No. ___-_____

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, CHRISTIAN BROTHERS SERVICES, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Applicants,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS 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, and UNITED STATES DEPARTMENT OF THE TREASURY,

Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND INJUNCTION PENDING RESOLUTION

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Dated: December 31, 2013

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Tenth Circuit:

In less than ten hours, a regulatory mandate (the "HHS Mandate") promulgated under the Patient Protection and Affordable Care Act will expose the Little Sisters of the Poor to draconian fines unless they abandon their religious convictions and participate in the government's system to distribute and subsidize contraception, sterilization, and abortion-inducing drugs and devices. The Little Sisters are an order of Catholic nuns whose religious faith leads them to devote their lives to caring for the elderly poor. Not surprisingly, they have sincere and undisputed religious objections to complying with this Mandate. Yet they were denied relief by the District Court for the District of Colorado on Friday afternoon, December 27, 2013 and this afternoon by a motions panel of the Tenth Circuit Court of Appeals. Without an emergency injunction, Mother Provincial Loraine Marie Maguire has to decide between two courses of action: (a) sign and submit a self-certification form, thereby violating her religious beliefs; or (b) refuse to sign the form and pay ruinous fines. Mother Loraine must make that decision by midnight tonight, unless relief is granted by this Court.

The Little Sisters do not stand alone. They are joined as Applicants by the Catholic "church plan"[1] through which they provide employee health benefits,

[1] A "church plan" is a benefit plan established by a church or a convention or association of churches covering employees of the church or convention of churches (or organizations controlled by or associated with the church or convention or association of churches). *See generally* 29 U.S.C. § 1002(33); 29 U.S.C. § 414(e). Unless they choose otherwise, church plans are exempt from regulation under the Employee Retirement Income Security Act of 1971 (ERISA). 29 U.S.C. § 1003(b)(2).

Christian Brothers Employee Benefits Trust (the "Trust"), the Catholic organization that administers the plan, Christian Brothers Services, and approximately 486 other Catholic non-profit organizations that provide employee benefits through the Trust.[2] These Applicants have deliberately come together to provide benefits in accordance with their shared Catholic religious beliefs. Yet by midnight tonight, they will be forced to choose between continuing to conduct themselves in accordance with those shared beliefs, or violating them in order to avoid stiff government penalties.

In most religious liberty cases, the government can come forward with at least a *reason* for forcing religious objectors to comply with a law. What is remarkable about this case, however, is that for these several hundred religious organizations—and for the hundreds more that participate in other church plans—the government openly contends that it cannot make parts of its Mandate system work or enforce its regulations, at least "at this time." Dkt. 29 at 2. Thus there is not even a purported public benefit to forcing Applicants to violate their religious beliefs. Yet rather than

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[2] Although the class has not yet been certified, Respondents agreed below that relief granted to the named Applicants could be extended to all members of the class. Dkt. 29 at 15 n.8, *Little Sisters of the Poor* v. *Sebelius*, Case No. 1:13-cv-02611-WJM-BNB (D. Colo.) (all docket references are to the district court docket below) ("[D]efendants do not object to the scope of the resulting preliminary injunction including the named Applicants as well as any members of the class Applicants have proposed in their complaint."). An injunction protecting all non-exempt Catholic ministries that provide benefits through the Trust is appropriate. *See, e.g., Kansas Health Care Assoc.* v. *Kansas Dept. of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994); *O Centro Espirita Beneficiente Unaio Do Vegetal v. Ashcroft*, No. CV 00-1647, Doc. 100 (D.N.M. Nov. 13, 2002), *aff'd*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004), aff'd*, *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006) (affirming injunction that benefits all members and participants).

allow these religious believers to avoid forced participation in the Mandate's allegedly broken system, the government continues to insist that they violate their religion by either (a) directly providing the services at issue, or (b) signing forms directing and authorizing others to do so in their place.

The result is a case that should be straightforward and easy under the Religious Freedom Restoration Act ("RFRA"). Applicants face a substantial burden on their religious exercise because their religious beliefs and objections are undisputed and sincere, and because the government is imposing massive pressure on them to violate those beliefs. The government has no prospect of surviving strict scrutiny because it acknowledges parts of its system do not work "at this time." Indeed, the government conceded strict scrutiny below in light of the Tenth Circuit's decision in *Hobby Lobby* v. *Sebelius*.

The only reason Applicants did not obtain relief below is that the trial court sought to revise their religious beliefs for them: it believed they *should* be willing to sign the forms and participate in the Mandate so long as parts of the system were not yet functional. But whatever the court may have thought Applicants *should* believe, the undisputed fact of the matter is that they actually *do* believe that they are barred from complying with the Mandate in the way embraced by the court. And as this Court has explained, the courts are not to second-guess the lines drawn by sincere religious believers. *See Thomas* v. *Review Bd.*, 450 U.S. 707, 715-16 (1981) (because Jehovah's Witness "drew a line" against participating in tank

manufacturing, "it is not for us to say that the line he drew was an unreasonable one").

The Tenth Circuit continued this error by skipping over the religious objection at issue—a claim that Applicants cannot sign and deliver the forms—to find that Applicants face no penalties so long as they do the precise act that violates their religion: "complet[e] a self-certification form and provid[e] it to the third-party administrator." Appendix Ex. 1 at 2.

Injunctive relief under the All Writs Act is necessary to prevent immediate and irreparable harm to Applicants during the appellate process, including any further review by this Court. The forced choice of either submitting authorization forms or beginning to incur fines is one that must be made in less than hours: the Court's ability to protect tonight's religious exercise will expire with the old year at midnight. Furthermore, the fines Applicants face are massive, and they will accrue daily, on hundreds of religious non-profits, while this case proceeds. That mounting financial burden, and that mounting pressure it exerts on religious exercise, threaten the ability of this Court to enter relief for some of these organizations at a future date. Moreover, review by this Court is warranted because the issues presented here are already the subject of conflicting decisions by numerous federal district and circuit courts,[3] and are also at issue in the *Hobby Lobby* and *Conestoga* matters now pending before this Court.[4] Furthermore, because of the overriding

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[3] *See infra* notes 17-19.

[4] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) *cert. granted,* 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S.*

importance of the legal issues presented in this case, because numerous lower courts have already reached conflicting decisions concerning them, and because this Court is already considering other matters raising similar RFRA challenges to the Mandate, Applicants also ask the Court to grant certiorari before judgment.

Finally, at a minimum, Applicants request a temporary, administrative stay to allow for full consideration and briefing of this Application, without the accumulation of daily fines. *E.g.*, *Ind. State Police Pension Trust* v. *Chrysler, LLC*, No. 08A196 (U.S. June 8, 2009) (Ginsburg, J., in chambers).

JURISDICTION

Applicants filed their complaint on September 24, 2013, challenging the HHS Mandate under the Religious Freedom Restoration Act, the First Amendment, the Fourteenth Amendment, and the Administrative Procedure Act. Dkt. 1 (Compl.) (Appendix Ex. 4). On October 24, 2013, they filed a motion for preliminary injunction. Dkt. 15. The district court had jurisdiction over Applicants' lawsuit under 28 U.S.C. sections 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. sections 2201 and 2202 and 42 U.S.C. section 2000bb, *et seq*.

The district court denied Applicants' motion for an injunction on December 27, 2013, and Applicants timely filed their notice of appeal to the Tenth Circuit later that day. Dist. Ct. Order (Appendix Ex. 2); Notice of Appeal (Appendix Ex. 3). The Tenth Circuit had jurisdiction over this appeal under 28 U.S.C. section 1292(a). The

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Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013) *cert. granted,* 134 S. Ct. 678 (2013).

Tenth Circuit denied Applicants' motion for an injunction pending appeal this afternoon (Appendix Ex. 1).

This Court has jurisdiction over this Application under 28 U.S.C. section 1254(1) and has authority to grant the relief that the Applicants request under the All Writs Act, 28 U.S.C. section 1651.

BACKGROUND AND PROCEDURAL HISTORY

Applicants Little Sisters of the Poor Home for the Aged, Denver, Colorado, and Little Sisters of the Poor, Baltimore (collectively the "Little Sisters") are part of an international order of Catholic nuns whose religious faith inspires them to spend their lives serving the sick and elderly poor. That same faith also precludes them from participating in the federal government's efforts to subsidize and promote the use of sterilization, contraceptives, and abortion-inducing drugs and devices. As a matter of religious exercise, the Little Sisters exclude such items from their employee health plan, Applicant Christian Brothers Employee Benefit Trust ("Trust"), which is administered by Applicant Christian Brothers Services. The same is true for approximately 486 other Catholic non-profit organizations that also provide employee benefits through the Trust, and as to which Respondents agree any preliminary injunctive relief may extend. Dkt. 29 at 15 n.8.

A provision of the Affordable Care Act requires some employers to provide coverage for "preventative care" in their employee group health plans. 42 U.S.C. § 300gg-13(a). Under regulations issued by Respondents, "preventative care" has been defined to include coverage for all FDA-approved contraceptive methods (including "emergency" contraceptives), sterilization procedures, and related patient education

and counseling. Dkt. 1-2; Dkt. 1-3 at 11-12 (describing several methods that Respondents acknowledge may prevent pregnancy by stopping implantation of an already-fertilized egg). Failure to comply with this HHS Mandate triggers a variety of penalties, including large daily and annual fines. *See, e.g.,* 26 U.S.C. § 4980D(b)(1) ("$100 for each day in the noncompliance period with respect to each person to whom such failure relates" if coverage is provided that does not comply with the Mandate); 26 U.S.C. § 4980H(c)(1) ($2000 annually for each full-time employee if no coverage is provided).

Applicants do not qualify for any exemptions from the HHS Mandate. The Trust is not a grandfathered plan, Dkt. 1, ¶ 147, which would be exempt from the preventative services requirement entirely. 42 U.S.C. § 18011; 75 Fed. Reg. 41726, 41731 (July 19, 2010) (noting that the preventive services requirement applies to "non-grandfathered group health plans"). Applicants do not meet Respondents' narrow definition of "religious employers" chiefly because they are not directly owned or controlled by the local Catholic bishops. *See* 78 Fed. Reg. 39870, 39896 (July 2, 2013) (codified at 45 C.F.R.§ 147.131(a)). Accordingly, Applicants must comply with the Mandate or face large fines and penalties.

There are only two ways for Applicants to comply with the Mandate. First, they could provide the required coverage. Because Applicants hold traditional Catholic religious beliefs about contraception, sterilization, and abortion, (Mother Loraine Decl., Dkt. 15-1 ¶ 30 (Appendix Ex. 6); Brother Quirk Decl., Dkt. 15-2 ¶¶ 17) (Appendix Ex. 7), they cannot comply with the Mandate in this manner. Dkt. 15-1 ¶

36-37, 39; Dkt. 15-2 ¶ 28-30; Suppl. Brother Quirk Decl. Dkt. 37-2 ¶ 8 (Appendix Ex. 9); Suppl. Mother Loraine Decl., Dkt. 37-1 ¶ 8-9 (Appendix Ex. 8).

The second way Applicants could "comply" with the Mandate is by signing a certification form authorizing and directing a third party to provide the required coverage, and deliver the form to the third party, which would qualify the third party for reimbursement payments from the federal government (along with a ten percent additional payment for margin and costs). This form is part of the government's purported "accommodation." 78 Fed. Reg. at 39879-80. According to Respondents' regulations, the purpose of the form is to "designate" a third party to provide payments for contraceptive services, 78 Fed. Reg. at 39879, to ensure that there is a party with "legal authority" to provide those payments, 78 Fed. Reg. at 39880, and to ensure that employees of employers with religious objections receive these drugs "so long as they remain enrolled in the plan." 78 Fed. Reg. at 39893; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A.

When the form is delivered to a third party administrator ("TPA"), federal regulations dictate that the TPA "shall provide" payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(2).[5] The second page of the required form includes the following notice:

[5] The same regulations allow a TPA to choose to terminate its relationship in response to a religious objector's submission of the form. 26 C.F.R. § 54.9815-2713A(b)(2). But TPAs who remain must provide the drugs. *Id.* Ironically, the government has acknowledged in parallel litigation that religious organizations have no similar freedom to walk away from a relationship with a TPA that, for

> The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

Dkt. 37-3 (reproduced as Appendix Ex. 5). The notice section thus (a) directs the TPA to portions of the CFR that say the TPA "shall provide" payments for contraceptive services, (b) instructs the TPA that these code sections set forth the TPA's "obligations," and (c) purports to make the form, including these notices, "an instrument under which the plan is operated."

The regulations use a "carrot" and "stick" approach to prompt TPAs to provide payments for contraceptive services. The "stick" is the legal mandate that the TPA "shall provide" the required payments. That mandate is backed up by the Department of Labor's ERISA enforcement authority (as described in 29 C.F.R. § 2590.715–2713A) and the Department of Treasury's enforcement authority under

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example, seeks to use the organization's employee information to provide payments for contraceptives, sterilizations, and abortion-inducing drugs and devices and then use its certification form to collect reimbursement from the government. *See* Dkt. 48-1 at 112:18-113:1.

the Internal Revenue code (as described in 26 C.F.R. § 54.9815–2713A). The "carrot" is the government's promise that any TPA that provides payments for contraceptive services can apply for payments from the government that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead. The TPA only qualifies for the "carrot," however, *if it has been given the certification form by the religious objector*. 45 C.F.R. 156.50. No form, no carrot, no government payments for giving out contraceptives.

After Applicants filed their motion for preliminary injunction, Respondents took the position that *part* of the above-described system does not work "at this time." Dkt. 29 at 2. In particular, Respondents claimed that, because they lack ERISA enforcement authority over non-ERISA church plan TPAs, the "stick" does not work, and therefore Applicants should have no objection to signing and submitting the certification form. Respondents acknowledge that the form can still be used as part of the "carrot" incentive.[6] And they have taken no steps to amend their regulations, or to withdraw the regulations issued under 26 C.F.R. § 54.9815–2713A, which do not purport to be based on ERISA enforcement authority at all.

Despite Respondents' explanation of their system, Applicants' religious beliefs continue to preclude them from providing the required certification form. Dkt. 37-1

[6] The government has conceded that the "carrot" part of its system—which depends on receipt of the form—is still operative. Indeed, just two weeks ago in another church plan case, the government acknowledged that the carrot continues to depend on whether the religious organization submits the form or not. *See* Dkt. 51-1 at 10 (Counsel for the government in another church plan case on 12/16: "I will concede that the TPA . . . if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.").

¶¶ 6-9; Dkt. 37-2 ¶¶ 8-9. Applicants explained that "[t]he government's new position does not change our religious objection to complying with the 'accommodation,'" Dkt. 37-1 ¶8, because, *inter alia*, the form could still be construed by a TPA as authorizing provision of contraceptives, Dkt. 37-1 ¶ 17, and because the government acknowledged that it "continue[s] to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans." Dkt. 37-1 ¶18 (quoting Dkt. 29 at 2). Simply put, as a religious matter, Applicants believe they cannot sign and send the form. Dkt. 15-1 ¶ 31-39; Dkt. 15-2 ¶ 28-30, 17-34; Dkt. 37-1 ¶ 8; Dkt 37-2 ¶9.

Unable to comply with the Mandate either by (a) including contraceptives in their employee benefit plan, or (b) signing and delivering the certification form, Applicants sought a preliminary injunction to protect them from being forced to violate their religious beliefs. Without an injunction, Applicants would be forced to either incur significant government penalties and damage to the Trust for continuing their religious exercise of neither providing these services nor submitting and accepting forms to authorize others to do so, or cease that religious exercise to avoid the fines.

On December 27th, however, the district court denied Applicants' motion. The court found that Mother Loraine's religious belief that God does not want her to sign and tender the forms "reads too much into the language of the Form." Op. at 28. Applicants' religious qualms about delivering or accepting the form were dismissed as "pure conjecture, one that ignores the factual and legal realities of this

case." Op. at 31. Ultimately, the court found Applicants faced no substantial burden because they should just sign and deliver the form and trust that it will have no effect. Op. at 26, 31-32.

This afternoon, the Tenth Circuit denied Applicants request for a preliminary injunction pending appeal. The Tenth Circuit found that if Applicants do the precise thing they object to doing—if they "complet[e] a self-certification form and provid[e] it to the third-party administrator," Appendix Ex. 1 at 2—they can avoid punishment. While true, this is cold comfort: the whole point is that submitting the form is the act that Mother Loraine and the other Applicants are forbidden by their religion from performing.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. § 1651(a)) (alterations in original). This "extraordinary" relief, *see Lux* v. *Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers), is warranted in cases involving the imminent and indisputable violation of civil rights. *See Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established

likely violation of Voting Rights Act); *Am. Trucking Assocs.* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same).

Applicants present such a case.

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

In less than ten hours, Applicants face an impossible choice: sign and submit a form forbidden by their religion, or decline to do so and risk exposure to millions of dollars in fines. A federal law—RFRA—exists precisely to prevent this type of enormous government pressure to give up a religious exercise. Without emergency relief from this Court, Applicants will suffer this illegal coercion beginning at midnight tonight, and each and every day thereafter. Those fines will continue to accumulate, day by day, unless and until Applicants give up their religious exercise or collapse from the mounting burden.

Applicants have no acceptable options. If Applicants violate their faith under this enormous pressure and participate in the Mandate (either by providing the drugs or by submitting authorization forms directing and helping others to do so), no future relief can repair the injury to their religious liberty. If Applicants remain steadfast in their faith, the penalties for doing so are potentially so large that it is unclear whether some of them could bear the risk long enough to pursue their case. In short, Applicants find themselves in "the most critical and exigent circumstances," *Fishman*, 429 U.S. at 1326 (Marshall, J., in chambers), both as to their ability to exercise their faith and as to the continued viability of their ministries.

The threat to Applicants' religious freedom derives from the sheer enormity of the government's pressure on them to forego their religious exercise of not providing coverage for the drugs and devices at issue and not authorizing or helping others to do so. It is black letter law that a violation of constitutional rights constitutes irreparable injury. *See, e.g., Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary."). Few laws in American history threaten fines as severe as those potentially available under the Mandate; no law has ever imposed such a price on the exercise of religion. Such unprecedented government pressure to abandon a religious exercise by midnight tonight creates extraordinarily exigent circumstances for Applicants.

Additionally, Applicants face critical and exigent circumstances concerning the financial viability of their ministries. As the Court explained in *Doran* v. *Salem Inn, Inc.*, where a business "would suffer a substantial loss of business and perhaps even bankruptcy," the case "[c]ertainly … meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." 422 U.S. 922, 932 (1975); *cf. Conkright* v. *Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (denying a stay where applicants did not allege that required payments would "place the [benefit] plan itself in jeopardy"). That is exactly what Applicants face.

Depending on how the government ultimately calculates the fine, Applicants could face exorbitant fines *each day*. Even profit-making businesses could not endure daily, recurring fines of that magnitude for any extended period of time. Nor could they long continue to hire new employees and serve the public in the face of such overwhelming potential liabilities.

For example, the Little Sisters home in Denver that is a named plaintiff has 67 employees. Dkt. 15-1 ¶ 56. If the I.R.S. calculates the § 4980D fines on a per-employee basis,[7] the Little Sisters face *daily* fines of $6,700 unless they cease their religious exercise and begin complying with the Mandate tonight. *Id.* That would amount to an annual fine of approximately $2.5 million—for an organization that cares for 69 elderly poor people and operates with an annual budget of approximately $6 million. Dkt. 15-1 ¶ 57.[8] The Denver home is one of about thirty Little Sisters homes nationwide that will face this pressure. Dkt. 15-1 ¶ 9.

The Little Sisters homes are not alone in this predicament. Nearly 500 Catholic non-profit ministries provide their benefits through the Trust and face the prospect of similarly onerous daily fines unless and until they cease their religious exercise of

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[7] Respondents have never fully explained how they intend to calculate the § 4980D fines. Over the two years of litigation concerning the HHS Mandate, however, most Plaintiffs have alleged that the fine might be calculated on a per-employee basis (i.e., fine = (# employees) * ($100) * (# days refusing to cover contraceptives)). Applicants' counsel are not aware of any case in which Respondents have disputed this method of calculating such fines.

[8] Generally speaking, Little Sisters homes run with about half the budget coming from "voluntary gifts, largely in response to the begging for funds and gifts in kind that the Little Sisters do to support [their] ministry" and about half from government payments (chiefly Medicaid and Medicare) for the care they provide to the needy elderly. Dkt. 15-1 ¶ 14.

refusing to submit forms to authorize or help others to provide contraceptives. Collectively, unless these ministries give up their religious exercise, they could face fines exceeding $1.1 million *just for January 1st alone*. Dkt. 15-2 ¶ 44. Those fines would exceed $400 million over the course of 2014. *Id.* These non-profit ministries—which provide needed social services like educating children, feeding the hungry, caring for the sick, and comforting the old and the dying—could not possibly endure such massive daily fines over time, meaning the fines will likely force them to either give up their religious exercise (surely an irreparable harm) or to close under the weight of the fines before their litigation could run its course.

Not surprisingly, these kinds of losses would also be catastrophic for the Trust and for Christian Brothers Services. If these ministries close or are forced to leave the Trust because they must stop providing employee health benefits, the Trust and Christian Brothers Services estimate that they could lose as much as $130 million in medical plan contributions per year. Dkt. 15-2 ¶53. As a religious matter, neither the Trust nor Christian Brothers Services can facilitate the provision of the services at issue. Dkt. 15-2 ¶¶16-36. Yet the required Forms would be "an instrument under which the plan [i.e., *Christian Brothers'* plan] is operated." Dkt. 37-2. The Trust and Christian Brothers Services are thus forced to choose between (a) dramatically reducing the scope of their religious ministry of providing health benefits to Catholic organizations or (b) violating their religious commitment to avoid cooperation with the Mandate. Dkt. 15-2 ¶¶ 44-59.

In light of the burden on religious exercise to be imposed by the Mandate in just a few hours, and the massive fines threatened against any organization that fails to comply, Applicants face critical and exigent circumstances.[9]

II. APPLICANTS HAVE AN INDISPUTABLY CLEAR RIGHT TO RELIEF.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b).

Applicants present a clear and straightforward RFRA claim and, as a result, have an overwhelming likelihood of prevailing on their claim. As the majority of courts to consider the issue have found, threatening non-profit religious organizations with substantial fines unless they give up their objection to participating in the Mandate—either by providing drugs or authorization forms—imposes a substantial burden on religion triggering strict scrutiny.[10] In finding

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[9] This exigency is balanced on the other side of the ledger by virtually no government interest. Indeed, the government's argument below was not that it is particularly important to have Applicants submit the forms, but that the forms would likely be meaningless and, therefore, should be acceptable to Applicants' religion.

[10] *See Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Srvs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *Reaching Souls Int'l, Inc.* v. *Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Southern Nazarene University* v. *Sebelius,* No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *E. Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (N.D.

otherwise, however, the courts below failed to apply the controlling legal standard for "substantial burden" and inappropriately second-guessed the substance of Applicants' religious beliefs.

A. Applicants have clearly established a substantial burden on a religious exercise.

The government does not dispute the existence, religiosity, or sincerity of Applicants' religious beliefs. Accordingly, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abstain from that religious

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Tex. Dec. 27, 2013); *Grace Schools* v. *Sebelius,* No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc.* v. *Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva College* v. *Sebelius,* No. 2:12-cv-00207 (W.D. Pa. Dec. 23 2013); *Legatus* v. *Sebelius,* No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York* v. *Sebelius*, No. 1:12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik* v. *Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *see also Ave Maria Foundation* v. *Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order to religious non-profits because the regulations "likely substantially burden" their religious exercise); *compare Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:13-cv-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (finding substantial burden with respect to a self-insured non-exempt religious non-profit but concluding that religious non-profits in a church plan lacked standing). *But see Michigan Catholic Conference* v. *Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), emergency motion for injunction filed Dec. 29, 2013, No. 13-2723 (6th Cir.); *Catholic Diocese of Nashville* v. *Sebelius*, No. 3:13-cv-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), emergency motion for injunction filed Dec. 27, 2013, No. 13-6640 (6th Cir.); *Univ. of Notre Dame* v. *Sebelius,* No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction denied and expedited briefing schedule set, Doc. 11, No. 13-3853 (7th Cir. Dec. 30, 2013); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), emergency motion for injunction filed Dec. 20, 2013, No. 13-5368 (D.C. Cir.).

exercise. *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").

As discussed above, Applicants have identified a specific religious exercise, namely their refusal to sign and submit the self-certification form which authorizes and can be used to provide contraceptives, sterilization, and abortion-inducing drugs to their employees and which facilitates coverage for contraceptives, sterilization, and abortion-inducing drugs to plan participants of the Trust. *See* Dkt. 15-1 ¶¶ 44-52; Dkt. 15-2 ¶¶ 17-34; Dkt. 37-1 ¶¶ 6-9; Dkt. 37-2 ¶¶ 8-9; 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Employment Div*. v. *Smith*, 494 U.S. 872, 877 (1990) (explaining "the 'exercise of religion often involves not only belief and profession but the performance (or abstention from) physical acts").

In turn, the government has imposed a substantial—indeed, a crushing—burden on Applicants' exercise of religion. If Applicants continue engaging in this particular exercise of religion (i.e., if they continue their religious refusal to sign a form authorizing the provision of contraceptives, sterilization, and abortion-inducing drugs to their employees and supply that form in concert with administration of the Trust) they will face enormous government fines unless and until they yield. Failure to take the actions required by the Mandate will subject Applicants to ruinous fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b) & (e)(1). If Applicants seek to drop health coverage altogether, they will be subject to an

annual fine of $2,000 per full-time employee, *see* 26 U.S.C. § 4980H(a), (c)(1)), and/or face ruinous practical consequences due to their inability to offer a crucial healthcare benefit to employees. As described above, these penalties, which involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

Such a burden on religious practice easily qualifies as "substantial." *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable pressure upon [applicant] to forgo [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *see also Hobby Lobby*, 723 F.3d at 1138 (government action substantially burdens a religious belief when it "requires participation in an activity prohibited by a sincerely held religious belief," prevents participation in conduct motivated by a sincerely held religious belief," or "'places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief") (internal citation and quotation marks omitted). Fining people who refuse to violate their faith is a paradigm substantial burden. *Sherbert,* 374 U.S. at 404. This Court has deemed a modest fine of *five dollars* for believers' refusal to violate their faith a substantial burden. *Wisconsin* v. *Yoder*, 406 U.S. 205, 208, 218 (1972) (fine "not only severe, but inescapable"). This formulation of "substantial burden" is widely shared among Courts of Appeals under RFRA and

its companion statute, RLUIPA.[11] In the for-profit Mandate challenges, every circuit to reach substantial burden has strongly reaffirmed it.[12] Under RFRA, such a

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[11] *See, e.g., Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'") (quoting *Sherbert*); *Washington* v. *Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (a substantial burden exists, among other situations, where "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) ("a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'") (citing *Thomas*); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between 'following the precepts of her religion and forfeiting benefits' or when the action in question placed 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'"); *Navajo Nation* v. *U.S. Forest Ser*v., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."); *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("A substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (quoting *Thomas*)); *see also Ford v. McGinnis*, 352 F.3d 582 (2d. Cir. 2003) (Sotomayor, J.) ("[C]ourts are not permitted

substantial burden on Applicants' religious exercise triggers strict scrutiny, the "most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), which the Mandate cannot possibly survive.

B. The District Court and Tenth Circuit ignored this Court's precedents by replacing their judgment for Applicants' religious beliefs.

In denying interim relief under RFRA, the District Court and Tenth Circuit made two fundamental legal errors directly at odds with this Court's jurisprudence and with the plain text of RFRA. First, the underlying courts completely disregarded the substantial burden imposed upon Applicants proposed religious

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to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be. * * * We have no competence to examine whether plaintiff's belief has objective validity.").

[12] *See, e.g., Hobby Lobby*, 723 F.3d at 1137 (rejecting "an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs") (emphasis in original); *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) ("A 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"); *Korte* v. *Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) ("[T]he 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.").

Both of the circuits to rule against the for-profit mandate plaintiffs have done so without reaching the substantial burden inquiry. *See Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013) *cert. granted,* 134 S. Ct. 678 (2013) ("We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself."); *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013) ("[W]e do not reach the government's arguments that the mandate fails to impose a substantial burden on Autocam.").

exercise by the fines in question.[13] The courts ignored the fact that Applicants would be fined millions of dollars if they refuse to sign the self-certification form because of their religious beliefs which is an *ipso facto* substantial burden. Second, the court impermissibly sought to tell Applicants—who provided sworn declarations that they could not sign and deliver the forms—whether signing and delivering the forms actually violated their religion or not.

In so doing, the underlying courts failed to apply the proper legal standard under RFRA and its established precedent. In deciding substantial burden, the court's inquiry is necessarily limited. The nature of a plaintiffs' religious exercise is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' religious beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also Lee*, 455 U.S. at 257 (same). "Courts are not arbiters of scriptural interpretation" and it is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716; *see also Hernandez* v.

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[13] The district court noted the Hobson's choice necessitating an injunction in *Hobby Lobby, e.g.* the false choice between fines ranging between $26 million and $475 million dollars or the violation of religious beliefs; however, the district court declined to relieve Applicants from this same Hobson's choice declaring that Applicants could "avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form and providing it to Christian Brothers Services, their third party administrator." Op'n at *18. In other words, Applicants must navigate this Hobson's choice by choosing to violate their religious beliefs through signing and submitting the self-certification form and participating in this coverage scheme.

C.I.R., 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). It is thus left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

But instead of accepting the line Applicants drew, the district court impermissibly "purport[ed] to resolve the religious question underlying th[is] case[]: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. The district court's answer was "no," but of course, "[n]o civil authority can decide that question." *Id.* Ultimately, the trial court's opinion amounts to an argument about why signing the forms *should* not violate Applicants' religion. The lower court clearly believed that Appellants *should* be comfortable signing the self-certification form.[14] However, the questions of moral complicity in this case are

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[14] At the same time, however, the district court independently acknowledged Applicants' own concerns that "the Final Rules could be construed to require an eligible organization to contract with a third party administrator that is willing to act as an ERISA plan administrator and claim administrator and take on all of the obligations set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A", Op. at 25, and that "the regulations implementing the ACA are in flux, and that Congress may, at some point in the future, grant Defendants some authority outside of ERISA to enforce the Mandate, and/or promulgate new regulations that apply to church plans. Indeed, there is a story on the news almost daily about changes being made to the ACA regulations." Op. at 33. It is, of course, a perfectly valid *religious* belief for a party to believe they are *religiously* required to refrain from signing and releasing authorization forms in such an uncertain system.

Giving rise to greater concern, the Trust utilizes Express Scripts, Inc. ("ESI") which provides pharmaceutical claim administrative services under the Trust, and it is not clear whether Respondents will treat ESI as a TPA. Second Suppl. Brother

religious, not legal. *See, e.g., Gilardi*, 733 F.3d at 1215 ("[I]t is not for courts to decide [what] severs [a religious objector's] moral responsibility") (internal citation omitted); *Korte* v. *Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (rejecting Defendants' "'attenuation' argument" because it asks whether "th[e] [Mandated] coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," a question which "[n]o civil authority can decide"); *Zubik*, 2013 WL 6118696, at *14 ("Completion of the self-certification form would be akin to cooperating with/facilitating 'an evil' and would place the Diocese 'in a position of providing scandal' because 'it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching.'"); *Reaching Souls Int'l, Inc.* v. *Sebelius*, No. 5:13-cv- 1092-D, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013) (holding that the question 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.") (internal quotations omitted); *Southern Nazarene University* v. *Sebelius*, No. 13-cv-1015-F, 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013) ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.").

Quirk Decl., Dkt. 42-4 ¶¶2-3 (Appendix Ex. 10). Applicants have received no assurance that ESI would not use such forms to make payments and seek reimbursement (plus ten percent) from the government based on the forms. Thus Applicants cannot provide these forms in violation of their beliefs.

The district court acknowledged its limitations and recognized that it "cannot look behind [Appellants'] statements about what offends their religious beliefs" and "cannot question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief" Op. at 21. Yet that is precisely what the decision below does: it repeatedly explains why the court thinks an act that Appellants say violates their religion (signing and delivering the Form to participate in the accommodation) really does not violate their religion. *See, e.g.,* Op. at 28 (finding that religious refusal to sign the form "reads too much into the language of the Form"); *id.* at 31 (dismissing religious belief as "pure conjecture, one that ignores the factual and legal realities of this case"). Under the established law described above, however, it was for the Applicants, not the trial judge, to decide whether a particular action violates their religious beliefs. As in *Thomas*, Applicants "drew a line" between religiously permissible and impermissible conduct, and "it [wa]s not for [the court] to say [the line was] unreasonable." 450 U.S. at 715, 718. If Applicants interpret the "creeds" of Catholicism to prohibit compliance with the Mandate, as they do, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 440 U.S. at 669.

The Tenth Circuit said far less about Applicants' religious exercise. Indeed, the crux of the Tenth Circuit's decision was that Applicants could avoid all penalties . . . *if* they would simply fill out the forms the government mandates. Such reasoning would, of course, resolve *all* religious liberty cases: Quaker conscientious objectors would suffer no penalties if they would just join the military; Jewish prisoners

would suffer no burden if they would just eat the pork; Seventh Day Adventists would not lose their benefits if they would just work on Saturdays. Such reasoning is at odds with RFRA and this Court's First Amendment cases.

C. The Mandate cannot survive strict scrutiny.

Because the Mandate substantially burdens Applicants' religious exercise, the government must justify the Mandate under strict scrutiny—the "most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534; 42 U.S.C. § 2000bb-1(b). It cannot hope to do so here.

The government did not carry its burden of proving that the Mandate passes strict scrutiny. *See O Centro*, 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA * * * including at the preliminary injunction stage") (citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)).

Compelling Interest. The government did not demonstrate that applying the requirement to Applicants furthers any compelling interest. To be compelling, the interest cannot be "broadly formulated," but must be shown to apply particularly to the Applicants. *O Centro*, 546 U.S. at 431 (citing *Wisconsin* v. *Yoder*, 406 U.S. 205, 236 (1972)). Yet below, the government articulated only the same "broadly formulated interests" in public health and gender equality that it has offered in all of its Mandate-related litigation, and "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.'" *Hobby Lobby*, 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 431); *see also* Gov't Opp., Dkt. 29 at 10 (reiterating below the identical interests in "public health" and "gender equality" that were identified as "broadly formulated" in *Hobby Lobby*). That lack of

specificity dooms a compelling interest claim under RFRA. *See, e.g., O Centro*, 546 U.S. at 430-31 (RFRA requires government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the *particular claimant* whose sincere exercise of religion is being substantially burdened") (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added). The government failed to show with any "particularity" how its interests would be "adversely affected" by granting an exemption to the Applicants. *Yoder*, 406 U.S. at 236).

That failure is particularly glaring here. For instance, the government has offered religious exemptions to thousands of religious entities, exemptions which, in the government's own words, are necessary to "protect[]" objecting organizations from an identical burden on their religious beliefs. 78 Fed. Reg. 39870, 39872 (July 2, 2013). The government fails to explain why Applicants, all of whom are also religious entities, do not deserve the same "protection"—beyond bald speculation that their employees are "less likely" to share their religious beliefs than are those of the churches. 78 Fed. Reg. at 39874; *see also* Dkt. 30-3 at 5 (deposition testimony admitting there is "no evidence" for the government's speculation that employees of religious organizations like Applicants "are more likely not to object to the use of contraceptives."). Even if the government had shown that its interests were slightly served by exempting Catholic bishops running churches and not Catholic nuns serving the poor, the Mandate must still fail, for "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741 n. 9 (2011).

Worse still, the government exempts countless secular employers based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As several courts of appeals, including the *en banc* Tenth Circuit, properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222. Numerous employers are not required to offer employees any contraceptive coverage, such as employers with "grandfathered" plans and employers with fewer than fifty employees (who are not required to offer health insurance at all). *Hobby Lobby*, 723 F.3d at 1143. Given these enormous gaps, the government cannot plausibly maintain its interests are compelling. *See, e.g., Lukumi*, 508 U.S. at 547 (explaining that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

More to the point, the government has now taken the legal position that they cannot force third party administrators in non-ERISA church plans to provide the underlying coverage. If that is true, the government has no compelling interest—or even *rational* interest—in coercing Applicants to sign and submit an authorization form that violates their religious beliefs.

Narrow Tailoring. Even assuming *arguendo* a compelling interest, the contraceptive-coverage requirement still fails strict scrutiny because the government did not prove it is the least restrictive means of furthering its interests.

United States v. *Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 813 (2000) (if a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." (emphasis added)).

This failure results in part from its extremely broad statement of the government's interests, which makes it analytically "impossible to show that the Mandate is the least restrictive means of furthering" those interests. *Korte*, 735 F.3d at 686; *Brown*, 131 S. Ct. at 2739 (the government must specifically "identify an 'actual problem' in need of solving" and that curtailing religious liberty is "actually necessary to the solution" (citations omitted)). But it also results from the government's failure to meet its burden and offer evidence to explain why it could not increase contraceptive access and use by other readily available means. *See, e.g., O Centro*, 546 U.S. at 429; *Korte*, 735 F.3d at 687 (noting that the government "has not made *any* effort to explain how the contraceptive Mandate is the least restrictive means of furthering its stated goals"). For instance, the government spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services." 42 C.F.R. § 59.5(a)(1).[15] The government did not explain why it could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. *See, e.g.,* 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family"). Indeed, HHS has

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[15] *See also, e.g.,* RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

"many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte*, 735 F.3d at 686; *see also, e.g., Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting programs like Title X and the government's lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

D. Most other courts to have considered the issue have granted preliminary injunctions.

Most lower courts to consider the impact of the Mandate on non-profits generally, and on church plan participants specifically, have found that it *does* impose a substantial burden.[16] The great weight of authority explains why the trial court's analysis was simply wrong.

Several other courts to consider this very issue have rejected the government's position as misconstruing the religious objection: "Plaintiffs' religious objection is not only to the use of contraceptives but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of New York*,

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[16] Three out of five federal courts of appeals have concluded that the Mandate burdens the religious exercise of for-profit corporations. *Hobby Lobby*, 723 F.3d at 1137-1145, (holding that the Mandate substantially burdened the religious exercise of a for-profit corporation); *see also Gilardi v. U.S. Dep't of Health & Human Srvs.*, 733 F.3d 1208 (D.C. Cir. 2013) (same); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (same); *but see Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted* 134 S. Ct. 678 (2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013). In Mandate challenges brought by religious non-profits, fourteen out of nineteen courts have concluded that the government's scheme likely violates RFRA. *See supra* n. 10.

2013 WL 6579764, at *14. The accommodation requires Appellants themselves to sign a form that is, "in effect, a permission slip." *Southern Nazarene Univ*., 2013 WL 6804265, at * 8.

As another court in the Tenth Circuit explained, the claim that Appellants' objection to signing the form is "legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage" is "simply another variation of a proposition rejected by the Tenth Circuit in *Hobby Lobby*." *Reaching Souls*, 2013 WL 6804259, at *7. The question 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.'" *Id.*, quoting *Hobby Lobby*, 723 F.3d at 1137 (rejecting government's argument as "fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs."). And because Applicants view completing the self-certification itself as forbidden complicity with the government's scheme, "regardless of the effect of plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion." *Roman Catholic Archdiocese of New York*, 2013 WL 6579764, at *7; *E. Texas Baptist Univ*., 2013 WL 6838893, at *20 (Rosenthal, J.) ("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and

that they find this act — their own act — to be religiously offensive. That act is completing and providing to their issuer or TPA the self-certification forms.").

In sum, other courts have appropriately recognized that the government's imposition of severe pressure on Applicants to comply notwithstanding their religious objection to participation is a substantial burden on their exercise of religion. *See Southern Nazarene Univ.*, 2013 WL 6804265, at * 9 ("The government has put these institutions to a choice of either acquiescing in a government enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.").

In contrast, the handful of courts that have denied injunctions have committed the same error that happened here: the trial courts did not apply a proper substantial burden inquiry and incorrectly substituted their own religious judgment for the plaintiffs. *See, e.g.,* Michigan Catholic Conference v. Sebelius, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013) ("It is difficult to see how a substantial burden exists when the relationship to the objectionable act is so attenuated.").

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and

take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910). The Court should exercise this authority here because the fines for non-compliance with the Mandate—which begin at midnight tonight—threaten Plaintiffs' ministries. *See* Section I *supra*. Plaintiffs face exposure to potentially massive daily fines and therefore will suffer palpable and rapidly mounting burdens on their religious exercise. And it is precisely because those burdens will increase during the appellate process—inflicting greater and greater harm Petitioners' on religious exercise and their ministries—that Petitioners need temporary injunctive relief from this Court. Otherwise, the Mandate's punitive fines risk scuttling the process of review before Petitioners can complete the process of appellate review, including any further review by this Court.

One reason given for the denial of an injunction pending appeal in the *Hobby Lobby* case last year was that "[e]ven without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 133 S.Ct. 641, 643 (2012) (Sotomayor, J., in chambers). But if January 1, 2014 arrives without injunctive relief, Applicants will have irretrievably lost their right not to be subject to a forced choice between their religious exercise and fines. And, unlike in *Hobby Lobby*, there is no argument that Applicants—all of whom are religious non-profits—are incapable of exercising religion. They might still ultimately obtain some relief, but no relief can restore the status quo that exists today—before the threatened fines start mounting.

In this respect, Plaintiffs' situation is like that of the religious believer who received injunctive relief from this Court to prevent the government from shaving his beard. *See Holt* v. *Hobbs*, No. 13A374 (Nov. 14, 2013), 2013 BL 316731. If the Court had not issued relief and the government had shaved his beard, the applicant could have grown a beard back later. But he would have irretrievably lost the protection to which his religious exercise was entitled. In *Holt* v. *Hobbs*, as in this application, the requested injunctive relief is in aid of this Court's jurisdiction to rule on a specific religious exercise—protection against a forced choice in violation of Plaintiffs' religious beliefs.

Finally, injunctive relief would also be in aid of this Court's jurisdiction to review this Application as a petition for certiorari before judgment. *See New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.").

IV. THE COURT SHOULD ALSO GRANT CERTIORARI BEFORE JUDGMENT

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the court of appeals and enjoin enforcement of the Mandate against Applicants pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Given the way in which the waves of RFRA litigation over the Mandate have broken over the federal courts in the past two years, RFRA's protection for non-exempt religious non-profits who cannot comply with the Mandate is now "of such imperative public importance as to justify deviation from normal appellate

practice and to require immediate determination in this Court." S. Ct. R. 11. Cases brought by non-exempt religious non-profits have trailed behind cases brought by for-profit corporations because the government's shifting rules for non-profits meant that the government was largely successful in getting non-profits' cases dismissed on standing and ripeness grounds when first brought because the government was continuing to review and revise the governing regulations. But the final regulation has now issued, and the non-profits' cases are now ready for this Court's consideration. They present overlapping legal issues with *Hobby Lobby* and *Conestoga Wood*, and further percolation is not only unnecessary but also harmful. In the absence of immediate action, the burden of cumulative fines for non-compliance will become heavier and heavier day by day, while the variations in treatment under the law will become broader and deeper decision by decision. This division will have a real distorting effect on society at large: religious institutions fortunate enough to be in winning cases will be allowed to remain true to their faiths and continue to provide social services without fear of fines or hypocrisy. Those like Applicants, who are not given even temporary relief to protect them while their lawsuits to proceed, must either violate their religion or risk closing their ministries.

This Court has already agreed to decide two cases about RFRA's statutory protection for employers who object to the contraceptives Mandate on religious grounds. *See Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354; *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356. Those cases present important questions of

federal law regarding statutory religious freedom protection from regulatory employer coverage mandates. Both the already granted cases and those that involve non-exempt religious non-profits present the question whether and how RFRA protects against the Mandate imposed by the government. To be sure, those already granted cases present some threshold questions that cases involving non-exempt religious non-profits like the Little Sisters of the Poor do not. But all of the cases share some core questions about how RFRA protects any employer, for-profit or non-profit, from the Mandate. The government argues in all of the cases, for example, that the burden imposed on the employer is insubstantial, and that the Mandate satisfies strict scrutiny. The overlap, but not complete identity of issues with these already granted cases, weighs in favor of granting certiorari now in this case. *See Gratz* v. *Bollinger*, 539 U.S. 244, 260 (2003) (explaining that the desire to address the constitutionality of race-conscious admissions "in a wider range of circumstances" justified grant of certiorari before judgment in affirmative-action case with overlapping but not identical issues present in previously granted case of *Grutter* v. *Bollinger*); *see also Gratz* v. *Bollinger*, No. 02-516, Petn. for Certiorari at 15 (arguing that *Grutter* and *Gratz* "considered together will present the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles that they involve than if only one case is considered, or if they are resolved separately and at different times or in different terms").

This Court needs to step in now because while most lower court decisions addressing RFRA claims by non-exempt religious non-profits have granted

preliminary relief, those few who have not been granted relief run out of time tonight. *See United States* v. *Mistretta*, 488 U.S. 361, 371 (1989) (identifying "disarray in the Federal District Courts" as a reason for granting certiorari before judgment in the court of appeals). In cases brought by non-exempt religious non-profits, the district courts have split on outcome by a more than two-to-one ratio in nineteen cases (with more granting relief than denying it).[17] As of one p.m. on December 31, 2013, two circuit courts of appeals (the Seventh and the Tenth Circuits) had denied motions for injunctive relief pending appeal, while such motions remained pending in two others (the D.C. and Sixth Circuits). In the subset of non-exempt religious non-profit cases analyzing "church plans," the split on outcome has been three to three.[18] And some of the cases in this category that have reached the same outcome of no preliminary injunctive relief have done so for different reasons. *Compare Roman Catholic Archbishop of Wash.* v. *Sebelius*, No. 1:13-cv-01441 (D.D.C. Dec. 20, 2013) (no standing for certain church plan employer Applicants), *with Little Sisters of the Poor* v. *Sebelius*, No. 13-cv-2611, 2013 BL

[17] *See* cases cited *supra* n. 10. The precise count depends on how one characterizes the *Archbishop of Washington* case, in which one non-exempt religious nonprofit won its RFRA claim, others lost that claim on standing, and the group prevailed on a free-speech claim.

[18] *Compare Roman Catholic Archdiocese of New York* v. *Sebelius*, No. 1:12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (granting injunctive relief to church plan participants); *Reaching Souls Int'l, Inc.* v. *Sebelius*, No. 5:13-cv-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *E. Texas Baptist Univ.* v. *Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013) (same), *with Little Sisters of the Poor Home for the Aged, Denver, Colorado* v. *Sebelius*, No. 1:13-cv-02611 (D. Colo. Dec. 27, 2013) (denying injunctive relief to church plan participants); *Roman Catholic Archbishop of Washington* v. *Sebelius*, No. 1:13-cv-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (same); *Michigan Catholic Conference* v. *Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013) (same).

356702 (D. Colo. Dec. 27, 2013) (standing for church plan employer Applicants but no substantial burden on them). There is an intra-circuit split on church plan cases in the Tenth Circuit: *Reaching Souls* v. *Sebelius* was a win for Southern Baptist religious employers while the present case of *Little Sisters of the Poor* v. *Sebelius* was a loss for Catholic religious employers. And there is a split in cases concerning the religious organizations participating in the Trust.[19] These different outcomes—and relatedly different prospects for the future—are not attributable to different creeds, of course, but to different district courts and the lack of harmonizing appellate decisions.

This Court's decisions in the pending *Hobby Lobby* and *Conestoga Wood* cases certainly hold some potential to bring greater uniformity to lower court decisions about RFRA's protections for all religious employers. But there is little point in having lower court decisions percolating while the Court is deciding these two already granted. This is particularly true regarding cases pending in the Tenth Circuit; that court, sitting en banc, has already set forth how RFRA analysis of the contraceptives Mandate should proceed. Moreover, while *Hobby Lobby* and *Conestoga Wood* remain pending before this Court, they will overhang all of the contraceptives Mandate cases that may remain for decision in the lower courts. That overhang, which has the potential to waste further litigation on this issue in

[19] The United States District Court for the Eastern District of Texas just granted a preliminary injunction in *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-00709 (E.D. Tex. Dec. 31, 2013). Plaintiffs in that case include the Catholic Diocese of Beaumont and Catholic Charities of Southeast Texas, Inc., both of which are employers participating in the Trust.

the lower courts, is particularly severe in the Tenth Circuit. If Applicants in this case are sent back to litigate in that court, much of the dispute will be over the meaning and significance of the *Hobby Lobby* case that this Court already has before it for review. Meanwhile, substantial fines will become daily more substantial.

The issues to be decided in these cases are purely legal, requiring interpretation of RFRA's "substantial burden" standard in the context of the contraceptives Mandate, and they have already been thoroughly examined in the lower courts. The government, for its part, has told the district court in this case that "no discovery is required for the Court . . . to resolve any of Applicants' claims." Dkt. No. 44 at 3. And adding additional squares to the legal patchwork of lower-court decisions will not at this point provide new insight for this Court's decision making. In contrast, granting certiorari now will save parties from lengthy litigation and expensive uncertainty, protect Applicants from irreparable harm, and avoid unnecessary additional investment of scarce federal judicial resources into more lower-court litigation over legal issues ripe for consideration by this Court now.

If the Court is not prepared right now to grant certiorari before judgment, Applicants request denial of certiorari without prejudice together with injunctive relief of sufficient duration to allow for preparation and submission of a petition for certiorari before judgment that reflects the state of affairs as it exists after January 1, 2014. Given the speed with which this case and other similar cases have moved

through the lower courts, Applicants and other non-exempt religious non-profits whose motions for preliminary injunction or injunction pending appeal had been denied just minutes or hours before seeking relief from this Court should be given the opportunity to more fully brief this matter for the Court's consideration.

Finally, at a minimum, Applicants respectfully seek an administrative stay to allow for orderly briefing and disposition of this Application.

CONCLUSION

Applicants respectfully ask the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal enjoining them from enforcing or applying the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and from assessing penalties, fines, or taking any other enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d against Appellants, all non-exempt employer participants in the Trust, and their third party administrators as their conduct relates to the Trust.

In the alternative, Applicants respectfully ask the Court to grant certiorari before judgment to review the district court's denial of preliminary injunctive relief, and to grant injunctive relief pending disposition of that petition.

At a minimum, Applicants respectfully seek an administrative stay to allow for orderly briefing and disposition of this Application.

Respectfully submitted,

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Dated: December 31, 2013

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Mark L. Rienzi, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application and Appendix was served via electronic mail December 31, 2013 and by first-class United States Postal Service mail on December 31, 2013 on:

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