptive services as an administrative cost that is spread across the issuer's entire risk pool (excluding plans established or maintained by eligible organizations). *Id*. at 39,877-78. In the case of an organization with a self-insured group health plan, upon receipt of the self certification, the organization's TPA is designated as plan administrator and claims administrator for purposes of providing or arranging separate payments for contraceptive services without cost sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or it's plan. *Id*. at 39,879–80. Under the 2013 final rules, costs incurred by TPAs relating to the coverage of contraception services for employees of eligible organizations can be reimbursed through an adjustment to Federally-Facilitated Exchange user fees. *See* 78 Fed. Reg. 39,880. The contraceptive services provided are directly tied to the employer's insurance policy, and are available only so long as the employees are enrolled in the organization's health plan. 45 C.F.R. § 147.131(c). The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. 78 Fed. Reg. 39,872.

Ultimately, several exemptions from the ACA's coverage requirements have survived the law's revisions, including exemptions for smaller employers—those with fewer than fifty full time employees, 26 U.S.C. § 4980H, and employer health plans that are grandfathered, 42 U.S.C. § 18011. In addition, religious employers meeting the narrow definition of religious employer

are exempted from the contraceptive coverage requirement. 45 C.F.R. § 147.131(a). A noncomplying employer who does not meet an exemption will face large fines, specifically, $2,000 per year per full time employee (less 30 employees) for not providing insurance meeting the coverage requirements, 26 U.S.C. § 4980H(c), or $100 per day per employee for providing insurance that excludes the coverage required by the contraception mandate, 26 U.S.C. § 4980D, and will face the risk of other enforcement actions.

As detailed below, the Diocese itself is exempted from the mandate under the religious employer exemption, while the remaining plaintiffs are subject to its accommodation [DE 73 at ¶¶ 10, 14] created for nonprofit religiously affiliated employers—which the Seventh Circuit has characterized as "an attempted workaround whereby the objecting employer gives notice to its insurance carrier and the insurer issues a separate policy with the mandated coverage." *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (Rovner, J., dissenting). The plaintiffs argue that compliance with the contraception mandate, even via the accommodation, violates their religious exercise rights.

Factual Background

The plaintiffs have verified the facts applicable to their claims and request for injunctive relief via various affidavits and declarations[5] [DE 76-82; DE 98-1 at 00001-00107].

[5]Unless specifically noted herein, the government defendants do not contest these facts, which are admitted for preliminary injunction purposes. In addition, no hearing was necessary given the controversy was controlled by the undisputed facts detailed in this order.

1. The Plaintiffs' Religious Beliefs

In sum, Plaintiffs are all religious entities that are part of the Roman Catholic Church [DE 76 at ¶ 4; DE 77 at ¶¶ 5, 20; DE 78 at ¶ 18; DE 79 at ¶ 7; DE 80 at ¶ 10; DE 81 at ¶ 5; DE 82 at ¶¶ 4, 15]. The Catholic Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, that artificial interference with life and conception are immoral [DE 76 at ¶ 29]. Thus, plaintiffs believe that human life must be respected and protected absolutely from the moment of conception, that contraception is immoral, and that the termination of pregnancy before viability is an abortion [DE 98-1 at 99-100; DE 98-2 at 978].

Catholic religious teaching also prohibits subsidizing, providing, and/or facilitating coverage for abortion-inducing products, sterilization services, artificial contraceptives, and related counseling services [DE 98-1 at 99]. Thus, offering a health insurance plan that provides coverage for or facilitates access to[6] abortion-inducing products, contraceptives, sterilization, and related education and counseling, as permitted by the contraception mandate and its accommodation, is inconsistent with plaintiffs' core moral and religious beliefs [DE 98-1 at 99-104]. Plaintiffs' provision of health benefits to their employees reflects the Catholic social teaching that healthcare is among those basic rights that flow from the sanctity and dignity of human life [DE 98-1 at 103].

And while the government argues plaintiffs only speculate about the likely impact of any

[6]Defendants dispute that the regulations require plaintiffs to provide or facilitate the provision of contraceptive services to which plaintiffs object; however, this is plaintiffs' characterization of what the mandate requires of them were the plaintiffs to complete the self-certification form and provide a copy of it to their issuer/TPA.

fines, the plaintiffs assert that as a result of the substantial fines to be imposed for non-compliance with the ACA's coverage requirements, they may be forced to limit the significant services they provide to the community and they may even be required to downsize [DE 98-1 at 57-58, 64, 72, 77-78, 83, 89, 95]. Further, plaintiffs are concerned that fines will likely result in a reduction of donations because donors will be concerned that their money will be used to pay fines as opposed to being used in support of charitable and other community services. *Id*.

2. The Plaintiffs

The Diocese

As Chief Financial Officer of the Diocese, Joseph Ryan, provided sworn statements indicating that the Diocese is the civil law entity for the Diocese of Fort Wayne-South Bend, which is the local embodiment of the Universal Roman Catholic Church, a community which encompasses fourteen counties located in Northeast Indiana and consists of the baptized who profess the Catholic faith, share in sacramental life, and has been entrusted since January 2010 to the ministry of Bishop Kevin C. Rhoades [DE 98-1 at 54]. Bishop Rhoades is also a member of plaintiff Catholic Charities and of Saint Anne Home, and as chairman of their boards, Bishop Rhoades oversees the management of Catholic Charities and Saint Anne Home, which are integral components to the fulfillment of the religious and charitable missions of the Diocese and Catholic Church. *Id*. at 55.

The Diocese itself has approximately 2,502 employees, with over 1,400 classified as full-time (working an average of at least 30 hours per week) and over 1,200 classified as part-time (working an average of less than 30 hours per week) [DE 76 at ¶ 23]. The Diocese employs Catholic and non-Catholic teachers in its schools who must have a knowledge of and respect for

the Catholic faith, abide by the tenets of the Catholic Church as they apply to that person, exhibit a commitment to the ideal of Christian living, and be supportive of the Catholic faith. *Id*. at ¶ 22.

Consistent with Church teachings on social justice, the Diocese makes health insurance benefits available to its religious personnel, seminarians, and full-time employees through the Diocesan Health Plan. *Id*. at ¶ 24. Approximately 116 active and retired priests, religious sisters and seminarians of the Diocese, and approximately 1,034 of the Diocese's full-time employees participate in the Diocesan employee health plan. *Id*. The Diocesan Health Plan is a self-insured plan that is administered by a TPA, which handles the administrative aspects of the plan. *Id*. at ¶ 25. While the Diocese itself meets the religious employer exemption, *id*. at ¶ 31, the Diocesan Health Plan also includes the employees of non-exempt, affiliated entities such as Catholic Charities. *Id*. at ¶ 26. 33. Currently, the Diocesan Health Plan also meets the ACA's definition of a grandfathered plan and includes a statement in plan materials provided to participants or beneficiaries that it believes it is a grandfathered plan, as is required to maintain its grandfathered status [DE 76 at ¶ 27]. But in order to maintain its grandfathered status, the Diocese foregoes approximately $180,000 a year in increased premiums, so that it can protect Catholic Charities from the contraceptive mandate. *Id*. at ¶¶ 27, 32. Absent maintaining its grandfathered status at great expense, the only other options would be to either (1) sponsor a plan that will provide the employees of Catholic Charities with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to Catholic Charities, subjecting it to massive fines if it does not contract with another insurance provider that will provide the objectionable coverage [DE 76 at ¶ 33]. The Diocese asserts that the first option forces the Diocese to act contrary to its sincerely-held religious beliefs, and the

second option makes the Diocese complicit in the provision of objectionable coverage and compels the Diocese to submit to the Government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries. *Id*. ¶¶ 33- 36. The Diocesan Health Plan year begins on January 1. *Id*. at ¶ 28.

Catholic Charities

Interim Executive Director of Catholic Charities, Lisa Young, confirms in her affidavit that Catholic Charities is a nonprofit corporation affiliated with the Diocese and created in 1922 to provide organized, concerted charitable efforts [DE 77 at ¶¶ 2, 5, 7]. Catholic Charities' 36 full-time employees are offered health insurance through the Diocesan Health Plan, which, in accordance with Catholic Church teachings (as Catholic Charities bears witness to), has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its multi-employer health plan. *Id*. at ¶¶ 16, 20. And every dollar foregone by the Diocese in order to maintain its employee health plan's grandfathered status is a dollar that cannot be funneled to Catholic Charities in the execution of its programs, and yet compliance with the contraception mandate or its accommodation would be contrary to Catholic Charities' beliefs. *Id*. at ¶¶ 19, 21.

Saint Anne Home

According to the affidavit of Jason Wardwell, the Director of Human Resources of Saint Anne Home and Retirement Community of the Diocese, Saint Anne Home serves the local community by offering residential apartments, a nursing facility, rehab suites, and adult day services [DE 78 at ¶¶ 2, 8, 14]. It has approximately 310 employees, of which approximately 220 are eligible for health insurance via the Saint Anne Home Health Plan, which is a

self-insured plan administered by a TPA. *Id*. at ¶¶ 15, 23. Because the Saint Anne Home Health Plan is not grandfathered and the plan year begins on January 1, at that time it must be prepared to comply with the contraception mandate. *Id*. at ¶¶ 16, 17.

Saint Anne Home is part of the Roman Catholic Church which bears witness to the Church's teachings [DE 78 at ¶¶ 18, 22]. All of Saint Anne Home's facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time. *Id.* at ¶ 11. Saint Anne Home also abides by The National Catholic Bioethics *Center's A Catholic Guide to End-of-Life Decisions: An Explanation of Church Teaching on Advanced Directives, Euthanasia, and Physician-Assisted Suicide*. *Id*. Accordingly, though Saint Anne Home provides health insurance to its employees, it has historically excluded coverage for abortion, abortion-inducing products, contraceptives, sterilization, and related education and counseling from its health plan. *Id*. at ¶ 19. To comply with the contraception mandate and its accommodation, in order to avoid significant fines, would violate Saint Anne Home's religious beliefs by facilitating access to objectionable contraceptive services. *Id*. at ¶¶ 20-25.

Franciscan

Sister Jane Marie Klein, O.S.F., the Chair of Franciscan, provided an affidavit on behalf of the Franciscan Alliance, Inc., establishing that Franciscan is a nonprofit health system that includes eleven facilities in Indiana and two facilities in Illinois [DE 79 at ¶¶ 2, 4]. Franciscan's benefits-eligible employees may participate in a number of health benefits programs, depending on the region in which they work: Central Indiana Region, Northern Indiana Region, Western

Indiana Region, and the South Suburban Chicago Region in Illinois. *Id*. at ¶ 13. Franciscan's approximately 4,369 benefits-eligible employees in its Central Indiana Region are offered six Advantage Health Solutions, Inc. fully-insured benefits program options that are not grandfathered. *Id*. at ¶ 14. Franciscan's approximately 8,719 benefits-eligible employees in its Western Indiana and Northern Indiana Regions are offered six benefits plan options, four of which are self-insured plans administered by a TPA, Advantage Health Solutions, Inc., and two of which are Blue Cross Blue Shield of Illinois fully-insured benefits plans—none of them are grandfathered. *Id*. at ¶ 15. Franciscan's approximately 1,733 benefits-eligible employees in its South Suburban Chicago Region are offered three benefits plan options, two of which are Blue Cross Blue Shield of Illinois fully-insured benefits plans, and one of which is a self-insured benefits plan that is administered by the TPA Blue Cross Blue Shield of Illinois—none of the plans have grandfathered status. *Id*. at ¶ 16. Because Franciscan's health plans' years begin on January 1, Franciscan must comply with the contraception mandate by that date. *Id.* at ¶ 18.

Since its founding in 1875, Franciscan has been faithful to the tenets of the Catholic Church [DE 79 at ¶¶ 7, 19, 23]. All of Franciscan's facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time. *Id.* at ¶ 9. Accordingly, none of the benefits plans offered by Franciscan covers abortion, sterilization, or contraceptives, and yet, compliance with the accommodation forces Franciscan to facilitate access to contraceptive products and services antithetical to its Catholic faith. *Id.* at ¶¶ 20-26.

Specialty Physicians

Sister Jane Marie Klein, O.S.F., also filed an affidavit on behalf of Specialty Physicians establishing that Specialty Physicians is a member managed nonprofit limited liability company providing physician and related healthcare services in Illinois, and its sole member is Franciscan Alliance, Inc. [DE 80 at ¶¶ 2, 4]. The approximately 317 benefits-eligible employees are offered the choice of a Blue Cross Blue Shield of Illinois fully-insured health maintenance organization option, or a BCBSI fully-insured preferred provider organization option. *Id*. at ¶ 7. As of January 1, 2014, both of Specialty Physicians' plans will no longer be grandfathered because of changes made to the amount of employee contributions [DE 73 ¶ 128; DE 80 at ¶ 15], which means Specialty Physicians must comply with the contraception mandate by that date or face significant fines [DE 80 at ¶¶ 9, 15].

All of Specialty Physicians' facilities are operated in a manner that abides by *The Ethical and Religious Directives for Catholic Health Care Services* as promulgated by the United States Conference of Catholic Bishops and interpreted by the local Bishop and as modified from time to time [DE 80 at ¶ 6]. And because Specialty Physicians is faithful to the Roman Catholic Church and its teachings, *see id.* at ¶¶ 10, 14, Specialty Physicians has historically excluded coverage for abortion, contraceptives (except when used for noncase contraceptive purposes), sterilization, and related education and counseling from its multi-employer health plan. *Id*. at ¶ 11. The contraception mandate and its accommodation does not resolve Specialty Physicians' religious objection to the provision or facilitating access to objectionable contraceptive services. *Id*. at ¶¶ 12-17.

Saint Francis University

The president of Saint Francis University, Sister Elise Kriss, O.S.F., provided an affidavit indicating that the University is a Catholic, Franciscan-sponsored co-educational, liberal arts college that bears responsibility to witness the Church's teachings [DE 81 at ¶¶ 2, 5, 28, 32]. Faith is at the heart of the University's efforts, and the apostolic constitution *Ex Corde Ecclesiae*, which governs and defines the role of Catholic colleges and universities, provides that "the objective of a Catholic University is to assure . . . [f]idelity to the Christian message as it comes to us through the Church." *Id*. at ¶ 20.

Saint Francis University has approximately 413 total faculty and staff members, of which approximately 346 full-time employees are eligible for health care benefits. *Id*. at ¶ 24. The University's employees (but not its students) are offered a self-insured health care plan, which is administered by a TPA and is not grandfathered, thus it must comply with the contraception mandate on January 1. *Id*. at ¶¶ 23, 25-27. The current Saint Francis employee health plan complies with Catholic teachings, which means abortion and sterilization are not covered, and contraceptives are not covered when prescribed for contraceptive purposes. *Id*. at ¶ 29. In fact, Sister Kriss indicates that the University will never provide objectionable services to its employees because such services violate Catholic teachings, Franciscan Values and the moral conscience of the Sisters of Saint Francis. *Id*. at ¶ 28. Further, the accommodation still forces the University to initiate the provision of objectionable contraceptive benefits to its employees in a manner contrary to Saint Francis' beliefs. *Id*. at 31-33.

Our Sunday Visitor

Gregory Erlandson, President of Our Sunday Visitor, established by way of affidavit that

Our Sunday Visitor is a nonprofit Catholic publishing company located in Huntington, Indiana which publishes religious periodicals and other parish materials [DE 82 at ¶¶ 2, 4, 5, 15]. Our Sunday Visitor is organized under the Indiana Nonprofit Corporation Act of 1991, it is organized and operated exclusively for the benefit of, and to carry out the purposes of, the Roman Catholic Church, and it is operated in connection with the Diocese. *Id*. at ¶ 20. Between its publishing and offertory solutions divisions, Our Sunday Visitor employs approximately 317 benefits-eligible employees who are offered a self-insured health care plan that is administered by a TPA. *Id*. at ¶¶ 11, 12. The plan is not grandfathered and will need to comply with the contraception mandate when its new plan begins on October 1, 2014. *Id*. at ¶¶ 13, 14.

Because Our Sunday Visitor is a Catholic entity which bears witness to the Church's teachings in its words and deeds, Our Sunday Visitor's current employee health plan does not cover abortion and sterilization, or contraceptives that are prescribed for contraceptive purposes (although hormone therapies for non-contraceptive purposes are covered) [DE 82 at ¶¶ 15, 16, 19]. The accommodation does not resolve Our Sunday Visitor's religious objections to the contraception mandate because it would still require Our Sunday Visitor to facilitate access to products and services antithetical to the Catholic faith or face significant fines. *Id*. at ¶¶ 18, 22.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate that (1) it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied; and (2) there is some likelihood of success on the merits of the claim. *See Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If the moving party meets this threshold burden, the court weighs the competing harms to the parties if an injunction is granted or denied and also

considers the public interest. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Ezell*, 651 F.3d at 694. This equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.[7] *See Planned Parenthood*, 699 F.3d at 972. The aim is to minimize the costs of a wrong decision. *See Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012).

The appropriateness of a preliminary injunction in this case rests on plaintiffs' RFRA claim and presents the following issues: does the contraception mandate and accommodation substantially burden the religious exercise rights of the plaintiffs, and if so, has the government discharged its burden of justifying its regulations under strict scrutiny. Here, plaintiffs have shown some likelihood of success on the merits of their RFRA claim, that no adequate remedy at law exists, and that they will suffer irreparable harm without an injunction. And, a weighing of the injunction equities and consideration of the public interest also strongly supports issuance of an injunction at this stage of the litigation.

III. Analysis

To begin, for purposes of determining whether a preliminary injunction is appropriate in the instant case, no one questions that the issues presented based on the 2013 final rules are ripe

[7]As an aside, the government noted an objection to applying the sliding scale approach, arguing that the approach is inconsistent with the Supreme Court's holding in *Winter v. NRDC, Inc*., 555 U.S. 7, 20 (2008) requiring a plaintiff to show all of the preliminary injunction factors. But the government also recognized that the undersigned is nonetheless bound to apply the Seventh Circuit's sliding scale approach to an injunction. In fact, the Seventh Circuit has recently determined that its sliding scale approach is "a variant of, though consistent with, the Supreme Court's recent formulations of the standard . . ." *Planned Parenthood of Wisc., Inc. v. Van Hollen*, No. 13-2726, 2013 WL 6698596 (7th Cir. Dec. 20, 2013) (citing *Winter*, 555 U.S. at 20).

for ruling, that the threat of financial penalty and other enforcement action is sufficient to establish the plaintiffs' standing to challenge the accommodation, and that plaintiffs—nonprofit religious organizations—exercise religion in the sense that their activities are religiously motivated. The Court will thus consider the appropriateness of injunctive relief in the instant case.

Success on the Merits of the RFRA Claim

The RFRA prohibits the federal government from placing substantial burdens on "a person's exercise of religion," 42 U.S.C. § 2000bb–1(a), unless it can demonstrate that applying the burden is "in furtherance of a compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest," *id*. § 2000bb–1(b). RFRA creates a broad statutory right to case-specific exemptions from laws that substantially burden religious exercise even if the law is neutral and generally applicable, unless the government can satisfy the compelling-interest test. *Korte*, 735 F.3d at 671-72 (reasoning that with RFRA, Congress expressly required accommodation rather than neutrality) (citation and quotation marks omitted). RFRA is structured as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Id*. at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)).

Once a RFRA claimant makes a *prima facie* case that the application of a law or regulation substantially burdens his religious practice, the burden shifts to the government to justify the burden under strict scrutiny. *Id.* (citing *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006)). "Congress's express decision to legislate the compelling interest test indicates that

RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . .". *Id*. (citing *O Centro Espirita*, 546 U.S. at 430). Thus, in RFRA litigation, as in First Amendment litigation, "the burdens at the preliminary injunction stage track the burdens at trial." *Id*. (citing *O Centro Espirita*, 546 U.S. at 429).

1. Substantial Burden

While neither the United States Supreme Court nor any Circuit Courts have had the opportunity to consider whether the contraception mandate creates a substantial burden on a non-secular, nonprofit organization's religious exercise rights given the "accommodation" created for eligible organizations,[8] the Seventh Circuit recently discussed in *Korte* the substantial burden analysis in the context of RFRA:

> Recall that "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphases added). At a minimum, a substantial burden exists when the government compels a religious person to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs." *Wisc. v. Yoder*, 406 U.S.

[8]In fact, not many district courts have had the opportunity to consider this question relative to nonprofit religious organizations, and their conclusions vary. Three courts have upheld the accommodation. *See Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303 (M.D. Tenn. Dec. 26, 2013); *University of Notre Dame v. Sebelius*, No. 3:13-cv-1276-PPS-CAN (N.D. Ind. Dec. 20, 2013) (Simon, C.J.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013). While the other courts have found the accommodation to pose a substantial burden. *See East Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009 (S.D. Tex. Dec. 27, 2013); *Geneva College v. Sebelius*, No. 12-0207 (W.D. Pa. Dec. 23, 2013); *Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013); *see also Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (drawing a distinction between self insured and group insured plans and granting a preliminary injunction only with respect to a self insured plaintiff despite the fact that all eligible organizations are confronted with the self certification process created by the accommodation).

> 205, 218, 92 S.Ct. 1526 (1972). But a burden on religious exercise also arises when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 (1981); *see also Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Construing the parallel provision in RLUIPA, we have held that a law, regulation, or other governmental command substantially burdens religious exercise if it "bears direct, primary, and fundamental responsibility for rendering [a] religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The same understanding applies to RFRA claims.
>
> Importantly, the substantial-burden inquiry does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. *See United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982); *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. It 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. *Id.*; *see also id.* at 715, 101 S.Ct. 1425 ("Thomas drew a [religious] line, and it is not for us to say that the line he drew was an unreasonable one.").
>
> Checking for sincerity and religiosity is important to weed out sham claims. The religious objection must be both sincere and religious in nature. *Cf. United States v. Seeger*, 380 U.S. 163, 184–86, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (military-conscription exemption applies only to objections based on sincerely held religious beliefs as opposed to philosophical views or a personal moral code). These are factual inquiries within the court's authority and competence. But we agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the "intensity of the coercion applied by the government to act contrary to [religious] beliefs." *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 114, 1137 (10th Cir. 2013). 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 682-83. With these principles in mind, the Seventh Circuit determined, in relevant part, that it was a substantial burden on the for profit company plaintiffs and their

owners to require them to *purchase or provide* the required contraception coverage (or self-insure for these services). *Korte*, 735 F.3d at 668.

In the instant case, the government defendants posit that *Korte* and other similar for profit plaintiff cases, *see, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), are distinguishable because the burden on plaintiffs in the instant litigation to comply with the accommodation[9] is merely de minimus where they would barely have to modify their behavior by complying with the purely administrative self certification requirement which should take a matter of minutes. Moreover, the government believes that any burden cast upon plaintiffs is too attenuated to constitute a substantial burden.

The Court acknowledges that the burden on plaintiffs to complete and submit a self certification is different than the burden imposed on the *Korte* plaintiffs. Simply put, these plaintiffs are not required "to contract, arrange, pay, or refer for contraceptive coverage" to which they have religious objections, 78 Fed. Reg. 39,874. Rather the non-exempted plaintiffs must complete a self certification form stating that each is an eligible organization which objects to providing the contraceptive coverage on religious grounds and provide a copy of that self certification to its issuer or TPA, so that the payment for the services can then be provided or arranged for by the issuer or TPA at no cost to plaintiffs. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39,874-75. But even so, the Court cannot agree with the government that the plaintiffs have not

[9]Admittedly, the Diocese does not have to submit a self certification on its own behalf because it is considered a religious employer exempted from the contraception mandate. However, the government does not contest the fact that the Diocesan Health Plan currently insures employees of the non-exempt Catholic Charities. The burden placed on the Diocese as a result of these facts, although mostly overlooked by the government, is discussed *infra*.

shown at least some reasonable likelihood of success on the merits relative to the showing of a substantial burden as defined in *Korte.*

According to the Seventh Circuit, the pertinent inquiry for the substantial burden test under RFRA is whether the claimant has an honest conviction that what the government is requiring or pressuring him to do conflicts with his religious beliefs and whether the governmental pressure exerts a sufficiently coercive influence on the plaintiffs' religious practice. *Korte,* 735 F.3d at 683; *see Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *Gilardi*, 733 F.3d at 1217-18 (" . . . the burden becomes substantial because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong."). And in this case, the government defendants concede that plaintiffs' religious beliefs are sincerely held. In fact, the plaintiffs' undisputed affirmations concerning their religious views indicate that their beliefs are indeed sincere and religious in nature. Therefore, the government rests its argument on its belief that plaintiffs cannot establish a substantial burden on plaintiffs' religious exercise rights where the regulations do not, according to the government, require the plaintiffs to modify their religious behavior.

The plaintiffs have established that the accommodation compels them to facilitate and serve as the conduit through which objectionable contraceptive products and services are ultimately provided to their employees, in violation of their unquestionably sincerely held religious beliefs. While it is true that prior to the ACA's enactment, plaintiffs had notified their

insurers/TPAs that objectionable contraceptive services were to be excluded from their health plans, never before had that notification triggered the provision of the services, nor were plaintiffs designating another to provide the services. In other words, the government's argument relative to the de minimus nature of any burden created by the accommodation is too narrow of a focus. The government's argument, that the completion of a simple self certification form that takes minutes doesn't create a substantial burden, misses the point. It is not the mere filling out and submitting the certification that creates a burden. Rather, if plaintiffs choose to provide health insurance coverage for employees (to comply with their own religious tenants and to avoid the ACA's fines for failing to meet coverage requirements), then they must either directly provide contraceptive services themselves (which are clearly contrary to their religious beliefs) or they must invoke the accommodation and facilitate, indeed in their mind enable, the availability of contraceptive services (which is also contrary to their sincerely held religious beliefs). Thus, although plaintiffs avoid paying for the services, the compulsion to offer group health insurance results in their direct facilitation of insurance coverage and the potential use of contraceptive services by their employees, services which plaintiffs morally oppose. That the accommodation scheme allows the plaintiffs to avoid the costs of such services provides no comfort or relief. It's the facilitation of the objectionable services, not the related cost, that offends their religious beliefs. Ultimately, the plaintiffs would be forced to modify their behavior *and* violate their religious beliefs by either giving up their health insurance plans or by providing insurance but taking critical steps to facilitate another's extension of the objectionable coverage. *See Korte*, 735 F.3d at 682-83; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (citing *Thomas*, 450 U.S. at 718). And,

their failure to comply with insurance requirements or provide contraceptive services results in enormous penalties that would be financially detrimental to their operations likely resulting in the reduction of necessary community services and even layoffs. In short, the government's accommodation results in the plaintiffs violating their sincerely held religious beliefs, as well as the choice between conformity with the ACA's requirements or face substantial fines. *See Korte*, 735 F.3d at 683; *see also Southern Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (DE 45 at 16) ("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. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary.").

Thus, given the nature of the analysis utilized, the undersigned believes that *Korte* may logically be extended to conclude that the completion and submission of the self certification is an alteration in plaintiffs' behavior such that it constitutes a substantial burden under RFRA. *See University of Notre Dame*, No. 3:13-cv-1276-PPS-CAN ("Perhaps upon review of this case, *Korte* will be extended by the Seventh Circuit to say that the filing of a certification is an alteration in Notre Dame's behavior such that it constitutes a substantial burden under RFRA"); *see also Zubik (and Persico) v. Sebelius*, Nos. 13cv1459 and 13cv0303, 2013 WL 6118696, at *23-25 (W.D. Pa. Nov. 21, 2013) ("although the 'accommodation' legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products,

services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs."). Given *Korte's* guidance, the lack of mandatory authority on the precise issue at hand, and the divergence of case holdings demonstrating the difficulty of the issue and the uncertainty of the ultimate decision on the merits, the Court believes that plaintiffs have shown at least some reasonable likelihood of success on the merits relative to the substantial burden analysis. And even if that likelihood was just more than slight, the balance of harms could support injunctive relief.[10]

The government's alternative argument is that any burden on plaintiffs' religious exercise is too attenuated to render it substantial. In summary, the government believes that because plaintiffs are not required to actually contract or pay for contraceptive coverage, any burden is too attenuated to be substantial because plaintiffs are separated by a series of events that must occur before the objectionable contraceptive services would be utilized. Specifically, after receiving the certification from plaintiffs, the TPA or issuer would actually pay for or arrange payment for the contraceptive services should employees independently decide to even use those services.

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[10]*See Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 315 (7th Cir. 1994) ("Once the district court determined that [plaintiff's] likelihood of success on the merits of its claim was slight, it required [plaintiff] to make a proportionately stronger showing that the balance of harms was in its favor.") (citing *Accord Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

Similarly, in *Korte*, the government argued that the contraception mandate's burden was insubstantial because any use of contraceptive services could not be attributed to the corporate plaintiffs or their owners since the provision of the contraceptive coverage was several steps removed from an employee's independent determination to use contraception. *See Korte*, 735 F.3d at 684. However, the Seventh Circuit's majority opinion reasoned that the government's attenuation argument is equivalent to improperly asking whether "providing this coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' religion]." *Id*. at 685.[11] But, "[n]o civil authority can decide that question". *Id.*; *see Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14 ("The Government feels that the accommodation sufficiently insulates the plaintiffs from the objectionable services, . . . [but] it is not the Court's role to say that plaintiffs are wrong about their religious beliefs."); *see also Hobby Lobby*, 723 F.3d at 1142 (the 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).

Here, no one questions that among the plaintiffs' religious tenets is that life begins at conception and that providing all FDA approved contraceptive service violates those tenets. And so it follows that plaintiffs object to deliberately providing health insurance that will trigger access to objectionable contraceptive services and related education and counseling. By completing the self certification, plaintiffs sincerely believe that they will be facilitating, and actually supporting, a step in the process by which their employees will eventually secure access

[11]Judge Rovner understood the majority to be rejecting any assessment on how direct or attenuated the burden imposed on the plaintiff's religious practices may be. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting).

to free contraceptive services. In their minds, this makes them complicit in the provision and use of such services. Again, the government does not contest the sincerity of these beliefs. Because plaintiffs hold these honest religious convictions and because failing to comply with the law will result in heavy financial penalties and the risk of enforcement actions (which will significantly impact their ability to provide religiously based services), *id*. at 683, plaintiffs have shown that the contraception mandate and accommodation constitute a substantial burden on their religious exercise.

And while the government gives short shrift to any burden imposed specifically on the Diocese simply because it is exempted from the mandate, the Court would note the uncontested fact that the Diocese has foregone almost $200,000 annually in order to maintain its grandfathered status in an effort to protect Catholic Charities from having to comply with the contraceptive mandate and its religiously objectionable self certification requirement. Thus, despite being exempted as a religious employer, the Diocese is forced to modify its behavior and incur substantial costs to stay grandfathered under the ACA, or else it will be compelled to violate its religious beliefs by having Catholic Charities' employees provided with a plan that covers objectionable contraceptive services or access to the same. Essentially, absent forgoing the annual increased premiums, the Diocese would be prevented from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings.

The application of the two regulations—the exemption and the accommodation—has the ultimate effect of dividing the Catholic Church into two separate entities, despite overlapping membership and leadership. *See Zubik*, 2013 WL 6118696, at *26-27. The regulations protect those who work inside a church's walls, but not those engaging in the fulfillment of the religious

and charitable missions of the Diocese and Catholic Church—despite the fact that all of the plaintiffs claim the same burden is imposed on their religious exercise rights by the mandate and its accommodation. The Court concludes that this divide and its resulting consequences has similarly created a substantial burden on the Diocese and Catholic Charities, and as a result, the government must justify its regulations under the compelling interest test.

2. Least Restrictive Means and Compelling Government Interest

RFRA requires the government to demonstrate that applying the contraception mandate and its accommodation are "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb–1(b). Again, the Court follows the precedent set forth in *Korte*, in applying the appropriate test in this context. In fact, the government has since conceded that the recent decision in *Korte* forecloses its arguments that the regulations satisfy strict scrutiny, even in this context [DE 105 at 2, fn. 1]. Regardless, the Court will conduct an analysis for completeness of the record.

Consistent with *Korte*, the Supreme Court has instructed courts to look beyond "broadly formulated interests justifying the general applicability of government mandates" and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Korte*, 735 F.3d at 685 (citing *O Centro Espirita*, 546 U.S. at 431). In other words, under RFRA's version of strict scrutiny, the government must establish a compelling and specific justification for burdening these claimants. *Id*.

The compelling-interest test generally requires a "high degree of necessity." *Id*. (citing *Brown v. Entm't Merchs. Ass'n*, — U.S. — , 131 S.Ct. 2729, 2741 (2011)). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be

actually necessary to the solution." *Id*. (citing *Brown*, 131 S.Ct. at 2738). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. (citing *Yoder*, 406 U.S. at 215). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .". *Id.* (citing *Sherbert*, 374 U.S. at 406). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Korte*, 735 F.3d at 686 (citing *Sherbert*, 374 U.S. at 403). Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (7th Cir. 1993)).

Similar to the interests claimed by the government in *Korte*, the government identified two legitimate public interests in the instant case, improving the public health and providing equal access to health care services for women. The government (prior to the issuance of *Korte*) had argued that the contraception mandate and the accommodation furthers these interests in a narrowly tailored fashion by not requiring nonprofit religious organizations with religious objections to providing contraceptive coverage to contract, pay, arrange, or refer for that coverage.

The Court agrees that the government's stated interests are indeed important, and for the sake of argument (and a thorough analysis) will assume they are even compelling. However, the government has not shown that the contraception mandate employs the least restrictive means of furthering the government's interests, because strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest.

Korte, 735 F.3d at 686.

As discussed, the regulatory scheme exempts or excludes certain employers from the contraception mandate and does not apply the ACA's requirements to employers with grandfathered plans or those with less than 50 employees. Since the government grants so many exceptions already, it cannot legitimately argue that its regulations are narrowly tailored, nor can they argue against exempting these plaintiffs—by the government's estimate, approximately 20,000 employees (not including the already exempted Diocese). *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222 ("underinclusiveness can suggest an inability to meet the narrow-tailoring requirement, as it raises serious questions about the efficacy and asserted interests served by the regulation"). Also, there is nothing to suggest the ACA would become unworkable if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement. *See Gilardi*, 733 F.3d at 1223-24.

Further, the government's reason for creating the religious employer exemption in particular was that houses of worship and their integrated auxiliaries are more likely than other employers to employ people of the same faith who share the same objection to contraceptive coverage, and who would be less likely than others to use contraceptive services even if such services were covered. *See* 78 Fed. Reg. 39,874. This may in fact be true, however, the government amended the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified "because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013). So even though these plaintiffs provide religiously based community services outside the confines of the church and employ people of

different faiths, these plaintiffs share the same legitimate claim to the free exercise of religion as those exempted as "religious employers." And despite the religiously affiliated nature of the plaintiffs and their longstanding religious stance (and public pronouncement) against abortion and contraception, *these* plaintiffs have not received the same exemption as "religious employers" from having to facilitate or initiate the provision of objectionable contraceptive services, merely because they are not organized and operated as a nonprofit entity referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986—a basis which has nothing to do with the government's stated interests for imposing the requirements of the contraception mandate. *See Zubik*, 2013 WL 6118696 at *29 (noting that the religious employer exemption was not predicated on the government's stated interests). And so again, even assuming the government's interests are compelling, there is no basis indicating the government would be unable to enforce its legislation simply because these plaintiffs could avoid compliance with the contraception mandate.

Finally, there are certainly other ways to promote public health and gender equality less burdensome on religious liberty, and the government has not carried its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights. Pre-*Korte*, the government maintained that the accommodation provides the least restrictive means because the self certification requires the plaintiffs to act just as they would without the mandate—by informing their TPAs or insurers that coverage should not include certain contraceptive services. But the argument falls short. First, the government has made exemptions from the coverage requirements for other employers, like the Diocese, without requiring the same form of self certification (and resulting consequences), despite the fact that plaintiffs share

the same legitimate claim to the free exercise of religion as those exempted as religious employers. And second, the self certification process created in the accommodation (and being avoided by the Diocese and Catholic Charities at great expense) essentially transforms a voluntary act that plaintiffs may have utilized to ensure that the objectionable services are not provided, consistent with their religious beliefs, into a compelled act that they sincerely believe provides and promotes conduct that is forbidden by their religious beliefs. *See Roman Catholic Archdiocese of New York*, No. 1:12-cv-02542-BMC, 2013 WL 6579764, at *14. And so the nature of the act itself has changed, not merely the consequences of that act.

And as identified in *Korte* and as offered by plaintiffs in the instant action, there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. For instance, the government can provide a "public option" for contraception insurance; it can give tax incentives or grants to contraception suppliers to provide these medications and services at no cost to consumers; and it can give tax incentives to consumers of contraception and sterilization services—all without requiring plaintiffs to self certify their religious objections to the contraception mandate and thereby directly facilitate access to objectionable contraceptive services to be arranged or paid for by third parties. Simply because these options may make it more difficult for the government to administer the regulations in a manner that would achieve the government's stated interests, greater efficacy does not equate to the least restrictive means. *See Zubik*, 2013 WL 6118696 at *23. And as the government has conceded in the instant case, *Korte* has recently made clear that its regulations fail the strict scrutiny analysis.

Bearing in mind that at this stage the court need not be certain about the outcome of the

case to grant a preliminary injunction, the Court concludes the plaintiffs have shown some reasonable likelihood of success on the merits relative to their RFRA claim. *See S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) ("The case is before us on an appeal from the grant of a preliminary injunction, and as is too familiar to require citation such a grant is proper even if the district judge is uncertain about the defendant's liability.").

Adequate Remedy at Law and Irreparable Harm

Although the claim is statutory, RFRA protects First Amendment free-exercise rights, and "in First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor.'" *Korte*, 735 F.3d at 666 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Village of Washington Park, Ill*., 378 F.3d 613, 620 (7th Cir. 2004))). "This is because the 'loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury . . .'. " *Korte*, 735 F.3d at 666 (citing *Alvarez*, 679 F.3d at 589 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion))). Furthermore, injunctions are especially appropriate in the context of first amendment violations because the "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (citing *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982)).

In the instant case, the non-exempt plaintiffs must decide by December 31, 2013 whether or not to provide insurance coverage and sign the self certification with respect to its employee health plan, with the exception of Our Sunday Visitor, who must also make the same decisions in October. Relative to the Diocese, by December 31, 2013, it will have to decide whether to continue to forgo increased premiums in order to maintain its grandfathered status, or permit Catholic Charities to be faced with the same decisions that need be made by the non-exempt

plaintiffs. Ultimately, should plaintiffs fail to comply with the insurance coverage requirements of the ACA and its contraception mandate, the plaintiffs face financially devastating fines and enforcement actions. Thus, plaintiffs will be irreparably harmed if forced to forgo their religious beliefs by facilitating access to the objected to services in order to avoid detrimental fines, and there simply is insufficient time to litigate the merits of the plaintiffs' claims without the relief of a preliminary injunction. Given that plaintiffs' religious exercise rights are at stake in the immediate future, that a loss of these freedoms for even a minimal period of time unquestionably constitutes irreparable injury which cannot be prevented or fully rectified by waiting for a final judgment, *see Elrod*, 427 U.S. at 373; *Anderson v. U.S.F. Logistics (IMS), Inc.*, 274 F.3d 470, 478 (7th Cir. 2011), and that injunctions are designed to offer relief when legal remedies are inadequate to protect the parties' rights, *see Roland Machinery Co. v. Dresser Indus., Inc*., 749 F.2d 380, 397 (7th Cir. 1984) (Swygert, J., dissenting), the Court concludes that these factors weigh strongly in favor of granting the requested relief.

Weighing the Equities and Public Interest

In weighing the equities, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc*., 549 F.3d 1079, 1100 (7th Cir. 2008). To do so, the court compares the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted. *Id*. (citing *Ty, Inc. v. Jones Group, Inc*., 237 F.3d 891, 895 (7th Cir. 2001)). We evaluate these harms using a sliding scale approach. *Id*. (citing *Ty, Inc.*, 237 F.3d at 895). The more likely it is that plaintiffs will win their case on the merits, the less the balance

of harms need weigh in their favor. *Id*. (citations omitted). Conversely, if it is very unlikely that plaintiffs will win on the merits, the balance of harms need weigh much more in plaintiffs' favor. *Id*. (citations omitted). When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation. *Id*. (other citations omitted). This analysis is "'subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.'" *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1100 (citations omitted).

As the Court has previously detailed herein, the harm likely to be caused the plaintiffs without an injunction is imminent and irreparable, whereas the government likely faces no risk of harm, let alone irreparable harm, if the preliminary injunction is granted. The Court agrees with the district court's comments in *Zubik*, in that the combined nationwide total of the millions of Americans whose employers fall within some type of exclusion, exemption, or plan grandfathered from the ACA and contraception mandate's requirements demonstrates that the government will not be harmed in any significant way by the exclusion of these plaintiffs. *Zubik*, 2013 WL 6118696 at *34; *see also Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, *10 (W.D. Pa. June 18, 2013) ("tens of millions of individuals . . . remain unaffected by the mandate's requirements"). Moreover, the government has itself delayed the enforcement of the contraception mandate by initially granting a safe harbor from its enforcement and agreeing to injunctions in other cases involving challenges to the mandate.

Additionally, granting the preliminary injunction furthers the public interest. While it is true that employees and dependents of the plaintiffs will face an economic burden not shared by

employees and dependants of organizations that cover all of the contraceptive methods imposed by the mandate, plaintiffs' long-standing and publically made religious stance regarding contraception and abortion, have kept them from offering procuring, participating in, facilitating, or paying for objectionable contraceptive services up until this point. And while not all employees of the plaintiffs share in the plaintiffs' religious objections to certain contraceptive services, the plaintiffs' employees and the public are best served if the plaintiffs can continue to provide needed (and expected) religiously based community services, and the needed (and expected) insurance coverage to its employees, without the threat of substantial fines and the risk of layoffs for noncompliance with the contraception mandate and its accommodation. Moreover, injunctions protecting First Amendment freedoms are always in the public interest, *see Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), and the Court sees no reason to make an exception here.

The Court would also note that plaintiffs quickly filed an amended complaint and sought an injunction after the 2013 final rules were passed. Thus, there has been no delay in their pursuit of a preliminary inunction. *See Ty, Inc.*, 237 F.3d at 903 (a delay in pursuing a preliminary injunction may raise questions regarding irreparable harm). And, it cannot be said that there was any expectation that the plaintiffs would ever facilitate access to all FDA approved contraceptive services for its employees. Undoubtedly, the balance of harms in this case weighs heavily in plaintiffs' favor, enough so that any weakness in the merits of their case is overcome, thereby making injunctive relief appropriate to maintain the status quo until a decision on the merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 783 (7th Cir. 2011) ("The

preliminary injunction, after all, is often seen as a way to maintain the status quo until merits issues can be resolved at trial. By moving too quickly to the underlying merits, the district court required too much of the plaintiffs . . .").

IV. Conclusion

Accordingly, it is hereby ORDERED that plaintiffs' motion for a preliminary injunction [DE 74] is GRANTED, and as a result, defendants, their agents, servants, officers, employees, representatives, and all persons in active concert or participation with them are hereby ENJOINED from:

> Applying or enforcing against plaintiffs, Diocese of Fort Wayne-South Bend, Inc., Catholic Charities of the Diocese of Fort Wayne-South Bend, Inc., Saint Anne Home & Retirement Community of the Diocese of Fort Wayne-South Bend, Inc., Franciscan Alliance, Inc., Specialized Physicians of Illinois, LLC, University of Saint Francis, and Our Sunday Visitor, Inc., or their employee health insurance plans, including their plan brokers, plan insurers, or third party administrators, the requirements set out in 42 U.S.C. § 300gg-13(a)(4) and 45 C.F.R. § 147.130(a)(1)(iv), corresponding guidelines, and corresponding press releases to provide, pay for, or otherwise facilitate access to coverage for FDA approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and related patient education and counseling.

It is further ORDERED that plaintiffs shall not be required to post bond; however, should circumstances change prior to the Court's making a determination on the merits of the case, including new developments in the law, which may make the preliminary injunction or its terms no longer appropriate, then counsel are free to file a motion seeking a modification or vacatur of

the injunction.

SO ORDERED.

ENTERED: December 27, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court