No. _____

IN THE

Supreme Court of the United States

MICHIGAN CATHOLIC CONFERENCE, CATHOLIC FAMILY SERVICES, THE CATHOLIC DIOCESE OF NASHVILLE, CATHOLIC CHARITIES OF TENNESSEE, INC., AQUINAS COLLEGE, DOMINICAN SISTERS OF ST. CECILIA CONGREGATION, MARY QUEEN OF ANGELS, INC., CAMP MARYMOUNT, INC., AND ST. MARY VILLA, INC.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
20001-2113
(202) 879-3939
njfrancisco@jonesday.com

MATTHEW A. KAIRIS
Counsel of Record
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
(614) 469-3939
makairis@jonesday.com

Counsel for Petitioners

QUESTION PRESENTED

This case presents the question this Court did "not decide" in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 & n.39 (2014):

> Whether, consistent with the Religious Freedom Restoration Act ("RFRA"), the Government can compel a nonprofit religious organization to act in violation of its sincerely held religious beliefs by participating in a regulatory scheme to provide its employees with coverage for abortion-inducing products, contraceptives, and sterilization.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are Michigan Catholic Conference; Catholic Family Services; the Catholic Diocese of Nashville; Catholic Charities of Tennessee, Inc.; Aquinas College, Nashville, Tennessee; Dominican Sisters of St. Cecilia Congregation; Mary Queen of Angels, Inc.; Camp Marymount, Inc.; and St. Mary Villa, Inc. Aquinas College's sole member is St. Cecilia Congregation, a Tennessee not-for-profit corporation. No other Petitioners have parent corporations. No publicly held corporation owns any portion of Petitioners, and Petitioners are not subsidiaries or affiliates of any publicly owned corporation.

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

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district courts' denials of Petitioners' motions for preliminary injunctions (Pet. App. 1a-55a) are reported at 989 F. Supp. 2d 577 and 2013 WL 6834375. The district courts' subsequent denials of Petitioners' motions for injunctions pending appeal (Pet. App. 56a-58a) are unreported. The Sixth Circuit's orders granting injunctions pending appeal (Pet. App. 59a-88a) are available at 2013 U.S. App. LEXIS 25937 and 2013 U.S. App. LEXIS 25936. The Sixth Circuit's consolidated merits opinion affirming the district courts (Pet. App. 89a-136a) is reported at 755 F.3d 372. Its order denying Petitioners' request for rehearing en banc (Pet. App. 137a-138a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on June 11, 2014. Pet. App. 89a-136a. That court denied rehearing en banc on September 16, 2014. Pet. App. 137a-138a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in Appendix N (Pet. App. 362a-417a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16; 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

INTRODUCTION

Petitioners are religious nonprofits who have an undeniable and deeply held religious belief about the immorality of abortion-inducing products, contraceptives, and sterilization. The Government has made it effectively impossible for Petitioners to offer health coverage to their employees in a manner consistent with these religious beliefs. Specifically, the Government compels Petitioners to (1) contract with third parties that will provide payments for the objectionable products and services to Petitioners' plan beneficiaries, and (2) submit documentation that, in their religious judgment, makes them complicit in the delivery of such payments. It is undisputed that these actions violate Petitioners' religious beliefs, and it is equally undisputed that if Petitioners refuse to take these actions, they will be subject to massive fines.

This case, therefore, is not about preventing women from obtaining cost-free contraceptive coverage. Given its extensive powers and virtually unlimited resources, the Government cannot seriously contend that conscripting Petitioners to act in violation of their beliefs is necessary to achieve that goal, which could be accomplished through tax credits or deductions, or through the many programs that already exist for providing health care subsidies, such as the Title X family planning program, the Medicaid program, or the insurance exchanges established under the Affordable Care Act. All of these alternatives—and presumably many others—would remain available to the Government even if Petitioners prevail.

This case is also not about a challenge to an exemption. Notwithstanding the Government's characterizations, the so-called "accommodation" offered to Petitioners is not an "opt out." As the undisputed record shows, the accommodation still compels Petitioners to take specific actions in violation of their religious beliefs. Consequently, Petitioners are forced to choose between two different courses of action, *both* of which violate their sincerely held religious beliefs. That is no choice at all. It is no more of an "opt out" than allowing a religious pacifist to choose between military service and working in a munitions factory, when his beliefs forbid him from engaging in *either* activity. *Cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

In short, this case is only about whether the Government can commandeer Petitioners and their health plans as vehicles for delivering contraceptive coverage. Although Petitioners, as Roman Catholic entities, oppose the Government's goal of providing such coverage, they do not challenge the legality of that goal. Rather, Petitioners ask only that they not be forced to violate their religious beliefs by participating in the regulatory scheme by which the Government seeks to accomplish its ends. RFRA clearly accords them that right.

Certiorari is warranted under this Court's traditional criteria. The Sixth Circuit's decision is inconsistent with *Hobby Lobby*. And the issue presented has split the courts of appeals, as this Court has observed. *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2807 (2014) (citing S. Ct. R. 10(a)). Accordingly, Petitioners respectfully ask that the Court grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). If an employer's health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care," and so the Department of Health and Human Services ("HHS") tasked the Institute of Medicine ("IOM") with drafting a definition. 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). According to the IOM definition HHS adopted, "preventive care" includes "all [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited Dec. 9, 2014); *see* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). FDA-approved contraceptive methods include drugs and devices (such as Plan B and ella) that can induce an abortion. *Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

1. Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people.

For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). As of the end of 2013, by the Government's own estimates, over 90 million individuals participated in health plans excluded from the Mandate's scope. 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013).

Acknowledging the burden the Mandate places on religious exercise, the Government created an exemption for plans sponsored by entities it deems "religious employers," 45 C.F.R. § 147.131(a), which include "churches, their integrated auxiliaries, and conventions or associations of churches," 26 U.S.C. § 6033(a)(3)(A)(i). Those entities are allowed to offer conscience-compliant employee health coverage through an insurance company or third party administrator ("TPA") that will not provide coverage for FDA-approved contraception. But that exemption is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *see also* 77 Fed. Reg. 8725, 8727-28, 8730 (Feb. 15, 2012). For religious entities that do not qualify as a "house of worship," there is no exemption.

Despite sustained criticism, the Government refused to expand this "religious employer" exemption to all objecting religious groups. 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Instead, it offered an inaptly named "accommodation," which went into effect "for plan years beginning on or after January 1, 2014." 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

Unlike the exemption, the accommodation does not allow religious objectors to provide conscience-compliant employee health coverage. Instead it forces them to contract with a third party that *will* provide coverage for FDA-approved contraception. After this Court temporarily enjoined enforcement of the accommodation in *Wheaton*, the Government revised its regulations yet again, but still refused to expand the "religious employer" exemption. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).

2. The Revised Accommodation

To be eligible for the accommodation, an entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a)(1)-(4). If an organization meets these criteria and wishes to avail itself of the accommodation, it must either provide a "self-certification" directly to its insurance company or TPA, *id.* § 54.9815-2713A(a)(4), or, under the revised regulations issued in August 2014, submit a notice to HHS stating its religious objection to providing contraceptive coverage. This latter notice must include detailed information on the organization's plan name and type, along with "the name and contact information for any of the plan's [TPAs] and health insurance issuers." *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii).

The ultimate effect of either form of compliance is the same. If an "eligible organization" submits the self-certification form, its insurance company or TPA becomes authorized, obligated, and incentivized to

arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan under the accommodation. *See id.* § 54.9815-2713A(a); § 54.9815-2713AT(b)-(c). If the organization instead submits the notice to the Government, the Government will use the contact information provided by the eligible organization to "send a separate notification" to the organization's insurance company or TPA "describing the[ir] obligations" under the accommodation. *Id.* § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii). In either scenario, payments for contraceptive coverage are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).

For organizations that offer self-insured health plans, the accommodation has additional implications. Both the self-certification and the notification provided by the Government upon receipt of the eligible organization's submission "designat[e] . . . the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. In fact, the Government concedes that in the self-insured context, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius* ("*RCAW*"), 19 F. Supp. 3d 48, 80 (D.D.C. 2013) (citation and alteration omitted); 29 C.F.R. § 2510.3-16(b) (stating that the certification or the Government's notification to the TPA are "instrument[s] under which the plan is operated"). Moreover, TPAs are under no obligation "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently,

religious organizations must either maintain a contractual relationship with a TPA that will provide the objectionable coverage to their plan beneficiaries, or else find and contract with a TPA willing to do so. The accommodation further provides an incentive for TPAs to provide the mandated coverage by making them eligible to be reimbursed for the full cost of coverage plus fifteen percent. 45 C.F.R. § 156.50; 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014).

B. Petitioners

Petitioners are nonprofit organizations that provide a range of spiritual, charitable, educational, and social services to members of their communities.

The Michigan Petitioners:

- Michigan Catholic Conference ("MCC") sponsors a range of benefit programs for approximately 827 Catholic institutions in Michigan, providing services to approximately 10,374 participants. Pet. App. 140a.
- Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo provides charitable services within the Diocese of Kalamazoo. Pet. App. 141a.

The Tennessee Petitioners:

- Catholic Diocese of Nashville includes approximately 79,000 Catholics and serves individuals in Middle Tennessee through schools and various charitable programs. Pet. App. 206a.
- Catholic Charities of Tennessee offers charitable services throughout Middle Tennessee. Pet. App. 207a.

- Camp Marymount, Inc. provides a Catholic-based summer camp for school-age children. Pet. App. 207a.
- Mary, Queen of Angels, Inc. provides top-quality, affordable assisted-living services to the elderly. Pet. App. 207a.
- St. Mary Villa, Inc. provides affordable educational childcare. Pet. App. 207a.
- St. Cecilia Congregation (the "Congregation") is a congregation of religious sisters who own and operate multiple Catholic schools. Pet. App. 207a.
- Aquinas College educates over 600 students annually, and operates a School of Nursing with low tuition to respond to the critical shortage of licensed nurses and nursing educators. Pet. App. 207a.

Despite these organizations' avowedly religious missions, only MCC, the Catholic Diocese of Nashville, and the Congregation qualify as "religious employers."

Petitioners offer health coverage to eligible employees through a number of self-insured and fully insured health plans. Petitioners' plans are administered through or provided by a number of third parties, including Blue Cross Blue Shield of Michigan, Express Scripts, and Blue Cross Blue Shield of Tennessee. Pet. App. 295a.

As part of the Catholic Church, Petitioners believe that life begins at the moment of conception, and that abortion-inducing products, contraception, and sterilization are immoral. *E.g.*, Pet. App. 303a. Petitioners' beliefs thus forbid them from taking

actions that would make them complicit in the delivery of coverage for these services, or that would create "scandal," which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. Pet. App. 307a-308a; Pet. App. 339a-340a. Accordingly, Petitioners believe that they may not provide, pay for, and/or facilitate access to coverage for these objectionable products and services. *E.g.*, Pet. App. 303a. The accommodation, even as revised, does not resolve Petitioners' objections because they are still required to take numerous actions in violation of their religious beliefs. *E.g.*, Pet. App. 304a-306a. Specifically, they must maintain an objectionable insurance relationship and submit a notice or self-certification that obligates, authorizes, and incentivizes their own TPA or insurance company to provide contraceptive coverage to their plan beneficiaries.

Left with no other alternative, the Michigan Petitioners filed suit on November 14, 2013. On December 27, 2013, the district court denied the request for a preliminary injunction. The Michigan Petitioners immediately sought an injunction pending appeal from the district court (later denied as moot) and appealed to the Sixth Circuit. On December 31, 2013, the Sixth Circuit granted the Michigan Petitioners an injunction pending appeal.

Similarly, the Tennessee Petitioners filed suit on November 22, 2013. On December 26, 2013, the district court denied a request for a preliminary injunction. The Tennessee Petitioners immediately sought an injunction pending appeal, and appealed to the Sixth Circuit. On December 27, 2013, the district

court denied the motion for an injunction pending appeal, but on December 31, 2013, the Sixth Circuit provided that relief.

After consolidating Petitioners' appeals, on June 11, 2014, the Sixth Circuit affirmed the district courts' denials of injunctive relief. In doing so, the court effectively substituted its judgment for that of Petitioners to conclude that Petitioners are not forced to "facilitate" the objectionable coverage in violation of Catholic doctrine. Subsequently, this Court issued its opinion in *Hobby Lobby*, enjoining the Mandate as applied to several for-profit corporations. Days later, the Court entered an injunction pending appeal for a nonprofit plaintiff challenging the accommodation in *Wheaton*. Petitioners thereafter sought rehearing en banc in light of *Hobby Lobby* and *Wheaton*, but their petition was denied on September 16, 2014. On September 19, 2014, Petitioners sought to stay the Sixth Circuit's mandate, or in the alternative, for an injunction pending disposition of their petition for certiorari. The court has not yet ruled upon that motion.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's "substantial burden" analysis is irreconcilable with this Court's decision in *Hobby Lobby*. The regulations at issue in this litigation—the so-called accommodation for nonprofit religious organizations—put Petitioners to the exact choice that faced the plaintiffs in *Hobby Lobby*. There is no dispute that Petitioners sincerely believe they cannot, consistent with their religious beliefs, (a) hire or maintain a contractual relationship with companies authorized to provide contraceptive coverage to beneficiaries enrolled in their health

plans; or (b) submit the self-certification or notice required under the accommodation. There is also no dispute that refusal to take these actions subjects Petitioners to crippling consequences. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]," "they will be facilitating" immoral conduct in violation of their religious beliefs. 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply, they will pay a very heavy price." *Id.*

Faced with this impossible choice, Petitioners sought relief from the courts, but their requests were rebuffed in both the district court and the Sixth Circuit. In the wake of *Hobby Lobby* and *Wheaton*, it is apparent that the lower courts were in error. While *Hobby Lobby* shows that RFRA requires courts to assess the "*consequences*" of noncompliance when analyzing substantial burden, i.e., the pressure placed on plaintiffs to violate their beliefs, 134 S. Ct. at 2759, 2775-76 (emphasis added), the Sixth Circuit focused instead on the nature of the *actions* Petitioners are compelled to take. Pet. App. 108a-109a. And while *Hobby Lobby* squarely held that it is left to plaintiffs to determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral," 134 S. Ct. at 2798 (citation omitted), the Sixth Circuit confidently assured Petitioners that taking the actions detailed above would not "facilitat[e] access to contraceptive coverage" in violation of their religious beliefs. Pet. App. 111a. The court then compounded its error by refusing to reconsider its ruling in light of this Court's subsequent decision in *Hobby Lobby*. Pet. App. 137a-138a.

Certiorari is appropriate not only because the Sixth Circuit's decision is inconsistent with the rule of law laid down in *Hobby Lobby*, but also because the lower courts are sharply divided on the validity of the accommodation. As this Court stated in *Wheaton*, the issues raised in this petition, including whether Petitioners can be forced to submit a document they believe makes them complicit in immoral conduct, have split the courts of appeals. *Wheaton*, 134 S. Ct. at 2807 (citing S. Ct. R. 10(a)); *see also id.* at 2811 (Sotomayor, J., dissenting) (noting disagreement among the circuits).[1] "Such division is a traditional ground for certiorari." *Id.* at 2807. And while the Sixth Circuit joined the D.C. and Seventh Circuits in upholding the accommodation, the overwhelming majority of district courts have enjoined application of the Mandate against nonprofit organizations.[2]

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[1] *Compare Diocese of Cheyenne v. Burwell*, No. 14-8040, 2014 U.S. App. LEXIS 12686 (10th Cir. June 30, 2014) (granting injunction pending appeal); *Eternal Word Television Network, Inc. v. Sec'y U.S. Dept. of Health & Human Servs. ("EWTN")*, 756 F.3d 1339 (11th Cir. June 30, 2014) (same)*, with Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-5368, 2014 U.S. App. LEXIS 21625 (D.C. Cir. Nov. 14, 2014) (denying relief); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 559 (7th Cir. Feb. 21, 2014) (same).

[2] *Compare Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-795, 2014 WL 5471054 (M.D. Fla. Oct 28, 2014); *Ave Maria Univ. v. Burwell*, No. 2:13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014); *La. College v. Sebelius*, No. 12-0463, 2014 WL 3970038 (W.D. La. Aug. 13, 2014); *Archdiocese of St. Louis v. Burwell*, No. 4:13-CV-2300, 2014 WL 2945859 (E.D. Mo. June 30, 2014); *Brandt v. Burwell*, No. 14-CV-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); *Colo. Christian Univ. v. Sebelius*, No. 13-CV-02105, 2014 WL 2804038 (D. Colo. June 20, 2014); *Catholic Benefits Ass'n v. Sebelius*, No. CIV-14-240-R, 2014 WL 2522357 (W.D. Okla. June 4, 2014); *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa 2014); *Fellowship of*

Nor can there be any question regarding the importance of the issues at stake. This Court has acknowledged their significance by twice taking the extraordinary step of awarding injunctive relief to nonprofit organizations challenging the accommodation. *Wheaton*, 134 S. Ct. 2806; *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014). And the same reasons that prompted this Court to grant relief to for-profit corporations challenging the Mandate in *Hobby Lobby* counsel even more strongly in favor of protecting nonprofit religious organizations, such as Petitioners here, whose free exercise rights receive "special solicitude" in our

(continued…)

Catholic Univ. Students v. Sebelius, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atl. v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d 725 (E.D. Tex. 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, 988 F. Supp. 2d 511 (W.D. Pa. 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, 988 F. Supp. 2d 794 (E.D. Mich. 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232 (E.D.N.Y. 2013); *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W.D. Pa. 2013), *with Priests for Life*, 2014 U.S. App. LEXIS 21625; *Notre Dame*, 743 F.3d 547.

constitutional system. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012).

Accordingly, Petitioners respectfully request that this Court grant the petition. At the least, Petitioners ask that this Court grant the petition, vacate the Sixth Circuit's opinion, and remand the case for further consideration in light of *Hobby Lobby* and *Wheaton*. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (stating that a GVR is appropriate when subsequent authority is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case"). For reasons discussed below, those cases reveal a "'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001).[3]

I. THE SIXTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH *HOBBY LOBBY* AND *WHEATON*

The Sixth Circuit denied Petitioners relief by applying a version of the "substantial burden" test that cannot be reconciled with *Hobby Lobby*. Its analysis was flawed for at least four reasons.

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[3] Because the Sixth Circuit failed to provide a reasoned basis for its denial of rehearing en banc, that Petitioners sought rehearing in light of *Hobby Lobby* and *Wheaton* does not preclude a GVR. This Court has "never held lower court briefing to bar our review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 170 (1996); *Robinson v. Story*, 469 U. S. 1081 (1984) (GVR-ing in light of case decided three months before court of appeals decision).

First, rather than assessing the severity of the "consequences" facing Petitioners if they refuse to violate their religious beliefs, *Hobby Lobby*, 134 S. Ct. at 2759, 2775-76, the court devoted the entirety of its analysis to assessing the *actions* Petitioners are compelled to take. Indeed, the Sixth Circuit's opinion is devoid of any reference to the massive fines that will be imposed on Petitioners should they fail to comply with the regulations. Instead, the court began its substantial burden analysis by trivializing Petitioners' religious exercise. After repeatedly asserting that "all that [Petitioners] must do" is file a form, the court appeared surprised that Petitioners would object when "[t]hat [wa]s the entirety of the conduct" at issue. Pet. App. 108a-109a.

As an initial matter, as discussed below, Petitioners' objection to the accommodation goes beyond the submission of a form, because they object to maintaining an insurance relationship with any company that will provide contraceptive coverage to their plan beneficiaries. *Infra* p. 23. But even if submitting the form were all that was required, it would not alter the analysis. While it is true that "[w]hether a government obligation substantially burdens the exercise of religion is a question of law," Pet. App. 107a, *Hobby Lobby* makes clear that this inquiry is limited to the substantiality *of the pressure* the Government imposes on the plaintiff to violate his beliefs, 134 S. Ct. at 2775-76 (assessing the consequences of noncompliance). There is no independent requirement that the act in question involve substantial physical exertion; to the contrary, RFRA protects "'any exercise of religion.'" *Id.* at 2792 (citation omitted). The reason for this approach is obvious: what may seem like an "administrative"

burden to a court may mean much more to a believer. *Univ. of Notre Dame v. Sebelius* 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) (noting that in *Bowen v. Roy*, 476 U.S. 693 (1986), "'five justices . . . expressed the view that the plaintiffs *were entitled* to an exemption from an analogous administrative requirement'" that they submit a form containing their daughter's social security number (citation omitted)). Courts have no role in determining whether a particular action violates a plaintiff's religious beliefs: instead, they must accept a plaintiff's "'honest conviction'" that what the Government is pressuring him to do conflicts with his religion. 134 S. Ct. at 2779.

Second, though it acknowledged that Petitioners "believe that the regulatory framework makes them complicit in the provision of contraception," Pet. App. 107a, the Sixth Circuit asserted that if they complied, Petitioners would "not," in fact, "facilitate access to contraceptive coverage," Pet. App. 111a. This pronouncement cannot be squared with *Hobby Lobby*'s command that plaintiffs, not courts, determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. The panel's fundamental error lies in its failure to appreciate that whether a particular action "facilitates" the provision of contraceptive coverage is itself a *religious* judgment, rooted in Catholic teachings regarding material cooperation and "scandal." *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting) (noting that the objection is based not on principles "of legal causation but of religious faith"). As *Hobby Lobby* confirms, courts may not "[a]rrogat[e]" unto themselves "the authority" to "answer" the "religious

and philosophical question" of "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778. Like the plaintiffs in *Hobby Lobby*, if Petitioners do as the Government demands, "they believe they will be facilitating [immoral conduct]," *id.* at 2759, "and it is not for [courts] to say that their . . . beliefs are mistaken or insubstantial," *id.* at 2779.

Third, the Sixth Circuit's error appears to rest in part on the mistaken belief that Congress imposed an "independent obligation" on TPAs and insurers to provide contraceptive coverage to Petitioners' employees. Pet. App. 112a-113a. Not so. As discussed above, any such obligation is contingent on actions *Petitioners* are coerced to take, whether that action be offering a health plan; hiring or maintaining a relationship with a TPA or insurance company; or submitting the self-certification or notification. *E.g.*, 26 C.F.R. § 54.9815-2713AT(b)-(c) (obligations of insurer or TPA arise only "[w]hen" and "[i]f" an objector offers a health plan, contracts with an insurer or TPA, and provides the notification). Both the Government and this Court have previously recognized this point. *Hobby Lobby,* 134 S. Ct. at 2763 ("When a group-health-insurance issuer receives [the form], the issuer *must then* . . . provide separate payments for contraceptive services." (emphasis added)); *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (stating that a TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification" (emphasis added)); Hr'g Tr. at 12-13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013

WL 6729515 (D.D.C. Nov. 22, 2013) (conceding that "[a TPA's] duty to [provide the mandated coverage] only arises by virtue of the fact that [it] has a contract with the religious organization[]" and "receive[s] the self-certification"). It is those actions upon which Petitioners base their RFRA claim, not the subsequent acts of third parties.[4]

Indeed, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs and insurance companies truly had an obligation to provide contraceptive coverage to Petitioners' employees independent of any act on the part of Petitioners, then the Government could not plausibly claim that granting injunctive relief "would deprive hundreds of employees" of contraceptive coverage. Opp'n at 36, *Wheaton Coll. v. Burwell*, No. 13A1284 (U.S. July 2014). And if the regulatory scheme truly "did not require anything" of Petitioners, Pet. App. 114a, it is impossible to see how the Government could claim a "compelling interest" in forcing Petitioners to act in violation of their beliefs.[5]

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[4] This compulsion to act in violation of religious beliefs makes inapt the Sixth Circuit's reliance on *Bowen* and *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). Those cases stand for nothing more than the proposition that an individual cannot challenge an "activit[y] of [a third party], in which [he] play[ed] *no role*." *Kaemmerling*, 553 F.3d at 679. Here, Petitioners "vigorously object on religious grounds to the act[s] that the government requires them to perform, not merely to later acts by third parties." *E. Tex. Baptist*, 988 F. Supp. 2d at 765.

[5] To the extent the panel's assertion that "'[f]ederal law, not the [submission of the self-certification]'" requires Petitioners' insurers or TPAs to provide the coverage, Pet. App. 112a (citation omitted), is anything beyond a restatement of its erroneous "independent obligation" theory, it too is without merit. To be sure, federal law compels an insurance company or

Finally, even assuming the Sixth Circuit accurately interpreted the regulations, the accommodation would still substantially burden Petitioners' religious exercise, because they object to maintaining a contractual relationship with third parties authorized to provide their employees with contraceptive coverage. Whether the authorization arises from an "independent obligation" under federal law or is "triggered" by the self-certification or governmental notice is of no moment. Just as a Jew might refuse to hire a caterer determined to serve pork at his son's bar mitzvah, Petitioners refuse to maintain a contractual relationship with a third party that will provide contraceptive coverage to their plan beneficiaries. Petitioners believe such actions "[are] connected" to illicit conduct "in a way that is sufficient to make [them] immoral," and it is not for courts to "tell the[m] their beliefs are flawed." *Hobby Lobby*, 134 S. Ct. at 2778.

II. PETITIONERS WOULD PREVAIL UNDER THE STANDARD SET FORTH IN *HOBBY LOBBY* AND *WHEATON*

If the substantial burden test set forth in *Hobby Lobby* were applied, Petitioners would prevail. This

(continued…)

TPA to provide contraceptive coverage to Petitioners' plan beneficiaries under the accommodation *if they are in a contractual relationship* with Petitioners, and *if Petitioners submit the self certification or notice.* But to say Petitioners cannot object to taking those actions is akin to suggesting that a member of the Shinto faith opposed to organ donation could be compelled to fill out an organ donor card, because "federal law" would then authorize a third party to use that card to initiate an organ transplant.

remains true regardless of the Government's recent superficial revisions to the accommodation.[6]

A. The Mandate Substantially Burdens Petitioners' Exercise of Religion

When, as here, a claimant's sincerity is not in dispute, *Hobby Lobby* makes clear that RFRA's substantial burden test involves a 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 exercise. *See* 134 S. Ct. at 2775-76 (substantial burden arises when the Government "demands" that entities either (1) "engage in conduct that seriously violates their religious beliefs" or else (2) suffer "substantial" "consequences").

Under the first step, the court's inquiry is necessarily limited. After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must thus accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714. In other words, it is left to the plaintiff to "dr[a]w a line"

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[6] Under the revised accommodation, Petitioners must still maintain contractual relationships with third parties authorized to deliver the mandated coverage to their plan beneficiaries, and Petitioners must still submit a document that they believe impermissibly facilitates the delivery of such coverage. Accordingly, the "gravamen of [their] complaint" remains, as the new rule "disadvantages [Petitioners] in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993).

regarding the actions his 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. Instead, a court's "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted).

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). In short, it looks to the "sever[ity]" of the "consequences" of noncompliance. *Hobby Lobby*, 134 S. Ct. at 2775. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), by putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 718.

1. Declining to Comply with the Accommodation Is a Protected Exercise of Religion

Hobby Lobby confirms that the "'exercise of religion'" protected under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" 134 S. Ct. at 2770 (citation omitted). Significantly, RFRA protects "'*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief'" and "mandate[s] that this concept 'be construed in favor of a broad protection of religious exercise.'" *Id.* at 2762 (citation omitted) (emphasis added).

Here, Petitioners exercise their religious beliefs by "abst[aining] from" specific "acts" that continue to be required under the Government's new regulations. *First*, Petitioners believe that maintaining a contractual relationship with a third party obligated, authorized, or incentivized to provide contraceptive coverage to the beneficiaries enrolled in their health plans would make them complicit in the provision of that coverage in a manner contrary to Catholic doctrine. In other words, Petitioners object to offering health plans that serve as conduits for the delivery of coverage their faith forbids. And even under the revised regulatory scheme, that is exactly what Petitioners' plans become: TPAs and insurance companies will provide the objectionable coverage to Petitioners' employees only by virtue of their enrollment in Petitioners' health plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, the Government has conceded that once a self-insured organization provides the self-certification, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" *RCAW*, 19 F. Supp. 3d at 80 (citation and alteration omitted).

In this sense, Petitioners are akin to Muslims or Mormons who refuse to hire a caterer that will serve alcohol to their guests at a social function. If the Government decides that all guests at social functions are entitled to alcohol, a law forcing hosts to hire such a caterer would substantially burden a Muslim or Mormon host's religious exercise, regardless of whether he would have to pay for the alcohol or serve it himself. Here, the same is true. It makes no difference whether Petitioners must pay for

the contraceptive coverage; what matters is that, in their religious judgment, it would be immoral for them to contract with a vendor that will provide the offending coverage to their plan beneficiaries.

Second, Petitioners separately object to submitting either the self-certification or the notification, because they believe as a religious matter that either action would impermissibly facilitate immoral conduct. As noted above, Petitioners believe that filing these documents makes them complicit in a regulatory framework designed to deliver objectionable coverage to their plan beneficiaries. *Supra* pp. 9-10. Both the notice and the self-certification have the same effect.[7] By filing either document, Petitioners believe that they would impermissibly facilitate a scheme to (a) oblige or authorize their insurance company or TPA to provide the mandated coverage to their plan beneficiaries under the accommodation, and (b) incentivize TPAs to offer such coverage by rendering them eligible for reimbursement of 115% of their costs. 79 Fed. Reg. at 13,809; 45 C.F.R. § 156.50(d)(3)(ii). To be sure, because Petitioners need not submit the self-certification directly to their insurance company or TPA, the new regulations insert one additional link

[7] Under the revised accommodation, if—and only if—Petitioners offer health coverage and submit a notification, the Government "will send a separate notification" to their insurance company or TPA "describing the[ir] obligations" under the accommodation. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B); *id.* § 54.9815-2713AT(c)(1)(ii). Whether it receives the self-certification from Petitioners or a "separate notification" from the Government, Petitioners' insurance company or TPA "shall provide or arrange payments for contraceptive services" to "participants and beneficiaries" in Petitioners' health plans. *Id.* § 54.9815-2713AT(b)(2); *id.* § 54.9815-2713AT(c)(2).

into the causal chain. But under Petitioners' religious views, that does not alter the moral calculus.

In this respect, the Government has placed Petitioners in a situation akin to that faced by German Catholics in the 1990s. At the time, Germany allowed certain abortions only if the mother obtained a certificate that she had received state-mandated counseling. If the mother decided to abort her child, she had to present the certificate from her counselor to her doctor as a prerequisite. Pope John Paul II concluded that Church representatives could not act as counselors in this regulatory scheme, *even where they counseled against abortion*, because "the certification issued by the churches was a necessary condition for abortion." *EWTN*, 756 F.3d at 1343 (Pryor, J., concurring).

The role played by Petitioners is further illustrated by the information they must provide in the notice demanded by the revised accommodation. That "notice must include" "[1] the name of the eligible organization . . . , [2] the plan name and type; . . . and [3] the name and contact information for any of the plan's [TPAs] and health insurance issuers." 79 Fed. Reg. at 51,094-95. The sole purpose of requiring Petitioners to include this information is to force them to assist the Government in commandeering their plans for the delivery of services they believe to be immoral.

After *Hobby Lobby*, there can be no dispute that the required actions described above—maintaining an objectionable insurance relationship or submitting an objectionable document—fall well within the scope of religious exercise protected by RFRA. They are clearly "'physical acts'" from which Petitioners believe

they must "'abst[ain]'" "'for religious reasons.'" 134 S. Ct. at 2770 (citation omitted). Thus, as in *Hobby Lobby,* Petitioners have "dr[a]w[n] a line" "between [actions they] found to be consistent with [their] religious beliefs" and actions they "found morally objectionable." *Id.* at 2778. It is not for a court "'to say that the line [they] drew was an unreasonable one.'" *Id.* (citation omitted).

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

In *Hobby Lobby*, this Court held that the Mandate substantially burdened the plaintiffs' exercise of religion because "the economic consequences [would] be severe" if the plaintiffs "[did] not yield" to the Government's "demand[] that they engage in conduct that seriously violates their religious beliefs." 134 S. Ct. at 2775. Notably, this Court did not consider whether complying with the regulations would be a "substantial" violation of the plaintiffs' religious beliefs, or whether it would require "substantial" physical exertion. Instead, the Court simply noted that the plaintiffs "object[ed] on religious grounds" to complying with the regulation, and proceeded to ask whether the plaintiffs would incur a substantial *penalty* if they did not comply. *Id.* at 2775-79. The Court answered that question in the affirmative: if the plaintiffs refused to comply, they would pay millions of dollars in fines. Because those "sums [we]re surely substantial," *id.* at 2776, the Court found a "substantial burden" on the plaintiffs' exercise of religion, *id.* at 2779.

Here, Petitioners face the same "consequences" for noncompliance as the plaintiffs in *Hobby Lobby*. *Id.*

at 2776. Just as in *Hobby Lobby*, failure to comply with the regulations at issue subjects Petitioners to potentially fatal fines of $100 a day per affected beneficiary. *See id.* at 2775 (citing 26 U.S.C. § 4980D(b)). And just as in *Hobby Lobby*, if Petitioners drop their health plans, they will be subject to fines of $2,000 a year per full-time employee, *see id.* at 2776 (citing 26 U.S.C. § 4980H), and/or will incur ruinous practical consequences due to their inability to offer a healthcare benefit to employees, *id.* at 2777. Moreover, Petitioners' provision of health coverage is itself an exercise of religion, motivated by the Catholic social teaching that health care is among those basic rights which flow from the sanctity and dignity of human life. Dropping coverage would inhibit Petitioners' ability to follow those teachings. *See id.* at 2776. After *Hobby Lobby*, there can be no doubt that "these consequences" of noncompliance "amount to a substantial burden" on Petitioners' religious exercise. *Id.* at 2759.

B. The Regulations Cannot Survive Strict Scrutiny

Because the regulations substantially burden Petitioners' exercise of religion, the "burden is placed squarely on the Government" to show that they satisfy strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). This Court's decision in *Hobby Lobby*—along with the decisions of nearly every court to have ruled on the question—confirms that the Government has not met this demanding standard.[8]

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[8] *See Korte*, 735 F.3d at 685-87; *Gilardi v. HHS*, 733 F.3d 1208, 1219-24 (D.C. Cir. 2013), *vacated on other grounds*, 134 S.

1. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted). "[B]roadly formulated" or "sweeping" interests are inadequate. *O Centro*, 546 U.S. at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236. In other words, a court must "look to the marginal interest in enforcing the contraceptive mandate in th[is] case[]." *Hobby Lobby*, 134 S. Ct. at 2779. Here, the Government has failed to establish a compelling interest for at least four reasons.

First, the Government has proffered two purportedly compelling interests in (1) "public health" and (2) "ensuring that women have equal access to health care." 78 Fed. Reg. at 39,872. But *Hobby Lobby* rejected these "very broadly framed" interests, noting that RFRA "contemplates a 'more focused' inquiry." 134 S. Ct. at 2779. Indeed, "[b]y stating the public interests so generally, the

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(continued…)

Ct. 2902 (2014); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-45 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751; *supra* note 2; *but see Priests for Life,* 2014 U.S. App. LEXIS 21625, at *61-91 (regulations would satisfy strict scrutiny). Because it ruled against Petitioners on substantial burden, the Sixth Circuit did not address strict scrutiny.

government guarantee[d] that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Second, "'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "'highest order'" because, as of the end of 2013, its regulations exempted health plans covering 90 million employees through, among other things, "grandfathering" provisions. *Korte*, 735 F.3d at 686 (citation omitted); *Geneva Coll.*, 941 F. Supp. 2d at 684 & n.12.

Third, at best, the Mandate would only "[f]ill[]" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 n.21 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an 'actual problem' in need of solving." *Brown*, 131 S. Ct. at 2738. After all, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9. There is no compelling interest in forcing nonprofit religious organizations to be the vehicle by which contraceptive coverage is provided to the relatively small population of women who choose to work for such organizations.

Indeed, the fact that the Government has granted a full exemption for "religious employers" shows that it lacks a compelling interest in enforcing the Mandate against Petitioners, who are equally religious groups. "Everything the Government says about" exempt religious employers "applies in equal measure to" nonprofit groups like Petitioners, and thus "it is difficult to see how" the Government can "preclude any consideration of a similar exception for" these plaintiffs. *O Centro*, 546 U.S. at 433. This is particularly true as the "religious employer" exemption extends to *all* churches, *regardless* of whether they object to providing contraceptive coverage. And while the Government has asserted, without evidence, that "religious employers" deserve an exemption because their employees are more likely to share their employers' opposition to contraceptives than employees of entities like Petitioners, 78 Fed. Reg. at 39,874, RFRA demands more than unsubstantiated speculation to justify this distinction.

Finally, RFRA requires the Government to identify a compelling need for enforcement against the "'particular religious claimants'" filing suit, not among the general population. *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted). The Government has not even attempted to make this showing, relying instead on the general proposition that "lack of access to contraceptive services" may "have serious negative health consequences." 78 Fed. Reg. at 39,887. But this does not establish a significant lack of access among Petitioners' plan beneficiaries or that the Mandate would significantly increase contraception

use among those individuals.[9] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against Petitioners is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

To be clear, the Government's failure to "satisfy th[is] Court's compelling interest standard[]" does not preclude this Court from "recogniz[ing] the importance of [the asserted] interests." *Hobby Lobby*, 723 F.3d at 1143. The fact that an interest is not compelling does not make it unimportant or insignificant—it merely means that it does not justify overriding the congressional concern for religious liberty embodied in RFRA. *Gilardi*, 733 F.3d at 1221 ("[The interests] underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but [they do] not rank as *compelling*, and that makes all the difference.").

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

The Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Under that "exceptionally demanding" test, *Hobby Lobby*, 134 S. Ct. at 2780, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A regulation is the least

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

restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). This test is particularly demanding here, because "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 n.3.

It bears emphasizing that the Government has the burden of proof here. As the Solicitor General explained in the analogous RLUIPA context, the Government cannot satisfy its burden through "unsubstantiated statement[s]." Br. for the U.S. as Amicus Curiae at 17, *Holt v. Hobbs*, No. 13-6827 (U.S. May 2014), 2014 WL 2329778. Rather, it must "offer evidence—usually in the form of affidavits from [government] officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case." *Id.* Such "explanation[s must] relate to the specific accommodation the plaintiff seeks." *Id.* at 18. In short, to prevail, the Government must rely on *evidence* that the accommodation is the only feasible way to distribute cost-free contraceptives to women employed by religious objectors.

The Government has not met this burden—indeed, in the courts below, it barely tried. "There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing religious organizations to

participate in the delivery of free contraception in violation of their beliefs. *Korte*, 735 F.3d at 686. As this Court explained in *Hobby Lobby*, "[t]he most straightforward way of doing this would be for the Government to assume the cost" of providing the "contraceptives at issue to any women who are unable to obtain them." 134 S. Ct. at 2780.

There are numerous ways the Government could provide free contraceptive coverage without using Petitioners' plans as a conduit: It could provide "coverage directly to [Petitioners'] employees, or work with third parties—be it insurers, health care providers, drug manufacturers, or nonprofits—to do so without requiring [Petitioners'] active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 987 F. Supp. 2d at 255-56; *see also Korte*, 735 F.3d at 686 (same). This could be accomplished by adjusting the eligibility requirements of the Title X family planning program, Medicaid, or any number of other federal programs that already provide cost-free contraceptives to women. *Cf. Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012). Indeed, the Government has recently established a network of insurance exchanges under the ACA, and nothing prevents the Government from allowing employees of religious objectors to purchase subsidized coverage (either for contraceptives alone, or full plans) on those exchanges. While Petitioners oppose many of these alternatives on policy grounds, all of them are "less restrictive" than the accommodation because they would deliver free contraception without forcing Petitioners to violate their beliefs.

The Government has not even attempted to show why these "alternative[s]" are not "viable." *Hobby Lobby,* 134 S. Ct. at 2780. Indeed, it has submitted *no* evidence to show that its interests would be negatively impacted by extending the religious employer exemption to Petitioners. And even had the Government attempted to shoulder its burden, it would not be able to meet this test. The Government cannot plausibly assert that the cost of providing contraceptive coverage independently of nonprofit religious objectors would be prohibitive, especially because it has *already* committed to paying TPAs 115% of their costs under the accommodation. 79 Fed. Reg. at 13,809. And regardless, if "providing all women with cost-free access to [contraceptives] is a Government interest of the highest order, it is hard to understand [an] argument that [the Government] cannot be required . . . to pay *anything* in order to achieve this important goal." *Hobby Lobby,* 134 S. Ct. at 2781.

Moreover, providing free contraceptive coverage independently of religious objectors could be achieved through minor tweaks to existing programs. *Supra* p. 33.[10] Even if a new regulatory program were necessary, the Government can hardly object, as it has shown its willingness to create (and repeatedly modify) such programs—by, among other things, establishing the infrastructure by which TPAs are compensated under the accommodation at a 15% guaranteed profit margin. 45 C.F.R. § 156.50; *Hobby Lobby*, 134 S. Ct. at 2781 (stating that "nothing in RFRA" suggests that a less restrictive means cannot

[10] This remains true even if legislative action were necessary. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014) (describing alternatives requiring congressional action).

involve the creation of a new program). The Government may attempt to claim that it is more *convenient* to commandeer Petitioners' private health plans, but administrative convenience cannot justify forcing religious organizations to violate their beliefs, particularly where the Government has no evidence of any need to do so.

Finally, any suggestion that *Hobby Lobby* approved of the accommodation as a viable least-restrictive means in all cases is incorrect. This Court expressly did "not decide" that question. 134 S. Ct. at 2782 & n.40; *id.* at 2763 n.9. It simply found the accommodation acceptable for plaintiffs who *did not object* to it. *See id.* at 2782 & n.40; *id.* at 2786 (Kennedy, J., concurring) (noting that "the plaintiffs have not criticized [the accommodation]"). While the accommodation may "effectively exempt[]" such plaintiffs, *id.* at 2763 (majority op.), it does no such thing for plaintiffs who *do* object to compliance. Indeed, if there was ever any suggestion that *Hobby Lobby* somehow blessed the accommodation, this Court dispelled that notion in *Wheaton*. Far from foreclosing challenges to the accommodation, the dissenters in *Wheaton* confirmed that the order "entitle[d] hundreds or thousands of other [nonprofits]" to relief. 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

CONCLUSION

The petition for certiorari should be granted. Alternatively, this Court should GVR the decision of the Sixth Circuit in light of *Hobby Lobby* and *Wheaton*.

Respectfully submitted,

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Ave., NW
Washington, D.C.
20001-2113
(202) 879-3939
njfrancisco@jonesday.com

MATTHEW A. KAIRIS
Counsel of Record
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
(614) 469-3939
makairis@jonesday.com

Counsel for Petitioner

December 12, 2014

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CATHOLIC CONFERENCE, et al.,	Case No. 1:13-CV-1247
Plaintiffs,	HON. GORDON J. QUIST

v.

KATHLEEN SEBELIUS, et al.,

Defendants. /

ORDER DENYING MOTION
FOR PRELIMINARY INJUNCTION

In accordance with the Opinion entered today,

IT IS HEREBY ORDERED that Plaintiffs' Motion For Preliminary Injunction (dkt. # 9) is **DENIED**.

Dated: December 27, 2013 /s/ Gordon J. Quist

GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CATHOLIC CONFERENCE, et al.,	Case No. 1:13-CV-1247
Plaintiffs,	HON. GORDON J. QUIST

v.

KATHLEEN SEBELIUS, et al.,

Defendants. /

OPINION

Plaintiffs, the Michigan Catholic Conference (MCC) and Catholic Family Services, d/b/a Catholic Charities Diocese of Kalamazoo (Catholic Charities), have sued Defendants, the Department of Health and Human Services and its Secretary, Kathleen Sebelius, the Department of Labor and its Secretary, Jacob J. Lew, and the Department of Treasury. Plaintiffs seek to enjoin Defendants from enforcing provisions of the Patient Protection and Affordable Care Act (the ACA) related to contraceptive coverage.

This is one of many cases filed by religious nonprofits challenging the ACA's contraceptive coverage requirement. As far as this Court is aware, ten courts have ruled on challenges to the final version of the regulations. Six courts have ruled in favor of the plaintiffs. *Southern Nazarene University, et al., v. Sebelius, et al.*, No. 5:13-cv-1015, 2013 WL 6804625 (W.D. Okl. Dec. 23, 2013); *Geneva College,*

et al. v. Sebelius, et al., 2:12-cv-00207 (W.D. Pa. Dec. 23, 2013); *Legatus, et al., v. Sebelius, et al.*, No. 12-1206, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Reaching Souls, Int'l, Inc., et al. v. Sebelius, et al.*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okl. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y., et al. v. Sebelius, et al.*, No. 12civ2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, No. 13cv1459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). Three courts have ruled in favor of the defendants. *Catholic Diocese of Nashville, et al. v. Sebelius, et al.*, No. 3:13-cv-1303 (M.D. Tenn. Dec. 26, 2013); *Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13cv-01276-PPS-CAN (N.D. Ind. Dec. 20, 2013); *Priests for Life v. Sebelius, et al.*, No. 13-1261 (EGS), 2013 WL 6672400 (D.D.C. Dec. 19, 2013). And one court ruled in favor of the plaintiffs in part and the defendants in part. *Roman Catholic Archbishop of Washington v. Sebelius, et al.*, No. 1:13cv-01441-ABJ, 2013 WL 6729515 (D.D.C. Dec. 20, 2013).

Plaintiffs have moved for a preliminary injunction, requesting that the Court issue a decision before January 1, 2014. Defendants oppose the motion for preliminary injunction, and have moved to dismiss Plaintiffs' complaint. The Court has reviewed the parties' submissions and has held oral argument. Plaintiffs' motion for preliminary injunction is now ready for decision.

Background

1. The Plaintiffs

Plaintiff MCC is a nonprofit corporation that sponsors and administers the MCC Second Amended and Restated Group Health Benefit Plan for Employees (the MCC Plan). (Compl. ¶ 16.) The MCC

Plan is a self-funded "church plan," and is administered by separate third party administrators (TPAs). (*Id.* ¶¶ 16, 41.) The MCC Plan provides health benefits to clergy, as well as to lay employees of Catholic schools, institutions, and other organizations (the covered units). (*Id.* ¶¶ 31, 41.) Catholic Charities, a nonprofit subsidiary of the Roman Catholic Diocese of Kalamazoo, is a covered unit under the MCC Plan. (*Id.* ¶¶ 17, 50.)

Plaintiffs believe that the use of contraceptives is immoral and that abortion and sterilization are prohibited. (Byrnes Decl. ¶¶ 8, 9.) In accordance with these beliefs, the MCC Plan has historically not offered coverage for contraceptives, sterilization, abortion-inducing drugs, or related counseling services. (Long Decl. ¶ 17.) In the past, the MCC has specifically notified its TPA that it would not cover such services. (*Id.* ¶ 18.)

2. The ACA Framework

The ACA, Pub. L. No. 111-148, 124 Stat. 119 (2012), was enacted in 2010. The ACA requires that employers with 50 or more full-time employees provide health insurance for their full-time employees or pay a penalty on their federal tax return. 26 U.S.C. § 4980H. Employers with fewer than 50 full-time employees are not required to provide their employees with health insurance. *Id.* If these employers offer health coverage to their employees, however, they are generally subject to the other requirements of the ACA. 42 U.S.C. § 300gg–13.

The ACA also requires that group health plans provide coverage for certain preventative services without cost-sharing requirements. These preventative services include "with respect to women,

such additional preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA] . . . ." 42 U.S.C. § 300gg–13(a)(4).

Plans that are "grandfathered" under the ACA are not required to meet all the requirements for coverage, including that for women's preventative care services. 42 U.S.C. § 18011. A plan loses its "grandfathered" status if it cuts benefits or increases out-of-pocket spending for consumers. 26 C.F.R. § 54.9815-1251T. The government projects that the majority of plans will lose their "grandfathered" status by the end of 2013. *See* 75 Fed. Reg. 34552. The MCC plan is not a "grandfathered" plan under the ACA. (Compl. ¶ 43.)

3. Rulemaking under the ACA

On February 15, 2012, the government published final rules pursuant to the ACA specifying that plans cover, among other things, "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" (the contraceptive mandate). 77 Fed. Reg. 8725. The rule contained an exemption for certain religious employers. *Id.* at 8727. The goal of the exemption was to "respect[] the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623. The rule provided a safe harbor for nonprofit organizations that had religious objections to contraceptive coverage but did not qualify for the exemption, and expressed the government's intention to develop new regulations to accommodate these organizations. 77 Fed. Reg. 8725, 872628.

On July 2, 2013, the government issued a final rule (the 2013 final rule) addressing the requirements for religious nonprofits and clarifying the religious employer exemption. 45 C.F.R. § 147.131(b). The rule establishes an accommodation (the accommodation) for organizations that meet the following criteria:

> (1) The organization opposes providing coverage for some or all of the 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 (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 requirements under section 107 of [ERISA].

Id. The rule also clarified that the religious employer exemption applies to nonprofit organizations referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which refers to churches, their integrated auxiliaries, conventions and associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a).

Under the 2013 final rule, an organization that meets the criteria for the accommodation is not required to "contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39874. To avoid those obligations, the organization must submit a self-certification form to its health insurer or, if the organization has a self-insured plan, to a TPA. *Id.* at 39875. In the case of an organization with a self-insured plan, the TPA will provide or arrange for separate payments for contraceptive services for plan participants. *Id.* at 39880. The TPA will be reimbursed through adjustments to certain federal user fees. *Id.* The accommodation applies to plan years beginning on or after January 1, 2014. *Id.* at 39,872.

MCC qualifies for the exemption for religious employers. Catholic Charities does not qualify for the exemption, but does qualify for the accommodation. As such, Catholic Charities will have to self-certify in order to avoid being required to comply with the contraceptive mandate.

Legal Standard

A preliminary injunction is an "extraordinary remedy" that is warranted only upon a clear showing that the movant is entitled to relief. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 376 (2008). A plaintiff seeking a preliminary injunction must demonstrate that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Id.* at 20, 129 S. Ct. at 374. "[I]n the First Amendment context, the other [preliminary injunction] factors are

essentially encompassed by the analysis of the movant's likelihood of success on the merits." *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 890 (6th Cir. 2012).

Discussion

1. Standing

Under the ACA regulations, Defendants may enforce the contraceptive mandate against TPAs through ERISA's enforcement authority. *See* 78 Fed. Reg. at 39,879-39,880. However, church plans, including the MCC Plan, are specifically excluded from ERISA. *See* 29 U.S.C § 1003(b)(2). Defendants argue that, because they lack enforcement power over the TPA of the MCC Plan, there is no guarantee that the TPA will provide contraceptive coverage. Accordingly, Defendants argue, Plaintiffs lack standing because the harm alleged — the facilitation of access to contraceptive services — does not exist.

Defendants' argument is flawed. Regardless of whether the government can force the TPA to take any action, the 2013 final rule requires Catholic Charities to take some action — provide contraceptive coverage or self-certify. Plaintiffs object to taking either of these actions and allege that the act of self-certification, itself, violates their religious beliefs because it requires them to be involved in a "scheme" aimed at providing contraceptives. Whether the end result involves the provision of contraceptive services or not, Plaintiffs have alleged an injury-in-fact.

2. Likelihood of success on the merits

Plaintiffs' claims arise under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*,

the First Amendment to the U.S. Constitution, and the Administrative Procedures Act (APA), 5 U.S.C. § 1001 *et seq*. The Court will address each of these claims in turn.

A. RFRA

RFRA provides that the government shall not "substantially burden a person's exercise of religion," even under a "rule of general applicability," unless the government demonstrates "that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[1] A law substantially burdens an exercise of religion if it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432 (1981). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). The burden of demonstrating a substantial burden is high, and determining its existence is fact intensive. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007).

Plaintiffs argue that the contraceptive mandate imposes a substantial burden on their exercise of

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[1] The purpose of RFRA was to "restore the compelling interest test" abandoned by the Supreme Court in *Emp't Div. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). 42 U.S.C. § 2000bb. Thus, the Supreme Court's pre-*Smith* cases discussing the Free Exercise Clause are instructive in evaluating RFRA claims.

religion because it forces them to facilitate access to contraceptives and thus prevents them from bearing witness to their religious beliefs, causing "scandal."[2] Plaintiffs argue that the accommodation does nothing to alleviate the burdens imposed upon them for several reasons. Plaintiffs state that the accommodation requires Catholic Charities to contract with a TPA which will provide contraceptive services to Catholic Charities' employees as long as they remain on the health plan.[3] Catholic Charities must complete the self-certification form, which constitutes its "designation" of the TPA as the administrator for contraceptive benefits. By these acts, Plaintiffs assert that they will be forced to participate in a "scheme *specifically designed to lure* women to engage in" the use of contraceptive services. (Pls.' Br. Supp. Mot. for Prelim. Inj. (Pls.' Br.) at 22) (emphasis in original).[4] In essence, Plaintiffs argue

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[2] The pleadings in this case do not define "scandal." Testimony in *Zubik*, 2013 WL 6118696, was that, in the Roman Catholic faith, scandal "means cooperation with an objectionable practice that goes against the faith or teaching one thing and behaving in another manner." *Id.* at *34, fn. 15 (internal quotations omitted). This is consistent with the discussion of scandal during oral argument in this case.

[3] At oral argument, Plaintiffs argued that the law would require them to seek out a TPA to provide contraceptive services. It is undisputed that Plaintiffs already have a contractual relationship with a TPA. (Compl. ¶ 41.) Plaintiffs have not provided any evidence to indicate that their present TPA would refuse to provide these services.

[4] Plaintiffs also argue that the costs of providing contraceptive services will be passed back to religious organizations. The law, however, expressly prohibits this. 78 Fed. Reg. at 39,875-77. Any argument that TPAs will violate the law is speculative.

that the accommodation requires Catholic Charities to take actions that trigger its TPA to provide contraceptive coverage, which then provides a means for Plaintiffs' employees to access contraceptive services. Thus, Plaintiffs argue, these acts constitute facilitation of objectionable services, and this facilitation is prohibited by their religious beliefs.

In response, Defendants point out that Catholic Charities may avoid the requirement to provide contraceptive coverage by self-certifying, i.e., signing a one-page form stating its objection to providing contraceptives, and submitting this form to its TPA. Defendants argue that this is not materially different from actions that Plaintiffs have taken in the past when they informed their TPA that they objected to such services in order to exclude the services from the plan. Because the regulation does not require Plaintiffs to "modify [their] behavior," *Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432, Defendants argue that any burden is *de minimis*. *See Kaemmerling*, 553 F.3d at 679.

The threshold issue before the Court concerns how to determine whether a burden is substantial. The Tenth and Seventh Circuits, in cases brought by for-profit companies challenging the contraceptive mandate, have focused solely on the extent of government pressure imposed by the law. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). The Tenth Circuit found that, once the court identified the religious belief and found that it was sincere, the only remaining question was whether the government exerted "substantial pressure on the religious believer." *Hobby Lobby*, 723

F.3d at 1140. Similarly, the Seventh Circuit found that the inquiry focused on the "coercive effect of the governmental pressure." Korte, 735 F.3d at 684. Under the approach advocated by Plaintiffs, if a plaintiff shows that it has a sincerely held belief that performing an act would violate its religious beliefs, the only remaining inquiry for the court is whether the government exerts substantial and coercive pressure on the plaintiff to perform the act.

Defendants argue that this misinterprets the substantial burden standard. They assert that a plaintiff is entitled to its sincerely held beliefs but is not entitled to determine what constitutes a substantial burden on the exercise of these beliefs. Although courts may not evaluate the merits of a plaintiff's beliefs, courts must examine the impact of a regulation on such beliefs. This approach finds support in some district court opinions evaluating the contraceptive mandate as applied to for-profit corporations. *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 413 (E.D. Pa. 2013), *aff'd on other grounds*, 724 F.3d 377 (3d Cir. 2013) ("[W]e reject the notion . . .that a plaintiff shows a burden to be substantial simply by claiming it is so."); *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *8 (W.D. Mich. Dec. 24, 2012) *aff'd on other grounds*, 730 F.3d 618 (6th Cir. 2013) (explaining that, although the court did not question the plaintiffs' sincerely held belief, it remained a "separate question whether the sincerely held belief amounts, in fact, to a substantial burden on the exercise of religion").

Defendants' argument is persuasive. RFRA requires heightened scrutiny of only those laws that

place a "substantial" burden on an individual's exercise of religion. Thus, the Court "has a duty to assess whether the claimed burden — no matter how sincerely felt — really amounts to a substantial burden on a person's exercise of religion." *Autocam*, 2012 WL 6845677 at * 6. To make this assessment, the Court must necessarily evaluate how the burden affects an individual's ability to exercise his religion. "Without venturing into the content and merit of the plaintiffs' religious beliefs, [the Court] may still consider the nature of the act that the plaintiffs are called upon to perform, the connection between their beliefs and the compelled action, and the extent to which their ability to practice their religion is interfered with by the action." *Korte*, 735 F.3d at 710 (Rovner, J., dissenting).

In evaluating whether the burden is substantial, a court must determine whether it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432. The ACA and its regulation require Catholic Charities to sponsor a plan, to contract with a TPA for this plan, and to notify the TPA that it opposes contraceptive coverage on religious grounds. Plaintiffs have acknowledged that they already sponsor a plan, that they contract with a TPA to administer this plan, and that they have previously notified the TPA that they oppose contraceptives. Thus, they have no objection to these actions *per se*.[5] Plaintiffs argue, however, that the actions are now different because they will have the effect of authorizing the TPA to provide contraceptive services

[5] Plaintiffs have never asserted that they object to the act of signing a statement attesting to their objection to contraceptives.

rather than preventing it from doing so, and that this difference is the key to determining the morality of their actions.

At oral argument, Plaintiffs made an analogy to a hypothetical law that required Roman Catholics to sign a document stating their opposition to the death penalty in order for an executioner to proceed with the execution. Under this hypothetical law, the executioner would be required to proceed as soon as he received the document. Plaintiffs asserted that a Roman Catholic could not sign this document, even though it accurately stated his belief regarding the death penalty, because the document would effectively authorize the executioner to proceed with the execution. Similarly, Plaintiffs argued that they could not sign the self-certification form stating their beliefs about contraceptives because it would trigger coverage of contraceptive services.

Plaintiffs' analogy does not hold up. If the ACA provided that, upon the completion of the self-certification form, employees would be forced to use contraceptives, the analogy might be apt. But that is not what the ACA requires.

In sticking with the death penalty theme, a more apt analogy might involve a law that required potential jurors in capital cases to state whether they would be unable to impose the death penalty based on their religious beliefs. If a potential juror said "yes," he would be excused for cause, and a different potential juror whose religion would not prohibit her from imposing the death penalty would be selected. That jury, after hearing the evidence, might or might not choose to impose the death penalty. Assume that there is a potential juror who is Roman Catholic and

whose religion prohibits her from imposing the death penalty or facilitating the imposition of the death penalty. Does asking her to state her opposition to the death penalty — which will eventually result in the selection of a jury that may choose to impose the death penalty — constitute a substantial burden? This Court does not believe so.

Similarly, the accommodation in this case requires Catholic Charities to attest to its religious beliefs and step aside. It is true that, once it steps aside, another person may step in and provide coverage of contraceptive services for Catholic Charities' employees. These employees may then make a completely independent decision to utilize such services. In any case, the action that Plaintiffs' find objectionable — the use of contraceptives — is several steps removed from any action taken by Plaintiffs. It is difficult to see how a substantial burden exists when the relationship to the objectionable act is so attenuated. *See Conestoga*, 917 F. Supp. 2d at 414-15 (noting that a "series of events must first occur before the use of an abortifacient would come into play"); *Autocam*, 2012 WL 6845677 at *6 (finding that any burden imposed on the individual plaintiffs' free exercise rights was "probably too attenuated to be substantial").

More importantly, the contraceptive mandate requires Catholic Charities to do what it has always done — sponsor a plan for its employees, contract with a TPA, and notify the TPA that it objects to providing contraceptive coverage. Thus, Plaintiffs are not require to "modify [their] behavior." *Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432. Rather, it is the TPA that is required to modify *its* behavior and take

action by providing contraceptive services — without the assistance of Catholic Charities. *See* 78 Fed. Reg. 39874. (eligible organizations may not be required to contract, arrange, pay, or refer for contraceptive coverage). Although the TPA's action may be deeply offensive to the religious beliefs of Plaintiffs, RFRA does not allow a plaintiff to restrain the behavior of a third party that conflicts with the plaintiff's religious beliefs.

Courts have previously rejected RFRA claims in which plaintiffs objected to the activities undertaken by a third party. *See Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147 (1986); *Kaemmerling*, 553 F.3d 669. In *Kaemmerling*, the D.C. Circuit faced the issue of whether a prisoner could object to the government's collection, extraction, and storage of his DNA information. The court found that, "[a]lthough the government's activities with his tissue or fluid sample after the [prison] takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not 'pressure [him] to modify his behavior and to violate his beliefs.'" *Id.* at 679 (quoting *Thomas*, 450 U.S. at 718, 1015 S. Ct. at 1432.) Similarly, in *Roy*, the Supreme Court rejected the claim of the plaintiffs, who believed that the use of their child's social security number would harm her spirit. *Roy*, 476 U.S. 693, 106 S. Ct. 2147. The Court explained that the plaintiffs could "not demand that the Government join in their chosen religious preference by refraining from using a number to identify their daughter." *Id.* at 700, 106 S. Ct. at 2152.

Plaintiffs sincerely believe that the use of contraceptives is immoral, and that they may not

facilitate a practice that they find morally objectionable. *See Thomas*, 450 U.S. at 714, 101 S. Ct. at 1430 ("courts are not arbiters of scriptural interpretation"). The Court must look beyond these beliefs, however, and determine whether the law at issue substantially burdens Plaintiffs' exercise of their religious beliefs. An objection to the activities of third parties — no matter how sincere or deeply felt — does not constitute a substantial burden. "[A]lthough [a] plaintiff may have a religiously-based objection to what the government or another third party does with something that the law requires the plaintiff to provide . . . [RFRA] does not necessarily permit him to impose a restraint upon another's decision." *Korte*, 735 F.3d at 713-14 (Rovner, J., dissenting).

Moreover, although Plaintiffs assert that the accommodation requires them to participate in a scheme to provide contraceptives, in fact, it just does the opposite. It provides a mechanism for employers with religious objections to contraceptives, like Catholic Charities, to opt out of that scheme. This mechanism simply requires Plaintiffs to state that they choose to opt out based on their religious beliefs. The fact that the scheme will continue to operate without them may offend Plaintiffs' religious beliefs, but it does not substantially burden the exercise of those beliefs.

Plaintiffs may exercise their religious beliefs regarding contraceptives in a number of ways. They may refuse to provide coverage of contraceptives or pay for such coverage. They may speak out against the use of contraceptives, and encourage their employees not to use contraceptives. They may

engage in political action to change the laws regarding access to contraceptives and contraceptive coverage. What they may not do, however, is block a third party from providing their employees with contraceptive coverage. Under these circumstances, the Court finds that the law does not place a substantial burden on Plaintiffs' exercise of their religion. Accordingly, their RFRA claim fails.

B. Free Exercise Clause

The Free Exercise Clause prohibits laws that discriminate against religious beliefs or regulate or prohibit conduct because it is undertaken for religious purposes. *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993). The Free Exercise Clause does not require heightened scrutiny of laws that are neutral and generally applicable. *Emp't Div. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600 (1990). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. A law is not generally applicable if its burdens are imposed "in a selective manner . . . only on conduct motivated by religious belief." *Id.* at 543, 113 S. Ct. at 2232.

Plaintiffs argue that the contraceptive mandate is not generally applicable because it includes exemptions. However, "[t]hat categorical exemptions exist does not mean that the law does not apply generally." *Autocam*, 2012 WL 6845677 at * 5 (citing *United States v. Lee*, 455 U.S. 252, 260-61, 102 S. Ct. 1051, 1057 (1982) (finding that social security tax requirements were generally applicable although there were categorical exemptions)). *See also Olsen v.*

Muaksey, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality."). Because the "secular" exemptions cited by Plaintiffs apply to all employers, including religious employers, the burdens of the law are not imposed selectively against conduct motivated by religious belief. *See Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. Accordingly, the law is generally applicable.

Plaintiffs also argue that the law is not neutral because it "is specifically targeted at Plaintiffs' religious practice of refusing to provide or facilitate access to contraception." (Pls.' Br. at 34.) Plaintiffs argue that most secular employers previously provided coverage, and that the law was enacted to fill any gap in coverage by forcing religious groups to provide it. There is no evidence, however, that the law was specifically targeted at the Plaintiffs' or anyone else's religious practices. In fact, the inclusion of an exemption for houses of worship and an accommodation for other religious groups indicates just the opposite. Furthermore, the contraceptive mandate requires many employers that have historically provided contraceptive coverage to expand that coverage by eliminating cost-sharing. The contraceptive mandate thus requires a wide range of employers — including many that are not religious— to offer their employees new benefits related to contraceptive coverage. Accordingly, there is no evidence supporting Plaintiffs' claim that the law is not neutral.

Finally, Plaintiffs argue that the contraceptive mandate is subject to strict scrutiny because it infringes on Plaintiffs' rights of free speech and association, and thus implicates Plaintiffs' "hybrid"

rights. Because the Sixth Circuit has rejected the hybrid rights theory advanced by Plaintiffs, *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993), this argument must fail.

C. Free Speech Clause

Plaintiffs argue that the contraceptive mandate violates their free speech rights in several ways. Plaintiffs first argue that the regulations violate their rights against compelled speech. "It is . . . a basic First Amendment principle that freedom of speech prohibits the government telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, – U.S. – , 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S. Ct. 2334, 2338 (2001). Similarly, the government may not compel a person to subsidize speech with which he or she disagrees. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557–58, 125 S. Ct. 2055, 2060–61 (2005). Plaintiffs argue that the contraceptive mandate violates the prohibition against compelled speech in two respects. First, they argue that because it requires them to "provide, pay for, and/or facilitate access to 'counseling,'" (Pls.' Br. at 36), they are being forced or compelled to support speech with which they disagree. Plaintiffs argue that they are thus "forced to act as mouthpieces in the Government's campaign to expand access to abortion and contraception." (*Id.* at 37.) Second, Plaintiffs assert that the "certification" requirement, which in turn designates and obligates Plaintiffs' TPA to provide the objectionable services, compels Plaintiffs to engage in speech with which they disagree and deprives them of the freedom to speak

on issues of abortion and contraception on their own terms.

Contrary to Plaintiffs' assertion, the contraceptive mandate does not require or compel them to support or advocate for abortion or the use of contraceptives. As already noted, *supra*, Plaintiffs are not required to provide or pay for contraceptive services. Moreover, even if Plaintiffs' acts are deemed as facilitating the provision of contraceptive services, including counseling, there is no compelled speech violation because Plaintiffs are not required to support or advocate a particular viewpoint or result. *See Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 441 (W.D. Pa. 2013) ("To the extent that the Hepler plaintiffs in the present case are being called upon to fund speech—in the form of education and counseling—the content of that speech is not defined by the mandate's requirements."). As one court has observed, "the speech subsidized is an unscripted conversation between a doctor and a patient, not political propaganda in favor of one candidate, an amicus brief espousing one side of an issue, or advertisements in favor of a particular product." *O'Brien v. United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1166 (E.D. Mo. 2012). Hence, the regulations do not compel Plaintiffs to convey any particular message or speech in violation of the First Amendment.

Plaintiffs' argument that the certification constitutes compelled speech fails because any speech involved in the execution of a certification is appropriately considered merely incidental to the regulation of conduct. As many courts have recognized in disposing of similar First Amendment

challenges, *Rumsfeld v. Forum for Academic and Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 126 S. Ct. 1297 (2006), is particularly instructive as to whether the certification constitutes speech. In *FAIR*, the Court considered whether the Solomon Amendment, which conditioned law schools' funding on their provision of access to military recruiters at a level equal to that provided to the nonmilitary recruiter receiving the most favorable access, violated law schools' First Amendment rights. The Court held that requiring law schools to accommodate military recruiters on campus did not affect their free speech rights because hosting a recruiter is not speech:

> In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

Id. at 64, 126 S. Ct. at 1309–10. Moreover, the Court observed that any speech in which the law schools

were required to engage was "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62, 126 S. Ct. at 1308; *see also United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Similarly, in the instant case, any speech in which Plaintiffs must engage in completing the certification is incidental to regulation of conduct. *See e.g.*, *Autocam*, 2012 WL 6845677, at *8 ("Including contraceptive coverage in a health care plan is not inherently expressive conduct, particularly when the coverage is included to comply with a neutral, generally applicable law."); *MK Chambers Co. v. Dep't of Health & Human Servs.*, No. 13-11379, 2013 WL 1340719, at *6 (E.D. Mich. Apr. 3, 2013) (same). Accordingly, the act of self-certifying eligibility for the accommodation is not inherently expressive conduct entitled to First Amendment protection.

Finally, Plaintiffs argue that 26 C.F.R. § 54.9815-2713A(b)(iii) constitutes an unlawful "gag order" on their freedom to express their beliefs that contraception is immoral. That regulation provides:

> The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third

> party administrator's decision to make any such arrangements.

Plaintiffs argue that this regulation precludes them from expressing their views to fellow citizens that contraception is immoral. (Pls.' Br. at 38.) The Court disagrees. The regulation does not prohibit Plaintiffs from expressing their views. Rather, it precludes Plaintiffs from interfering with a TPA's decision or efforts to provide contraceptive services once Plaintiffs have provided a certification. In other words, Plaintiffs may still convey their views about contraception, but they may not do so in a way that threatens or interferes with employees' attempts to obtain coverage from a third party. *See* 78 Fed. Reg. at 39,880 n.41 ("Nothing in these final regulations prohibit an eligible organization from expressing its opposition to the use of contraceptives.").

D. Establishment Clause

Plaintiffs argue that the religious employer exemption violates the Establishment Clause of the First Amendment. That clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Under this clause, the government may neither officially promote religion nor harbor "an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226. Courts typically use the *Lemon* test [*Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971)] as a guide to resolve Establishment Clause issues. *See Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506, 526 (6th Cir. 2012). Under that test, a court asks: (1) whether the government's predominant purpose was secular; (2) whether the

government action has the purpose or effect of endorsing religion; and (3) whether the action fosters an excessive entanglement with religion. *Id.*

Plaintiffs argue that the mandate favors some religions over others by creating an official category of "religious employer" that includes only "churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. at 8,461. Plaintiffs argue that such definition favors religious groups that fit into the traditional categories of "houses of worship" while disadvantaging other religious organizations, like Catholic Charities, that express their faith through the provision of charitable and social services. Plaintiffs' argument fails because the regulation does not refer to any particular denomination, nor is there any indication that it was designed to favor any particular religion. *See Cutter v. Wilkinson*, 544 U.S. 709, 723–24, 125 S. Ct. 2113, 2123 (2005) (holding that the Religious Land Use and Institutionalized Persons Act does not run afoul of the Establishment Clause because it does not "differentiate among bona fide faiths" and "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment"). As several courts have observed, the Establishment Clause does not prohibit governmental line drawing when granting religious accommodations. *See O'Brien*, 894 F. Supp. 2d at 1164. "[T]he Establishment Clause does not prohibit the government from making such distinctions when granting religious accommodations as long as the distinction drawn by the regulations between exempt and non-exempt entities is not based on religious affiliation." *Grote Indus., LLC v. Sebelius*, 914 F. Supp.2d 943, 953 (S.D. Ind. 2012) (citing *Walz v. Tax*

Comm'n of City of N.Y., 397 U.S. 664, 90 S. Ct. 1409 (1970), and *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995)); *see also Geneva Coll.*, 929 F. Supp. 2d at 438 (concluding that the religious employer exemption does not make distinctions that violate the Establishment Clause).

Plaintiffs also argue that the exemption fosters excessive entanglement because the IRS applies an "intrusive" 14-factor test to determine whether an organization is a church. Plaintiffs argue that any application of the 14-factor test will constitute improper scrutiny of whether an organization is sufficiently religious to qualify for the exemption. Plaintiffs' argument lacks merit because there is no indication that the 14-factor test has ever been applied to them. *See United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982) (noting that a guideline contained in an IRS internal manual was "adopted solely for the internal administration of the IRS, rather than for the protection of the taxpayer, [and did] not confer any rights upon the taxpayer"). Moreover, as Defendants note, the requirements for an organization to qualify as a "religious employer" are set forth in the pertinent regulation, 45 C.F.R. § 147.131(a), and require no intrusive inquiry by the government to determine whether an organization qualifies as a "religious employer."

Citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, – U.S. – , 132 S. Ct. 694 (2012), Plaintiffs also argue that the mandate interferes with the internal governance of the Catholic Church by artificially splitting the church into two segments and precluding the church from exercising supervisory authority over its subordinate

components to ensure compliance with church teachings. This Court agrees with Justices Alito's and Kagan's concurrence that the "ministerial" exception in employment law "should apply to any 'employee' who leads a religious organization, . . . *or serves as a messenger or teacher of its faith*." *Id.* at 712 (Alito, J., concurring) (emphasis added). The principle of no governmental interference with the religious functions of a church goes beyond the employment context. In the instant case, this Court believes that Catholic Charities would qualify as messengers or teachers of the Roman Catholic faith. For example, while any secular organization might render aid to the sick, poor, or oppressed, a Roman Catholic organization would render such aid as part of its religious duty and message. As pointed out in this concurring opinion, "the mere adjudication of such questions [e.g., whether a particular doctrine "is a central and universally known tenet of Lutheranism"], would pose grave problems for religious autonomy . . . ." *Id.* at 715. All of that being said, *Hosanna-Tabor* is inapposite. In *Hosana-Tabor*, the Court adopted the so-called "minister exception" to employment discrimination suits. The Court reasoned that requiring a church to retain an unwanted minister would do more than intrude on an employment decision. *Id.* at 706. Rather, it would "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* The regulations at issue in the instant case do not interfere with internal church governance. Rather, for the reasons stated in the "substantial burden analysis," they relieve the Plaintiffs from a law that

would otherwise cause them to violate their religious beliefs.

E. APA

Plaintiffs argue that the 2013 final rule discriminates against them based on their refusal to provide coverage for "abortion-inducing products." Plaintiffs argue that the rule therefore violates the Weldon Amendment, which prohibits federal agencies from discriminating against any health care entity on the basis that it does not provide coverage for abortions. Thus, Plaintiffs argue, the rule is contrary to law.

Plaintiffs believe that FDA-approved emergency contraceptives are "abortion-inducing products" — as is their right. However, federal law does not define them as such. *See* 62 Fed. Reg. 8610. Accordingly, the regulations are not contrary to law, and Plaintiffs' APA claim fails.

3. Other Preliminary Injunction Factors

Because Plaintiffs' claims are premised on the First Amendment and RFRA, the analysis of Plaintiffs' likelihood of success encompasses the other factors for determining whether a preliminary injunction is warranted. *See Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (noting that the likelihood of success is often the determinative factor for RFRA and First Amendment claims). Because Plaintiffs have not demonstrated that they are likely to succeed on the merits, the Court need not analyze the other factors.

Conclusion

For the foregoing reasons, the Court will deny Plaintiffs' motion for preliminary injunction. An Order consistent with this Opinion will be entered.

Dated: December 27, 2013 /s/ Gordon J. Quist

GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

THE CATHOLIC DIOCESE OF NASHVILLE, et al.	)	
v.	)	No. 3:13-01303
	)	JUDGE
	)	CAMPBELL
KATHLEEN SEBELIUS, et al.	)	

ORDER

Pending before the Court is the Plaintiffs' Motion For Preliminary Injunction (Docket No. 14), the Defendants' Response (Docket No. 41), and the Plaintiffs' Reply (Docket No. 57). The Court held a hearing on the Motion on December 23, 2013. For the reasons set forth in the accompanying Memorandum, the Motion For Preliminary Injunction is DENIED.

It is so ORDERED.

/s/ Todd J. Campbell

TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE CATHOLIC DIOCESE OF NASHVILLE, et al.	)	
v.	)	No. 3:13-01303
	)	JUDGE CAMPBELL
KATHLEEN SEBELIUS, et al.	)	

MEMORANDUM

I. Introduction

Pending before the Court is the Plaintiffs' Motion For Preliminary Injunction (Docket No. 14), the Defendants' Response (Docket No. 41), and the Plaintiffs' Reply (Docket No. 57).[1] The Court held a hearing on the Motion on December 23, 2013. For the reasons stated herein, the Motion For Preliminary Injunction is DENIED.

II. Factual/Procedural Background

This action has been brought by The Catholic Diocese of Nashville ("The Diocese"); Catholic Charities of Tennessee ("Catholic Charities"); Camp Marymount; Mary, Queen of Angels ("MQA"); St. Mary Villa; Dominican Sisters of St. Cecilia

[1] The American Civil Liberties Union and American Civil Liberties Union of Tennessee have also filed an *amicus* brief opposing the Plaintiffs' position. (Docket No. 51). Also pending is Defendants' Motion To Dismiss, Or Alternatively, For Summary Judgment (Docket No. 38), which is not fully briefed for decision.

Congregation ("The Congregation"); and Aquinas College to challenge certain regulations implementing the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010). (Complaint, Docket No. 1). Plaintiffs allege that they are Catholic religious entities that provide a wide range of spiritual, educational and social services to individuals in Middle Tennessee and beyond, regardless of whether those individuals are Catholic. (*Id.*) Plaintiffs allege that they uphold and follow the teachings of the Catholic Church. (*Id.*) Plaintiffs contend that their sincerely-held religious beliefs dictate that it is unacceptable to provide, pay for, and/or facilitate access to abortion, [2] sterilization, or the use of contraception. (*Id.*) Plaintiffs claim that the ACA and its implementing regulations require them to violate those teachings. (*Id.*) Plaintiffs base their challenge on the Religious Freedom Restoration Act ("RFRA"); the First Amendment Free Exercise Clause, Free Speech Clause, Establishment Clause,

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[2] Defendants strongly dispute Plaintiffs' characterization of the contraception services in the ACA as including "abortion." *See* Administrative Record, at 320 (". . . abortion services were considered to be outside of the project's scope, given the restrictions contained in the ACA."). As Plaintiffs allege in their Complaint, the "Weldon Amendment" to the Consolidated Appropriations Act of 2012 denies funds to any federal, state or local agency, program, or government that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 112-74, § 507(d)(1), 125 Stat. 786, 1111 (Dec. 23, 2011). Because the Plaintiffs do not raise violation of the Weldon Amendment in their preliminary injunction briefs, the Court considers the argument waived for purposes of the preliminary injunction motion.

and Religion Clauses; and the Administrative Procedures Act ("APA"). (*Id.*) Named as Defendants are Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services; Thomas Perez, Secretary of the U.S. Department of Labor; Jacob J. Lew, Secretary of the U.S. Department of Treasury; U.S. Department of Health and Human Services; U.S. Department of Labor; and U.S. Department of Treasury. (*Id.*)

Plaintiffs seek to enjoin Defendants from "application or enforcement against Plaintiffs, their employee health plans, participants in their employee health plans, or their third party administrators or insurers of the requirement under 45 C.F.R. §147.130(a)(1)(iv), corresponding Guidelines, and corresponding press releases that provide coverage for FDA-approved contraceptive methods, abortion-inducing drugs, sterilization procedures, and patient education and counseling, including the substantive requirement imposed in 42 U.S.C. §300gg–13(a)(4)." (Motion For Preliminary Injunction, at 2 (Docket No. 14)).

The ACA, enacted on March 23, 2010, provides in pertinent part as follows:

> (a) A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for–
>
> * * *
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1)

> as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C.A. §300gg-13(a)(4).

On August 1, 2011, the Health Resources and Services Administration ("HRSA") issued interim final regulations that outlined the preventive care and services for women required by the ACA, and created an exemption for certain religious employers. 76 Fed. Reg. 46621-01 (Aug. 3, 2011). The preventive care and services identified in the guidelines include well-woman visits, breastfeeding support, domestic violence screening, and "[a]ll Food and Drug Administration ["FDA"] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Administrative Record ("A.R."), at 283-284. FDA-approved contraceptive methods include condoms, spermicides, oral contraceptives, intrauterine devices, and emergency contraceptives. A.R., at 402-03.

The interim final regulations defined "religious employer" as one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 76 Fed. Reg., at 46623. In final rules issued on February 15, 2012, the definition of "religious employer" was maintained, but a temporary enforcement "safe harbor" was created for

non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe-harbor period, the government developed and proposed changes to the final regulations in an effort to "provid[e] contraceptive coverage without cost-sharing to individuals who want it and accommodat[e] non-exempted, non-profit organizations' religious objections to covering contraceptive services. . . " 77 Fed. Reg. at 8727. These final regulations, challenged by Plaintiffs here, were promulgated on July 2, 2013. 78 Fed. Reg. 39870-01 (July 2, 2013); 45 C.F.R. §147.131; 26 C.F.R. §54.9815-2713A; 29 C.F.R. §2590.715-2713A.

Under the final rules, a "religious employer" is exempt from providing contraceptive coverage, and is defined as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. §147.131(a). That provision refers to "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 other criteria set forth in the interim regulations were not retained. This exemption for religious employers became effective on August 1, 2013. 78 Fed. Reg., at 39871.

In addition, the final rules provide that a group health insurer must expressly exclude contraceptive coverage from the group health plan coverage of "eligible organizations." 45 C.F.R. §147.131(b), (c).

An "eligible organization" is an organization that satisfies all of the following requirements:

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

45 C.F.R. §147.131(b).

A group health plan that receives such a self-certification must: (1) "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan;" and (2) "[p]rovide separate payments for any contraceptive services required to

be covered . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan." 45 C.F.R. §147.131(c)(1), (2)(i). In addition, the insurer "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." 45 C.F.R. §147.131(c)(2)(ii). The insurer is also required to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." *Id.* [3] The regulation governing the treatment of "eligible organizations" is to become effective for plan years beginning on or after January 1, 2014. 78 Fed. Reg., at 39871.[4] The exemption for "religious employers" became effective on August 1, 2013.

III. Preliminary Injunction Standard

In determining whether to issue a temporary restraining order or a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil

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[3] The insurer must provide plan participants and beneficiaries with "written notice of the availability of separate payments for contraceptive services" specifying 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).

[4] The Defendants indicate that the enforcement safe harbor has been extended such that Plaintiffs MQA and St. Mary Villa will not be subject to the regulations until August 1, 2014, and Plaintiffs Congregation and Aquinas College will not be subject to the regulations until September 1, 2014. (Docket No. 41, at 45).

Procedure, the Court is to consider: (1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether irreparable harm will result without an injunction; (3) whether issuance of an injunction will result in substantial harm to others; and (4) whether the public interest is advanced by the injunction. *Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997).

IV. Analysis

A. Likelihood of Success on the Merits

1. RFRA

Under RFRA, government action may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates that application of the burden: (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.[5] *See Autocam*, 730 F.3d at 625. "Exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§2000bb-2(4); 2000cc-5(7).

The Sixth Circuit recently explained the procedure for evaluating RFRA claims:

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[5] Because RFRA claims are similar to First Amendment claims, "the likelihood of success on the merits often will be the determinative factor" in analyzing whether a preliminary injunction should issue. *Autocam*, 730 F.3d at 624.

> RFRA provides that '[a] person whose religious exercise has been burdened ... may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government,' subject to the requirements of Article III standing. *Id.* §2000bb–1(c). RFRA claims proceed in two steps. First, the plaintiff must make out a prima facie case by establishing Article III standing and showing that the law in question 'would (1) substantially burden (2) a sincere (3) religious exercise.' *[Gonzales v.] O Centro Espirita*, 546 U.S. at 428, 126 S.Ct. 1211. If the plaintiff makes out a prima facie case, it falls to the government to 'demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' *Id.* §2000bb–1(b). The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice. *Id.* §2000bb–2(3).

Autocam, 730 F.3d at 625.

The Supreme Court has described a "substantial burden" as one that "conditions receipt of an important benefit upon conduct proscribed by a religious faith" or "denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his

behavior and to violate his beliefs. . ." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624 (1981).

Plaintiffs argue that the regulations impose a substantial burden on their exercise of religion because they are required to: (1) trigger the facilitation of contraception services via self-certification; (2) contract with an insurer who will provide contraception services; (3) provide their insurer with the names of employees and dependents; and (4) sponsor a plan that will provide contraception services to their employees and dependents. Plaintiffs strongly urge the Court to adopt the decision of the District Court for the Western District of Pennsylvania in *Zubik v. Sebelius*, ____ F.Supp.2d ____, 2013 WL 6118696 (W.D. Penn. Nov. 21, 2013) where the court found a RFRA violation based on similar arguments.[6]

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[6] Plaintiffs have also filed copies of the decisions in *Legatus, et al. v. Sebelius, et al.*, No. 12-12061 (E. D. Mich. Dec. 20, 2013), *Reaching Souls Int'l, Inc., et al. v. Sebelius, et al.*, No. 13-1092 (W.D. Okla. Dec. 20, 2013), *Archdiocese of New York, et al. v. Sebelius, et al.*, No. 1:12-cv-02542 (E.D.N.Y. Dec. 13, 2013), *Geneva College, et al. v. Sebelius, et al.*, No. 12-0207 (W.D. Pa. Dec. 23, 2013), and *Southern Nazarene University, et al. v. Sebelius, et al.*, No. CIV-13-1015-F (W.D. Okla. Dec. 23, 2013) (Docket Nos. 59, 60, 62). The Defendants have filed copies of the decisions of *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013), *University of Notre Dame v Sebelius*, No. 3:13-cv-01276-PPS-CAN (N.D. Ind. Dec. 20, 2013), and *Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:13-cv-01441-ABJ (D.D.C. Dec. 20, 2013). (Docket Nos. 58, 61).

This Court is not persuaded by the reasoning of the *Zubik* decision. As for the Plaintiffs that are entirely exempt from contraceptive coverage, The Diocese and The Congregation, the regulations do not place any burden, much less a *substantial* one, on the exercise of their religious beliefs.

As for the remaining Plaintiffs, the Court is not persuaded that the act of self-certification "facilitates" the receipt of contraceptive services by their employees such that it imposes a substantial burden on their religious beliefs. Such a "burden" is too attenuated and speculative to be substantial. [7] The services to which the Plaintiffs object will only be provided in the event one of their employees independently requests the services, and in the event such a request is made, the regulation prohibits any costs of those services, directly or indirectly, to be

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[7] Although the Court accepts the Plaintiffs' determination that self-certification is at odds with their sincerely-held religious beliefs, the determination of whether those beliefs are "substantially burdened" by self-certification is an objective one that RFRA requires the courts to make. In that respect, the Court disagrees with the analysis in *Zubik*, 2013 WL 6118696, at *14, 24-27, where the court found a RFRA violation by relying on the plaintiffs' testimony that self-certification would substantially burden their religious beliefs. *Cf. Mersino Mgmt. Co. v. Sebelius*, 2013 WL 3546702 (E.D. Mich. July 11, 2013) ("As many courts have noted, permitting Plaintiffs to determine what constitutes 'substantial' and then insulating this proposition from challenge, impermissibly converts the 'substantial burden' requirement to an 'any burden' showing.") In a more recent opinion, the District of Columbia District Court was similarly unpersuaded by the *Zubik* court's analysis. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261-EGS (D.D.C. Dec. 19, 2013), slip op. at 24 n. 5 (Docket No. 58-1) (plaintiff cannot establish burden on exercise of religion is substantial "simply because he claims it to be so.")

imposed on the Plaintiffs.[8] In other words, Plaintiffs bear no costs for the services and nothing is provided unless a third party employee independently requests the services from yet another third party – the insurer. It is only the independent actions of third parties that result in anyone obtaining contraceptive services. *See Priests for Life*, *supra*. Plaintiffs remain free to voice their opposition to the use of contraception services, and to discourage their use. But Plaintiffs' inability to prevent others from acting in contravention of Plaintiffs' religious beliefs does not constitute a substantial burden on those beliefs. For these reasons, self-certification does not put substantial pressure on the Plaintiffs to modify their behavior or violate their beliefs.

As for Plaintiffs' other arguments, the Court is not persuaded that requiring insurers to provide contraception services substantially burdens the Plaintiffs' religious beliefs simply because Plaintiffs have a contractual relationship with the insurers. And Plaintiffs have not shown that the act of providing a list of employees to their insurers is an additional obligation imposed by the regulations that substantially burdens their religious beliefs.[9]

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[8] In that regard, the consequences of self-certification are not unlike an employee's purchase of contraceptive services on his or her own, without any governmental involvement, by using a portion of the salary paid by Plaintiffs. The actions by any employee to obtain the disputed services are the proximate cause, or at a minimum the superseding cause, for them not the Plaintiffs' actions. After all, if no employee requests contraceptive services, none are provided.

[9] Again, the Court disagrees with the *Zubik* court that providing employee names constitutes a substantial burden because it is analogous to providing a knife to a neighbor who seeks to use it

Plaintiffs must give the names of their employees to the insurance company anyway to get them covered by any insurance.

The Court concludes that Plaintiffs have not shown a likelihood of success as to their RFRA claim.

2. Free Exercise Clause

The Free Exercise Clause of the First Amendment prohibits Congress from making a law "respecting an establishment of religion, or prohibiting the free exercise thereof...." The protections of the Free Exercise Clause apply if a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472 (1993). In applying these protections, the Supreme Court has held that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*, at 531. A law that is not neutral and of general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*, at 531-32. A law is not neutral if the object of the law "is to infringe upon or restrict practices because of their religious motivation." *Id.*, at 533. In determining the object of the law, the Court considers whether it is facially neutral. *Id.* A law that "refers to

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to kill someone. 2013 WL 6118696, at 24-25. The flaw in the analogy is that it fails to account for all the independent actors involved. As discussed above, the names are provided to a third party insurer who only provides contraceptive services in the event another third party, the employee, requests those services.

a religious practice without a secular meaning discernable from the language or context" is not facially neutral. *Id.* The Court also considers the intent expressed by the lawmakers in enacting the challenged legislation, and its operation. *Id.*, at 534. In *Lukumi*, the Court determined that the city council's stated intention in enacting ordinances prohibiting animal sacrifice was to target the Santeria religion, and that the practices of the Santeria religion was the only conduct prohibited by the ordinances. *Id.*, at 534-35.

A law is not one of general applicability if it "in a selective manner impose burdens only on conduct motivated by religious belief." *Id.*, at 543. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,' . . . and inequality results when a legislature decides that the government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.*, at 542-43. In *Lukumi*, the Court concluded that the city's ordinances were not of general applicability because they pursued the city's interests in protecting public health and preventing cruelty to animals only against conduct motivated by the religious beliefs of those practicing the Santeria religion. *Id.*, at 543-46.

Plaintiffs argue that the regulations at issue here are not neutral and of general applicability because they offer many secular exemptions, and do not create an exemption for "religious employers like Plaintiffs," and because they target Plaintiffs' religious practice of refusing to provide or facilitate access to contraception. (Docket No. 11, at 33).

The record before this Court, however, indicates that the regulations requiring contraception services are neutral as they were not passed with the intent to target or burden any religious practices, but to advance the goals of safeguarding public health and ensuring that women have equal access to health care. *See*, *e.g.*, 78 Fed. Reg., at 39872. The creation of an exemption for "religious employers" and of an accommodation for "eligible organizations" further evidences an intent, not to burden Plaintiffs' religious beliefs, but to recognize and respect them.

The Court concludes that the regulations are also generally applicable. The exemptions for grandfathered plans and religious employers, and the accommodations for eligible organizations, do not undermine the regulations' general applicability because, unlike the laws in *Lukumi,* they do not disfavor religion. *See*, *e.g.*, *Autocam Corp. v. Sebelius*, 2012 WL 6845677, at *5 (W.D. Mich. Dec. 24, 2012), *aff'd* 730 F.3d 618 (6th Cir. 2013). *See also Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality."). Indeed, the "religious employers" exemption and the "eligible organizations" accommodation were created to recognize and respect Plaintiffs' religious beliefs, not burden them. Unlike the laws at issue in *Lukumi,* the contraception services requirement cannot be described as creating a burden "society is prepared to impose upon [the Plaintiffs] but not upon itself." *Lukumi*, 508 U.S. at 545-46.[10]

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[10] Plaintiffs also argue that the regulations are subject to strict scrutiny because they implicate the "hybrid rights" of religious believers by burdening both their rights of speech and association. In *Kissinger v. Board of Trustees of Ohio State*

The Plaintiffs have not show a likelihood of success regarding their Free Exercise claim.

3. Free Speech Clause

The Supreme Court has held that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum For Academic and Inst. Rights, Inc. ("FAIR")*, 547 U.S. 47, 61, 126 S.Ct. 1297, 1308, 164 L.Ed.2d 156 (2006). The Court has applied this prohibition to a requirement that school children recite the Pledge of Allegiance and to salute the flag, *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943), and to a requirement that automobile owners in New Hampshire display the state motto – "Live Free or Die" – on their license plates. *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

The Court has also applied this prohibition to situations in which the government forces one speaker to host or accommodate another speaker's message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (Court struck down requirement that parade, a unique form of expression, include a group whose message contravenes that intended by the organizer); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20-21, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986)

Univ., 5 F.3d 177, 180 (6th Cir. 1993), the Sixth Circuit rejected these so-called "hybrid claims" as illogical and as unreasonably relying on dicta in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Thus, the Court concludes that Plaintiffs have not shown a likelihood of success on the merits as to such a claim.

(Court struck down requirement that utility company include the newsletter of a third party in its billing envelopes when it regularly included its own newsletter); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (Court struck down requirement that newspaper permit a political candidate a right to equal space to reply to newspaper's criticism).

On the other hand, in *FAIR, supra*, the Court held that a requirement that law schools receiving federal funds offer military recruiters the same access to its campus and students that it provides to nonmilitary recruiters did not unconstitutionally compel speech. In reaching its decision, the Court explained that the requirement "regulates conduct, not speech" and "neither limits what law schools may say nor requires them to say anything." 547 U.S. at 60. The Court also rejected the argument that the law schools could be viewed as endorsing the views of the military. *Id.,* at 64-65. The Court concluded that students would be able to appreciate the difference between speech a school sponsors and speech the school permits because it is legally required to do so. *Id.* Finally, the Court rejected the argument that the requirement regulates "symbolic speech," like flag burning, as providing equal access to military recruiters is not "inherently expressive." *Id.,* at 65-67.

Plaintiffs argue that the regulations compel them to express views with which they do not agree in violation of the First Amendment. Plaintiffs contend that this compulsion occurs in two different ways – by requiring them to provide, pay for, [11] and/or

[11] Plaintiffs' argument that they are required to pay for or provide contraception services is not supported legally or

facilitate access to counseling relating to contraception services; and by requiring self-certification, which triggers an obligation on behalf of the insurer to provide contraception services.

The regulations at issue here do not resemble those condemned in the Court's compelled speech cases because they do not require the Plaintiffs to speak the government's message. The Plaintiffs remain free to convey to their employees and others their vehement objections to the use of contraceptive services, and nothing in the self-certification process restricts that freedom. As with the regulation at issue in *FAIR*, the self-certification requirement neither limits what the Plaintiffs may say nor requires them to say anything. *Id.* In that regard, the self-certification requirement regulates non-expressive conduct, not the Plaintiffs' speech. *See FAIR*, 547 U.S. at 60. Indeed, the speech to which the Plaintiffs object is the speech of those who may provide counseling, which may or may not advocate the use of contraception services, to employees who may or may not seek such counseling. There is little likelihood the Plaintiffs will be viewed as endorsing the views of these third-parties.

Plaintiffs are unlikely to succeed on the merits as to their compelled speech claim.

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factually. As explained above, the regulations do not require any of the Plaintiffs to provide or pay for contraception services. Indeed, the regulations clearly state that the insurance plans of "religious employers" are exempt from any requirement to provide contraception services, and the insurance plans of "eligible organizations" that self-certify are prohibited from imposing any direct or indirect cost for contraception services on the organization.

4. Establishment Clause

The Supreme Court has explained that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982). In *Larson*, the Court invalidated a Minnesota statute that imposed special registration requirements on any religious organization that solicited more than 50% of their funds from nonmembers. 456 U.S. at 231–33. The Court concluded that the statute discriminated against religions, like the Unification Church, that depend heavily on soliciting donations from the general public. *Id.*, at 253-255.

In *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), the Court held that the creation of a special school district for an area including a religious enclave violated the Establishment Clause by allocating political power based on religious criterion. *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (Court struck down statute granting religious bodies veto power over liquor license applications on Establishment Clause grounds).

On the other hand, in *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), the Court upheld a regulation recognizing an exemption from military service only for those objecting to "all wars," as opposed to those objecting only to a particular war, to an Establishment Clause challenge because it did not discriminate on the basis of religious affiliation or belief. *See also Cutter v. Wilkinson*, 544 U.S. 709, 723-24, 125 S.Ct. 2113, 161

L.Ed.2d 1020 (2005) (Court upheld Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides increased level of protection to prisoners' religious rights, to Establishment challenge, pointing out that RLUIPA does not differentiate among bona fide faiths).

Plaintiffs argue that the "religious employer" exemption violates the Establishment Clause of the First Amendment by creating a government-favored category of religious employers over other types of religious groups; and by creating an excessive entanglement between government and religion.

The distinction in the regulations between "religious employers" and "eligible organizations," however, applies equally to all religious denominations, and is based on the structure of the organization, not on its religious affiliation. The Plaintiffs have not shown that this distinction was intended to prefer, or results in a preference for, one denomination over another.

To the extent the Plaintiffs argue that the Establishment Clause prohibits distinctions between "houses of worship," on the one hand, and non-profit religious ministries, such as church-affiliated schools, on the other, they have cited no persuasive authority to support such a theory. In the case cited by Plaintiffs, *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) the Tenth Circuit struck down a Colorado law that provided scholarships to students attending any accredited state college – public or private, secular or religious – except those deemed "pervasively sectarian." But the distinction in "types of institutions" made in the Colorado law was based on the nature of the organization's

religious beliefs and practices. The distinction challenged here is based on the organizations's structure, and does not require any inquiry into the organization's religious beliefs.

Plaintiffs also rely on *Weaver*, as well as the District of Columbia Circuit Court's opinion in *University of Great Falls v. National Labor Relations Board*, 278 F.3d 1335 (D.C. Cir. 2002), in arguing that the regulations create an "excessive entanglement" between religion and government. In *Univ. of Great Falls*, the court rejected the NLRB's test for applying the constitutional exemption for church-operated schools, which considered factors, such as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty. 278 F.3d at 1339-40. The court concluded that such a test required an unconstitutional inquiry and entanglement into the religious mission of the school. *Id.*, at 1342-43 ("Here too we have the NLRB tolling though the beliefs of the University, making determinations about its religious mission, and that mission's centrality of the 'primary purpose' of the University.") Instead, the court determined, the NLRB should consider only whether the educational institution: (a) holds itself out to students, faculty and community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) affiliated with a recognized religious organization. *Id.*, at 1343-44.

The ACA regulations' definition of "religious employer" and "eligible organization" are not unlike

the three-part test adopted by the *Univ. of Great Falls* court.[12] Plaintiffs have not shown a likelihood of success on the merits regarding their Establishment Clause claim.

5. Religion Clauses

Finally, Plaintiffs argue that the regulations violate the Religion Clauses of the First Amendment by interfering with matters of internal church governance. Plaintiffs contend that the regulation artificially splits the Catholic Church in two and prevents it from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. By permitting employees of the Plaintiffs that are "eligible organizations" to access free contraception services, the Plaintiffs argue that the regulation interferes with the ability of the Catholic Church to ensure that their religious affiliates remain faithful to Church teaching.

Plaintiffs rely on the Supreme Court's decision in *Hosanna–Tabor Evangelical Lutheran Church &*

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[12] In contending that the regulations' definition of "religious employer" requires an unconstitutional inquiry into their bona fide religious status, the Plaintiffs rely on a 14-factor test applied by the United States Court of Federal Claims in determining whether an organization qualifies for tax-exempt church status under the Internal Revenue Code, 26 U.S.C. § 170(b)(1)(A)(i). *Foundation of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). Plaintiffs have not demonstrated, however, that this 14-factor test has been adopted as part of the ACA regulation defining "religious employer," or that it has been applied to them or any other organization under the ACA. Under these circumstances, it is unnecessary and inappropriate for the Court to consider the constitutionality of the 14-factor test.

School v. Equal Opportunity Commission, ___ U.S. ___, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) where the Court adopted the "ministerial exception" to employment discrimination statutes. In reaching its decision, the Court explained that the "ministerial exception" was grounded in the First Amendment, and "precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." 132 S.Ct. at 705. The Court concluded that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so. . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.*, at 706.

Unlike *Hosanna-Tabor*, the regulations at issue here do not purport to regulate Plaintiffs' internal structure; their hiring, firing or management of employees; or their ability to express their views to employees about contraception services. Furthermore, the regulations do not require employees to seek contraception services, they merely provide that the employees will not be required to pay for such services. As pointed out above, these same employees may currently obtain contraception services, without any government involvement, though they must use their own funds to do so. Plaintiffs' constitutionally-recognized right to their own internal governance is not implicated by the regulations.

Plaintiffs have not shown a likelihood of success on the merits as to their Religion Clauses claim.[13]

B. Other Factors for Injunctive Relief

As set forth above, the Court must also consider whether irreparable harm will result without an injunction; whether issuance of an injunction will result in substantial harm to others; and whether the public interest is advanced by the issuance of an injunction. Plaintiffs' arguments regarding these factors rely heavily on their contention that they are likely to succeed on the merits in establishing a violation of their First Amendment rights. For the reasons described above, the Court finds little likelihood that the Plaintiffs will succeed on the merits.

On the other hand, the Defendants argue that there is no urgent need for injunctive relief as four of the seven Plaintiffs will not be subject to the new regulation until August 1, 2014 at the earliest. As for the other three, the Defendants argue that they waited roughly five months to file suit after the challenged regulations appeared in the Federal Register. Defendants also argue that injunctive relief will undermine the government's ability to achieve the goals underlying the enactment of the contraception services mandate, and consequently, will harm the third parties whom the legislation was designed to benefit.

Since the ACA does not violate the Plaintiffs' rights, there is no irreparable harm to Plaintiffs, and the

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[13] Because the Plaintiffs have not raised the APA claim in their preliminary injunction briefs, the Court considers that claim waived for purposes of the preliminary injunctive motion.

public interest will not be advanced by the issuance of an injunction. Because no injunction is being issued, whether the issuance of an injunction will result in substantial harm to others is moot. For these reasons, the Court concludes that the remaining three factors do not weigh in favor of the Plaintiffs.

V. Conclusion

Weighing all these factors, the Court concludes that Plaintiffs have not established that a preliminary injunction is warranted. Accordingly, Plaintiffs' Motion For Preliminary Injunction (Docket No. 14) is denied.

It is so ORDERED.

/s/ Todd J. Campbell

TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CATHOLIC CONFERENCE, et al.,	Case No. 1:13-CV-1247
Plaintiffs,	HON. GORDON J. QUIST

v.

KATHLEEN SEBELIUS, et al.,

Defendants. /

ORDER DISMISSING MOTION FOR PRELIMINARY INJUNCTION

On December 27, 2013, the Court denied Plaintiffs' motion for preliminary injunction. (Dkt. No. 41.) The same day, Plaintiffs appealed that decision and moved this Court to enter a preliminary injunction pending appeal. (Dkt. Nos. 42, 43.) On December 29, 2013, Plaintiffs filed a similar motion in the Sixth Circuit. (No. 13-2723.) On December 31, 2013, the Sixth Circuit granted Plaintiffs' motion. Because the Sixth Circuit has granted Plaintiffs the relief they seek, the motion before this Court is now moot.

Therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion For Preliminary Injunction Pending Appeal (Dkt. No. 43) is **dismissed as moot**.

Dated: January 2, 2014

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE CATHOLIC DIOCESE OF NASHVILLE, et al.,	)	No. 3:13-01303
v.	)	JUDGE CAMPBELL
KATHLEEN SEBELIUS, et al.	)	

ORDER

Pending before the Court are the Plaintiffs' Motion For Preliminary Injunction Pending Appeal (Docket No. 68), and the Defendants' Opposition (Docket No. 69). For the reasons set forth in the Court's Memorandum and Order entered December 26, 2013 (Docket Nos. 65, 66), the Motion is DENIED.

It is so ORDERED.

/s/ Todd J. Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 03, 2014

Ms. Jennifer Brinkman Flannery
Jones Day
901 Lakeside Avenue, E.
Cleveland, OH 44114

Mr. Adam C. Jed
U.S. Department of Justice
Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Matthew A. Kairis
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43215

Ms. Alisa B. Klein
U.S. Department of Justice
Civil Division, Appellate Staff

950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Jacek Pruski
U.S. Department of Justice
20 Massachusetts Avenue, NW
P.O. Box 883
Washington, DC 20044-0000

Mr. Mark B. Stern
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7531
Washington, DC 20530

Ms. Paula Batt Wilson
Jones Day
901 Lakeside Avenue, E.
Cleveland, OH 44114

Re: Case No. 13-2723, Michigan Catholic Conference, et al v. Kathleen Sebelius, et al
Originating Case No.: 1:13-cv-01247

Dear Sir or Madam,

The Court issued the enclosed Order today in this case. *The order is amended to include Judge Stranch's dissent.*

Sincerely yours,

s/Julie Brock
Case Manager
Direct Dial No. 513-564-7011

cc: Ms. Tracey Cordes
Enclosure

No. 13-2723

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE, in its own name and, obo Michigan Catholic Conference Second Amended And Restated Group Health Benefit Plan for Employees; CATHOLIC FAMILY SERVICES, dba Catholic Charities Diocese of Kalamazoo, Plaintiffs-Appellants, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF	FILED Jan 03, 2014 DEBORAH S. HUNT, Clerk *AMENDED ORDER*

LABOR; U.S. DEPARTMENT OF TREASURY	)
Defendants-Appellees.	)

Before: BATCHELDER, Chief Judge; SILER and STRANCH, Circuit Judges.

The plaintiffs appeal the denial of their motion to preliminarily enjoin the defendants from enforcing requirements under the Affordable Care Act that result in the provision of cost-free coverage for contraceptive services to their employees. The plaintiffs move for an injunction pending appeal, alleging that the provision violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.* The defendants oppose an injunction, and the plaintiffs reply.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

To demonstrate a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted). The Supreme Court has never considered similar RFRA claims. No circuit court has considered these claims on the merits. The district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare*, *e.g.*, *Mich. Catholic Conference v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400, at *5-10 (D.D.C. Dec. 19, 2013), *with S Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at *8-9 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of NY v. Sebelius*, No. 12 CIV. 2542 BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, Nos. 13cvl459/0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). The divergence of opinion by the district courts establishes more than a mere possibility of success on the merits.

Congress passed the RFRA "to restore the compelling interest test for free-exercise cases . . . and to provide a claim or defense to persons whose religious exercise is substantially burdened by

government." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013) (internal quotations omitted), *pet. for cert. filed*, 82 U.S.L.W. 3245 (Oct. 15, 2013) (No. 13-482). The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet*, 305 F.3d at 578; *see also 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."); *cf. McNeilly v. Land*, 684 F.3d 611, 620-21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . [b]ecause [the plaintiff] does not have a likelihood of success on the merits, . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."). Given the divergence of opinions and the arguable merit of both the plaintiffs' and the government's position, it is not clear that the accommodation violates the RFRA. But the possibility that the plaintiffs' constitutional rights may be violated weighs heavily in our decision, particularly given that there does not appear to be a substantial harm to others. The entities here presently have insurance plans that do not provide contraceptive services to their employees. The contraceptive mandate itself does not apply to three groups, all of which are large in number—employers with less than fifty employees, religious employers, and employees subject to grandfathered plans. Moreover, the government has already delayed implementation of the contraceptive mandate to the plaintiffs, and other entities similarly situated, during the safe harbor. Therefore, at this juncture,

we believe that the factors weigh in support of an injunction pending appeal.

Finally, this appeal focuses on legal issues that have already been briefed below. The district court's decision on appeal, as well as the district court's decision in *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), conflict with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013). Therefore, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **GRANTED**. The government is hereby **ENJOINED** from enforcing the provision in question against the plaintiffs pending the disposition of this appeal. The appeal shall be expedited for briefing and submission, and no extensions of time of the briefing schedule will be granted absent extraordinary circumstances.

Stranch, Circuit Judge, Dissents. The reasons for my dissent will be submitted in a separate writing at a future time.

Jane B. Stranch, Dissenting.

The litigation before this panel presents issues of law seated at the intersection of the Mandate of the Affordable Care Act (ACA)—enacted in part to provide comprehensive women's preventative health care, including contraceptive coverage—and the Religious Freedom Restoration Act (RFRA)—enacted to protect our nation's plural and diverse expressions of religious belief. Plaintiffs seek an injunction pending appeal, "extraordinary relief" available only upon their clear showing that they are likely to

succeed on the merits, that they will suffer irreparable harm without relief, that the equities tip in their favor, and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20-22 (2008). We are to review the district court's denial of an injunction pending appeal under the familiar abuse of discretion standard, examining findings of fact for clear error and legal conclusions de novo. *See Autocam, Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013) (applying the abuse of discretion standard for denial of a preliminary injunction); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572-73 (6th Cir. 2002) (reviewing a motion for injunction pending appeal under abuse of discretion standard). Relying on the divergence of district court opinions and noting the "arguable merit" of the position of both parties, the majority grants an injunction pending appeal. This is not the correct standard. Because application of the proper standard reveals that plaintiffs have failed to carry their burden to prove a likelihood of success on the merits and that the district court did not abuse its discretion, I respectfully dissent.

Proper analysis begins with determining whether the findings of fact made below are clearly erroneous. The district court made specific findings that impact coverage under the ACA: (1) that plaintiffs' religious objection is to taking actions that "trigger" its third party administrator to provide contraceptive services; (2) that plaintiffs provide to their employees a self-funded healthcare plan administered by a third-party and excluded from the Mandate's ERISA enforcement mechanism; and, (3) that one of the plaintiffs is exempt from the Mandate as a religious employer and the other is eligible for the "religious

accommodation." The court found that under the accommodation, plaintiffs are not required to comply with the Mandate as long as they self-certify that they object to contraceptive coverage for religious reasons. *See* 45 C.F.R. § 147.131(b). Upon self-certification, the third party administrator may separately pay for contraceptive services to participants and may be reimbursed by the federal government. *See* 78 Fed. Reg. 39,870, 39,987, 39,880 (Health and Human Servs. July 2, 2013) (final rule). There is nothing in these factual findings that could constitute clear error; they are taken directly from the plaintiffs' complaint and from the rules in question.

The next step looks to RFRA, the requirements of which set the stage for the appropriate analysis. Recognizing the right of free exercise of any religious faith, 42 U.S.C. § 2000bb, RFRA protects in equal measure the established, the well-regarded, the obscure, the disfavored and even the despised expressions of religious belief. Courts therefore must honor a plaintiff's declaration of religious belief, *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (pre-RFRA application of substantial burden test), and may ask only whether the belief is sincere and religious in nature, *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). The questions of sincerity and religiosity are "factual inquiries within the court's authority and competence." *Id.* at 683.

To identify proscribed interference, RFRA incorporated the "substantial burden" standard previously articulated by the Supreme Court: where

a governmental entity "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18. In the context of zoning, we have noted that the "'substantial burden' hurdle is high" and that a substantial burden does not exist where "although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007). Other circuits have noted that the focus of the substantial burden test is on the "intensity of the coercion . . . to act contrary to [religious] beliefs." *Korte*, 735 F.3d at 683 (internal quotation marks and italics omitted). [1] We have also recognized that "determining its existence is fact intensive." *Living Water*, 258 F. App'x at 734. The findings of the district court thus govern analysis of the application of RFRA's substantial burden hurdle to the motion before this panel.

The district court began by accepting the plaintiffs' objection to the contraceptive Mandate, and then

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[1] Plaintiffs rely on *Korte* (in which the Seventh Circuit held that the contraception mandate is a substantial burden on the religious rights of for-profit companies) to support its position here. 735 F.3d at 683-85. But *Korte* is inapposite because the court there reasoned that the Mandate is coercive to for-profit companies because they are forced to provide and pay for contraceptive coverage—something not required of the plaintiffs here because religious non-profits may take advantage of the accommodation. *Id.*

found it to be sincere and religious. I agree that plaintiffs needed only to have declared their religious objection—through self-certification—and that under RFRA, we must accept their declaration of belief. As recognized by the district court, however, that is not the same as authorizing the plaintiffs—through their declaration—to determine that the Mandate substantially burdens their belief. It is the province of the courts to make that determination.

The district court resolved this "fact intensive" question by holding that the Mandate does not substantially burden plaintiffs' religious belief because it does not in any way coerce their behavior. The district court found that the actions that plaintiffs have always done are all that is necessary to receive the accommodation—they sponsor a health plan, they contract with a third party to administer the plan, and they notify the third party that they oppose contraceptive coverage. Thus, plaintiffs' only objection refers to the *effect* of self-certification. The court further found that the religious accommodation does not "trigger" contraception coverage, as plaintiffs contend, but instead allows plaintiffs to "step aside" and remove itself from the process while another party provides coverage. *See* 45 C.F.R. § 147.13l(b). The third party administrator is then asked to separately pay for contraceptive services to participants and is allowed to seek reimbursement from the federal government. *See* 78 Fed. Reg. at 39,987, 39,880. The third party administrator carries out the preventative services scheme for plaintiffs' employees but does so wholly *without* plaintiffs.

Plaintiffs argue that the Mandate violates their religious rights under RFRA because by filing the

self-certification form, they facilitate the provision of independent coverage. Not only did the district court find this to be false, but the independent action of third party entities with which plaintiffs disagree does not impose a substantial burden on plaintiffs' exercise of their religious beliefs. *See Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (rejecting claim of plaintiffs who believed that the state's use of their child's social security number would harm her spirit because plaintiffs could not demand that the government join their religious preference); *Kaemmerling v. Lapin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008) (concluding that although the government's storage of a prisoner's tissue samples may offend the prisoner's religious beliefs, it cannot be a substantial burden to his religious exercise because the government did not pressure him to modify his behavior). Nor can plaintiffs' inability to prevent their employees from independently obtaining contraceptives in opposition to plaintiffs' religious beliefs be a substantial burden on plaintiffs' religious beliefs. That RFRA is rightly used as a shield does not make proper its use as a sword. If the full range of religious beliefs in our pluralistic society that are protected by RFRA were authorized to be used as a sword, there would exist no limiting principle on an employer's right to intrude into the private choices and lives of its employees.

The findings of the district court are supported by the language of the regulations and the factual record. They are not clearly erroneous. Given these findings and our standard of review, plaintiffs have not shown that they are substantially burdened by the ACA's Mandate and religious accommodation. Plaintiffs will not be denied a benefit if they self-certify; they

will gain the benefit of removing their entity entirely from the government mandated provision of preventative services coverage. The regulation also does not require the plaintiffs to modify their behavior—they already inform their third party administrator that they object to contraceptive coverage, and they already provide a list of names of those employees they wish to insure.

Unique to this case is also the district court's finding that these plaintiffs provide to their employees a self-funded health plan, which is administered by a separate third party administrator, and which is not subject to the Mandate's enforcement mechanism. Without an enforcement mechanism, the accommodation cannot impose a "substantial burden" on plaintiffs because there is no government coercion. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013). Nor could a denial of an injunction run afoul of RFRA based on plaintiffs' speculative argument that they are substantially burdened by the Mandate because it requires them to maintain a business relationship with a third party that provides contraceptive coverage. Because the self-funded health plan can refuse to comply with the Mandate without any legal consequences, plaintiffs cannot show that they are coerced into maintaining a business relationship that is contrary to their religious beliefs.

For these reasons as well as the ones explained by Judge Quist below and by Judge Campbell in the similar case of the *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), I do not think that plaintiffs

carried their burden to prove a likelihood of success on the merits. Nor have plaintiffs shown that they will suffer irreparable harm or that the balance of the equities and public interest weigh in favor of an injunction. Thus, plaintiffs have failed to meet their burden to establish that the district court abused its discretion in denying a preliminary injunction or injunction pending appeal.

Therefore, I respectfully dissent from the panel decision granting an injunction pending appeal. I would instead join my colleagues in the Tenth and Seventh Circuits in denying an injunction. *See Little Sisters*, No. 13-1540; *University of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Dec. 30, 2013).

ENTERED BY ORDER OF THE COURT
/s/ Deborah S. Hunt

Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 03, 2014

Mr. Antonio J. Aguilar
Mr. Louis G. Marchetti
Mr. Matthew Christopher Pietsch
Taylor, Pigue, Marchetti & Mink
2908 Poston Avenue
Nashville, TN 37203

Mr. Adam C. Jed
Ms. Alisa B. Klein
Mr. Mark B. Stern
U.S. Department of Justice
Appellete Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Robb S. Harvey
Ms. Lauren M. Sturm
Waller, Lansden, Dortch & Davis
511 Union Street
Suite 2700
Nashville, TN 37219

Mr. Matthew A. Kairis
Ms. Melissa Dunlap Palmisciano
Ms. Brandy Hutton Ranjan
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43215

Mr. Jacek Pruski
U.S. Department of
Justice
20 Massachusetts
Avenue, NW
P.O. Box 883
Washington, DC 20044-
0000

Re: Case No. 13-6640, *The Cath. Diocese Nashville, et al v. Kathleen Sebelius, et al*
Originating Case No. : 3:13-cv-01303

Dear Counsel:

The Court issued the enclosed Order today in this case. *The Order is amended to include Judge Stranch's dissent.*

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Keith Throckmorton

Enclosure

No. 13-6640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CATHOLIC DIOCESE OF NASHVILLE; CATHOLIC CHARITIES OF TENNESSEE, INC.; CAMP MARYMOUNT, INC.; MARY QUEEN OF ANGELS, INC.; ST. MARY VILLA, INC.; DOMINICAN SISTERS OF ST. CECILIA CONGREGATION; AQUINAS COLLEGE,	)	
	)	*AMENDED ORDER*
Plaintiffs-Appellants,	)	
v.	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN	)	

SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF TREASURY	)
Defendants-Appellees.	)

Before: BATCHELDER, Chief Judge; SILER and STRANCH, Circuit Judges.

The plaintiffs appeal the denial of their motion to preliminarily enjoin the defendants from enforcing requirements under the Affordable Care Act that result in the provision of cost-free coverage for contraceptive services to their employees. The plaintiffs move for an injunction pending appeal, alleging that the provision violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*. The defendants oppose an injunction, and the plaintiffs reply.

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111–152, 124 Stat. 1029 (2010), which combined, make up the Affordable Care Act ("ACA"). *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 627–28 (6th Cir. 2013), *pet. for cert. filed*, 82 U.S.L.W. 3318 (Nov. 12, 2013) (No. 13-591). The ACA requires employers with fifty or more full-time employees to provide their employees with a health insurance plan that provides certain essential minimum coverage. *See* 26 U.S.C. § 4980H. Failure to comply with this provision results in substantial financial penalties for the employer. *See*

26 U.S.C. § 4980H(a). Pertinent here, "essential minimum coverage" includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" ("the contraceptive mandate"). *See* 42 U.S.C. § 300gg-13(a)(1), (4); *Eden Foods*, 733 F.3d at 628–29.

Religious employers—organizations that are organized and operated as nonprofit entities and referred to in I.R.C. § 6033(a)(3)(A)(i) or (iii) (1986)—are exempt from the contraceptive mandate. 45 C.F.R. § 147.131(a). Also exempt are companies with less than fifty employees, *see* 26 U.S.C. § 4980H(a), (c)(2)(A), and companies with health insurance plans in existence on March 23, 2010 that remained unchanged after that date (the "grandfathered" plans). *See* 45 C.F.R. § 147.140.

Following objections from religious organizations that did not qualify as religious employers, the government established a temporary "safe harbor" from enforcement of the contraceptive mandate for non-profit religiously-affiliated organizations. *Korte v. Sebelius*, 735 F.3d 654, 661–62 (7th Cir. 2013). On July 2, 2013, during this safe-harbor period, a regulatory scheme was adopted, known as the "accommodation," wherein "eligible organizations" may be exempted from the contraceptive mandate. 29 C.F.R. § 2590.715-2713A. An entity is an "eligible organization" if it satisfies four requirements: (1) it opposes providing coverage for some or all of the contraceptive services covered under the contraceptive mandate on religious grounds; (2) it is organized and operated as a non-profit entity; (3) it holds itself out as a religious organization or entity;

and (4) it "self certifies, in a form and manner specified by the Secretary, that it satisfies the [first three criteria], and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation . . . applies." 29 C.F.R. § 2590.715-2713A(a)(1)–(4).

The plaintiffs, religious employers subject to the exemption for non-profit entities eligible for the accommodation, filed an action for declaratory and injunctive relief against the defendants, alleging violations of the RFRA, the First Amendment, and the Administrative Procedures Act. They also moved for a preliminary injunction to prohibit the enforcement of the contraceptive mandate, scheduled to take effect on January 1, 2014, based on their allegations that the accommodation violated the RFRA and the First Amendment. After conducting a hearing on the motion, the district court denied the motion for a preliminary injunction in a lengthy and reasoned decision. The plaintiffs appealed the denial of their motion for a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). They also contemporaneously moved the district court for an injunction pending appeal. The district court denied the motion, for the reasons stated in its memorandum denying their motion for a preliminary injunction. This motion followed.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Overstreet v. Lexington-Fayette Urban*

Cnty. Gov't, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573; *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

To demonstrate a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted). The Supreme Court has never considered similar RFRA claims. No circuit court has considered these claims on the merits. The district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare, e.g., Mich. Catholic Conference v. Sebelius,* No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* No. 13-1261, 2013 WL 6672400, at *5–10 (D.D.C. Dec. 19, 2013), *with S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at *8–9 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of NY v.*

Sebelius, No. 12 CIV. 2542 BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, Nos. 13cv1459/0303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). The divergence of opinion by the district courts establishes more than a mere possibility of success on the merits.

Congress passed the RFRA "to restore the compelling interest test for free-exercise cases . . . and to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013) (internal quotations omitted), *pet. for cert. filed*, 82 U.S.L.W. 3245 (Oct. 15, 2013) (No. 13-482). The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet*, 305 F.3d at 578; *see also 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."); *cf. McNeilly v. Land*, 684 F.3d 611, 620–21 (6th Cir. 2012) ("Once a probability of success on the merits was shown, irreparable harm followed . . . . [b]ecause [the plaintiff] does not have a likelihood of success on the merits, . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails."). Given the divergence of opinions and the arguable merit of both the plaintiffs' and the government's position, it is not clear that the accommodation violates the RFRA. But the possibility that the plaintiffs' constitutional rights may be violated weighs heavily in our decision, particularly given that there does not appear to be a substantial harm to others. The entities here presently have insurance plans that do not provide

contraceptive services to their employees. The contraceptive mandate itself does not apply to three groups, all of which are large in number—employers with less than fifty employees, religious employers, and employees subject to grandfathered plans. Moreover, the government has already delayed implementation of the contraceptive mandate to the plaintiffs, and other entities similarly situated, during the safe harbor. Therefore, at this juncture, we believe that the factors weigh in support of an injunction pending appeal.

Finally, this appeal focuses on legal issues that have already been briefed below. The district court's decision on appeal, as well as the district court's decision in *Michigan Catholic Conference v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 20, 2013), conflict with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013). Therefore, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **GRANTED**. The government is hereby **ENJOINED** from enforcing the provision in question against the plaintiffs pending the disposition of this appeal. The appeal shall be expedited for briefing and submission, and no extensions of time of the briefing schedule will be granted absent extraordinary circumstances.

Stranch, Circuit Judge, Dissents. The reasons for my dissent will be submitted in a separate writing at a future time.

Jane B. Stranch, Dissenting.

The litigation before this panel presents issues of law seated at the intersection of the Mandate of the

Affordable Care Act (ACA)—enacted in part to provide comprehensive women's preventative health care, including contraceptive coverage—and the Religious Freedom Restoration Act (RFRA)—enacted to protect our nation's plural and diverse expressions of religious belief. Plaintiffs seek an injunction pending appeal, "extraordinary relief" available only upon their clear showing that they are likely to succeed on the merits, that they will suffer irreparable harm without relief, that the equities tip in their favor, and that the injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20-22 (2008). We are to review the district court's denial of an injunction pending appeal under the familiar abuse of discretion standard, examining findings of fact for clear error and legal conclusions de novo. *See Autocam*, *Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013) (applying the abuse of discretion standard for denial of a preliminary injunction); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't,* 305 F.3d 566, 572-73 (6th Cir. 2002) (reviewing a motion for injunction pending appeal under abuse of discretion standard). Relying on the divergence of district court opinions and noting the "arguable merit" of the position of *both* parties, the majority grants an injunction pending appeal. This is not the correct standard. Because application of the proper standard reveals that plaintiffs have failed to carry their burden to prove a likelihood of success on the merits and that the district court did not abuse its discretion, I respectfully dissent.

Proper analysis begins with determining whether the findings of fact made below are clearly erroneous. The district court made specific findings that impact coverage under the ACA: (1) that plaintiffs' religious

objection is that they find it unacceptable to provide, pay for, and/or facilitate access to the mandated contraceptive services; (2) that two of the plaintiffs are entirely exempt from the mandate; and, (3) that the other plaintiffs are nonprofit entities eligible for the "religious accommodation." The court found that the accommodation allows plaintiffs to opt out of the Mandate as long as they self-certify that they object to contraceptive coverage for religious reasons. *See* 45 C.F.R. § 147.131(b). Upon self-certification, the health insurance companies must "expressly exclude" contraceptive coverage from their plans, 45 C.F.R. § 147.131(c)(2)(i)(A), and instead provide contraceptive coverage to the plaintiff's employees through a separate mechanism with a separate administrative and notification system that does not directly or indirectly impose on plaintiffs any cost of contraceptive coverage, 45 C.F.R. § 147.131(c)(2)(i)(B), (ii). There is nothing in these factual findings that could constitute clear error; they are taken directly from the plaintiffs' complaint and from the text of the rules in question.

The next step looks to RFRA, the requirements of which set the stage for the appropriate analysis. Recognizing the right of free exercise of any religious faith, 42 U.S.C. § 2000bb, RFRA protects in equal measure the established, the well-regarded, the obscure, the disfavored and even the despised expressions of religious belief. Courts therefore must honor a plaintiff's declaration of religious belief, *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (pre-RFRA application of substantial burden test), and may ask only whether the belief is sincere and religious in nature, *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *Korte v.*

Sebelius, 735 F.3d 654, 683 (7th Cir. 2013). The questions of sincerity and religiosity are "factual inquiries within the court's authority and competence." *Id.* at 683.

To identify proscribed interference, RFRA incorporated the "substantial burden" standard previously articulated by the Supreme Court: where a governmental entity "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18. In the context of zoning, we have noted that the "'substantial burden' hurdle is high" and that a substantial burden does not exist where "although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007). Other circuits have noted that the focus of the substantial burden test is on the "intensity of the coercion . . . to act contrary to [religious] beliefs." *Korte*, 735 F.3d at 683 (internal quotation marks and italics omitted). [1] We have also recognized that

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[1] Plaintiffs rely on *Korte* (in which the Seventh Circuit held that the contraception mandate is a substantial burden on the religious rights of for-profit companies) to support its position here. 735 F.3d at 683-85. But *Korte* is inapposite because the court there reasoned that the Mandate is coercive to for-profit companies because they are forced to provide and pay for contraceptive coverage—something not required of the plaintiffs here because religious non-profits may take advantage of the accommodation. *Id.*

"determining its existence is fact intensive." *Living Water*, 258 F. App'x at 734. The findings of the district court thus govern analysis of the application of RFRA's substantial burden hurdle to the motion before this panel.

The district court began by accepting the plaintiffs' objection to the contraceptive Mandate, and then found it to be sincere and religious. I agree that plaintiffs needed only to have declared their religious objection—through self-certification—and that under RFRA, we must accept their declaration of belief. As recognized by the district court, however, that is not the same as authorizing the plaintiffs—through their declaration—to determine that the Mandate substantially burdens their belief. It is the province of the courts to make that determination.

The district court resolved this "fact intensive" question by holding that the Mandate does not substantially burden plaintiffs' religious belief. It found that the religious accommodation, which applies to the four plaintiff entities that are not entirely exempt from the Mandate, does not "facilitate" contraception coverage, but instead allows the plaintiffs to "opt out." By filling out a "self-certification" form, the plaintiffs permit the insurance companies to "expressly exclude" the plaintiffs from the provision of any contraceptive coverage. *See* 45 C.F.R. § 147.131(c)(2)(i)(A). The insurance companies then act on their own independent duty to provide contraceptive coverage. They fulfill their legal duty through a separate administrative and notification process and through separate funds. *See* 45 C.F.R. § 147.131(c)(2)(i)(B), (ii). The insurance company carries out the preventative

services scheme for plaintiffs' employees but does so wholly *without* plaintiffs.

Plaintiffs argue that the Mandate violates their religious rights under RFRA because by filing the self-certification form, they facilitate the provision of independent coverage. Not only did the district court find this to be false, but the independent action of third party entities with which plaintiffs disagree does not impose a substantial burden on plaintiffs' exercise of their religious beliefs. *See Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (rejecting claim of plaintiffs who believed that the state's use of their child's social security number would harm her spirit because plaintiffs could not demand that the government join their religious preference); *Kaemmerling v. Lapin*, 553 F.3d 669, 678-79 (D.C. Cir. 2008) (concluding that although the government's storage of a prisoner's tissue samples may offend the prisoner's religious beliefs, it cannot be a substantial burden to his religious exercise because the government did not pressure him to modify his behavior). Nor can plaintiffs' inability to prevent their employees from independently obtaining contraceptives in opposition to plaintiffs' religious beliefs be a substantial burden on plaintiffs' religious beliefs. That RFRA is rightly used as a shield does not make proper its use as a sword. If the full range of religious beliefs in our pluralistic society that are protected by RFRA were authorized to be used as a sword, there would exist no limiting principle on an employer's right to intrude into the private choices and lives of its employees.

The findings of the district court are supported by the language of the regulations and the factual record.

They are not clearly erroneous. Given these findings and our standard of review, plaintiffs have not shown that they are substantially burdened by the ACA's Mandate and it religious accommodation. Plaintiffs will not be denied a benefit if they self-certify; they will gain the benefit of removing their entity entirely from the government mandated provision of preventative services coverage. The regulation also does not require the plaintiffs to modify their behavior—they already inform their insurance providers that they object to contraceptive coverage, and they already provide a list of names of those employees they wish to insure. Nor does the denial of an injunction run afoul of RFRA based on plaintiffs' argument that they are substantially burdened by the Mandate because it requires them to maintain a business relationship with companies that provide contraceptive coverage. The district court did not number this among plaintiffs' religious objections, and it is difficult to see how it could qualify as one. The plaintiffs already provide insurance to their employees through their business relationship with Blue Cross Blue Shield of Tennessee, a company that currently provides and historically has provided contraceptive coverage to innumerable participants.

For these reasons and those explained by Judge Campbell below and by Judge Quist in the similar case of *Michigan Catholic Conference, et al. v. Sebelius*, No. 1:13-CV-1247, 2013 WL 6838707 (W.D. Mich. Dec. 20, 2013), I do not think that plaintiffs carried their burden to prove a likelihood of success on the merits. Nor have plaintiffs shown that they will suffer irreparable harm or that the balance of the equities and public interest weigh in favor of an injunction. Thus, plaintiffs have failed to meet their

burden to establish that the district court abused its discretion in denying a preliminary injunction or injunction pending appeal.

Therefore, I respectfully dissent from the panel decision granting an injunction pending appeal. I would instead join my colleagues in the Tenth and Seventh Circuits in denying an injunction. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013); *University of Notre Dame v. Sebelius,* No. 13-3853 (7th Cir. Dec. 30, 2013).

ENTERED BY ORDER OF THE COURT

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Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE and D/B/A CATHOLIC CHARITIES DIOCESE OF KALAMAZOO (13-2723); THE CATHOLIC DIOCESE OF NASHVILLE, CATHOLIC CHARITIES OF TENNESSEE, INC., CAMP MARYMOUNT, INC., MARY, QUEEN OF ANGELS, INC., ST. MARY VILLA, INC., DOMINICAN SISTERS OF ST. CECILIA CONGREGATION, and AQUINAS COLLEGE (13-6640), Plaintiffs-Appellants, v. SYLVIA MATTHEW BURWELL, Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, Secretary of the United States Department of Labor; JACOB J. LEW, Secretary of the United States Department of Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES	Nos. 13-2723/6640

DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids; No. 1:13-cv-01247—Gordon J. Quist, District Judge.

and

Appeal from the United States District Court for the Middle District of Tennessee at Nashville; No. 3:13-cv-01303—Todd J. Campbell, District Judge.

Argued: May 8, 2014

Decided and Filed: June 11, 2014

Before: MOORE and ROGERS, Circuit Judges; NIXON, District Judge.*

COUNSEL

ARGUED: Matthew A. Kairis, JONES DAY, Columbus, Ohio, for Appellants. Adam C. Jed, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Matthew A. Kairis, Melissa Dunlap Palmisciano, Neil Vakharia, JONES DAY, Columbus, Ohio, for Appellants. Adam C. Jed, Mark B. Stern, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Charles E. Davidow, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, Washington, D.C., Daniel Mach, Brigitte Amiri, AMERICAN CIVIL LIBERTIES

* The Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

UNION FOUNDATION, Washington, D.C., Ayesha N. Khan, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,Washington, D.C., B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Amici Curiae.

OPINION

KAREN NELSON MOORE, Circuit Judge. The plaintiffs-appellants in this consolidated appeal are non-profit entities affiliated with the Catholic Church who have religious objections to certain preventive care standards under the Patient Protection and Affordable Care Act. Specifically, the appellants object to the requirement that their employer-based health insurance plans cover all Food and Drug Administration-approved contraception, sterilization methods, and counseling. All of the appellants are eligible for either an exemption from the requirement or an accommodation to the requirement, through which the entities will not pay for the contraceptive products and services and the coverage will be independently administered by an insurance issuer or third-party administrator. Nonetheless, in their complaints filed in the District Courts for the Middle District of Tennessee and Western District of Michigan, the appellants alleged that the contraceptive-coverage requirement violated the Religious Freedom Restoration Act; the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment; and the Administrative Procedure Act. Both district courts denied the appellants' motions for a preliminary injunction. We AFFIRM

the denials of preliminary injunctions to all appellants on all claims.

I. BACKGROUND

A. Factual Background

The appellants allege that they are Catholic entities that provide "spiritual, educational, social, and financial services to members of their communities, Catholic and non-Catholic alike." MCC R. 1 (MCC Compl. at ¶ 1) (Page ID #2); CDN R. 1 (CDN Compl. at ¶ 2) (Page ID #2).[1]

All appellants currently provide health plans to their employees. Michigan Catholic Conference ("MCC") offers a self-insured group health plan that is "administered by separate third party administrators,[2] Blue Cross Blue Shield of Michigan and Express Scripts." MCC R.

1 (Compl. at ¶ 41) (Page ID #13). Catholic Charities of Kalamazoo is a "Covered Unit[]" whose

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[1] MCC R. refers to documents in *Michigan Catholic Conference et al. v. Burwell et al.,* No. 13-2723, and CDN R. refers to documents in *Catholic Diocese of Nashville et al. v. Burwell et al.,* No. 13-6640.

[2] "A self-insured plan is one in which benefits are paid from contributions supplied by the employer without the assistance of outside insurance." 1A Steven Plitt, et al., *Couch on Insurance* § 10.1 n.1 (3d ed. 2013). "An employer is said to have a 'self-insured' plan if [the employer] bears the financial risk of paying claims." Government Br. at 7 n.1. Many companies that offer self-insured plans hire an insurance company or other outside entity, referred to as a third-party administrator, "to administer their plans, performing functions such as developing networks of providers, negotiating payment rates, and processing claims." *Id.*

employees may participate in the plan that MCC offers its employees. MCC R. 1 (Compl. at ¶¶ 41, 50–51) (Page ID #13, 15). The remaining appellants—the Catholic Diocese of Nashville ("CDN"); [3] Catholic Charities of Tennessee, Inc. ("Catholic Charities of Tennessee"); Camp Marymount, Inc. ("Camp Marymount"); Mary, Queen of Angels, Inc. ("MQA"); St. Mary Villa, Inc. ("St. Mary Villa"); Aquinas College; and Dominican Sisters of St. Cecilia Congregation ("St. Cecilia Congregation")—offer fully-insured group health plans.[4] CDN R. 1 (Compl. at ¶¶ 43, 61, 71, 79, 80, 107, 129) (Page ID #13, 17, 19, 20, 25, 30).

MCC, CDN, and St. Cecilia Congregation allege that they are eligible for the total exemption from the contraceptive-coverage requirement for "religious employers," meaning that their health plans need not provide contraceptive coverage. MCC R. 1 (Compl. at ¶ 9) (Page ID #4); CDN R. 1 (Compl. at ¶ 14) (Page ID #7). The remaining appellants allege that they are eligible for the accommodation for certain religiously affiliated non-profits. MCC R. 1 (Compl. at ¶ 11) (Page ID #5); CDN R. 1 (Compl. at ¶ 10) (Page ID #5).

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[3] CDN offers its employees a choice including a preferred provider option ("PPO plan") and a high-deductible option. CDN R. 1 (Compl. at ¶ 43) (Page ID #13). The PPO plan meets the definition of a "grandfathered plan" under the ACA; thus, at this time, that plan is exempt from the contraceptive-coverage requirement. CDN R. 1 (Compl. at ¶ 46) (Page ID #13).

[4] "An insured plan, also known as a fully insured plan, is one in which insurance is purchased from a regulated insurance company." 1A Steven Plitt, et al., *Couch on Insurance* § 10.1 n.1 (3d ed. 2013).

Regulatory Background

The enactment of the Patient Protection and Affordable Care Act ("ACA") in 2010 established new minimum standards requiring employer-based group health plans and health insurance issuers to cover certain services without cost-sharing through a deductible or other payment by the plan participant or beneficiary. 42 U.S.C. § 300gg-13. The term "group health plan" is broadly defined to include both insured group health plans and self-insured group health plans: "[t]he term 'group health plan' means an employee welfare benefit plan . . . to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise." 42 U.S.C. § 300gg-91(a)(1). Congressional hearings emphasized the importance of coverage without cost-sharing for women's specific healthcare needs because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29049, 29070 (Dec. 2, 2009) (statement of Sen. Feinstein). "Women of childbearing age spent 68 percent more in out-of-pocket health care costs than men." *Id.* Additionally, the legislative debates recognized that medical costs disproportionately discourage women from seeking treatment: "[w]omen are more likely than men to neglect care or treatment because of cost." 155 Cong. Rec. S11985, S11987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski). The enacted law thus required coverage for, "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported

by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4); *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01, 8725 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

For assistance in developing the guidelines for covered "preventive care and screenings," *id.*, the Health Resources and Services Administration ("HRSA") asked the Institute of Medicine ("IOM") to bring together a committee to "conduct a review of effective preventive services to ensure women's health and well-being." IOM, *Clinical Preventive Services for Women: Closing the Gaps ("Closing the Gaps")* (2011), 1.[5] "The Institute of Medicine was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public." *Id.* at iv. The members of the Committee on Preventive Services for Women ("Committee") included "specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." *Id.* at 2. The Committee recommended preventive measures that "met the following criteria:

- The condition to be prevented affects a broad population;
- The condition to be prevented has a large potential impact on health and well-being; and

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[5] The report may be read online for free at: http://www.iom.edu/Reports/2011/Clinical-Preventive- Services-for-Women-Closing-the-Gaps.aspx.

- The quality and strength of the evidence is supportive.

Id. at 8. The Committee made eight recommendations[6] for preventive services for women, including coverage for "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10; *see also* 77 Fed. Reg. at 8725. This recommendation was based on the Committee's concern about the high rate of unintended pregnancy in the United States; forty-nine percent of pregnancies in 2001 "were unintended—defined as unwanted or mistimed at the time of conception," a rate much higher than comparable developed countries. *Closing the Gaps* at 102. The rate of unintended pregnancy "is more likely among women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." *Id.* The Committee concluded that contraceptive coverage would greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other negative health consequences, and significantly reduce women's medical costs. *Id.* at 102–07. The regulations promulgated by the agencies implementing the ACA required group health plans and insurance issuers offering group or individual health insurance coverage to provide coverage without cost-sharing for preventive care and screenings provided for in guidelines supported by the HRSA. *See* 26 C.F.R. § 54.9815-2713A (Tax); 29

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[6] One of the sixteen members of the Committee, Anthony Lo Sasso, dissented from the report.

C.F.R. § 2590.715-2713A (Labor); 45 C.F.R. § 147.131 (Health and Human Services).[7]

The regulations provide for a religious-employer exemption from the contraceptive-coverage requirement and an accommodation for certain non-profits that do not qualify for the exemption but that object to contraceptive coverage on religious grounds. The government first developed the religious-employer exemption, under which HRSA is authorized to "establish an exemption . . . with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines." 45 C.F.R. § 147.131(a). A "religious employer" is defined as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."

45 C.F.R. § 147.131(a); see 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii) (referring to "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order.").

Based on objections that the religious-employer exemption as borrowed from the Tax Code was drawn

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[7] The Department of Treasury, Department of Labor, and Department of Health and Human Services promulgated identical regulations regarding the framework. *See* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131. For the sake of simplicity, we cite only the Department of Labor regulations.

too narrowly, the government developed a special accommodation for certain non-profits. The accommodation was intended to "meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services." 77 Fed. Reg. at 8727. The final regulations permitted "eligible organization[s]" to obtain the accommodation if the organization "satisfies all of the following requirements:

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

45 C.F.R. § 147.131(b).

The process by which an organization obtains the exemption and the accommodation will be discussed as relevant to the appellants' claims.

B. Procedural History

MCC and Catholic Charities of Kalamazoo (together, "MCC plaintiffs") filed suit in the District Court for the Western District of Michigan on

November 14, 2013. CDN, Catholic Charities of Tennessee, Camp Marymount, MQA, St. Mary Villa, St. Cecilia Congregation, and Aquinas College (together, "CDN plaintiffs") filed suit in the District Court for the Middle District of Tennessee on November 22, 2013. Both sets of plaintiffs alleged that the contraceptive-coverage requirement violated the Religious Freedom Restoration Act; the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment, and the Administrative Procedure Act. In November 2013, the plaintiffs moved for preliminary injunctions in their respective district courts. The District Court for the Western District of Michigan denied a preliminary injunction on all claims because the plaintiffs had not shown a likelihood of success on the merits of their claims. *Michigan Catholic Conference v. Sebelius* No. 1:13-CV-1247, 2013 WL 6838707, at *13 (W.D. Mich. Dec. 27, 2013). The District Court for the Middle District of Tennessee held that the plaintiffs waived their claims under the Administrative Procedure Act, and denied a preliminary injunction on all other claims because the plaintiffs had not shown a likelihood of success on the merits of their claims. *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-01303, 2013 WL 6834375, at *4–10 (M.D. Tenn. Dec. 26, 2013).

The appellants now appeal the denials of their motions for a preliminary injunction.

II. ANALYSIS

A. Standard of Review

As we recently stated in a unanimous en banc decision, there are:

> four factors [the district court] must balance when considering a motion for preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor. Whether the movant is likely to succeed on the merits is a question of law we review de novo. We review for abuse of discretion, however, the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief. This standard is deferential, but the court may reverse the district court if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact.

City of Pontiac Retired Emps. Ass'n v. Schimmel, No. 12-2087, 2014 WL 1758913, at *2 (6th Cir. May 5, 2014) (en banc) (internal quotation marks and citations omitted). "The party seeking a preliminary injunction bears a burden of justifying such relief, including showing irreparable harm and likelihood of

success." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012).

B. Religious Freedom Restoration Act

The appellants argue that the contraceptive-coverage requirement violates the Religious Freedom Restoration Act ("RFRA") because it imposes a substantial burden on their exercise of religion by forcing them to provide, pay for, and/or facilitate access to insurance coverage for contraception, and the contraceptive-coverage requirement is not the least restrictive means to further a compelling government interest. Both district courts concluded that the contraceptive-coverage requirement does not impose a substantial burden on the exercise of religion because the plaintiffs were eligible for either the exemption or the accommodation from the requirement.

To analyze properly the appellants' claim under RFRA, we begin with the genesis of the law. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that if a state law survived constitutional challenge, it would be "because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ." Id. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Supreme Court rejected the compelling-interest test in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), stating that:

> The government's ability to enforce generally applicable prohibitions of

> socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.

Id. at 884–85 (quotation marks and internal citations omitted). In "direct response" to *Employment Division v. Smith*, Congress enacted RFRA. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). RFRA's stated purposes are:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b). Under RFRA, the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that application of the burden "(1) is in

furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[8] 42 U.S.C. §§ 2000bb-1(a), (b).

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[8] As a preliminary matter, we note two questions that have not been raised by the parties in this case and that, because we conclude that the contraceptive-coverage requirement does not violate RFRA, we need not address. First, whether the appellants, all of whom are non-profit corporations, are "persons" capable of the "exercise of religion" within the meaning of RFRA. Second, whether RFRA applies to a later-enacted statute. RFRA contains an express-reference requirement providing that "[f]ederal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). Essentially, RFRA purports to bind all later Congresses unless they specifically reject the application of RFRA by the means specified by the earlier Congress that enacted RFRA. The Supreme Court has questioned the binding effect of express-reference requirements. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (refusing "to require the Congress to employ magical passwords in order to effectuate an exemption from" a previously enacted statute). In *Dorsey v. United States*, the Court treated a savings statute with an express-reference requirement as:

> in effect a less demanding interpretive requirement. That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention *either expressly or by implication as it chooses*.

--U.S.--, 132 S. Ct. 2321, 2331 (2012) (emphasis added) (citations omitted). *See also Lockhart v. United States*, 546 U.S. 142, 149–50 (2005) (Scalia, J., concurring) (identifying RFRA as a statute with an express-reference requirement and remarking

We follow a two-step process for analyzing RFRA claims:

> First, the plaintiff must make out a prima facie case by establishing Article III standing and showing that the law in question would (1) substantially burden (2) a sincere (3) religious exercise. If the plaintiff makes out a prima facie case, it falls to the government to demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. The government carries the burdens of both production and persuasion when it seeks to justify a substantial burden on a sincere religious practice.

Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013) (internal quotation marks and citations omitted). "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 717–18

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that "it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such express-reference provisions are ineffective."). Thus, Congress may reject the application of RFRA to a later-enacted statute without explicitly stating that RFRA does not apply.

(1981). But a government action does not constitute a substantial burden on the exercise of religion even if "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the "rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

The exercise of religion that appellants argue is burdened by the contraceptive-coverage requirement is their "refus[al] to take certain actions in furtherance of a regulatory scheme to provide their employees with coverage for abortion-inducing products, contraceptives, sterilization, and related education and counseling." Appellant Br. at 26–27. The government does not dispute that the appellants' desire not to participate in the provision of contraception is a sincere religious belief.

The government does argue, however, that the contraceptive-coverage requirement does not impose a substantial burden on the appellants' exercise of religion. Because the appellants all concede that they are eligible for either the exemption or the accommodation, they need not actually participate in the contraceptive-coverage requirement. Government Br. at 18–19. The appellants respond that the exemption and accommodation do not alleviate the burden of the contraceptive-coverage requirement because the process to obtain the exemption or accommodation forces the appellants "to play an integral role in the delivery of

objectionable products and services to their employees." Appellant Br. at 27–29.

First, we must address the appellants' argument that the court should defer to their conclusion that the exemption and accommodation arrangement forces them to provide, pay for, and/or facilitate access to contraceptive coverage. See Appellant Br. at 18–20 (describing the district court's conclusion that the contraceptive-coverage requirement imposes a burden on third parties, not the appellants, as a "foray into the theology behind Catholic precepts on contraception [that] was manifestly improper") (internal quotation marks omitted); Appellant Br. at 36 ("Whether the accommodation relieves Appellants of moral culpability for their actions (i.e., allows them to opt out) or makes them complicit in a grave moral wrong is a question of religious conscience for [Appellants] to decide.") (internal quotation marks omitted). Put another way, the appellants appear to ask the court to defer not only to their *belief* that requesting the exemption or the accommodation makes them complicit in sin, but also to defer to their understanding of how the regulatory measure *actually works*.

But as was recently explained, "there is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept plaintiffs' characterization of the regulatory scheme on its face." *Roman Catholic Archbishop of Washington v. Sebelius*, —F. Supp. 2d—, No. 13-1441, 2013 WL 6729515, at *14 (D.D.C. Dec. 20, 2013), injunction granted pending appeal, No. 13-5371 (D.C. Cir. Dec. 31, 2013)). Although we are in no position to determine the moral or theological consequences of

appellants requesting the exemption or accommodation, we must determine the legal consequences. Whether a government obligation substantially burdens the exercise of religion 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)). We "accept[ ] as true the factual allegations that [appellants'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C Cir. 2008). Thus, although we acknowledge that the appellants believe that the regulatory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require and whether they impose a substantial burden on appellants' exercise of religion.

1. Appellants Eligible for the Exemption

MCC, CDN, and St. Cecilia Congregation allege that they are eligible for the religious-employer exemption from the contraceptive-coverage requirement. MCC R. 1 (Compl. at ¶ 9) (Page ID #4); CDN R. 1 (Compl. at ¶ 14) (Page ID #7). The government agrees that these three appellants are "exempt from the contraceptive coverage requirement under 45 C.F.R. § 147.131(a)." Government Br. at 9–10, 18; *see also* Government Br. at 13. The appellants do not object to any specific act that they must engage in to obtain the exemption. Indeed, the government states that these "[p]laintiffs are . . . already exempt from the requirement to provide contraceptive coverage." Government Br. at 13.

Because both parties agree that MCC, CDN, and St. Cecilia Congregation are eligible for the exemption and because the appellants do not identify any particular action that they must take to obtain the exemption that burdens their exercise of religion, appellants have not demonstrated a strong likelihood of success on the merits of this claim.

2. Appellants Eligible for the Accommodation

The contraceptive-coverage framework does not impose a burden on the exercise of religion by those remaining appellants who are eligible for the accommodation. If an entity has an insured group health insurance plan, all that the entity must do to obtain the accommodation is "furnish[] a copy of the self-certification . . . to each issuer that would otherwise provide such coverage in connection with the group health plan."[9] 29 C.F.R. § 2590.715-2713A(c)(1). If an entity has a self-insured plan, such as Catholic Charities of Kalamazoo, all that the entity must do to obtain the accommodation is "[c]ontract with one or more third party administrators"[10] and "provide[] each third party

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[9] Nothing in the record indicates that any of the insurance issuers with which the appellants contract has refused to provide contraceptive coverage upon receipt of a self-certification form.

[10] Catholic Charities of Kalamazoo, the only appellant alleging that it is eligible for the accommodation and has a self-insured plan, already contracts with a third-party administrator. This appellant participates in the MCC Plan, "which consists of self-funded medical and prescription benefits administered by separate third party administrators, Blue Cross Blue Shield of Michigan and Express Scripts, respectively." MCC R. 1 (Compl. at ¶¶ 41, 50) (Page ID #13, 15).

administrator that will process claims for any contraceptive services[11]. . . with a copy of the self-certification." 29 C.F.R. § 2590.715-2713A(b)(1)(i), (ii). That is the entirety of the conduct that the objecting organization must engage in to obtain the accommodation.

The appellants are not required to "provide" contraceptive coverage. They are not required physically to distribute contraception to their employees upon request, and the eligible organization's health plan does not host the coverage. Upon receipt of the self-certification form, the insurance issuer "must—(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan." 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A). In the self-insured context, the self-certification form declares to the third-party administrator that "[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services." 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A). Instead, the third-party administrator "shall be responsible for . . . compliance with" the preventive care and screenings provided for in the HRSA guidelines. 29 C.F.R. § 2510.3-16(b), (b)(1) (referencing obligations in 42 U.S.C. § 300gg-13 and 29 C.F.R. § 2590.715-2713A(b)(1)(ii)). Thus, although the insurance issuer or third-party administrator will provide contraceptive coverage, the appellants will not.

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[11] Nothing in the record indicates that Catholic Charities of Kalamazoo's third-party administrator has refused to provide contraceptive coverage upon receipt of a self-certification form.

The appellants are not required to "pay for" contraceptive coverage. When an insurance issuer receives the self-certification form, it "must . . . Provide separate payments for any contraceptive services." 29 C.F.R. § 2590.715-2713A(c)(2)(i)(B). The eligible organization's money will not fund the contraceptive coverage: "[t]he issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(c)(2)(ii). When a third-party administrator receives the self-certification form, it must "provide or arrange payments for contraceptive services" either by providing the payments itself or arranging for an issuer or another entity to provide the payments. 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii). In either situation, whoever is providing the payments may not "impose[] a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries." 29 C.F.R. § 2590.715-2713A(b)(2)(i), (ii); (c)(2)(ii). The accommodated entity does not even need to be the one to tell the employees about the contraceptive coverage. The regulations require the insurance issuer or third-party administrator to provide written notice to plan participants and beneficiaries "specify[ing] that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(d). Thus, although the insurance issuer or third-party administrator will pay for contraceptive coverage, the appellants will not.

Moreover, the appellants are not required to "facilitate access to" contraceptive coverage. The crux of the appellants' "facilitation" argument is that providing the self-certification form to the insurance issuer or third-party administrator "triggers" the provision of the contraceptive coverage to their employees. Appellant Br. at 9, 27–31. This argument rests on two assumptions that are, perhaps, two sides of the same coin: first, that the insurance issuer and third-party administrator could not provide the coverage until they receive a self-certification form and second, that the insurance issuer and third-party administrator then provide the coverage because they received the self-certification form.

Submitting the self-certification form to the insurance issuer or third-party administrator does not "trigger" contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage. The ACA requires "[a] group health plan [12] and a health insurance issuer offering group or individual health insurance coverage" to "provide coverage for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health

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[12] Group health plan is broadly defined and includes both insured group health plans and self-insured group health plans: "[t]he term 'group health plan' means an employee welfare benefit plan . . . to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise." 42 U.S.C. § 300gg-91(a)(1).

Resources and Services Administration." 42 U.S.C. §§ 300gg-13(a), (a)(4). Thus, under the ACA, the appellants' health plans and insurance issuers must provide contraceptive coverage without cost-sharing, whether or not the appellants decide to self-certify. "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." *Univ. of Notre Dame*, 743 F.3d at 554. "Because Congress has imposed an independent obligation on insurers to provide contraceptive coverage to Appellants' employees, those employees will receive contraceptive coverage from their insurers *even if* Appellants self-certify—but not because Appellants self-certify." *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371; *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (Tatel, J., dissenting from injunction pending appeal). The obligation to cover contraception will not be triggered by the act of self-certification—it already was triggered by the enactment of the ACA.

The appellants allege that providing, paying for, and/or facilitating access to contraceptive coverage burdens their exercise of religion. As discussed *supra*, the exemption and accommodation framework does not require them to do any of these things. The framework does not permit them to prevent their insurance issuer or third-party administrator from providing contraceptive coverage to their employees pursuant to independent obligations under federal law. However, the inability to "restrain the behavior of a third party that conflicts with the [appellants'] religious beliefs," *Michigan Catholic Conference*, 2013

WL 6838707, at *7, does not impose a burden on the appellants' exercise of religion. "[W]hile a religious institution has broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution." *Univ. of Notre Dame*, 743 F.3d at 552.

The government's imposition of an independent obligation on a third party does not impose a substantial burden on the appellants' exercise of religion. In *Bowen v. Roy*, a pre-*Smith* Free Exercise case, the Supreme Court rejected a Free Exercise claim against the government's use of a Native American child's Social Security number. The father of the child "believe[d] the use of the number may harm his daughter's spirit." 476 U.S. 693, 699 (1986). The Court concluded that the Free Exercise Clause did not allow an individual to force the Government to conform its conduct to the individual's religious beliefs. "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* The family "may not demand that the Government join in their chosen religious practices . . . . As a result, Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700. Just as the government's use of the child's Social Security number "does not itself in any degree impair [the family's] 'freedom to believe, express, and exercise[e]' [their] religion," *id.*,

the Government's instruction to insurance issuers and third-party administrators to provide contraceptive coverage does not force the appellants to provide, pay for, and/or facilitate access to the coverage.

Similarly, in *Kaemmerling v. Lappin* the D.C. Circuit rejected a RFRA claim because the challenged government action did not require anything of the challenger. A prisoner expressed religious objections to the government collecting and analyzing his DNA profile pursuant to the DNA Act. 553 F.3d 669, 678–79 (D.C. Cir. 2008). The court held that the prisoner "cannot identify any 'exercise' which is the subject of the burden to which he objects" because the governmental process of extracting DNA "involves no action or forbearance on [the prisoner's] part, nor does it otherwise interfere with any religious act in which he engages." *Id.* at 679. Here, the only thing that the exemption and accommodation framework requires of the appellants is conduct in which they already engage. They will continue to sponsor health plans, contract with insurance issuers or third-party administrators, and declare their opposition to providing contraceptive coverage to their insurance issuer and third-party administrator. *Michigan Catholic Conference*, 2013 WL 6838707, at *7. The only difference in conduct is on the part of the insurance issuer or third-party administrator; appellants "are not required to 'modify [their] behavior.' Rather, it is the TPA [or insurance issuer] that is required to modify *its* behavior and take action by providing contraceptive services—without the assistance of" the appellant. *Id.* Employees and beneficiaries will receive contraceptive coverage, but that coverage will be "despite plaintiffs' religious

objections, not because of them." Government Br. at 26. Again, the insurance issuers and third-party administrators are not parties to this suit and have not expressed any opposition to complying with the contraceptive-coverage requirement. The fact that the regulations require the insurance issuers and third-party administrators to modify their behavior does not demonstrate a substantial burden on the appellants.

In addition to the objection to the self-certification form, the appellants raise various procedural objections to the accommodation framework, none of which is meritorious. The appellants object to having to offer enrollment paperwork to allow employees to enroll in the plan overseen by the third party and to sending health-plan enrollment paperwork to the third party. Appellant Br. at 29. The regulations do not require either of these acts; the regulations specifically provide that the third-party administrator or insurance issuer (not the accommodated eligible organization) notifies plan participants and beneficiaries of the availability of payments for contraceptive services. *See* 29 C.F.R. §§ 2590.715-2713A(d). The appellants object to having to "[i]dentify for a third party which of their employees will participate in the plan." Appellant Br. at 29. Again, this is not required by the regulations. Moreover, because these appellants already contract with insurance issuers and third-party administrators, the insurance issuers and third-party administrators presumably already have lists of plan participants and beneficiaries. Finally, the appellants object to having to "[r]efrain from canceling their insurance arrangement with a third party authorized to provide the objectionable

products and services." Appellant Br. at 29. Once again, the regulations do not prohibit the appellants from canceling an insurance arrangement, and the appellants have not expressed any actual intent to do so. Because these objections do not go to actual requirements of the contraceptive-coverage framework, they clearly do not demonstrate a substantial burden on appellants' exercise of religion.

The appellants argue that the exemption and accommodation mechanism pressures them to modify their behavior and violate their religious beliefs because previously they informed their insurance issuer or third-party administrator of their opposition to contraception and those entities did *not* cover contraception, but now they will inform their insurance issuer or third-party administrator of their opposition and those entities will cover contraception. But that is an objection to the later independent action of a third party, not to an obligation imposed on the appellants by the government. It is not the act of self-certification that causes the insurance issuer and the third-party administrator to cover contraception, it is the law of the United States that does that. Self-certification allows the eligible organization to tell the insurance issuer and third-party administrator "'we're excused from the new federal obligation relating to contraception,' and in turn, the government tells those insurance companies, 'but you're not.'" *Univ. of Notre Dame*, 743 F.3d at 557. Perhaps the appellants would like to retain the authority to prevent their insurance issuer or third-party administrator from providing contraceptive coverage to appellants' employees, but "RFRA is not a mechanism to advance a generalized objection to a governmental policy choice, even if it is one sincerely

based upon religion." *Roman Catholic Archbishop of Washington*, 2013 WL 6729515, at *2.

Because these appellants may obtain the accommodation from the contraceptive-coverage requirement without providing, paying for, and/or facilitating access to contraception, the contraceptive-coverage requirement does not impose a substantial burden on these appellants' exercise of religion. Therefore, these appellants have not demonstrated a strong likelihood of success on the merits of their RFRA claim.

C. First Amendment

1. Free Speech Clause

"It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, —U.S.—, 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted). "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, —U.S.—, 132 S. Ct. 2277, 2288 (2012). The appellants argue that the contraceptive-coverage requirement violates the Free Speech Clause of the First Amendment by forcing them to provide, pay for, and/or facilitate access to contraception counseling; forcing them to speak against their beliefs by filling out the self-certification form; and imposing a "gag order" by prohibiting them from interfering with or seeking to influence a third-party administrator's decision to cover contraception. We conclude that the contraceptive coverage requirement does not violate

the Free Speech Clause of the First Amendment, and will address each of the subclaims in turn.

a. Contraceptive counseling

First, the appellants argue that the contraceptive-coverage requirement unconstitutionally compels speech by forcing them to provide, pay for, and/or facilitate access to counseling about contraception, and that this obligation violates their religious opposition "to providing any support for 'counseling' that encourages, promotes, or facilitates such practices." Appellant Br. at 57–58. The guidelines recommended coverage without cost-sharing for "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Closing the Gaps* at 10; *see also* 77 Fed. Reg. at 8725. Presumably, this counseling would include discussion of the range of contraceptive options, how the various products work, and what may be a good fit for the counseled individual's health profile and lifestyle.

The regulations certainly do not require the accommodated entity to "provide" this counseling. The accommodated entity need not discuss or acknowledge the existence of the counseling coverage; the regulations require the insurance issuer or third-party administrator to inform plan participants and beneficiaries that separate payments are available for counseling and other contraceptive services. *See* 29 C.F.R. §§ 2590.715-2713A(d). The regulations make no attempt to stop the appellants' practice of "counsel[ing] men and women against" using contraception. Appellant Br. at 57, 58. *See Rumsfeld v. Forum for Academic and Institutional*

Rights, Inc. ("*FAIR*"), 547 U.S. 47, 65 (2006) (upholding a statute against a free-exercise challenge; the statute required law schools to give military recruiters equal access to other recruiters as a condition on receipt of certain federal funds, but "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."). Thus, in no way do the regulations compel the appellants' speech by forcing them to provide contraceptive counseling.

The regulations also do not compel the appellants' speech by forcing them to pay for contraceptive counseling. As discussed *supra*, the regulations specifically prohibit an insurance issuer or third-party administrator from passing on the cost of complying with the contraceptive-coverage requirement, which includes the cost of contraceptive counseling. *See* 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2).

Finally, the requirements do not force the appellants to facilitate access to contraceptive counseling. It is not clear what speech, exactly, the appellants believe is compelled by the facilitation of such coverage; in any event, as discussed *supra*, it is federal law, not the appellants' actions, that requires their insurance issuer or third-party administrator to provide insurance coverage for contraceptive counseling. The contraceptive coverage is provided through a government regulation of the insurance issuer and third-party administrator, not through the appellants' health insurance plan. *See* 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A) (upon receipt of the self-

certification form, the insurance issuer "must—(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan"); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) (the self-certification form declares to the third-party administrator that "[t]he eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services"). Thus, the framework does not require appellants to "host or accommodate another speaker's message" through their insurance plan. *FAIR*, 547 U.S. at 63; *cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (requiring a parade organizer to allow a group whose message it opposes to participate in the parade is unconstitutional forced accommodation of speech); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 20–21 (1986) (plurality opinion) (forcing a utility company to include a third-party organization's newsletter with the utility bill is unconstitutional forced accommodation of speech).

The contraceptive counseling provision does not violate the Free Speech Clause of the First Amendment. Thus, appellants have not demonstrated a strong likelihood of success on the merits of this claim.

b. Self-certification Form

Second, the appellants argue that the requirement that they complete the self-certification form in order to obtain the accommodation "compels Appellants to engage in speech that triggers provision of the objectionable products and services, and [ ] deprives Appellants of the freedom to speak on the issue of

abortion and contraception on their own terms, at a time and place of their own choosing, outside of the confines of the Government's regulatory scheme." Appellant Br. at 58. As discussed *supra*, the self-certification form does not trigger the provision of contraceptive coverage, but instead it triggers the entities' disassociation from what they deem to be the objectionable coverage. Thus, this framework is nothing like the unconstitutional state campaign finance law in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, where the state provided matching funds for publicly financed candidates when a privately financed candidate or independent expenditure group spent over a certain amount on the election, thus making the privately financed candidate's political expenditures a trigger of funding to his or her adversary. --U.S.--, 131 S. Ct. 2806, 2818 (2011). The self-certification form does not have a similar triggering function. Additionally, the self-certification form does not deprive appellants of the freedom to speak out about abortion and contraception on their own terms. The form requires the appellants to assert their opposition to contraception in order to opt out of a generally applicable government program. Successful compelled-speech cases are those when "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). Even assuming that the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim. Thus, the self-certification requirement does not compel speech in violation of the First Amendment, and so the appellants have not

demonstrated a strong likelihood of success on the merits of this claim.

c. "Gag Order"

Finally, the appellants argue that the accommodation framework imposes an unconstitutional "gag order" by prohibiting eligible organizations with self-insured group plans from interfering with, or seeking to influence, a third-party administrator's decision to provide contraceptive coverage. Specifically, the regulation provides:

> The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

29 C.F.R. § 2590.715-2713A(b)(iii). A footnote in the commentary to the regulations states that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39880 n.41 (July 2, 2013) (to be codified at 29 C.F.R. § 2510, 2590; 45 C.F.R. § 147, 156). The regulations thus draw a line between impermissible efforts to interfere with or influence a third-party administrator's provision of contraceptive

coverage and permissible expressions of opposition to contraceptives.

The appellants have presented their objections to this regulation at a very high level of generality and fail to identify what protected speech this regulation chills.[13] It is not clear what the appellants want to do or say that they believe this regulation prohibits. Do the appellants feel chilled from having a calm discussion with their third-party administrator about Catholic doctrine, discouraging third-party administrators from entering into or maintaining contractual relationships with religiously affiliated organizations, encouraging the insurance issuer to violate federal law and refuse to provide contraceptive coverage, or something else altogether? We do not know. Not all speech is protected by the First Amendment; for example, "an employer is free to communicate to his employees any of his general views about unionism" but may not make "a 'threat of

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[13] Only the MCC plaintiffs raised this claim in their complaint, where they allege that contraceptive-coverage requirement "impos[es] a gag order that prohibits Plaintiffs from speaking out in any way that might 'influence,' 'directly or indirectly,' the decision of a third party administrator to provide or procure contraceptive products and services to Plaintiffs' employees." MCC R. 1 (Compl. at ¶ 188) (Page ID #44–45). In their motion for a preliminary injunction in the district court, they repeated this general argument and asserted that "[p]laintiffs believe that contraception is immoral, and by expressing that conviction they routinely seek to 'influence' or persuade their fellow citizens of that view." MCC R. 15 (Prelim. Inj. Memo at 38) (Page ID #639). In their brief to this court, the appellants make a brief, general argument that they "believe that contraception is contrary to their faith, and speak and act accordingly. The Government has no authority to outlaw such expression." Appellant Br. at 55

reprisal or force or promise of benefit.'" *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Given the failure to "[tell] us what [they] want[] to say but fear[] to say" and the fact that "the government hasn't clearly embraced an interpretation of the regulation that would give rise to the [First Amendment] concerns," *Univ. of Notre Dame*, 743 F.3d at 561, the appellants have not demonstrated a strong likelihood of success on the merits of this claim.

2. Free Exercise Clause

The Free Exercise Clause is not violated by neutral laws of general applicability, "even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Church of the L.B.A.*"), 508 U.S. 520, 531 (1993). A law that is not neutral and of general applicability still does not violate the Free Exercise Clause if the law is "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Id.* at 531–32. The appellants argue that the contraceptive-coverage requirement is not a neutral law of general applicability because they say it was targeted at Catholic entities and has many exemptions. Appellant Br. at 53–54. On the contrary, the contraceptive-coverage requirement is a neutral law of general applicability and does not violate the Free Exercise Clause.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the L.B.A.*, 508 U.S. at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning

discernible from the language or context." *Id.* However, "[f]acial neutrality is not determinative . . . 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Id.* at 534 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The contraceptive-coverage requirement is a neutral law. Neither the text nor the history of the statute and regulations promulgated pursuant to the statute demonstrate that the requirement was targeted at a particular religious practice. There is no evidence that Congress and the executive branch agencies "had as their object the suppression of religion." *Id.* at 542. The record does not "disclose[] animosity" towards the Catholic practice of refusing to support access to contraception, the framework does not "by [its] own terms target this religious exercise," the program was not "gerrymandered with care to proscribe" the Catholic exercise of religion with respect to contraception but not secular opposition to contraception; and the arrangement does not "suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." *Id.* at 542. The appellants argue that the Government was aware of the refusal of Catholic employers to provide contraceptive coverage and enacted the requirement to force Catholic employers to violate their religious beliefs. Appellant Br. at 54. This argument is unpersuasive; the fact that the Government has required a religiously affiliated entity to do something that it does not want to on the basis of religion does not, *ipso facto*, mean that the law was targeted at religious practice. Accordingly, the framework is neutral.

A law is not of general applicability if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief," *Church of the L.B.A.*, 508 U.S. at 543. The appellants argue that the requirement is not generally applicable because grandfathered plans, small businesses, and religious employers that obtain an exemption need not comply with the contraceptive-coverage requirement. This argument misunderstands the meaning of general applicability under our Free Exercise jurisprudence. "General applicability does not mean absolute universality." *See Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008). A law need not apply to every person or business in America to be generally applicable. A law is generally applicable if it does not make distinctions based on religion. To determine this, we consider whether the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Church of the L.B.A.*, 508 U.S. at 542–43. The requirement at issue here does not pursue the governmental interest in contraceptive coverage only against entities with a religiously motivated objection to providing such coverage; that interest is pursued uniformly against all businesses that are not grandfathered and have more than fifty employees. This includes entities that have no objection to the requirement, entities that object for non-religious reasons such as general opposition to government dictating healthcare requirements, and entities that object to the requirement for religious reasons. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (holding a rule was generally applicable because "pharmacists who do not have a religious

objection to Plan B must comply with the rules to the same extent—no more and no less—than pharmacies and pharmacists who may have a religious objection to Plan B"). In fact, the availability of the exemption and the accommodation means that the law imposes a *lesser* burden on those who object for religious reasons because they do not have to pay for the coverage. Accordingly, the program is generally applicable.

Because the law requiring contraceptive coverage is neutral and generally applicable, it does not violate the Free Exercise Clause even if it incidentally burdens the exercise of religion. Thus, the appellants have not demonstrated a strong likelihood of success on the merits of this claim.

3. Establishment Clause

"Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. However, "[the Supreme] Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987). The appellants argue that allowing some entities with a religious mission to obtain the exemption and others to obtain only the accommodation violates the Establishment Clause because the distinction "favors some types of religious organizations and denominations over others" and creates an excessive entanglement between government and religion. Appellant Br. at 59. Because the law's distinction does not favor a certain denomination and does not cause excessive

entanglement between government and religion, the framework does not violate the Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "[N]o State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Id.* at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). For a claim such as this based on the allegedly disparate treatment of religions, "the constitutional value at issue is 'neutrality.'" *Gillette v. United States*, 401 U.S. 437, 450 (1971). The line that the exemption and accommodation framework draws between eligibility for the exemption and for the accommodation is based on organizational form and purpose, not religious denomination. Such a distinction does not violate the Establishment Clause. "[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii), without these advantages being thought to violate the establishment clause." *Univ. of Notre Dame*, 743 F.3d at 560 (citing *Walz*, 397 U.S. at 672–73). The appellants' reliance on the Tenth Circuit's decision in *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), is misplaced. There, the Tenth Circuit held that a state law permitting scholarship funding for students attending religious schools only if the school was not "pervasively" sectarian violated the Establishment Clause. *Id.* at 1258–60. The law did not make distinctions based on organizational form, as here; the Colorado law violated the Establishment Clause because it discriminated based on the nature of religious belief

and practice at the university. Accordingly, that case provides no support for the appellants' argument. The fact that all of the appellants are affiliated with the Catholic Church and some are eligible for the exemption while others are eligible for the accommodation demonstrates that the framework does not discriminate based on denomination. Because the exemption and accommodation arrangement distinguishes between entities based on organizational form, not denomination, it does not express an unconstitutional state preference on the basis of religion.

Further, the provisions do not excessively entangle government and religion. The regulations define a "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The referenced sections of the Internal Revenue Code provide exceptions from certain tax-return filing requirements for "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 IRS considers numerous factors to determine if an entity is eligible for the exceptions in § 6033(a)(3)(A)(i), (iii). *See Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980). The appellants argue that "these factors favor some religious groups over others . . . on the basis of intrusive judgments regarding beliefs, practices, and organizational structures." Appellant Br. at 63–64. However, the government argues that the "qualification for the religious employer exemption does not require the

government to make any determination, whether as a result of the application of the non-exhaustive, non-binding list or otherwise." Government Br. at 54–55. Plaintiffs have not shown how this is not correct.

Because the exemption and accommodation provisions do not prefer a denomination or excessively entangle government in religious practice, they do not violate the Establishment Clause. Thus, the appellants have not demonstrated a strong likelihood of success on the merits of this claim.

D. Administrative Procedure Act

Finally, the MCC appellants [14] argue that the contraceptive-coverage requirement violates the Administrative Procedure Act (APA) because the requirement violates the Weldon Amendment and thus is "not in accordance with law," and because the IOM guidelines recommending that contraception be included as preventive care were not subject to notice-and-comment rulemaking requirements. We conclude that the appellants have not demonstrated a strong likelihood of success on the merits of the Weldon Amendment claim, and we decline to reach the notice-and-comment claim.

1. Weldon Amendment

The MCC appellants argue that the contraceptive-coverage requirement violates the Weldon

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[14] Although the CDN plaintiffs included an APA claim in their complaint, that claim was not raised in the motion for a preliminary injunction, and so the district court correctly treated the claim as waived for purposes of the preliminary injunction. *Catholic Diocese of Nashville*, 2013 WL 6834375, at *10 n.13.

Amendment and therefore is "not in accordance with law," as required by the APA. The APA provides that a "reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Weldon Amendment is a rider to an appropriations bill that denies funding to federal agencies or programs "if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[15]

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[15] It is not clear that any of the MCC appellants who properly raised this claim is an "institutional or individual health care entity" within the meaning of the Weldon Amendment. The Weldon Amendment defines "[h]ealth care entity" as "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(2). The appellants allege that the Michigan Catholic Conference Second Amended and Restated Group Health Benefit Plan for Employees ("MCC Benefit Plan") is a health plan. MCC R. 1 (MCC Compl. at ¶ 16) (Page ID #7). However, it is not clear that the MCC Benefit Plan is an actual plaintiff in this case. The complaint is captioned "MICHIGAN CATHOLIC CONFERENCE in its own name and on behalf of the MICHIGAN CATHOLIC CONFERENCE SECOND AMENDED AND RESTATED GROUP HEALTH BENEFIT PLAN FOR EMPLOYEES . . . ." MCC R. 1 (MCC Compl. at 1) (Page ID #1). Although the complaint describes MCC and Catholic Charities as "plaintiff[s]," it does not describe the MCC Benefit Plan as a plaintiff. *See id.* at ¶¶ 16, 17 (Page ID #7). However, because we affirm the denial of the preliminary injunction on this claim, we need not decide this issue at this time.

Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). The district court held that the contraceptive-coverage requirement does not violate the Weldon Amendment because the FDA-approved emergency contraceptives are not defined as abortion-inducing products under federal law. The appellants argue that this analysis is in error because the court should defer to the plan provider's definition of "abortion" and the appellants believe that the "morning-after pill (Plan B) and Ulipristal (HRP 2000 or [e]lla)" are "abortion-inducing products." Appellant Br. at 65.

The appellants are correct that the Weldon Amendment does not define abortion. The appellants argue that the absence of a statutory definition means that the court should defer to their independent interpretation of "abortion." That is not how statutory interpretation works. Rather, the federal courts will utilize traditional methods of statutory interpretation to determine whether "abortion" in the Weldon Amendment includes FDA-approved emergency contraceptives.

We also question the appellants' assumption that MCC is discriminated against for refusing to provide contraceptive coverage. MCC concedes that it is eligible for the religious-employer exemption. MCC R. 1 (Compl. at ¶ 9) (Page ID #4). Consequently, its health insurance plan need not cover contraception or emergency contraception. Thus, it is not clear how MCC is discriminated against for refusing to provide contraceptive coverage. *See* Roman Catholic Archbishop of Washington, 2013 WL 6729515, at *46 (holding that the contraceptive-coverage requirement is consistent with the Weldon Amendment for entities that are eligible for the exemption or the accommodation).

The government notes that the FDA-approved labels for Plan B and ella describe these products as emergency contraceptives and do not mention abortion. *See* FDA-approved label for Plan B, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl.pdf; FDA-approved label for ella http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022474s002lbl.pdf. The appellants do not identify any statutory or regulatory definition of abortion that includes emergency contraceptives. Because the burden is on the appellants to demonstrate a strong likelihood of success on the merits, and the appellants have neither asserted nor argued nor presented evidence that the federal government classifies these drugs as abortifacients, they have not shown a strong likelihood of success on the merits of their claim.

2. Notice and Comment

The appellants argue that the government violated the APA because it did not subject the IOM recommendation that preventive services include contraceptive coverage to notice and comment rulemaking pursuant to 5 U.S.C. § 553(b). Appellant Br. 66–68. This claim was not properly raised in or decided by the district court, so we decline to address it for the first time on appeal.

As discussed *supra*, the CDN plaintiffs did not raise any APA claims in their motion for a preliminary injunction. The MCC plaintiffs' only reference to a notice-and-comment claim is a single sentence in the introduction section of their memorandum in support of the motion for a preliminary injunction: "Finally, the Mandate

violates the Administrative Procedure Act ('APA') because Defendants failed to conduct notice-and-comment rulemaking, and it contravenes the clear terms of the Weldon Amendment." MCC R. 15 (Prelim. Inj. Memo. at 3) (Page ID #604). In the argument section of the memorandum the MCC plaintiffs discussed the Weldon Amendment issue, but did not return to the notice-and-comment issue. *See id.* at 44–45 (Page ID #645–46). The district court did not address the notice-and-comment argument in its decision. *See Michigan Catholic Conference*, 2013 WL 6838707, at *13.

We generally do not consider issues raised for the first time on appeal. *In re Cannon*, 277 F.3d 838, 848 (6th Cir. 2002). "Factors guiding the determination of whether to consider an issue for the first time on appeal include:

> 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear and beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court.

Id. (internal quotation marks omitted). Accordingly, we decline to exercise our discretion to address this claim.

E. Other Factors for Injunctive Relief

We conclude that the appellants have not demonstrated a strong likelihood of success on the merits of any of their properly raised claims. The other three factors that we consider in evaluating a request for a preliminary injunction are: (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *City of Pontiac Retired Emps. Ass'n,* 2014 WL 1758913, at *2. When the alleged injury is to a First Amendment freedom, as here, the strong likelihood of success on the merits factor merges with the irreparable injury factor. "To the extent that [appellant] can establish a likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Conversely, if appellant "does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment right also fails." *McNeilly*, 684 F.3d at 615. Because the appellants do not demonstrate a strong likelihood of success on the merits of their claims, they also do not demonstrate that they will suffer irreparable injury without the injunction.

The district courts did not abuse their discretion by denying preliminary injunctions.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district courts' denial of preliminary injunctions. We lift the

stay temporarily issued by this court pending resolution of this appeal.

APPENDIX H

Nos. 13-2723/6640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CATHOLIC CONFERENCE AND CATHOLIC FAMILY SERVICES DOING BUSINESS AS CATHOLIC CHARITIES DIOCESE OF KALAMAZOO (13-2723); THE CATHOLIC DIOCESE OF NASHVILLE, CATHOLIC CHARITIES OF TENNESSEE, INC., CAMP MARYMOUNT, INC., MARY QUEEN OF ANGELS, INC., ST. MARY VILLA, INC., DOMINICAN SISTERS OF ST. CECILIA CONGREGATION AND AQUINAS COLLEGE (13-6640),	)	FILED Sep 16, 2014 DEBORAH S. HUNT, Clerk
Plaintiffs-Appellants,	)	
v.	)	
SYLVIA MATTHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,	)	O R D E R
Defendants-Appellees.	)	

BEFORE: MOORE and ROGERS, Circuit Judges; and NIXON, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Deborah S. Hunt, Clerk

* The Honorable John T. Nixon, Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN CATHOLIC CONFERENCE in its own name and on behalf of the MICHIGAN CATHOLIC CONFERENCE SECOND AMENDED AND RESTATED GROUP HEALTH BENEFIT PLAN FOR EMPLOYEES, and CATHOLIC FAMILY SERVICES d/b/a CATHOLIC CHARITIES DIOCESE OF KALAMAZOO,	CASE NUMBER: 1:13-cv-01247
	JUDGE: _____
	DATE STAMP:_____
Plaintiffs,	
v.	
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor, JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;	

U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY.	)
Defendants.	)

COMPLAINT AND DEMAND FOR JURY TRIAL

1. This lawsuit concerns one of America's most cherished freedoms: the freedom to practice one's religion without government interference. It is not about whether people have a right to contraception, abortion-inducing products, and sterilization (the "objectionable services"). Those products and services are widely available in the United States, and nothing prevents the government from making them more widely available. Here, however, Defendants (or, the "Government") seek to require Plaintiffs—Catholic entities—to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those products and services. American history, embodied in the First Amendment to the Constitution and the Religious Freedom Restoration Act ("RFRA"), safeguards religious entities from such overbearing governmental action. Plaintiffs therefore seek relief in this Court to protect this most fundamental of civil rights. Plaintiffs provide a range of spiritual, educational, social, and financial services to members of their communities, Catholic and non-Catholic alike. Plaintiff Michigan Catholic Conference ("MCC") sponsors a wide range of benefit programs for approximately 827 Catholic institutions in Michigan, providing services to approximately 10,374 participants. Among these institutions are the seven Catholic Dioceses in Michigan and additional non-profit religious

organizations that assist the Dioceses in carrying out the Catholic Church's missions. Plaintiff Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo ("Catholic Charities")—a nonprofit Michigan corporation—is one such entity, which provides a wide range of services including advocacy, crisis intervention, housing, counseling, and outreach services within the nine counties of southwestern Michigan that make up the Diocese of Kalamazoo.

2. Plaintiffs' work is guided by Catholic belief, including the requirement that they serve those in need, regardless of their religion. This is perhaps best captured by words attributed to St. Francis of Assisi: "Preach the Gospel at all times. Use words if necessary." As Pope Benedict has more recently put it, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Thus, Catholic individuals and organizations consistently work to create a more just community by serving any and all neighbors in need.

3. Catholic Church teachings also uphold the conviction that sexual union should be reserved to married couples open to the creation of life; thus, artificial interference with the creation of life, including contraception, abortion, and sterilization, violates Catholic doctrine.

4. Defendants, however, have promulgated various rules (collectively, the "Mandate") that force Plaintiffs to violate their sincerely held religious beliefs. These rules require Plaintiffs and other

religious organizations to provide, pay for, and/or facilitate insurance access to contraception, abortion-inducing products, sterilization, and related education and counseling. In response to the intense criticism that the Government's original proposal provoked, including some by the current Administration's ardent supporters, the Government proposed changes that, it asserted, eliminated the substantial burden imposed on the religious beliefs of nonprofit religious entities. In fact, these changes made that burden worse by significantly *increasing* the number of organizations subject to the Mandate.

5. In its final form (the "Final Rule"), the Mandate contains three basic components:

6. *First*, it requires group health plans to cover, without cost-sharing requirements, all "FDA-approved contraceptive methods and contraceptive counseling"—a term that includes, contraception, abortion-inducing products, sterilization, and related education and counseling.

7. *Second*, the Mandate creates a narrow exemption for certain "religious employers," defined to include only nonprofit entities described in § 6033(a)(l) and § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. These provisions are not about religious liberty. Rather, they are paperwork-reduction provisions that address whether tax-exempt nonprofit entities must file an annual informational tax return, known as a Form 990. As the Government has affirmed, this exemption protects only "the unique relationship between a house of worship and its employees in ministerial positions." Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8,456,

8,461 (proposed Feb. 6, 2013). The only entities that qualify are "churches [and their integrated auxiliaries], synagogues, mosques, and other houses of worship, and religious orders." *Id.* This is the narrowest "conscience exemption" ever adopted in federal law.

8. *Third*, the Mandate creates a second class of religious entities that, in the Government's view, are not sufficiently "religious" to qualify for the "religious employer" exemption. These religious entities, deemed "eligible organizations," are subject to a so-called "accommodation" that is intended to eliminate the burden that the Mandate imposes on their religious beliefs. The accommodation, however, is illusory: it continues to require "eligible organizations" to participate in a new employer-based scheme to provide, pay for, and/or facilitate provision of the objectionable coverage to their employees.

9. Under these rules, Plaintiff MCC appears to qualify as an integrated auxiliary of a "religious employer" and is eligible for the exemption. But through its health insurance plans, MCC provides coverage to a wide range of Catholic organizations that do not fall within the exemption, including, for example, Plaintiff Catholic Charities, Loyola High School, Catholic Social Services of the Upper Peninsula, Catholic Social Services of Washtenaw County, Baraga Broadcasting, and St. Francis Home (collectively, "non-exempt religious organizations"). MCC must therefore either (1) sponsor a plan that will provide Plaintiff Catholic Charities, and other non-exempt Catholic organizations, with access to the objectionable products and services; (2) sponsor a plan that will require the non-exempt organizations

to self-certify and facilitate provision of the objectionable services; (3) sponsor a plan that will subject the non-exempt religious organizations that fail to self-certify and facilitate provision of the objectionable services to onerous fines, *see* 11 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012); or (4) expel the non-exempt religious organizations from MCC's health insurance plans, thereby forcing expelled entities into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable products and services.

10. This aspect of the Mandate reflects a change from the original proposal, which tied the exemption to *plans* rather than *employers* and thus allowed non-exempt religious organizations to shield themselves from the Mandate by remaining on a plan sponsored by an exempt entity. The Government's Final Rule, in contrast, removes this protection and thereby *increases* the number of religious organizations subject to the Mandate. In so doing, the Mandate seeks to divide the Catholic Church, artificially separating its "houses of worship" from its faith in action, its charitable works, directly contrary to Pope Benedict's admonition that "[t]he Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word."

11. Plaintiff Catholic Charities, for example, participates in a plan offered by MCC, but it does not qualify for the exemption. Instead, it is subject to the accommodation. As a result, Catholic Charities' decision to provide insurance to its employees through an MCC plan triggers the requirement that it enter into a contract with the plan's third party administrator to provide the objectionable coverage

for its employees. Catholic Charities thus cannot avoid materially cooperating in the provision of this objectionable coverage without subjecting itself to crippling fines and/or lawsuits.

12. The accommodation also requires Plaintiff Catholic Charities to take a number of actions that result in the objectionable services being provided to its employees, which, according to Catholic doctrine, is impermissible. For example, in order to take advantage of the accommodation, Catholic Charities must provide a "certification" to its third party administrator that sets forth its religious objections to the Mandate. This "certification," in turn, "automatically" triggers an obligation on the part of the third party administrator to provide Catholic Charities' employees with the objectionable coverage. 78 Fed. Reg. at 8,463. A religious organization's self-certification, therefore, triggers the objectionable coverage.

13. Contrary to the Government's position, the Mandate's accommodation "requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage." Comments of U.S. Conference of Catholic Bishops, at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf (Ex. A). The Government asserts that the provision of the objectionable coverage will be "cost-neutral." This assertion, however, ignores the effect the accommodation will have on premiums and administrative fees charged to religious employers. Regulatory compliance will increase costs to insurers and third party administrators and those costs will be passed on to

employers. The Government's assertion of "cost neutrality" is also based on the implausible (and morally objectionable) assumption that "lower costs" from "fewer childbirths" will offset the cost of the contraceptive coverage. 78 Fed. Reg. at 8,463. More importantly, even if the Government's assumption were correct, it simply means that premiums previously going toward childbirths will be redirected to contraceptive and related services to achieve "fewer childbirths." Plaintiffs, therefore, would still actually be paying for the objectionable products and services.

14. In short, the Mandate, even with the accommodation, requires non-exempt religious organizations, like Plaintiff Catholic Charities, to provide, pay for, and/or facilitate objectionable insurance coverage contrary to their sincerely held religious beliefs or face onerous fines. Similarly, the Mandate requires exempt religious employers that sponsor a health plan including non-exempt employers, like Plaintiff MCC, to either sponsor a plan that will provide, pay for, and/or facilitate the provision of the objectionable products and services to non-exempt employees, expel the non-exempt entities from its plan, or face potential liability for the non-exempt organizations' onerous fines.

15. These burdens on religious freedom violate Plaintiffs' rights secured by the First Amendment and the Religious Freedom Restoration Act ("RFRA"). The manner in which the Mandate was passed, moreover, does not comport with the Administrative Procedure Act ("APA"). Accordingly, Plaintiffs seek a declaration that the Mandate cannot legally apply to

them, an injunction barring its enforcement against them, and an order vacating the Mandate.

I. BACKGROUND

A. Preliminary Matters

16. Plaintiff MCC is a nonprofit corporation incorporated in Michigan in 1963. Its principal place of business is in Lansing, Michigan. MCC is organized for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. The MCC Second Amended and Restated Group Health Benefit Plan for Employees ("MCC Plan") is a health plan sponsored and administered by MCC. MCC is a "church plan" generally exempt from the Employee Retirement Income Security Act ("ERISA").

17. Plaintiff Catholic Charities is a nonprofit subsidiary of the Roman Catholic Diocese of Kalamazoo ("Diocese") incorporated in Michigan in 1991. Catholic Charities is separately incorporated and independent from the Diocese. Its principal place of business is in Kalamazoo, Michigan. Catholic Charities is organized for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

18. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services ("HHS"). She is sued in her official capacity.

19. Defendant Thomas Perez is the Secretary of the U.S. Department of Labor. He is sued in his official capacity.

20. Defendant Jacob J. Lew is the Secretary of the U.S. Department of Treasury. He is sued in his official capacity.

21. Defendant U.S. Department of Health and Human Services ("HHS") is an executive agency of the United States within the meaning of RFRA and the APA.

22. Defendant U.S. Department of Labor is an executive agency of the United States within the meaning of RFRA and the APA.

23. Defendant U.S. Department of Treasury is an executive agency of the United States within the meaning of RFRA and the APA.

24. An actual, justiciable controversy currently exists between Plaintiffs and Defendants. Absent a declaration resolving this controversy and the validity of the Mandate, Plaintiffs will be required to provide, pay for, and/or facilitate access to healthcare coverage in contravention of their sincerely held religious beliefs, as described below.

25. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

26. This is an action for declaratory and injunctive relief under 5 U.S.C. § 702; 28 U.S.C. §§ 2201, 2202; and 42 U.S.C. § 2000bb-l(c).

27. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2).

28. Venue is proper in this Court under 28 U.S.C. § 1391(e)(l).

B. Plaintiff MCC And The Many Catholic Institutions That Participate In The MCC Plan

29. Plaintiff MCC was established by His Eminence John Cardinal Dearden, then Archbishop

of Detroit, in 1963. It has a Board of Directors of fourteen members, including the seven bishops of the seven Catholic Dioceses in Michigan, five lay persons, a priest, and a religious sister. The Archbishop of Detroit, the Most Reverend Allen H. Vigneron, is presently the Chairman of the Board.

30. Plaintiff MCC sponsors and administers several benefit programs, including the MCC Plan, and by doing so it can ensure that the health benefits provided by the participating Catholic institutions are consistent with Catholic Church teachings. Consistent with these efforts, MCC also serves as a vehicle by which the Catholic Church can speak with one voice in Michigan on the morality of certain healthcare products and services, including the objectionable products and services at issue in this litigation.

31. The MCC Plan offers health benefits to qualifying employees of "Covered Units," and defines "Covered Unit" to mean:

> a parish, school, institution, organization, corporation or other entity in the State of Michigan which is an integral part of the Catholic Church, engaged in carrying out the functions of the Catholic Church, and under the control of an Archbishop or Bishop of a Diocese in the Province of Detroit, unless the Archbishop or Bishop specifically exempts the unit from status as a Covered Unit. The Michigan Catholic Conference shall be a Covered Unit. Any parish, school, institution, organization, corporation or other entity listed within the Kenedy Directory which

> is an integral part of the Catholic Church and which is engaged in carrying out the functions of the Catholic Church, but which is not under the control of an Archbishop or Bishop of a Diocese in the Province of Detroit, may become a Covered Unit pursuant to a written agreement between its governing authority and the Michigan Catholic Conference.

Presently, approximately 827 Catholic institutions and approximately 10,374 participants receive their health insurance through the MCC Plan.

32. The seven Catholic Dioceses in Michigan are "Covered Units" in the MCC Plan and offer their employees healthcare coverage through the MCC Plan. These Dioceses cover the entire State:

a. The *Archdiocese of Detroit* encompasses over 270 parishes in six counties in the greater Detroit area. Since 2009, it has been led by Archbishop Allen Vigneron.

b. The *Diocese of Grand Rapids* encompasses 98 parishes in eleven counties in western Michigan. Since June 2013, it has been led by Bishop David J. Walkowiak.

c. The *Diocese of Lansing* encompasses 89 parishes in ten counties in central Michigan. Since 2008, it has been led by Bishop Earl A. Boyea.

d. The *Diocese of Kalamazoo* encompasses 59 parishes in nine counties in southwestern Michigan. Since 2009, it has been led by Bishop Paul J. Bradley.

e. The *Diocese of Saginaw* encompasses 109 parishes in eleven counties in Michigan's "thumb and index finger." Since 2009, it has been led by Bishop Joseph R. Cistone.

f. The *Diocese of Gaylord* encompasses 80 parishes in 21 counties in the northern part of Michigan's lower peninsula. It currently has a Vacant See.

g. The *Diocese of Marquette* encompasses 94 parishes in the fifteen counties in Michigan's upper peninsula. It currently has a Vacant See.

33. These seven Dioceses carry out the spiritual, educational, and social service missions of the Catholic Church in Michigan. The Dioceses, along with their local parishes, provide spiritual ministry to the approximately 2.1 million Catholics in Michigan that represent 21% of Michigan's population. They ensure the availability of the sacraments to all Catholics living in or visiting Michigan. The Dioceses conduct their educational missions, in part, through their various offices for Catholic schools and their many affiliated elementary and high schools, most of whom participate in the MCC Plan. The Dioceses perform charitable social services through their various diocesan ministries, their offices of Christian Service, and/or their local parishes. These diocesan and parish programs range from ministering to the prison population, to funding local self-help projects for the poor, to offering low-cost, legal representation to indigent immigrants, to providing meals to the homeless or visits to nursing homes.

34. Many affiliated non-profit Catholic charitable and educational entities that assist the Dioceses in carrying out the Catholic Church's mission are Covered Units in the MCC Plan and offer their employees healthcare coverage through the MCC Plan. Many of these organizations do not qualify for the Government's religious-employer exemption and so are instead subject to the so-called accommodation.

35. One such Covered Unit is Loyola High School in Detroit. In the 1990s, the Detroit Board of Education proposed opening several all-male academies to address the alarmingly high dropout rate of high-school males in Detroit. When a court found the state-run plan unconstitutional, Catholic leaders filled the gap by opening Loyola High School in Detroit to be run in the Jesuit tradition. It is an independent high school welcoming male students of all faiths who face the challenges of an urban environment. Its 99% minority student population is 95% non-Catholic. Since its first graduating class, every one of its graduating students has been admitted into a college or university. It offers employment opportunities to people of all faiths.

36. Catholic Social Services of the Upper Peninsula—a nonprofit Michigan corporation located in the Diocese of Marquette—is another Covered Unit under the MCC Plan with a similar service mission. Its mission is, among others, "[t]o promote and improve the healthy social functioning of individuals and families through counseling and prevention programming which enhance and support family life," "[i]n keeping with the teaching of the Catholic Church." It provides a broad range of assistance to Michigan families in need, ranging from adoption

services to counseling services, to assisted-living services. It has seventeen employees and hires people of all faiths.

37. Catholic Social Services of Washtenaw County—a nonprofit Michigan corporation located in the Diocese of Lansing—is a Covered Unit under the MCC Plan. Its mission "[i]s the work of the Catholic Church to share the love of Christ by performing the corporal and spiritual works of Mercy. We help. We participate. We Change Lives." Serving thousands of individuals and families of all faiths and all walks of life, CSSW offers more than two dozen programs reflecting the diversity of the community: adoption and pregnancy counseling, food assistance, homelessness prevention, domestic and child abuse intervention and prevention, family therapy, and services designed to assist older adults, individuals with developmental disabilities, and at-risk families with young children.

38. Baraga Broadcasting—a nonprofit Michigan corporation located in the Diocese of Gaylord—is another Covered Unit under the MCC Plan. A listener-supported radio network, Baraga Broadcasting seeks to proclaim the Truth and beauty of the Roman Catholic Faith by offering educational and inspirational programming that aims to engage its listeners and encourage them to live out their faith in Jesus Christ. With programs entitled "Catholic Answers," "Catholic Connection with Teresa Tomeo," "Word on Fire with Father Robert Barron," "Christ is the Answer with Father John Ricardo," as well as broadcasting the Holy Rosary and daily Mass, its coverage area is in the Dioceses of Gaylord and Marquette, Michigan.

39. St. Francis Home—a nonprofit Michigan corporation located in the Diocese of Saginaw—is another Covered Unit under the MCC Plan. It is a provider of quality skilled nursing care and successful rehabilitation services for seniors. As a human service agency, St. Francis Home offers a wide variety of activities and opportunities to serve the physical, emotional and spiritual needs of its residents. As an affiliate of the Catholic Diocese of Saginaw, it offers a warm Catholic culture to all residents, regardless of religion, race, or creed through daily Mass, daily rosary, Bible study and adoration of the Blessed Sacrament. As stated in the Mission Statement of St. Francis Home, the "primary goal is to get our residents into heaven."

40. These entities, and many others that participate in the MCC Plan, may participate in the health-benefit programs that MCC offers for their lay employees and clergy.

41. Covered Units may allow their lay employees to participate in the MCC Plan, which consists of self-funded medical and prescription benefits administered by separate third party administrators, Blue Cross Blue Shield of Michigan and Express Scripts, respectively. Approximately 6,429 employees (10,374 lives) participate in this program.

42. Qualified priests may also participate in self-funded medical and prescription benefits under the MCC Plan, administered by the same third party administrators. Approximately 704 clergy throughout Michigan participate in this program.

43. The MCC Plan limits the benefits that may be offered under any of these programs. It expressly indicates that "in no event shall any benefit be

provided which violates the tenets of the Catholic Church, including but not limited to expenses relating to sterilizations, abortions, and/or birth control devices." Thus, none of the MCC Plan's programs offer insurance coverage for abortion, sterilization, or contraceptive services.

44. The MCC Plan and its benefit programs do not meet the definition of a "grandfathered" plan. MCC has not included and does not include a statement in the MCC Plan materials provided to participants or beneficiaries informing them that it believes it is a grandfathered plan, as would be required to maintain the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

45. The MCC Plan lost its grandfathered status because the PPO benefit program increased the emergency room co-payment amount from $50 to $100, and increased the prescription co-payment amount for non-formulary brand name drugs from $30 to $50.

46. The plan year for the MCC Plan begins each year on January 1.

C. Plaintiff Catholic Charities

47. Plaintiff Catholic Charities—a nonprofit subsidiary of, and integral entity within, the Diocese of Kalamazoo—is a corporation with a Board of Directors that oversees all major questions of finance, policy, and programming. Catholic Charities was established on a membership, non-stock basis, and the sole member is the Bishop of the Diocese of Kalamazoo, Michigan, Paul J. Bradley ("Diocesan Bishop"). Catholic Charities manages two related corporations, Catholic Family Services Non Profit Housing Corporation and Otsego Senior Apartments,

Inc., d/b/a Baraga Manor Apartments, which are also separately incorporated from the Diocese.

48. Catholic Charities' bylaws state in Article III, Section 3.1 that its "purpose . . . is related to the fulfillment of [its] Christian responsibility to the community at large," and that the Diocesan Bishop's approval is required for any policy or program adopted by Catholic Charities. Catholic Charities is therefore required to adhere to Catholic doctrine at all times and in all manners.

49. Catholic Charities seeks to provide human services, and to promote and restore wholesome family life by providing comprehensive social services and related activities to families, children and other individuals that make up the Diocese of Kalamazoo. As indicated in its Mission Statement: "[t]he mission of Catholic Family Services is to provide social services in the manner of Jesus Christ, with compassion, care and concern for justice to all people in need and to advocate for their welfare calling those of good will to assist in this mission in the Diocese of Kalamazoo." Catholic Charities offers a range of programs to individuals in need without regard to their religion, for example, the Ark Shelter and the Caring Network. The Ark Shelter serves homeless and runaway children by providing them temporary housing and counseling sessions and by helping them reunite with their families. The Caring Network offers assistance to pregnant and parenting women and their babies, including professional counseling services and transitional living apartments for the homeless.

50. Catholic Charities is a Covered Unit under the MCC Plan.

51. Catholic Charities' approximately 55 employees are offered two options under the MCC Plan (Option 1 and Option 2), both of which comply with Catholic Church teachings on abortion-inducing products, sterilization services, contraceptives, and related counseling services. Specifically, abortion and sterilization are not covered. Contraceptives are not covered when prescribed for contraceptive purposes, but hormone therapies for non-contraceptive purposes are covered.

52. The MCC Plan offered to Catholic Charities' employees does not meet the Affordable Care Act's definition of a "grandfathered" plan.

53. The MCC Plan offered to Catholic Charities' employees begins each year on January 1.

II. STATUTORY AND REGULATORY BACKGROUND

A. The Affordable Care Act

54. In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, "Affordable Care Act" or "Act"). The Act set many new requirements for "group health plan[s]." 42 U.S.C. § 300gg-91(a)(l).

55. As relevant here, the Act requires an employer's group health plan to cover certain women's "preventive care" services. Specifically, it indicates that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such

additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). Because the Act prohibits "cost sharing requirements," the health plan must pay for the full costs of these "preventive care" services without any deductible or co-payment.

56. Violations of the Affordable Care Act may subject an employer, an insurer, or a group health plan to substantial monetary penalties.

57. Federal law provides several mechanisms to enforce the requirements of the Act, including the Mandate. For example:

a. Under the Internal Revenue Code, certain employers who fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" will be exposed to significant annual fines of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(l).

b. Under the Internal Revenue Code, group health plans that fail to provide certain required coverage may be subject to a penalty of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012) (asserting that this applies to employers who violate the "preventive care" provision of the Affordable Care Act).

c. Under ERISA, plan participants can bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(l)(B); *see also* Cong. Research Serv., RL 7-5700.

d. Similarly, the Secretary of Labor may bring an enforcement action against group health plans of employers that violate the Mandate, as incorporated by ERISA. *See* 29 U.S.C. § 1132(b)(3); *see also* Cong. Research Serv., RL 7-5700 (asserting that these penalties can apply to employers and insurers who violate the "preventive care" provision of the Affordable Care Act).

e. Under the Public Health Service Act, the Secretary of HHS may impose a penalty of $100 a day per individual where an insurer fails to provide the required coverage. *See* 42 U.S.C. § 300gg-22(b)(2)(C)(i); Cong. Research Serv., RL 7-5700.

58. The Act, in addition to other federal statutes, reflects a clear congressional intent that the agencies charged with identifying the required women's "preventive care" services should exclude all abortion-related services. The Act provides that "nothing in this title (or any amendment made by this title) shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." 42 U.S.C. § 18023(b)(l)(A)(i). And the Act leaves it to "the issuer of a qualified health plan" "[to] determine whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(l)(A)(ii).

59. Likewise, the Weldon Amendment, which has been included in every HHS and Department of

Labor appropriations bill since 2004, provides that "[n]one of the funds made available in this Act [to the Department of Labor and HHS] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(l), 125 Stat. 786, 1111 (2011).

60. The Act's intent to exclude abortions was instrumental in its passage, as cemented by an Executive Order without which the Act would not have passed. The legislative history shows an intent to prohibit executive agencies from requiring group health plans to provide abortion-related services. The House of Representatives originally passed a bill that included an amendment by Congressman Bart Stupak from Michigan prohibiting the use of federal funds for abortion services. *See* H.R. 3962, 111th Cong. § 265 (Nov. 7, 2009). The Senate version, however, did not contain the same provision. S. Amend. No. 2786 to H.R. 3590, 111th Cong. (Dec. 23, 2009).

61. To reconcile the different bills while avoiding a potential Senate filibuster, congressional proponents of the Act engaged in a procedure known as "budget reconciliation" that required the House to adopt the Senate version of the bill largely in its entirety. Congressman Stupak and other pro-life House members indicated that they would refuse to vote for the Senate version because it failed to adequately prohibit the use of federal funds for

abortion services. In an attempt to address these concerns, President Obama issued an executive order providing that no executive agency would authorize the federal funding of abortion services. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

62. The Act, therefore, was passed on the premise that all agencies would uphold and follow "longstanding Federal laws to protect conscience" and to prohibit federal funding of abortion. *Id.* That executive order was consistent with a 2009 speech that President Obama gave at the University of Notre Dame, in which he indicated that his Administration would honor the consciences of those who disagree with abortion and draft sensible conscience clauses.

B. Regulatory Background — Defining "Preventive Care" And The Narrow Exemption

63. The Mandate subverts the Act's clear purpose to protect the right of conscience and immediately prompted intense criticism and controversy. In response, the Government has undertaken various revisions. None of these revisions, however, alleviate the burden that the Mandate imposes on Plaintiffs' religious beliefs. To the contrary, these revisions have resulted in a Final Rule that is significantly worse than the original one.

1. The Original Mandate

64. On July 19, 2010, Defendants issued interim final rules concerning the requirement that group health plans cover women's "preventive care" services. Interim Final Rules, 75 Fed. Reg. at 41,726 (citing 42 U.S.C. § 300gg-13(a)(4)). Initially, the rules did not define "preventive care," instead noting that "[t]he Department of HHS is developing these guidelines

and expects to issue them no later than August 1, 2011." *Id.* at 41,731.

65. As Defendants have conceded, they did not comply with the notice-and-comment requirements of the APA when determining what services to include within the meaning of "preventive care." *Id.* at 41,730. Instead, HHS outsourced its deliberations to the Institute of Medicine ("IOM"), a non-governmental "independent" organization. The IOM in turn created a "Committee on Preventive Services for Women," composed of sixteen members who were selected in secret without any public input. At least eight of the Committee members had founded, chaired, or worked with "pro-choice" advocacy groups (including five different Planned Parenthood entities) that have well-known political and ideological views, including strong animus toward Catholic teachings on contraception and abortion.

66. In developing the guidelines, the IOM Committee invited presentations from several "pro-choice" groups, such as Planned Parenthood and the Guttmacher Institute (named for a former president of Planned Parenthood), without inviting any input from groups that oppose government-mandated coverage for contraception, abortion, and sterilization. Instead, opponents were relegated to lining up for brief open-microphone sessions at the close of each meeting.

67. At the close of this process, on July 19, 2011, the IOM issued a final report recommending that "preventive care" for women be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for

[all] women with reproductive capacity." Inst. Of Med., Clinical Preventive Services for Women: Closing the Gaps," (2011) ("IOM Report") at 218-19.

68. The extreme bias of the IOM process spurred one member, Dr. Anthony Lo Sasso, to dissent from the final report, writing: "[T]he committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* at 232. The IOM did not adhere to the rules governing federal agencies, including the notice-and-comment rulemaking process.

69. At a press briefing the next day, the chairwoman of the IOM Committee fielded a question from the audience regarding the "coercive dynamic" of the Mandate, asking whether the Committee considered the "conscience rights" of those who would be forced to pay for coverage that they found objectionable on religious grounds. In response, the chairwoman illustrated her cavalier attitude toward the religious-liberty issue, stating bluntly: "[W]e did not take into account individual personal feelings." Linda Rosenstock, Chair, Inst. Of Med. Comm. On Preventive Servs. For Women, Press Briefing Audio Webinar (July 20, 2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

70. Less than two weeks after the IOM Report, on August 1, 2011, HHS announced that it would adopt the IOM's definition of "preventive care," including all "FDA-approved contraception methods and

contraceptive counseling." *See* U.S. Dept. of Health and Human Services, "Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost," *available at* www.hhs.gov/news/press/201 lpres/08/20110801b.html (Ex. B). Again acting without notice-and-comment rulemaking, HHS announced these guidelines through a press release on its website rather than enactments in the Code of Federal Regulations or statement in the Federal Register.

71. Ignoring both the moral and ethical dimensions of the decision and the ideological bias of the IOM Committee, HHS stated that it had "relied on independent physicians, nurses, scientists, and other experts" to reach a definition that was "based on scientific evidence."

72. This definition of "preventive care," despite conflicting with the central compromise necessary for the Affordable Care Act's passage and President Obama's promise to protect religious conscience, requires group health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* www.hrsa.gov/womens guidelines/ (Ex. C).

73. FDA-approved contraceptives that qualify under these guidelines include abortion-inducing products. For example, the FDA has approved "emergency contraceptives," including the morning-after pill (otherwise known as Plan B) and Ulipristal (otherwise known as HRP 2000 or Ella). Both of these

drugs can prevent an embryo from implanting in the womb. Plaintiffs believe, in accordance with the Catechism of the Catholic Church, that "[h]uman life must be respected and protected absolutely from the moment of conception." *Catechism of the Catholic Church* ¶ 2270. Because these "emergency contraceptives" can prevent implantation of a fertilized egg, it is Plaintiffs' sincerely held religious belief that these are abortion-inducing products. By forcing Plaintiffs to provide, pay for, and/or facilitate access to these services, the Mandate violates Plaintiffs' sincerely held religious beliefs.

74. A few days later, on August 3, 2011, Defendants issued amendments to the interim final rules that they had previously enacted in July 2010. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011). Defendants crafted a narrow religious exemption from the Mandate for a small category of "religious employers" that met all of the following four criteria: "(1) The inculcation of religious values is the purpose of the organization"; "(2) The organization primarily employs persons who share the religious tenets of the organization"; "(3) The organization serves primarily persons who share the religious tenets of the organization"; and "(4) The organization is a nonprofit organization as described in section 6033(a)(l) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46,626 (codified at 45 C.F.R. § 147.130(a)(iv)(B)).

75. As the Government admitted, this narrow exemption was intended to protect only "the unique relationship between a house of worship and its employees in ministerial positions." *Id.* at 46,623. It provided no protection for religious universities, elementary and secondary schools, hospitals, and charitable organizations.

76. The sweeping nature of the Mandate and the narrow religious-employer exemption were subject to widespread criticism. Numerous organizations expressed concerns that contraception, abortion-inducing products, and sterilization, could not be viewed as "preventive care." They also explained that the exemption was "narrower than any conscience clause ever enacted in federal law, and narrower than the vast majority of religious exemptions from state contraceptive mandates." Comments of United States Conference of Catholic Bishops (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/ comments-to-hhs-on-preventive-services-201 l-08.pdf (Ex. D).

77. Despite such pleas, the Government at first refused to reconsider its position. Instead, the Government "finalize[d], without change," the narrow exemption as originally proposed. 77 Fed. Reg. 8,725, 8,729 (Feb. 15, 2012). At the same time, the Government announced that it would offer a "a one-year safe harbor from enforcement" for religious organizations that remained subject to the Mandate. *Id.* at 8,728. As noted by Cardinal Timothy Dolan, the "safe harbor" effectively gave religious groups "a year to figure out how to violate our consciences."

78. A month later, under continuing public pressure, the Government issued an Advance Notice

of Proposed Rulemaking ("ANPRM") that, it claimed, set out a solution to the religious-liberty controversy. 77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM reaffirmed the Government's view that the "religious employer" exemption would not be changed. *Id.* at 16,501-08. Instead, the ANPRM offered hypothetical "possible approaches" that would, in the Government's view, somehow solve the religious-liberty problem without granting an exemption for objecting religious organizations. *Id.* at 16,507. Any semblance of relief offered by the ANPRM was illusory. Although it was designed to "create an appearance of moderation and compromise, it [did] not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage." *See* Comments of U.S. Conference of Catholic Bishops, at 3 (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/ upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf (Ex. E).

2. MCC's First Lawsuit And The Government's Promises Of Non-Enforcement

79. On May 21, 2012, Plaintiff MCC—along with Franciscan University in Steubenville, Ohio, which still retains a grandfathered health plan—filed suit in the U.S. District Court for the Southern District of Ohio seeking to enjoin the Mandate on the ground that, among other things, it violated their rights of religious conscience under RFRA and the First Amendment. *See Franciscan University, et al v. Sebelius et al*, No. 2:12-cv-00440 (S.D. Ohio) (May 21, 2012).

80. According to the Government, the ANPRM "confirm[ed] defendant's intent, before the expiration of the safe harbor period, to propose and finalize additional amendments to the preventative services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations . . . ." Mem. in Supp. of Defs.' Mot. to Dismiss (2:12-cv-440, S.D. Ohio (Doc. No. 23-1)) at 2. Indeed, the Government assured the court that the ANPRM was just the beginning and that the finalized "religious employer" exemption "will establish alternative means of providing contraceptive coverage without cost-sharing while also accommodating non-exempt, non-grandfathered religious organizations' religious objectives to covering contraceptive services." *Id.* at 8 (citing 77 Fed. Reg. at 8,728 (Feb. 15, 2012)).

81. The Government conceded, however, that "[t]here is nothing to suggest that, if the amendment process does not alleviate plaintiffs' concerns altogether, plaintiffs would not have an opportunity to present a legal challenge in a timely manner once there are regulations that are ripe for review. And even if plaintiffs' worst fears were to somehow come to pass, plaintiffs could then seek preliminary injunctive relieve to preserve the status quo while the Court considers the merits of plaintiffs' claims." Defs.' Reply in Support of their Mot. To Dismiss (2:12-cv-00440, S.D. Ohio (Doc. No. 35)) at 12.

82. Based on the Government's representations, the district court on March 22, 2013 granted the Government's motion to dismiss for lack of ripeness without prejudice to await the outcome of the ongoing rulemaking process. *See Franciscan Univ., et al v.*

Sebelius et al. (2:12-cv-00440, S.D. Ohio (Doc. No. 68)).

3. The Government's Final Rule And The Empty Accommodation

83. On February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM"), setting forth in further detail its proposal to "accommodate" the rights of Plaintiffs and other religious organizations. Contrary to the Government's previous assurances that the ANPRM was just the beginning of the process, the NPRM simply adopted the proposals contained in the ANPRM. The NPRM was once again met with strenuous opposition, including over 400,000 comments. For example, the U.S. Conference of Catholic Bishops stated that "the 'accommodation' still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage. Such organizations and their employees remain deprived of their right to live and work under a health plan consonant with their explicit religious beliefs and commitments." Comments of U.S. Conference of Catholic Bishop, at 3 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf (Ex. A).

84. Despite this opposition, on June 28, 2013, the Government issued the Final Rule that adopted substantially all of the NPRM's proposal without significant change. *See* 78 Fed. Reg. 39,870 (July 2, 2013).

85. The Final Rule makes three changes to the Mandate, none of which relieve the unlawful burdens placed on Plaintiffs and other religious organizations. Indeed, one change significantly *increases* that

burden by increasing the number of religious organizations subject to the Mandate.

86. *First*, the Final Rule makes a non-substantive, cosmetic change to the definition of "religious employer." Under the new definition, an exempt "religious employer" is simply "an organization that is organized and operates as a nonprofit entity and is referred in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. at 39,874 (codified at 45 C.F.R. § 147.131(a)). As the Government has admitted, this new definition does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Instead, it continues to "restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* In this respect, the Final Rule mirrors the intended scope of the original "religious employer" exemption, which focused on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. Religious entities that have a broader mission are still not, in the Government's view, "religious employers."

87. The "religious employer" exemption, moreover, creates an official, Government-favored category of religious groups that are exempt from the Mandate, while denying this favorable treatment to all other religious groups. The exemption applies only to those groups that are "referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." This category includes only (i) "churches, their integrated

auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." The IRS has adopted an intrusive fourteen (14)-factor test to determine whether a group meets these qualifications. *See Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). Among these fourteen (14) factors is whether the group has "a recognized creed and form of worship," "a definite and distinct ecclesiastical government," "a formal code of doctrine and discipline," "a distinct religious history," "an organization of ordained ministers" "a literature of its own," "established places of worship," "regular congregations, "regular religious services," "Sunday schools for the religious instruction of the young," and "schools for the preparation of its ministers." *Id.* Not only do these factors favor some religious groups at the expense of others, but they also require the Government to make intrusive judgments regarding religious beliefs, practices, and organizational features to determine which groups fall into the favored category.

88. *Second*, the Final Rule establishes an illusory accommodation for any non-exempt objecting religious entity that qualifies as an "eligible organization" because it (1) "opposes providing coverage for some or all of [the] contraceptive services"; (2) is "organized and operated as a non-profit entity"; (3) "holds itself out as a religious organization"; (4) self-certifies that it meets the first three criteria; and (5) provides a copy of the self-certification either to its insurance company or, if the religious organization is self-insured, its third party administrator. 26 C.F.R. § 54.9815-2713A(a). Insurance issuers and third party administrators in

receipt of this self-certification are required to provide, or arrange "payments for[,] contraceptive services" for the non-exempt organization's employees without imposing any "cost-sharing requirements (such as a copayment, coinsurance, or a deductible)." *Id.* § 54.9815-2713A(b)(2), (c)(2). The objectionable coverage, moreover, is directly tied to the organization's health plan, lasting only as long as the employee remains on that plan. *See* 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131(c)(2)(i)(B). In addition, self-insured organizations are prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(l)(iii).

89. This so-called "accommodation" fails to relieve the burden on religious organizations. Under the original version of the Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan still results in the provision of coverage—now in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related counseling. *Id.* § 54.9816-2713A(b)-(c). In both scenarios, Plaintiffs' decision to provide a group health plan triggers the provision of "free" contraceptive coverage to their employees in a manner contrary to their beliefs. The provision of the objectionable products and services are directly tied to Plaintiffs' insurance policies, as the objectionable "payments" are available only so long as an employee is on the

organization's health plan. *See* 29 C.F.R. § 2590.715-2713A(d) (for self-insured employers, the third party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers that offer insured plans, the insurance issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan"). For self-insured organizations, moreover, the self-certification constitutes the organization's "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). Thus, employer health plans offered by non-exempt religious organizations are the vehicle by which "free" abortion-inducing products, contraception, sterilization, and related counseling are delivered to the organizations' employees.

90. No matter how Defendants may phrase it, it is beyond dispute that a non-exempt religious organization's employees would be receiving contraceptive coverage by virtue of their participation in the MCC Plan.

91. Furthermore, insurers and third party administrators are required to notify plan participants and beneficiaries of the free contraceptive coverage. 26 C.F.R. § 54.9815-2713 A(d). The model language provided by the government to use in the required notice makes it clear even to the employees of non-exempt religious organizations that they are receiving this coverage only because of their participation in the MCC Plan: "Your employer has

certified that your group health plan qualifies for an accommodation . . . [and your third party administrator] *will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan." Id.* (emphasis added).

92. Needless to say, this shell game does not address Plaintiffs' fundamental religious objection to facilitating access to the objectionable products and services. As before, Plaintiffs are coerced, through threats of crippling fines and other pressure, into facilitating access to contraception, abortion-inducing products, sterilization, and related counseling for employees on their health plans, contrary to their sincerely held religious beliefs.

93. The so-called "accommodation," moreover, requires Plaintiffs to cooperate in the provision of objectionable coverage in other ways as well. For example, in order to be eligible for the so-called "accommodation," Plaintiffs must provide a "certification" to their insurance provider setting forth their religious objections to the Mandate. The provision of this "certification," in turn, automatically triggers an obligation on the part of the insurance provider to provide Plaintiffs' employees with the objectionable coverage. A religious organization's self-certification, therefore, is a trigger and but-for cause of the objectionable coverage.

94. The Mandate also requires Plaintiffs to subsidize the objectionable products and services.

95. For self-insured organizations, the Government's "cost-neutral" assumption is likewise implausible. The Government asserts that third

party administrators required to provide or procure the objectionable products and services will be compensated by reductions in user fees that they otherwise would pay for participating in federally-facilitated health exchanges. *See* 78 Fed. Reg. at 39,882. Such fee reductions are to be established through a highly regulated and bureaucratic process for evaluating, approving, and monitoring fees paid in compensation to third party administrators. Such regulatory regimes, however, do not fully compensate the regulatory entities for the costs and risks incurred. As a result, few if any third party administrators are likely to participate in this regime, and those that do are likely to increase fees charged to the self-insured organizations. The Government naively asserts that non-exempt religious organizations will not pay for such coverage; however, third party administrators can easily increase fees disguised for other purposes to recoup their costs.

96. Either way, as with insured plans, self-insured organizations likewise will be required to subsidize contraceptive products and services notwithstanding the so-called "accommodation."

97. For all of these reasons, the Final Rule continues to require Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of their sincerely held religious beliefs.

98. Third, the Final Rule *increases* the burden imposed upon religious organizations by significantly increasing the number of religious entities subject to the Mandate. Under the Government's initial "religious employer" definition, if a non-exempt

religious organization "provided health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [non-exempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. at 16,502.

99. For example, MCC administers the MCC Plan that covers not only its own employees and the seven Catholic Dioceses in Michigan, but also other affiliated Catholic organizations—including, among others, Plaintiff Catholic Charities ("non-exempt religious organizations). Under the religious-employer exemption that was originally proposed, if MCC were an exempt "religious employer," the affiliated, but non-exempt, religious organizations received the benefit of that exemption, even if they could not meet the Government's unprecedentedly narrow definition of "religious employer."

100. The Final Rule eliminates this safeguard. Instead, it provides that "each employer" must "independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents." *See* 78 Fed. Reg. at 8,467. Since these affiliated, but non-exempt, religious organizations do not meet the Government's narrow definition of "religious employer" they are now subject to the Mandate and their participation in the MCC Plan will be frustrated.

101. Because there are non-exempt religious organizations participating as Covered Units in the

MCC Plan, MCC is now required by the Mandate to do one of four things: (1) MCC, as the plan sponsor for the non-exempt organizations, may either provide the employees of these non-exempt organizations with a separate insurance policy that covers contraception, abortion-inducing products, sterilization, and related counseling; (2) MCC may refuse to provide separate insurance and force non-exempt participating religious organizations to self-certify, which would force the MCC Plan's third party administrator to provide the objectionable coverage; (3) MCC may refuse to comply with the Mandate and potentially face the onerous fines that come with non-compliance; or (4) MCC may expel non-exempt participating religious organizations from the MCC Plan, which is inconsistent with MCC's purpose and simply passes the objectionable coverage issue on to another insurer or third party administrator.

102. The first and second options force MCC to act contrary to its sincerely held religious beliefs.

103. The third and fourth options not only make MCC complicit in the provision of objectionable coverage by forcing the non-exempt Covered Units out of the MCC Plan, but it also compels MCC to submit to the Government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

104. In this respect, the Mandate seeks to divide the Catholic Church. The Church's faith in action, carried out through its charitable and educational arms, is every bit as central to the Church's religious mission as is the administration of the Sacraments. In the words of Pope Benedict, "[t]he Church cannot neglect the service of charity any

more than she can neglect the Sacraments and the Word." Yet the Mandate seeks to separate these consubstantial aspects of the Catholic faith, treating one as "religious" and the other as not. The Mandate therefore deeply intrudes into internal Church governance.

105. As with MCC, the covered non-exempt religious organizations, for example, Plaintiff Catholic Charities, are being forced to either violate their morals and the tenets of the Catholic church, or face monumental penalties for their failure to do so. The Government has left them with no choice but to either decline to self-certify (resulting in substantial fees under § 4980D), or drop coverage altogether (resulting in monstrous penalties under the Employer Shared Responsibility Mandate for applicable large employers).

106. In sum, the Final Rule not only fails to alleviate the burden that the Mandate imposes on Plaintiffs' religious beliefs, but it in fact makes that burden significantly worse by increasing the number of religious organizations that are subject to the Mandate. The Mandate, therefore, requires Plaintiffs to act contrary to their sincerely held religious beliefs.

107. Accordingly, through administrative fiat, the Mandate imposes on the public that which has historically been rejected by the people, at both the state and federal level. In Congress, at least 21 bills have been introduced since 1997 to mandate prescription contraceptive coverage in private health plans. Yet not one of these bills, under the titles "Equity in Prescription Insurance and Contraceptive Coverage Act" or "Prevention First Act," have ever been reported out of a Congressional committee.

United States Conference of Catholic Bishops, Comments on the Interim Final Rule on Preventive Services CMS-9992-IFC2, at 4 (Aug. 31, 2011) (Ex. D).

III. THE MANDATE, THE RELIGIOUS EMPLOYER EXEMPTION, AND THE ACCOMMODATION VIOLATE PLAINTIFFS' RELIGIOUS BELIEFS AND FEDERAL RIGHTS

A. The Mandate Substantially Burdens Plaintiffs' Religion

108. The Mandate violates Plaintiffs' rights of conscience by forcing them to participate in an employer-based scheme to provide insurance coverage to which they strenuously object on religious grounds.

109. It is a core tenet of Plaintiffs' religion that contraception, abortion, and sterilization are serious moral wrongs.

110. Plaintiffs believe, in accordance with the Catechism of the Catholic Church, that the "dignity of the human person is rooted in his creation in the image and likeness of God," *Catechism of the Catholic Church* ¶ 1700, and that "[h]uman life must be respected and protected absolutely from the moment of conception," *id.* ¶ 2270. Therefore, Plaintiffs believe that abortion is "gravely contrary to the moral law." *Id.* ¶ 2271.

111. Likewise, Plaintiffs adhere to traditional Catholic teachings on the nature and purpose of human sexuality. They believe, in accordance with the Catechism of the Catholic Church, that the sexual union of spouses "achieves the twofold end of marriage: the good of the spouses themselves and the

transmission of life. These two meanings or values of marriage cannot be separated without altering the couple's spiritual life and compromising the goods of marriage and the future of the family." *Id.* ¶ 2363. Consequently, Plaintiffs believe that "every action," including artificial contraception and sterilization, "which . . . proposes, whether as an end or as a means, to render procreation impossible is intrinsically evil." *Id.* ¶ 2370.

112. Plaintiffs' sincerely held religious beliefs treat contraception, abortion (including abortion-inducing products), and sterilization, as intrinsically immoral, and prohibit them from paying for, providing, and/or facilitating those practices.

113. As a corollary, Plaintiffs' Catholic beliefs prohibit them from contracting with an insurance company or third party administrator that will, as a result, provide the objectionable coverage to Plaintiffs' employees. Thus, Plaintiffs' Catholic beliefs prohibit them from facilitating access to the objectionable products and services in the manner required by the Mandate.

114. Plaintiffs have adhered to their religious beliefs and have ensured that their group health plans do not include coverage for prohibited contraception, abortion, sterilization, or related education and counseling.

115. The Mandate seeks to compel Plaintiffs' to provide, pay for, and/or facilitate access to contraception, abortion-inducing products, and sterilization. It also seeks to compel Plaintiffs to fund related "patient education and counseling for [all] women with reproductive capacity." IOM Report at 218-19 (2011).

116. The Mandate, therefore, requires Plaintiffs to do precisely what their sincerely held religious beliefs prohibit—provide, pay for, and/or facilitate access to objectionable products and services, or else incur crippling fines.

117. The Mandate therefore imposes a substantial burden on Plaintiffs' religious beliefs.

118. The Mandate's exemption for "religious employers" does not alleviate the burden.

119. The "religious employers" exemption does not apply to Plaintiff Catholic Charities.

120. Although Plaintiff MCC is an "integrated auxiliary" of a "religious employer," the Mandate still burdens its sincerely held religious beliefs. MCC must therefore either (1) sponsor a plan that will provide Plaintiff Catholic Charities, and other non-exempt Catholic organizations, with access to the objectionable products and services; (2) sponsor a plan that will require the non-exempt organizations to self-certify and facilitate provision of the objectionable services; (3) sponsor a plan that will lead to onerous fines for non-exempt organizations that fail to self-certify and facilitate provision of the objectionable services, *see* 11 Fed. Reg. at 16,502; or (4) expel these non-exempt organizations from MCC's health insurance plans, thereby forcing expelled entities into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable products and service.

121. This first alternative violates Plaintiff MCC's sincerely held religious beliefs.

122. The second option constitutes a substantial burden on MCC's religious beliefs by

compelling MCC to submit to the government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

123. The third option is not financially feasible.

124. The fourth option also constitutes a substantial burden on MCC's religious beliefs by compelling MCC to submit to the government's interference with its structure and internal operations by accepting a construct that prevents it from ensuring that entities in Michigan do not provide the objectionable products and services.

125. Thus, the so-called "accommodation" does not alleviate the burden on Plaintiffs' religious freedom. While the President claims to have "found a solution that works for everyone" and that ensures that "religious liberty will be protected," his promised "accommodation" does neither. Unless and until this issue is definitively resolved, the Mandate does and will continue to impose a substantial burden on Plaintiffs' religious beliefs.

B. The Mandate Is Not A Neutral Law Of General Applicability

126. The Mandate is not a neutral law of general applicability. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for contraception, abortion-inducing products, sterilization, and related education and counseling. It was designed to target employers not offering the objectionable coverage because of religious beliefs. In no uncertain terms, this is a targeted attack on those beliefs.

127. The Mandate exempts "grandfathered" plans covering tens of millions of individuals from its requirements, thus excluding tens of millions of people from the mandated coverage. *See* 75 Fed. Reg. at 41,732 ("98 million individuals will be enrolled in grandfathered group health plans in 2013."). Elsewhere, the government has put the number at 87 million. *See* "Keeping the Health Plan You Have" (June 14, 2010), *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (Ex. F) ("87 million" individuals will be enrolled in grandfathered group health plans in 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012) ("191 million Americans belong[ed] to plans which may be grandfathered under the ACA.").

128. The Mandate exempts an arbitrary subset of religious organizations that qualify for tax-reporting exemptions under Section 6033 of the Internal Revenue Code. The Government cannot justify its protection of the religious-conscience rights of the narrow category of exempt "religious employers," but not of other religious organizations that remain subject to the Mandate.

129. Employers that do not have health plans are exempt from compliance with the Act, including the Mandate, until January 1, 2015. U.S. Dep't of Treasury, *Treasury Notes*, "Continuing to Implement the ACA in a Careful, Thoughtful Manner" (July 2, 2013) (Ex. G). Employers that already have health plans are, of course, not exempt and enforcement begins on January 1, 2014.

130. The Mandate was directed at religious organizations instead of creating a government

program because its purpose is to attack moral objections to contraceptives and abortion-inducing products and services, including, in particular, the teachings of the Catholic Church. On October 5, 2011, Defendant Sebelius spoke at a fundraiser for NARAL Pro-Choice America. Defendant Sebelius has long supported abortion rights and criticized Catholic teachings and beliefs regarding contraception and abortion. NARAL Pro-Choice America is a pro-abortion organization that likewise opposes many Catholic teachings. At that fundraiser, Defendant Sebelius criticized individuals and entities whose beliefs differed from those held by her and the other attendees of the NARAL Pro-Choice America fundraiser, stating: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much." Transcript of Kathleen Sebelius Remarks at NARAL Luncheon (Oct. 5, 2011) (Ex. H) at 4-5. In addition, the Mandate was modeled on a California law that was motivated by discriminatory intent against religious groups that oppose contraception.

131. The purpose of the Mandate, including the deliberately narrow exemption, is to discriminate against religious organizations that oppose contraception and abortion.

C. The Mandate Is Not The Least Restrictive Means Of Furthering A Compelling Governmental Interest

132. The Mandate is not narrowly tailored to serve a compelling governmental interest.

133. The Government has no compelling interest in forcing Plaintiffs to violate their sincerely

held religious beliefs by requiring them to participate in a scheme for the provision of contraception, abortion-inducing products, sterilization, and related education and counseling. The Government itself has relieved numerous other employers from this requirement by exempting grandfathered plans and plans of employers it deems to be sufficiently religious. Moreover, these services are widely available in the United States. The U.S. Supreme Court has held that individuals have a constitutional right to use such services. Nothing that Plaintiffs do inhibits any individual from exercising that right.

134. Even assuming the interest was compelling, the Government has numerous alternative means of furthering that interest without forcing Plaintiffs to violate their religious beliefs. For example, the Government could have created a program to provide the objectionable products and services. Or, at a minimum, it could have created a broader exemption for religious employers, such as those found in numerous state laws throughout the country and in other federal laws. The Government therefore cannot possibly demonstrate that requiring Plaintiffs to violate their consciences is the least restrictive means of furthering its interest.

135. The Mandate, moreover, would simultaneously undermine both religious freedom—a fundamental right enshrined in the U.S. Constitution—and access to the wide variety of social and educational services that the non-exempt organizations that participate in the MCC Plan provide. As President Obama acknowledged in his announcement of February 10, 2012, religious organizations like these organizations do "more good

for a community than a government program ever could." The Mandate, however, puts these good works in jeopardy.

136. Plaintiffs seek a declaration that the Mandate cannot lawfully be applied to Plaintiffs, an injunction barring its enforcement, and an order vacating the Mandate.

IV. THE MANDATE THREATENS PLAINTIFFS WITH IMMINENT INJURY THAT SHOULD BE REMEDIED BY A COURT

137. The Mandate is causing serious, ongoing hardship to Plaintiffs that merits relief now.

138. On June 28, 2013, Defendants finalized the Mandate, including the narrow "religious employer" exemption and the so-called "accommodation" proposed in the NPRM. By the terms of the Final Rule, Plaintiffs must comply with the Mandate by the beginning of the next plan year.

139. For Plaintiffs, the next plan year begins on January 1, 2014.

140. Defendants have given no indication that they will not enforce the provisions of the Mandate that impose a substantial burden on Plaintiffs' rights. Consequently, absent the relief sought herein, Plaintiffs will be required to provide, pay for, and/or facilitate access to contraception, abortion-inducing products, sterilization, and related education and counseling, in violation of their sincerely held religious beliefs.

141. Further, Plaintiffs are presently being injured by the Mandate in numerous other ways.

142. Plaintiffs need to know whether they will be forced to comply with the Mandate now,

rather than days before the end of the temporary safe harbor. The Government issued press releases and rules that constitute the Mandate without notice-and-comment rulemaking precisely because the "requirements in [those provisions] require significant lead time in order to implement." 75 Fed. Reg. at 41,730.

143. Health plans do not take shape overnight. A number of analyses, negotiations, and decisions must occur each year before Plaintiffs can offer a health benefits package to their employees. For example, Plaintiff MCC—after consulting with its actuaries—must similarly negotiate with its third party administrator.

144. Under normal circumstances, Plaintiffs must begin the process of determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the Mandate make this already lengthy process even more complex.

145. In addition, if Plaintiffs do not comply with the Mandate, they may be subject to government fines and penalties. Plaintiffs require time to budget for any such additional expenses.

146. The Mandate and its uncertain legality, moreover, undermine Plaintiffs' ability to hire and retain employees.

147. Plaintiffs thus need an immediate declaration of rights concerning their legal status and the legal status of the many other Catholic organizations that obtain insurance under the MCC Plan.

V. CAUSES OF ACTION

COUNT I

Substantial Burden on Religious Exercise in Violation of RFRA

148. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

149. RFRA prohibits the Government from substantially burdening an entity's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

150. RFRA protects organizations as well as individuals from government-imposed substantial burdens on religious exercise.

151. RFRA applies to all federal law and the implementation of that law by any branch, department, agency, instrumentality, or official of the United States.

152. The Mandate requires Plaintiffs' group health plans to provide, pay for, and/or facilitate products and services that are contrary to their religious beliefs.

153. The Mandate substantially burdens Plaintiffs' exercise of religion.

154. The Government has no compelling governmental interest to require Plaintiffs to comply with the Mandate.

155. Requiring Plaintiffs to comply with the Mandate is not the least restrictive means of furthering a compelling governmental interest.

156. By enacting and threatening to enforce the Mandate against Plaintiffs, Defendants have violated RFRA.

157. Plaintiffs have no adequate remedy at law.

158. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT II

Substantial Burden on Religious Exercise in Violation of the Free Exercise Clause of the First Amendment

159. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

160. The Free Exercise Clause of the First Amendment prohibits the Government from substantially burdening an entity's exercise of religion.

161. The Free Exercise Clause protects organizations as well as individuals from government-imposed burdens on religious exercise.

162. The Mandate requires Plaintiffs to provide, pay for, and/or facilitate services that are contrary to their religious beliefs.

163. The Mandate substantially burdens Plaintiffs' exercise of religion.

164. The Mandate is not a neutral law of general applicability, because it is riddled with exemptions for which there is not a consistent, legally defensible basis. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for contraception,

abortion-inducing products, sterilization, and related education and counseling.

165. The Mandate is not a neutral law of general applicability because it was passed with discriminatory intent.

166. The Mandate implicates constitutional rights in addition to the right to free exercise of religion, including, for example, the rights to free speech, free association, freedom from excessive government entanglement with religion.

167. The Government has no compelling governmental interest to require Plaintiffs to comply with the Mandate.

168. The Mandate is not narrowly tailored to further a compelling governmental interest.

169. By enacting and threatening to enforce the Mandate, the Government has burdened Plaintiffs' religious exercise in violation of the Free Exercise Clause of the First Amendment.

170. Plaintiffs have no adequate remedy at law.

171. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT III

Compelled Speech in Violation of the Free Speech Clause of the First Amendment

172. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

173. The First Amendment protects against the compelled affirmation of any religious or ideological proposition that the speaker finds unacceptable.

174. The First Amendment protects organizations as well as individuals against compelled speech.

175. Expenditures are a form of speech protected by the First Amendment.

176. The First Amendment protects against the use of a speaker's money to support a viewpoint that conflicts with the speaker's religious beliefs.

177. The Mandate would compel Plaintiffs to provide health care plans to their employees that include or facilitate access to products and services that violate their religious beliefs.

178. The Mandate would compel Plaintiffs to subsidize, promote, and facilitate education and counseling services regarding these objectionable products and services.

179. The Mandate would compel Plaintiffs to issue a certification of its beliefs that, in turn, would result in the provision of objectionable products and services to Plaintiffs' employees.

180. By imposing the Mandate, Defendants are compelling Plaintiffs to publicly subsidize or facilitate the activity and speech of private entities that are contrary to their religious beliefs, and compelling Plaintiffs to engage in speech that will result in the provision of objectionable products and services to Plaintiffs' employees.

181. The Mandate is viewpoint-discriminatory and subject to strict scrutiny.

182. The Mandate furthers no compelling governmental interest.

183. The Mandate is not narrowly tailored to further a compelling governmental interest.

184. Plaintiffs have no adequate remedy at law.

185. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT IV

Prohibition of Speech in Violation of the First Amendment

186. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

187. The First Amendment protects the freedom of speech, including the right of religious groups to speak out to persuade others to refrain from engaging in conduct that may be considered immoral.

188. The Mandate violates the First Amendment freedom of speech by imposing a gag order that prohibits Plaintiffs from speaking out in any way that might "influence," "directly or indirectly," the decision of a third party administrator to provide or procure contraceptive products and services to Plaintiffs' employees.

189. Plaintiffs have no adequate remedy at law.

190. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT V

Official "Church" Favoritism and Excessive Entanglement with Religion in Violation of the Establishment Clause of the First Amendment

191. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

192. The Establishment Clause of the First Amendment prohibits the Government from adopting an official definition of a "religious employer" that favors some religious groups while excluding others.

193. The Establishment Clause also prohibits the Government from becoming excessively entangled in the affairs of religious groups by scrutinizing their beliefs, practices, and organizational features to determine whether they meet the Government's favored definition.

194. The "religious employer" exemption violates the Establishment Clause in two ways.

195. First, it favors some religious groups over others by creating an official definition of "religious employers." Religious groups that meet the Government's official definition receive favorable treatment in the form of an exemption from the Mandate, while other religious groups do not.

196. Second, even if it were permissible for the Government to favor some religious groups over others, the "religious employer" exemption would still violate the Establishment Clause because it requires the Government to determine whether groups qualify as "religious employers" based on intrusive judgments about their beliefs, practices, and organizational features. The exemption turns on an intrusive fourteen (14)-factor test to determine

whether a group meets the requirements of section 6033(a)(l) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. These fourteen (14) factors probe into matters such as whether a religious group has "a distinct religious history" or "a recognized creed and form of worship." But it is not the Government's place to determine whether a group's religious history is "distinct," or whether the group's "creed and form of worship" are "recognized." By directing the Government to partake of such inquiries, the "religious employer" exemption runs afoul of the Establishment Clause prohibition on excessive entanglement with religion.

197. Plaintiffs have no adequate remedy at law.

198. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VI

Interference in Matters of Internal Church Governance in Violation of the Religion Clauses of the First Amendment

199. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

200. The Free Exercise Clause and Establishment Clause and RFRA protect the freedom of religious organizations to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

201. Under these Clauses, the Government may not interfere with a religious organization's internal decisions concerning the organization's structure, ministers, or doctrine.

202. Under these Clauses, the Government may not interfere with a religious organization's internal decision if that interference would affect the faith and mission of the organization itself.

203. Plaintiffs are religious organizations affiliated with the Roman Catholic Church.

204. The Catholic Church views contraception, abortion, and sterilization as intrinsically immoral, and prohibits Catholic organizations from condoning or facilitating those practices.

205. Plaintiffs have abided, and continue to abide by, the decision of the Catholic Church on these issues.

206. The Government may not interfere with, or otherwise question, the final decision of the Catholic Church that its religious organizations must abide by these views.

207. Plaintiffs have therefore made the internal decision that the health plans they offer to their employees may not cover, subsidize, or facilitate abortion, sterilization, or contraception.

208. The seven Dioceses in Michigan have further made the internal decision that their affiliated religious entities, including Plaintiff Catholic Charities, should offer their employees health-insurance coverage through the MCC Plan, which allows the Dioceses to ensure that these affiliates do not offer coverage for services that are contrary to Catholic teaching.

209. The Mandate interferes with Plaintiffs' internal decisions concerning their structure and

mission by requiring them to facilitate practices that directly conflict with Catholic beliefs.

210. The Mandate's interference with Plaintiffs' internal decisions affects their faith and mission by requiring them to facilitate practices that directly conflict with their religious beliefs.

211. Because the Mandate interferes with the internal decision-making of Plaintiffs in a manner that affects Plaintiffs' faith and mission, it violates the Establishment Clause and the Free Exercise Clause of the First Amendment and the RFRA.

212. Plaintiffs have no adequate remedy at law.

213. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VII

Failure to Conduct Notice-and-Comment Rulemaking in Violation of the APA

214. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

215. The Affordable Care Act expressly delegates to an agency within HHS, the Health Resources and Services Administration, the authority to establish guidelines concerning the "preventive care" that a group health plan and health insurance issuer must provide.

216. Given this express delegation, Defendants were required to engage in formal notice-and-comment rulemaking in a manner prescribed by law before issuing the guidelines that group health plans and insurers must cover. Proposed regulations

were required to be published in the Federal Register and interested persons were required to be given an opportunity to participate in the rulemaking through the submission of written data, views, or arguments.

217. Defendants promulgated the "preventive care" guidelines without engaging in formal notice-and-comment rulemaking in a manner prescribed by law.

218. Defendants, instead, wholly delegated their responsibilities for issuing preventive care guidelines to a non-governmental entity, the IOM.

219. The IOM did not permit or provide for the broad public comment otherwise allowed under the APA concerning the guidelines that it would recommend. The dissent to the IOM report noted both that the IOM conducted its review in an unacceptably short time frame, and that the review process lacked transparency.

220. Within two weeks of the IOM issuing its guidelines, HHS issued a press release announcing that the IOM's guidelines were required under the Affordable Care Act.

221. Defendants have never indicated reasons for failing to enact the "preventive care" guidelines through notice-and-comment rulemaking as required by the APA.

222. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

223. Plaintiffs have no adequate remedy at law.

224. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VIII

Illegal Action in Violation of the APA

225. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

226. The APA condemns agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

227. The Mandate, its exemption for "religious employers," and its so-called "accommodation" for "eligible" religious organizations are illegal and therefore in violation of the APA.

228. The Weldon Amendment states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(l), 125 Stat. 786, 1111 (2011).

229. The Affordable Care Act contains no clear expression of an affirmative intention of Congress that employers with religiously motivated objections to the provision of health plans that include coverage for abortion-inducing products, sterilization, contraception, or related education and counseling should be required to provide such plans.

230. The Mandate nevertheless requires employer-based health plans to provide coverage for abortion-inducing products, contraception, sterilization, and related education. It does not permit employers or issuers to determine whether the plan covers abortion, as the [Weldon Amendment] requires. By issuing the Mandate, Defendants have exceeded their authority, and ignored the direction of Congress.

231. The Mandate violates the Weldon Amendment, RFRA, and the First Amendment.

232. The Mandate therefore is not in accordance with law and thus violates 5 U.S.C. § 706(2)(A).

233. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

234. Plaintiffs have no adequate remedy at law.

235. Defendants' failure to act in accordance with law imposes an immediate and ongoing harm on Plaintiffs that warrants relief.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Enter a declaratory judgment that the Mandate violates Plaintiffs' rights under RFRA;
2. Enter a declaratory judgment that the Mandate violates Plaintiffs' rights under the First Amendment;

3. Enter a declaratory judgment that the Mandate was promulgated in violation of the APA;
4. Enter an injunction prohibiting the Defendants from enforcing the Mandate against Plaintiffs;
5. Enter an order vacating the Mandate;
6. Award Plaintiffs attorney's and expert fees under 42 U.S.C. § 1988; and
7. Award all other relief as the Court may deem just and proper.

Respectfully submitted, this 14 day of November, 2013.

By:_____

Matthew A. Kairis (OH No. 55502)
JONES DAY
325 John H. McConnell Blvd.
Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939

Paula Batt Wilson (0065421)
* Jennifer Flannery (0078651)
JONES DAY
North Point 901 Lakeside Avenue Cleveland, OH 44114-1190
(216) 586-3939

* Alison M. Kilmartin (PA No. 306422)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
(412) 391-3939

*Counsel for Plaintiffs * pending pro hac vice*

Thomas P. Van Dusen (P30602)
Rebecca D'Arcy O'Reilly (P70645)
BODMAN PLC
6th Floor at Ford Field

1901 St. Antoine Street
Detroit, MI 48226
(313) 259-7777

Counsel for Michigan Catholic Conference

Edward J. Bardelli (P53849)
Ian R. Kennedy (P67775)
WARNER NORCROSS & JUDD LLP
259 E. Michigan Ave., Suite 208
Kalamazoo, MI 49007
(269) 552-3411

Counsel for Catholic Family Services d/b/a Catholic Charities Diocese of Kalamazoo

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2013, I electronically filed the foregoing Plaintiffs' Complaint and Demand for Jury Trial with the Clerk of the United States District Court for the Western District of Michigan using the CM/ECF system and, upon receipt of the returned summonses, will mail the foregoing by certified mail via the United States Postal Service to the following:

Kathleen Sebelius,
Secretary
U.S. Department of
Health & Human
Services
200 Independence
Ave., S.W.
Washington, D.C.
20201

U.S. Department of
Health & Human
Services
200 Independence Ave.,
S.W.
Washington, D.C. 20201

Thomas Perez,
Secretary
U.S. Department of
Labor
200 Constitution Ave.,
N.W.
Washington, D.C.
20210

U.S. Department of
Labor
200 Constitution Ave.,
N.W.
Washington, D.C. 20210

Jacob J. Lew,
Secretary
U.S. Department of
Treasury
1500 Pennsylvania

U.S. Department of
Treasury
1500 Pennsylvania Ave.,
N.W. Washington, D.C.
20220

Ave., N.W.
Washington, D.C.
20220

Office of the Attorney General
U.S. Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C.
20530

United States Attorney
5th Floor Law Bldg.
330 Ionia Ave., N.W.
Grand Rapids, MI 49503

Matthew A. Kairls
Counsel for Plaintiffs

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE CATHOLIC DIOCESE OF NASHVILLE; CATHOLIC CHARITIES OF TENNESSEE, INC.; CAMP MARYMOUNT, INC.; MARY, QUEEN OF ANGELS, INC.; ST. MARY VILLA, INC.; DOMINICAN SISTERS OF ST. CECILIA CONGREGATION; and AQUINAS COLLEGE, *Plaintiffs*, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S.	CASE NO.:

DEPARTMENT OF TREASURY,	)
	)
Defendants.	)
	)

COMPLAINT

1. This lawsuit is about one of America's most cherished freedoms: the freedom to practice one's religion without government interference. It is not about whether people have a right to abortion-inducing products, sterilization, and contraception. Those products and services are widely available in the United States, and nothing prevents the Government itself from making them more widely available. Here, however, the Government seeks to require Plaintiffs—all of which are Catholic entities—to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those products and services. American history and tradition, embodied in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), safeguard religious entities from such overbearing and oppressive governmental action. Plaintiffs therefore seek relief in this Court to protect this most fundamental of American rights.

2. Plaintiffs provide a wide range of spiritual, educational, and social services to members of their communities, Catholic and non-Catholic alike. For example, Plaintiff The Catholic Diocese of Nashville (the "Diocese") not only provides pastoral care and spiritual guidance for approximately 79,000 Catholics, but also serves individuals throughout Middle Tennessee through its schools and various charitable programs. The Diocese's programs serve

those who are most often overlooked and marginalized in the community, including individuals who are poor, elderly, disabled, and others in need. Plaintiff Catholic Charities of Tennessee ("Catholic Charities") offers a host of social services to thousands in need. Its services feed the hungry, place children in adoptive families, improve the welfare of children from high-risk backgrounds, and provide assistance to refugees and new immigrants. Plaintiff Camp Marymount, Inc. ("Camp Marymount") provides a spiritual summer camp experience for school-age children from the Nashville Diocese and around the world. Plaintiff Mary, Queen of Angels, Inc. ("MQA") provides housing to low-income, elderly individuals and seniors needing care, including those suffering from Alzheimer's Disease. Plaintiff St. Mary Villa, Inc. ("St. Mary Villa") provides affordable daycare options to a diverse range of families with parents who are either working or in school. Plaintiff Dominican Sisters of St. Cecilia Congregation ("Dominican Sisters" or "St. Cecilia Congregation") is a congregation of religious sisters who own and operate multiple Catholic schools on The Dominican Campus in Nashville as well as Saint Rose of Lima Academy in Birmingham, Alabama. For its part, Plaintiff Aquinas College ("Aquinas College" or the "College") educates over 600 students annually, charging tuition well below the average private college in Middle Tennessee. And the College's School of Nursing is uniquely positioned to respond to the critical shortage of licensed nurses and nursing educators in Tennessee and the United States.

3. Plaintiffs' work is in every respect guided by and consistent with Roman Catholic belief, including the requirement that they serve those in

need, regardless of their religion. This is perhaps best captured by words attributed to St. Francis of Assisi: "Preach the Gospel at all times. Use words if necessary." As Pope Benedict XVI expressed it, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Or as Cardinal James Hickey, former Archbishop of Washington, once commented on the role of Catholic educators: "We do not educate our students because *they* are Catholic; we educate them because *we* are Catholic." Thus, Catholic individuals and organizations consistently work to create a more just community by serving any and all neighbors in need.

4. Catholic Church teachings also uphold the firm conviction that sexual union should be reserved to married couples who are open to the creation of life; thus, artificial interference with the creation of life, including through abortion, sterilization, and contraceptives, is contrary to Catholic doctrine.

5. Defendants have promulgated various rules (collectively, "the U.S. Government Mandate" or "Mandate") that force Plaintiffs to violate their sincerely held religious beliefs. These rules, first proposed on July 19, 2010, require Plaintiffs and other Catholic and religious organizations to provide, pay for, and/or facilitate insurance access to abortion-inducing products, sterilization, and contraception, and related counseling services (the "objectionable products and services") in violation of their sincerely

held religious beliefs. In response to the intense public criticism that the Government's original proposal provoked, including by some of the current Administration's most ardent supporters, the Government proposed changes to the rules that, it asserted, were intended to eliminate the substantial burden that the U.S. Government Mandate imposed on religious beliefs. In fact, however, these changes made that burden worse by significantly *increasing* the number of religious organizations subject to the U.S. Government Mandate, and by driving a wedge between religious organizations, such as Plaintiff Diocese, and their equally religious charitable and educational arms, Plaintiffs Catholic Charities and Camp Marymount. Reversing course from its original form, the U.S. Government Mandate now prohibits the Diocese from ensuring that its religious affiliates provide health insurance consistent with Catholic doctrine.

6. In its final form, the U.S. Government Mandate contains three basic components:

7. *First*, it requires employer group health plans to cover, without cost-sharing requirements, all "FDA-approved contraceptive methods and contraceptive counseling"—a term that includes abortion-inducing products, contraception, sterilization, and related counseling.

8. *Second*, the U.S. Government Mandate creates a narrow exemption for certain "religious employers," defined to include only organizations that are "organized and operate[] as a nonprofit entity and [are] referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." The referenced Code section does not, nor

is it intended to, address religious liberty. Instead, it is a paperwork-reduction provision that addresses whether and when tax-exempt nonprofit entities must file an annual informational tax return, known as a Form 990. As the Government has repeatedly affirmed, this exemption is intended to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013). Consequently, the only organizations that qualify for the exemption are "churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* This is the narrowest "conscience exemption" ever adopted in federal law. It grants the Government broad discretion to sit in judgment of which groups qualify as "religious employers," thus favoring certain religious organizations over others and entangling the Government in matters of religious faith and practice.

9. *Third*, the U.S. Government Mandate creates a second class of religious entities that, in the Government's view, are not sufficiently "religious" to qualify for the "religious employer" exemption. These religious entities, deemed "eligible organizations," are subject to a so-called "accommodation" that is intended to eliminate the burden that the U.S. Government Mandate imposes on their religious beliefs. The "accommodation," however, is illusory: it continues to require "eligible organizations" to participate in a new employer-based scheme to provide, pay for, and/or facilitate access to the objectionable products and services for their employees.

10. In particular, Plaintiffs Catholic Charities, Camp Marymount, MQA, St. Mary Villa, and Aquinas College do not qualify under the Government's narrow definition of "religious employers," even though they are religious organizations under any reasonable definition of the term. Instead, they are "eligible organizations" subject to the so-called "accommodation." But notwithstanding the "accommodation," these Plaintiffs are required to enter into a contract with a third party (either an insurance company or, for self-insured organizations, a third-party administrator), which, as a direct result, is required to provide or procure abortion-inducing products, contraception, sterilization, and related counseling for Plaintiffs' employees. Consequently, the religious organizations' actions are the trigger and but-for cause of the provision of the objectionable products and services. Plaintiffs cannot avoid facilitating the provision of the objectionable products and services—for example, by contracting with an insurance company that will not provide or procure the objectionable products and services or even dropping their health-insurance plans altogether—without subjecting themselves to crippling fines and/or lawsuits by individuals and governmental entities.

11. Plaintiffs, moreover, must facilitate the provision of the objectionable products and services in other ways that further exacerbate their religiously impermissible cooperation in the provision of the objectionable products and services. For example, in order to be eligible for the so-called "accommodation," Plaintiffs must provide a "certification" to a third party setting forth their religious objections to the U.S. Government Mandate.

The provision of this "certification," in turn, automatically triggers an obligation on the part of the third party to provide or procure the objectionable products and services for Plaintiffs' employees. A religious organization's self-certification, therefore, is a trigger and but-for cause of the provision of the objectionable products and services.

12. In addition, notwithstanding the "accommodation," the U.S. Government Mandate "requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage." Comments of U.S. Conference of Catholic Bishop (Mar. 20, 2013), at 3, *available at http://www.usceb.orglabout/general-counsel/rulemaking/upload/2013-ArPRM-Comments-3-20-final.pdf* The Government asserts that the provision of the objectionable products and services will be "cost-neutral." This assertion, however, ignores the regulatory and administrative costs that will inevitably force insurance companies and third-party administrators to increase the prices they charge religious employers subject to the "accommodation." The Government's assertion of "cost neutrality" is also based on the implausible (and morally objectionable) assumption that "lower costs" from "fewer childbirths" will offset the cost of the contraceptive services. 78 Fed. Reg. at 8,463. More importantly, even if the Government's assumption were correct, it simply means that premiums previously going toward childbirths will be redirected to contraceptive and related services in order to achieve the (objectionable) goal of "fewer childbirths."

13. In short, the "accommodation" requires non-exempt religious organizations, including

Plaintiffs, to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, and related counseling, contrary to their sincerely held religious beliefs.

14. Plaintiffs Diocese and St. Cecilia Congregation appear to qualify as "religious employers," and, as such, are eligible for the "religious employer" exemption. Nonetheless, the U.S. Government Mandate likewise requires the Diocese and St. Cecilia Congregation to act in violation of their Catholic beliefs. In particular, the Diocese makes fully-insured health insurance benefits plans available not only to individuals directly employed by the Diocese itself but also to individuals employed by affiliated Catholic organizations including, but not limited to, Plaintiffs Catholic Charities and Camp Marymount. Likewise, St. Cecilia Congregation sponsors a fully-insured healthcare plan that is offered to employees of Plaintiff Aquinas College and other affiliated organizations. Because Plaintiffs Catholic Charities, Camp Marymount, and Aquinas College (and other affiliated organizations) themselves do not appear to qualify as exempt "religious employers," the U.S. Government Mandate requires that the Diocese and St. Cecilia Congregation must either (1) sponsor plans that will provide, pay for, and/or facilitate the provision of the objectionable products and services to the employees of Plaintiffs Catholic Charities, Camp Marymount, Aquinas College, and other organizations, or (2) expel these organizations from the healthcare plans of the Diocese and St. Cecilia Congregation, which, in turn, will require Plaintiffs Catholic Charities, Camp Marymount, and Aquinas College to provide, pay for,

and/or facilitate access to the objectionable products and services.

15. This aspect of the U.S. Government Mandate reflects a change from the Government's original proposal of July 19, 2010. That proposal allowed Plaintiffs Catholic Charities and Camp Marymount to remain on the Diocesan plans and Plaintiff Aquinas College to remain on St. Cecilia Congregation's plan, which, in turn, would have shielded Catholic Charities, Camp Marymount, and Aquinas College from the U.S. Government Mandate if the Diocese and St. Cecilia Congregation were exempt. *See* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012). The Final Rule, however, removes this protection and thereby *increases* the number of religious organizations subject to the U.S. Government Mandate. And in so doing, the U.S. Government Mandate seeks to divide the Catholic Church, artificially separating its "houses of worship" from its faith in action, directly contrary to Pope Benedict XVI's admonition that "[t]he Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word."

16. The U.S. Government Mandate is irreconcilable with the First Amendment, RFRA, the Administrative Procedure Act, and other laws. The Government has not demonstrated any compelling interest in forcing Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, sterilization, and contraception. Nor has the Government demonstrated that the U.S. Government Mandate is the least restrictive means of advancing any interest it has in increasing access to these products and services, which are already widely

available and that the Government could make more widely available without conscripting Plaintiffs' health plans as vehicles for the dissemination of the objectionable products and services to which they so strongly object. The Government, therefore, cannot justify its decision to force Plaintiffs to provide, pay for, and/or facilitate access to these products and services in violation of their sincerely held religious beliefs.

17. Accordingly, Plaintiffs seek a declaration that the U.S. Government Mandate cannot lawfully be applied to Plaintiffs, an injunction barring its enforcement, and an order vacating the U.S. Government Mandate.

I. PRELIMINARY MATTERS

18. Plaintiff The Catholic Diocese of Nashville (the "Diocese") is an unincorporated religious association with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

19. Plaintiff Catholic Charities of Tennessee, Inc. ("Catholic Charities") is a nonprofit Tennessee public benefit corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

20. Plaintiff Camp Marymount, Inc. ("Camp Marymount") is a nonprofit Tennessee public benefit corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within

the meaning of Section 501(c)(3) of the Internal Revenue Code.

21. Plaintiff Mary, Queen of Angels, Inc. ("MQA") is a nonprofit Tennessee public benefit corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

22. Plaintiff St. Mary Villa, Inc. ("St. Mary Villa") is a nonprofit Tennessee public benefit corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

23. Plaintiff Dominican Sisters of St. Cecilia Congregation ("Dominican Sisters" or "St. Cecilia Congregation") is a nonprofit Tennessee public benefit and religious corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

24. Plaintiff Aquinas College ("Aquinas College") is a nonprofit Tennessee public benefit corporation with its principal place of business in Nashville, Tennessee. It is organized exclusively for religious, charitable, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. It is also an educational organization under Section 170(b)(1)(A)(ii) of the Internal Revenue Code.

25. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services ("HHS"). She is sued in her official capacity.

26. Defendant Thomas Perez is the Secretary of the U.S. Department of Labor ("Labor"). He is sued in his official capacity.

27. Defendant Jacob J. Lew is the Secretary of the U.S. Department of the Treasury ("Treasury"). He is sued in his official capacity.

28. Defendant U.S. Department of Health and Human Services ("HHS") is an executive agency of the United States within the meaning of RFRA and the Administrative Procedure Act ("APA").

29. Defendant U.S. Department of Labor is an executive agency of the United States within the meaning of RFRA and the APA.

30. Defendant U.S. Department of the Treasury is an executive agency of the United States within the meaning of RFRA and the APA.

31. This is an action for declaratory and injunctive relief under 5 U.S.C. § 702; 28 U.S.C. §§ 2201, 2202; and 42 U.S.C. § 2000bb-1.

32. An actual, justiciable controversy currently exists between Plaintiffs and Defendants. Absent a declaration resolving this controversy and the validity of the U.S. Government Mandate, Plaintiffs will be required to provide, pay for, and/or facilitate access to objectionable products and services in contravention of their sincerely held religious beliefs, as described below.

33. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any

effort to obtain an administrative remedy would be futile.

34. This Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2).

35. Venue is proper in this Court under 28 U.S.C. § 1391(a)(1).

A. The Catholic Diocese of Nashville

36. Plaintiff Diocese is the civil law entity for the local body of the Universal Roman Catholic Church, a community of the baptized confessing the Catholic faith, sharing in sacramental life, and entrusted since February 2006 to the ministry of Bishop David R. Choby. The Diocese encompasses thirty-eight (38) counties, including Davidson County, and covers over 16,300 square miles in Middle Tennessee. Its missions include seeing to the spiritual, educational, and social needs of the Middle Tennessee community.

37. The Diocese, through its fifty-three (53) local community parishes and three (3) missions situated throughout the Diocese, serves the spiritual needs of its Catholic population of approximately 79,000 individuals. Through its parishes, the Diocese ensures the regular availability of the sacraments to all Catholics living in or visiting the Middle Tennessee area. The Diocese also provides numerous other opportunities for prayer, worship, and faith formation. In addition to overseeing the sacramental life of its parishes, the Diocese coordinates Catholic campus ministries at eight (8) colleges and universities within its borders.

38. The Diocese also serves the needs of its communities with a variety of social welfare, educational, and charitable programs. These programs are largely carried out through the work of the parishes of the Diocese and through the separately incorporated entities affiliated with the Diocese (including Plaintiffs Catholic Charities, Camp Marymount, MQA, and St. Mary Villa). The parishes of the Diocese serve an indeterminate number of persons who are homeless, hungry, elderly, sick, or otherwise in need of material assistance.

39. In accord with Canon Law, the Diocese also fulfills an educational mission. *See* Code of Canon Law, Canons 802 § 1 and 803 § 2. The Diocese conducts its educational mission through the schools it sponsors, currently including eighteen (18) private Catholic schools within the Diocese: two (2) high schools and sixteen (16) elementary schools. Through its schools, the Diocese strives to provide an exceptional Catholic educational experience that is open to all in Middle Tennessee.

40. Presently, the Diocese has approximately 7,000 students enrolled in its schools. Many of the Diocesan schools serve a significant minority population. Pope John Paul II High School, for example, has a student body composed of over 20% minority students.

41. To make a Catholic education available to as many children as possible—no matter their faith, means, or heritage—the Diocese expends substantial funds in tuition assistance programs. For the 2011-2012 academic year, the elementary and high schools of the Diocese granted approximately $3 million in financial aid.

42. The Diocese, including its parishes and schools, has over 1,200 employees, with approximately 1,000 employees classified as full-time (*i.e.*, working an average of at least thirty (30) hours per week) and approximately 200 employees classified as part-time.

43. Consistent with Church teachings on social justice, the Diocese makes health insurance benefits plans (the "Diocesan Health Plans") available to its religious personnel, seminarians, and full-time employees and subsidizes the cost of those plans. The Diocesan Health Plans include a preferred provider option (the "PPO plan") and a high-deductible option (the "HDHP plan"). Both are fully-insured plans offered and administered by Blue Cross Blue Shield of Tennessee.

44. Plaintiffs Catholic Charities and Camp Marymount also offer insurance coverage through the Diocesan Health Plans.

45. Consistent with Church teachings regarding the sanctity of life, the Diocesan Health Plans specifically exclude coverage for abortion-inducing products, contraceptives, and sterilization. The Diocese cannot, without violating its sincerely held religious beliefs, offer coverage for these or other devices, products, procedures, or services that are inconsistent with the teachings of the Catholic Church. In limited circumstances, the Diocesan Health Plan's Pharmacy Benefit Manager can override the exclusion of certain drugs commonly used as contraceptives if a physician certifies that they were prescribed with the intent of treating certain medical conditions, not with the intent to prevent pregnancy.

46. The PPO plan meets The Patient Protection and Affordable Care Act's ("Affordable Care Act'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 the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

47. The HDHP plan does not meet the Affordable Care Act's definition of a "grandfathered" plan. The Diocese has not included and does not include a statement in plan materials provided to participants or beneficiaries that it believes the HDHP plan is a grandfathered plan within the meaning of section 1251 of the Affordable Care Act. *See*, *e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

48. The plan year for the Diocesan Health Plans begins on January 1st.

B. Catholic Charities of Tennessee, Inc.

49. Plaintiff Catholic Charities was created in 1962 for the purpose of providing coordinated service to all of God's people in need, especially the poor, regardless of race, culture, or religion. Catholic Charities is an affiliated corporation of the Diocese.

50. Catholic Charities offers a variety of services to meet the needs of a diverse population in the Middle Tennessee area. These programs include feeding the hungry, adoption and pregnancy counseling, child welfare services, refugee and immigration services, family counseling, and services for seniors. Various Catholic Charities programs see to the basic needs—food, clothing, and shelter—of individuals in Middle Tennessee.

51. Catholic Charities provided social services to over 69,000 Middle Tennesseans in 2011 alone. Each year, Catholic Charities serves thousands of meals to the hungry in Middle Tennessee through its Loaves and Fishes and its North Nashville programs. In 2011, Loaves and Fishes served approximately 22,000 hot midday meals, while food distributed by North Nashville provided approximately 88,000 meals in 2012. The North Nashville program also provides clothing and housing assistance and recently added a job training center to its services to address one cause of poverty.

52. Catholic Charities has a long history, dating back to its founding, of helping refugees and immigrants transition to life in the United States. One of the organization's first major initiatives following its founding focused on assisting Cuban refugees of all ages fleeing from Cuba. Catholic Charities found foster homes for forty-three Cuban refugee children who arrived in the United States without parents. By 1995, over 10,000 refugees had received assistance from Catholic Charities, including refugees of many different faiths and more than thirty-five different countries. More recently, in March 2008, Catholic Charities was selected by the Federal Office of Refugee Resettlement to manage and disburse federal funding for refugee services throughout Tennessee, after the Tennessee Department of Human Services ceased its participation in the statewide refugee program. As the designated interim replacement for the State of Tennessee in providing refugee services, Catholic Charities' Refugee and Immigration Services program offers classes to help newly arriving refugees attain self-sufficiency and financial

sustainability, including classes in financial literacy, cultural orientation, and English as a Second Language. Catholic Charities has assisted 3,200 refugees over the last decade alone.

53. Catholic Charities also assists seniors and the elderly in Middle Tennessee. It offers a licensed adult daycare program with supervised activities aimed at enhancing independence and self-esteem while providing respite for caregivers. Fees for the program are subsidized for lower income families.

54. Catholic Charities runs a variety of programs to make adoption an affordable and realistic option for families in Middle Tennessee, place children in need into loving homes, and encourage stability in adoptive families. It operates a state-licensed adoption agency, Caring Choices, that places infants, including special medical needs infants, into adoptive homes. Caring Choices serves families of all faiths, and its services are offered on a sliding scale to make adoption possible for lower income families. Finding Our Children Unconditional Support ("FOCUS") is another Catholic Charities adoption program designed to place older children in need of adoption into foster care and then assist families in adopting these children. Finally, Catholic Charities' Adoption Support and Preservation Program ("ASAP") is an innovative program that supports children and families as they create and maintain connections and access services that support permanency. ASAP gives families the tools to overcome obstacles they might face in bringing adopted children into their homes, seeks to increase the availability and accessibility of adoption support

services in Tennessee, and seeks to decrease incidences of disrupted or dissolved adoptions.

55. Catholic Charities also offers counseling services to parents and families. Its CHAP Program provides parenting education, crisis intervention, and case management designed to develop effective parenting skills through work with professional counselors. Catholic Charities also sponsors the HOPE Program, which provides counseling services to children and teens who are secondary victims of violent crimes. HOPE helps children learn to normalize their experiences, understand their feelings, and develop coping skills and support systems to deal with traumatizing experiences.

56. Catholic Charities' Angel Tree program provides gifts, food, and/or household and personal care items to approximately 1,200 people, many children and seniors, each year around Christmas time.

57. Catholic Charities has also provided aid to Middle Tennesseans in times of natural disaster. In May 2010, the city of Nashville was plagued with a major flood that caused thousands to be displaced for months. Catholic Charities responded by opening a warehouse center to distribute household goods, clothing, food, and other needed supplies. With the aid of Diocesan parishes and community groups, Catholic Charities developed an Adopt-a-Family program whereby individuals and groups could provide assistance to families or individuals in need of assistance during the flood.

58. Catholic Charities has approximately 115 full-time (*i.e.*, working 30 hours or more per week) employees.

59. Catholic Charities does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Catholic Charities does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

60. Catholic Charities is an affiliated corporation of the Diocese.

61. Catholic Charities full-time employees are offered health insurance through the Diocesan Health Plans; thus, Catholic Charities' plan year begins on January 1st.

C. Plaintiff Camp Marymount, Inc.

62. Plaintiff Camp Marymount provides a spiritual summer camp experience for children of the Nashville Diocese and from all over the world on its 340 acres in Middle Tennessee.

63. Camp Marymount—originally known as Camp Happy Hollow—was established in 1939 as a Catholic residential camp by the Diocese of Nashville in Joelton, Tennessee. Camp Marymount moved to its present location in Fairview, Tennessee in 1945 and hosted its first campers in the summer of 1946.

64. The mission of Camp Marymount is to develop and renew faith, character, and community in a rustic Christian environment. According to its creed, Camp Marymount gives a total experience in true living, forceful, inspirational and lasting in its impression on the body and soul of its campers. The summer camp experience is filled with community, faith, fun, and simplicity without the pressures of the outside world or technology.

65. While attending Camp Marymount, campers can experience traditional camp activities such as horseback riding, nature, arts and crafts, gardening, riflery, and swimming. The camp also instructs youth in self-control and self-discipline using the wonder of the outdoors to foster deep spirituality. In addition, a prayer service is held at least every other day and mass is celebrated every Sunday in addition to other times during the camp session. All Camp Marymount programs seek to develop the whole person—mind, body, and spirit.

66. Camp Marymount is accredited by the American Camp Association, meeting or exceeding over 300 industry-accepted standards. Camp Marymount currently offers four overnight summer sessions—two for girls and two for boys—to rising first through eleventh graders of all faiths. More than 600 campers experience Camp Marymount between mid-May through August each year with the assistance of seventy (70) counselors and support staff.

67. Today, Camp Marymount consists of eighteen (18) rustic camper cabins, four (4) cabins for support staff and retreats, an infirmary, office lodge/dining hall, arts and crafts hut, outdoor amphitheater, nature center, a five-acre spring fed lake, an outdoor chapel, and the St. George Chapel, an enclosed, year-round place of worship. In the non-summer months, Camp Marymount hosts a variety of events including luncheons, retreats, and weddings in its year-round facilities as well as a team building program called The Sun Trail Program that primarily serves Catholic schools. Camp Marymount also serves as a regular meeting place for Catholic groups

and as a location for celebrating mass. In fact, mass is celebrated at the St. George Chapel approximately forty (40) weekends out of the year.

68. Camp Marymount has five (5) full-time employees (*i.e.*, working 30 hours or more per week) and approximately ten (10) part-time employees. Camp Marymount also has sixty (60) seasonal employees during the summer months.

69. Camp Marymount does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Camp Marymount does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

70. Camp Marymount is an affiliated corporation of the Diocese.

71. Camp Marymount's full-time employees are offered health insurance through the Diocesan Health Plans; thus, Camp Marymount's plan year begins on January 1st.

D. Mary, Queen of Angels, Inc.

72. Plaintiff MQA is an assisted living facility located in Nashville, Tennessee.

73. The mission of MQA is to provide top-quality, affordable assisted living services to elderly persons in Middle Tennessee. MQA is designed to meet the physical, psychological, and spiritual needs of its residents in a safe, stimulating, and dignified environment. The average age of MQA's residents is approximately eighty-four (84) years.

74. MQA is the second largest assisted living facility in the Nashville area. It has a total of 98 apartments housing 110 residents, on average.

Sixteen (16) of its apartments are located in a secure unit that serves residents who are memory-impaired or who have Alzheimer's disease.

75. In addition to providing residence, MQA offers a meal program, as well as nursing, personal care, physical therapy, housekeeping and maintenance services, and assistance with the activities of daily life for those who need it. It also offers a rich and engaging program of activities. Mass is held daily in the MQA chapel, and there are regular church and prayer services available to residents of other denominations.

76. MQA's mission is driven by the Catholic belief that all human life is equally valuable and worthy of respect and support, and its living facilities are made available to all, regardless of race, creed, or national origin. Residents are admitted on a first-come, first-served basis.

77. Consistent with its Catholic mission and affiliation, fees for MQA's services are based upon its residents' abilities to pay. MQA provides some level of financial assistance in the form of rent discounts to approximately 45% of its residents. In its first ten years of operation, MQA provided an average of $640,000 in total rent assistance per year. No enrolled resident of MQA is denied care or residence due to the resident's inability to pay for those services.

78. MQA employs approximately eighty-five (85) employees, including approximately sixty-five (65) full-time (*i.e.*, working thirty hours or more per week) and twenty (20) part-time employees.

79. Plaintiffs MQA and St. Mary Villa (together, the "Mary Entities"), along with Villa

Maria Manor, Inc., collaborate with one another and pool their resources in order to provide a health benefits plan to their employees (the "Mary Entities' Health Plan"). Their plan is separate and distinct from the Diocesan Health Plans.

80. Each of the Mary Entities subsidizes the premiums for its eligible employees who enroll in the Mary Entities' Health Plan. The Mary Entities provide subsidized health insurance for their full-time employees, at least in part, in order to fulfill their duty as Catholic employers to provide a "living wage" to their employees. The Mary Entities' Health Plan is a fully-insured plan, offered and administered by Blue Cross Blue Shield of Tennessee.

81. Consistent with Church teachings regarding the sanctity of life, the Mary Entities' Health Plan does not include coverage for abortion-inducing products, contraceptives (except when prescribed for non-contraceptive purposes), and sterilization.

82. The Mary Entities' Health Plan does not meet the Affordable Care Act's definition of a "grandfathered" plan. The changes necessary to remove objectionable products and services from the plan precluded the Mary Entities' Health Plan from receiving "grandfathered" status. *See* 26 C.F.R. § 54.9815-1251T(a)(2)(i). Also, the Mary Entities' Health Plan has not included and does not include a statement in any plan materials provided to participants or beneficiaries that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act. *See*, *e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

83. MQA does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, MQA does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

84. MQA is an affiliated corporation of the Diocese.

85. The plan year for the Mary Entities' Health Plan begins on August 1st.

E. St. Mary Villa, Inc.

86. Plaintiff St. Mary Villa is an educational child care provider that supports families with employed parents and parents in school.

87. St. Mary Villa has a long history of providing child care responsive to the social needs of the Middle Tennessee community. St. Mary Villa began operations in the mid-nineteenth century in response to family and social disruption following the American Civil War. It was operated as a residential orphanage until the mid-1970s, when family and social needs changed from alternative placement to family supportive services. In response to the changing needs of the community, St. Mary Villa transformed to its current focus as an educational child care provider.

88. St. Mary Villa's mission, derived from the teachings of Jesus Christ and the Catholic Church, is to support families by providing affordable, quality day care, after school care and educational programs in a safe, healthy, nurturing and multi-cultural environment, promoting intellectual, physical, social and moral development of the child,

St. Mary Villa embraces diversity in socio-economic status, race, ethnicity and religion.

89. St. Mary Villa has been a long-time, continuous recipient of United Way Outcome-Based Investments, which are awarded based on findings of measurable and documented results. It has also consistently earned a "Three Star" rating from Tennessee, the highest score in the State's Quality Rating Program,

90. St. Mary Villa serves over 300 children and their families annually, at four locations in Davidson County, including locations at three Catholic schools affiliated with the Diocese. Approximately 60% of the families it serves through its preschool program participate in the Tennessee "Child Care Certificate" program or have annual incomes below $38,000.

91. A portion of St. Mary Villa's funds come from the Diocese. Other sources of its funding are the United Way of Nashville, the federal Government, endowments, community grants, and private donations. These funds are used to subsidize the cost of St. Mary Villa's services, up to 50%, for families who need assistance in affording childcare.

92. Motivated by the teachings of Jesus Christ and in the tradition of the Catholic faith, St. Mary Villa offers services to all members of the community. It also offers instruction in the Catholic faith and practices, on a voluntary basis, to those it serves.

93. St. Mary Villa employs approximately thirty-two (32) full-time (*i.e.*, working thirty hours or more per week) and eighteen (18) part-time staff:

94. St. Mary Villa collaborates with Plaintiff MQA and Villa Maria Manor, Inc., in order to provide a health benefits plan to their employees. St. Mary Villa is the plan sponsor. The Mary Entities' Health Plan is separate and distinct from Diocesan Health Plans.

95. The Mary Entities' Health Plan does not meet the Affordable Care Act's definition of a "grandfathered" plan. The changes necessary to remove objectionable products and services from the plan precluded the Mary Entities' Health Plan from receiving "grandfathered" status. *See* 26 C.F.R. § 54.9815-1251T(a)(2)(i). Also, the Mary Entities' plan has not included and does not include a statement in any plan materials provided to participants or beneficiaries that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act. *See*, *e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

96. St. Mary Villa does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, St. Mary Villa does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

97. St. Mary Villa is an affiliated corporation of the Diocese.

98. The plan year for the Mary Entities' Health Plan begins on August 1st.

F. Dominican Sisters of St. Cecilia Congregation

99. Plaintiff St. Cecilia Congregation is a Roman Catholic religious community composed of nearly 300 women that live a contemplative-apostolic

life of community, study, and apostolic service in a monastic framework that fosters contemplation.

100. St. Cecilia Congregation owns the facility and operations that constitute a "Motherhouse" for the Dominican Sisters in Tennessee. It was founded in 1860 following the arrival in Nashville, Tennessee of four sisters who were members of the religious order known under Roman Catholic Canon Law as the Order of Preachers or, in the vernacular, as the "Dominicans." These sisters arrived in Nashville at the request of the Right Reverend James Whelan, Nashville's second bishop and a member of the Dominican order, who had petitioned the sisters at St. Mary's in Somerset, Ohio to send sisters to establish an Academy for the higher education of young women in the Diocese of Nashville.

101. The four Dominican Sisters immediately began work to create a convent and a school for young women in Nashville. From its beginning, St. Cecilia Academy—the all girls school founded by the four original Nashville Dominican Sisters—emphasized music and art while providing young women an education of the highest religious, academic, and cultural standards. Today, St. Cecilia Academy is the oldest continuously operated school in the city of Nashville.

102. The Dominican Sisters combine a monastic communal lifestyle of contemplation with an active apostolate in Catholic education. The essence of what it means to be a Dominican Sister of St. Cecilia is summarized in the community's *Ratio Institutionis*, which outlines the program of initial and ongoing formation. The following characteristics

define the charism of St. Cecilia Congregation: (1) Contemplative Focus, (2) Active Apostolate, (3) Strong Community Life, and (4) Love of the Church.

103. One of St. Cecilia Congregation's mottos is "to contemplate and to give to others the fruits of our contemplation." The Dominican Sisters contemplate Truth and share that same Truth with others through their educational mission. The driving truth behind the Dominican Sisters' educational work is the principle of the dignity of the human person.

104. In 1936, the Dominican Sisters founded Overbrook School with just nine students and a mission to establish a school with traditional Catholic values and academic excellence. Today the Dominican Sisters still own and operate Overbrook school, which includes more than 230 boys and girls in grades pre-kindergarten through eighth. In 2010, Overbrook was recognized by the United States Department of Education as a Blue Ribbon School of Excellence.

105. In addition to the oversight and operation of St. Cecilia Academy and Overbrook, the Dominican Sisters operate The Dominican Campus—an eighty-three (83) acre campus that includes St. Cecilia Academy, Overbrook, and Plaintiff Aquinas College.

106. Plaintiff Dominican Sisters sponsor The Dominican Campus Health Plans, which cover the lay employees of The Dominican Campus (including the lay employees of St. Cecilia Academy, Overbrook, and Plaintiff Aquinas College) as well as the lay employees of Saint Rose of Lima Academy in Birmingham, Alabama, and the lay employees employed at the Motherhouse.

107. Eligible employees are offered two health benefits plans from which to choose. Both are fully-insured plans offered and administered by Blue Cross Blue Shield of Tennessee. St. Cecilia Congregation maintains a separate health benefits plan for the sisters of St. Cecilia Congregation.

108. Plaintiff Dominican Sisters has ensured that The Dominican Campus Health Plans it sponsors do not include coverage for elective abortion-inducing products, sterilization, or contraception (when prescribed for contraceptive purposes).

109. The Dominican Campus Health Plans have undergone a number of changes and amendments since March 23, 2010, and, accordingly, do not meet the Affordable Care Act's definition of a "grandfathered" health plan. Additionally, The Dominican Campus Health Plans have not included and do not include a statement in any plan materials provided to participants or beneficiaries that it believes it is a grandfathered plan, as is required to maintain the status of a grandfathered health plan. *See* 26 C.F.R. § 54.9815-1251T(a)(2)(i).

110. The plan years for The Dominican Campus Health Plans begin on September 1st.

G. Aquinas College

111. Aquinas College is an independent Catholic and Dominican college located in Nashville, Tennessee that confers undergraduate and graduate degrees. Founded in 1961 by St. Cecilia Congregation, Aquinas College is the only four-year Catholic liberal arts college in Eastern and Middle Tennessee.

112. Aquinas College is incorporated as a nonprofit Tennessee corporation, and the corporation's sole member is St. Cecilia Congregation. The College is governed by a Board of Directors, whose chairman is the Prioress General of St. Cecilia Congregation.

113. Aquinas College's mission is to provide an atmosphere of learning permeated with faith, directed to the intellectual, moral, and professional formation of the human person. The College's academic programs are rooted in the liberal arts and the Dominican tradition. Among the College's core values are the sanctity of human life, respect for the human person, and fidelity to Church teaching. Its curriculum emphasizes the dignity of the human person and is directed toward the development of the whole person through the acquisition of knowledge, the pursuit of Truth, and the integration of faith with daily life.

114. Aquinas College recognizes that its identity and mission spring from *Ex Corde Ecclesiae*, the apostolic constitution which governs and defines the role of Catholic colleges and universities. *Ex Corde Ecclesiae* provides that "the objective of a Catholic University is to assure . . . Fidelity to the Christian message as it comes to us through the Church."

115. In accordance with *Ex Corde Ecclesiae*, Aquinas College believes and teaches that "besides the teaching, research and services common to all Universities," it must "bring[] to its task the inspiration and light of the Christian message." "Catholic teaching and discipline are to influence all university activities," and "[a]ny official action or

commitment of the University [must] be in accord with its Catholic identity." "In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative."

116. Aquinas College's Catholic educational mission is furthered by its leadership. Each of the College's Presidents has been a Dominican Sister, including its current President, Sister Mary Sarah Galbraith, O.P. At the beginning of her term, the President makes a Profession of Faith and takes the Oath of Fidelity in accord with *Ex Corde Ecclesiae*.

117. Other members of the College's leadership are also affiliated with St. Cecilia Congregation. The Prioress General of St. Cecilia Congregation serves as the Chairperson of the College's Board of Directors, and two of the four Vice Presidents of the College are Sisters of St. Cecilia Congregation. Sisters also serve in positions among the faculty and staff of the college.

118. Theological study is a part of the liberal arts education offered to all Aquinas College students. Every teacher of theology at Aquinas College has the Mandatum, an acknowledgement by Church authority that a Catholic professor of a theological discipline is a teacher within the full communion of the Catholic Church. The Mandatum recognizes the professor's commitment and responsibility to teach authentic Catholic doctrine and refrain from putting forth as Catholic teaching anything contrary to the Church's Magisterium (the official teaching of the Catholic Church).

119. Sensitivity to both the permanent and the changing needs of the Nashville community and to the needs of the Church led to the establishment of the degrees that Aquinas offers today: degrees in nursing, education, business, and liberal arts and sciences. Aquinas College graduates enter the workforce prepared to serve the Nashville community and beyond.

120. Aquinas College maintains a long-standing tradition of educating competent and qualified nurses—regardless of their religious backgrounds—to care for the sick. Tennessee is projected to have a shortage of nearly 15,000 nurses by 2020 and an even more critical shortage of qualified nursing faculty, estimated at approximately 450 vacancies by 2020. To respond to the critical shortage, Aquinas College's School of Nursing began offering an innovative competency-based Master of Science in Nursing Education in 2012, and it is planning to implement a new four-year residential baccalaureate nursing program and expand enrollment in its nursing programs by 100% in the next four years. With one of the largest nursing programs in the state of Tennessee, Aquinas College is uniquely positioned to respond to the growing demand for qualified nurses and nursing faculty in the coming years.

121. The College also serves others directly through the education of its students and through its students' contributions to the community. For instance, students from the School of Nursing spend approximately 85,000 hours per academic year caring for the sick, regardless of age, race, or faith. Many of these hours are spent caring for patients suffering

from acute and chronic illnesses in traditional institutional settings (*e.g.*, hospitals, special care facilities, etc.).

122. Nursing students and faculty also participate in health fairs, where they educate Middle Tennesseans about issues of health, wellness, and nutrition and provide health assessment screenings to the public. Consistent with the College's Catholic mission, these services are provided to anyone who needs them, free of charge.

123. Aquinas College students and faculty contribute to the Nashville and greater Tennessee communities through other community service projects as well. Faculty, students, and alumni have volunteered at a local homeless shelter, made donations to Angel Tree programs, and participated in food drives, among other efforts.

124. Aquinas College also serves its community by providing a forum for intellectual and spiritual thought and discourse. Its annual Lecture Series offers the Nashville community the opportunity to learn from respected leaders from within the College and across the country, offering free lectures on a variety of topics. Past lectures have discussed financial planning, Jewish-Christian relations, music and fine arts, and parenting.

125. While committed to remaining a distinctly Catholic and Dominican institution, Aquinas College opens its doors to students, academics, prospective employees, and people in need, from all faiths and creeds.

126. Aquinas College costs over $2,000 less than the average private college in Tennessee and offers comprehensive financial aid programs to its

students. Approximately 92% of its students receive financial assistance annually.

127. Aquinas College currently educates nearly 600 graduate and undergraduate students annually, and it is rated among the top Catholic colleges in the nation. Approximately 45% of its students are Catholic and 17% of its students are minorities. Aquinas College students are not offered a health plan.

128. Aquinas College maintains a faculty of approximately 130 professors, who are recognized as leaders in their fields. An additional fifty-two (52) staff members are employed by the College. Eighty-nine (89) of the College's employees are classified as full-time (*i.e.* working thirty hours or more per week), including sixteen (16) Dominican Sisters.

129. Aquinas College offers its eligible employees health insurance through The Dominican Campus Health Plans sponsored by Plaintiff Dominican Sisters. Eligible employees are offered two health benefits plans from which to choose. Both are fully-insured plans offered and administered by Blue Cross Blue Shield of Tennessee. The College subsidizes health plan premiums for its eligible employees. Full-time employees of Aquinas College who are also Dominican Sisters receive employee health benefits through the Dominican Sisters' separate health benefits plan.

130. The health plans offered by Aquinas College to its employees do not meet the Affordable Care Act's definition of a "grandfathered" plan. Aquinas College has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it

believes its plans are grandfathered health plans within the meaning of section 1251 of the Affordable Care Act. *See*, *e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

131. Aquinas College does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Aquinas College does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

132. The plan year for Aquinas College (and The Dominican Campus Health Plans) begins on September 1st.

II. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Background

133. In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "Affordable Care Act" or the "Act"). The Affordable Care Act established many new requirements for "group health plan[s]," broadly defined as "employee welfare benefit plan[s]" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1), that "provide[] medical care . . . to employees or their dependents." 42 U.S.C. § 300gg-91(a)(1).

134. As relevant here, the Act requires an employer's group health plan to cover certain women's "preventive care." Specifically, it indicates that "[a] group health plan and a health insurance issuer offering group or individual health insurance

coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). Because the Act prohibits "cost sharing requirements," the health plan must pay for the full costs of these "preventive care" services without any deductible or co-payment.

135. "[T]he Affordable Care Act preserves the ability of individuals to retain coverage under a group health plan or health insurance coverage in which the individual was enrolled on March 23, 2010." Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,731 (July 19, 2010) ("Interim Final Rules"); 42 U.S.C. § 18011. These so-called "grandfathered health plans do not have to meet the requirements" of the U.S. Government Mandate. 75 Fed. Reg. at 41,731. HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41,732.

136. Federal law provides several mechanisms to enforce the requirements of the Act, including the U.S. Government Mandate. For example:

a. Under the Internal Revenue Code, certain employers who fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan" will be exposed to significant annual fines of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1).

b. Under the Internal Revenue Code, group health plans that fail to provide certain required coverage may be subject to a penalty of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012) (asserting that this applies to employers who violate the "preventive care" provision of the Affordable Care Act).

c. Under ERISA, plan participants can bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(1)(B); *see also* Cong. Research Serv., RL 7-5700.

d. Similarly, the Secretary of Labor may bring an enforcement action against group health plans of employers that violate the U.S. Government Mandate, as incorporated by ERISA. *See* 29 U.S.C. § 1132(b)(3); *see also* Cong. Research Serv., RL 7-5700 (asserting that these penalties can apply to employers and insurers who violate the

"preventive care" provision of the Affordable Care Act).

137. Several of the Act's provisions, along with other federal statutes, reflect a clear congressional intent that the executive agency charged with identifying the "preventive care" required by § 300gg-13(a)(4) should exclude all abortion-related services.

138. For example, the Weldon Amendment, which has been included in every HHS and Department of Labor appropriations bill since 2004, prohibits certain agencies from discriminating against an institution based on that institution's refusal to provide abortion-related services. Specifically, it states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). The term "health care entity" is defined to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, *a health insurance plan*, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2) (emphasis added).

139. The legislative history of the Act also demonstrates a clear congressional intent to prohibit

the executive branch from requiring group health plans to provide abortion-related services. For example, the House of Representatives originally passed a bill that included an amendment by Congressman Bart Stupak prohibiting the use of federal funds for abortion services. *See* H.R. 3962, 111th Cong. § 265 (Nov. 7, 2009). The Senate version, however, lacked that restriction. S. Amend. No. 2786 to H.R. 3590, 111th Cong. (Dec. 23, 2009). To avoid a filibuster in the Senate, congressional proponents of the Act engaged in a procedure known as "budget reconciliation" that required the House to adopt the Senate version of the bill largely in its entirety. Congressman Stupak and other pro-life House members, however, indicated that they would refuse to vote for the Senate version because it failed to adequately prohibit federal funding of abortion. In an attempt to address these concerns, President Barack Obama issued an executive order providing that no executive agency would authorize the federal funding of abortion services. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

140. The Act, therefore, was passed on the central premise that all agencies would uphold and follow "longstanding Federal laws to protect conscience" and to prohibit federal funding of abortion. *Id.* That executive order was consistent with a 2009 speech that President Obama gave at the University of Notre Dame, in which he indicated that his Administration would honor the consciences of those who disagree with abortion, and draft sensible conscience clauses.

B. Regulatory Background — Defining "Preventive Care" and the Narrow Exemption

141. In a span of less than two years, Defendants promulgated the U.S. Government Mandate, subverting the Act's clear purpose to protect the rights of conscience. The U.S. Government Mandate immediately prompted intense criticism and controversy, in response to which the Government has undertaken various revisions. None of these revisions, however, alleviates the burden that the U.S. Government Mandate imposes on Plaintiffs' religious beliefs. To the contrary, these revisions have resulted in a final rule that is significantly worse than the original one.

(1) The Original Mandate

142. On July 19, 2010, Defendants issued interim final rules addressing the statutory requirement that group health plans provide coverage for women's "preventive care." 75 Fed. Reg. 41,726 (July 19, 2010) (citing 42 U.S.C. § 300gg-13(a)(4)). Initially, the rules did not define "preventive care," instead noting that "[t]he Department of HHS is developing these guidelines and expects to issue them no later than August 1, 2011." *Id.* at 41,731.

143. To develop the definition of "preventive care," HHS outsourced its deliberations to the Institute of Medicine ("IOM"), a non-governmental "independent" organization. The IOM in turn created a "Committee on Preventive Services for Women," composed of 16 members who were selected in secret without any public input ("IOM Committee"). At least eight of the Committee members had founded, chaired, or worked with "pro-choice" advocacy groups (including five different Planned Parenthood entities) that have well-known political and ideological views,

including strong animus toward Catholic teachings on abortion and contraception.

144. Unsurprisingly, the IOM Committee invited presentations from several "pro-choice" groups, such as Planned Parenthood and the Guttmacher Institute (named for a former president of Planned Parenthood), without inviting any input from groups that oppose government-mandated coverage for abortion, contraception, and sterilization. Instead, opponents were relegated to lining up for brief open-microphone sessions at the close of each meeting.

145. At the close of this process, on July 19, 2011, the IOM Committee issued a final report recommending that "preventive care" for women be defined to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for [all] women with reproductive capacity." Inst. Of Med., Clinical Preventive Services for Women: Closing the Gaps," at 218-19 (2011) ("IOM Report").

146. The extreme bias of the IOM process spurred one member of the Committee, Dr. Anthony Lo Sasso, to dissent from the final recommendation, writing: "[T]he committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* at 232.

147. At a press briefing the next day, the chair of the IOM Committee fielded a question from a representative of the U.S. Conference of Catholic

Bishops regarding the "coercive dynamic" of the U.S. Government Mandate, asking whether the Committee considered the "conscience rights" of those who would be forced to pay for coverage that they found objectionable on moral and religious grounds. In response, the chair illustrated her cavalier attitude toward the religious-liberty issue, stating bluntly: "[W]e did not take into account individual personal feelings." *See* Linda Rosenstock, Chair, Inst. Of Med. Comm. On Preventive Servs. For Women, Press Briefing (July 20, 2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx. The chair later expressed concern to Congress about considering religious objections to the U.S. Government Mandate because to do so would risk a "slippery slope" that could occur by "opening up that door" to religious liberty. *See* Executive Overreach: The HHS Mandate Versus Religious Liberty: Hearing Before the H. Comm. On the Judiciary, 112th Cong. (2012) (testimony of Linda Rosenstock, Chair, Inst. Of Med. Comm. On Preventive Servs. For Women).

148. Less than two weeks after the IOM Report, without pausing for notice and comment, HHS issued a press release on August 1, 2011, announcing that it would adopt the IOM's definition of "preventive care," including all "FDA-approved contraception methods and contraceptive counseling." *See* U.S. Dept. of Health and Human Services, "Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost," *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html. HHS ignored the religious, moral and ethical dimensions of the decision and the ideological bias of the IOM

Committee, and stated that it had "relied on independent physicians, nurses, scientists, and other experts" to reach a definition that was "based on scientific evidence." Under the final "scientific" definition, the category of mandatory "preventive care" extends to "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* "Women's Preventive Services: Required Health Plan Coverage Guidelines," http://www.hrsa.gov/womensguidelines.

149. The Government's definition of mandatory "preventive care" also includes abortion-inducing products. For example, the FDA has approved "emergency contraceptives" such as the morning-after pill (otherwise known as Plan B), which can prevent an embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or ella), which likewise can induce abortions.

150. Shortly after announcing its definition of "preventive care," the Government proposed a narrow exemption from the U.S. Government Mandate for a small category of "religious employers" that met all of the following four criteria: "(1) The inculcation of religious values is the purpose of the organization"; "(2) The organization primarily employs persons who share the religious tenets of the organization"; "(3) The organization serves primarily persons who share the religious tenets of the organization"; and "(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed.

Reg. at 46,621, 46,626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(iv)(B)).

151. As the Government itself admitted, this narrow exemption was intended to protect only "the unique relationship between a house of worship and its employees in ministerial positions." *Id.* at 46,623. It provided no protection for religious universities, elementary and secondary schools, hospitals, and charitable organizations.

152. The sweeping nature of the U.S. Government Mandate was subject to widespread and withering criticism. Religious leaders from across the country protested that they should not be punished or considered less religious simply because they chose to live out their faith by serving needy members of the community who might not share their beliefs. As Cardinal Wuerl later wrote, "Never before has the government contested that institutions like Archbishop Carroll High School or Catholic University are religious. Who would? But HHS's conception of what constitutes the practice of religion is so narrow that even Mother Teresa would not have qualified."

153. Despite such pleas, the Government at first refused to reconsider its position. Instead, the Government "finalize[d], without change," the narrow exemption as originally proposed. 77 Fed. Reg. at 8,729. At the same time, the Government announced that it would offer a "a one-year safe harbor from enforcement" for religious organizations that remained subject to the U.S. Government Mandate. *Id.* at 8,728. As noted by Cardinal Timothy Dolan, the "safe harbor" effectively gave religious groups "a year to figure out how to violate our consciences."

154. A month later, under continuing public pressure, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM") that, it claimed, set out a solution to the religious-liberty controversy created by the U.S. Government Mandate. 77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM did not revoke the U.S. Government Mandate, and in fact reaffirmed the Government's view at the time that the "religious employer" exemption would not be changed. *Id.* at 16,501-08. Instead, the ANPRM offered hypothetical "possible approaches" that would, in the Government's view, somehow solve the religious-liberty problem without granting an exemption for objecting religious organizations. *Id.* at 16,507. As the U.S. Conference of Catholic Bishops soon recognized, however, any semblance of relief offered by the ANPRM was illusory. Although it was designed to "create an appearance of moderation and compromise, it [did] not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage." *See* Comments of U.S. Conference of Catholic Bishops (May 15, 2012), at 3, *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

(2) Plaintiffs' First Lawsuit and the Government's Promise of Non-Enforcement

155. The first lawsuit filed by Plaintiffs (except for Camp Marymount and Dominican Sisters) was dismissed by this Court, without prejudice, based on the Government's express promises that it would never enforce the then-current regulations against Plaintiffs and the Government's commitment to

amend the regulations to accommodate the concerns of entities with religious objections like those of Plaintiffs before the expiration of the safe harbor in August 2013.

156. Specifically, Plaintiffs filed their first lawsuit on September 12, 2012 in the U.S. District Court for the Middle District of Tennessee. Plaintiffs' Complaint sought to enjoin the U.S. Government Mandate on the grounds that, among other things, it violated their rights of religious conscience under RFRA and the First Amendment. *See The Catholic Diocese of Nashville v. Sebelius*, Docket No. 3:12-cv-0934 (M.D. Tenn.) [Dkt. #46].

157. In response to this and similar litigation, the Government cited the ANPRM and promised that "[i]n light of the forthcoming amendments [to the regulations], and the opportunity the rulemaking process provides for plaintiffs to help shape those amendments, there is no reason to suspect that plaintiffs will be required to sponsor a health plan that covers contraceptive services in contravention of their religious beliefs once the enforcement safe harbor expires." Mem. in Support of Defs.' Mot. to Dismiss [Dkt. # 29] at 12-13.

158. The Government also represented that "the forthcoming amendments [were] intended to address the very issue that plaintiffs raise here by establishing alternative means of providing contraceptive coverage without cost-sharing while accommodating religious organizations' religious objections to covering contraceptive services." *Id.* at 17. Indeed, the Government assured this Court, "[o]nce defendants complete the rulemaking outlined

in the ANPRM, plaintiffs' challenge to the current regulations likely will be moot." *Id.* at 18-19.

159. In response to the Government's motion to dismiss, Plaintiffs made clear that even if the ANPRM were enacted, it would still require them to provide, pay for, and/or facilitate the provision of objectionable insurance coverage for their employees and, therefore, would not relieve the burden on their religious exercise. *See* Pl. Mem. in Opp. [Dkt. #35]. Indeed, Plaintiffs submitted uncontested factual affidavits expressly so stating. *See*, *e.g.*, Pl. Mem. in Opp. [Dkt. #35-1], Robinson Aff., Director of Human Resources of the Catholic Diocese of Nashville, at 10 (noting that the ANPRM "will not alter the core requirement of the Mandate that forces the Diocese to pay for or facilitate the provision of abortion-inducing drugs, contraception, and sterilization, in contravention of its religious beliefs").

160. On November 15, 2012, a hearing was held on the Government's motion to dismiss in which the Government assured the Court that "defendants are amending the challenged regulations to address the very type of religious concerns that plaintiffs raise in this case." Mot. to Dismiss Tr. at 3 [Dkt. #45]. The Government further represented that "Plaintiffs' allegation or argument that they will be injured by being excluded from the religious employer exemption presupposes that their concerns will not be addressed by the forthcoming accommodation even though plaintiffs [] have an opportunity now to participate in the ongoing regulatory process. And even though plaintiffs say that they will be unsatisfied with the ideas that were listed in the ANPRM, those ideas do not encompass the full range

of considerations that defendants are taking into effect." Mot. to Dismiss Tr. at 41 [Dkt. #45].

161. Based on the Government's representations, on November 21, 2012, the district court granted the Government's motion to dismiss for lack of standing "[b]ecause an amendment to the final rule that may vitiate the threatened injury is not only promised but underway." *The Catholic Diocese of Nashville v. Sebelius*, Docket No. 3:12-cv-0934 (M.D. Tenn.) [Dkt. #46] at 7.

(3) The Government's Final Offer and the Empty "Accommodation"

162. On February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM"), setting forth in further detail its proposal to "accommodate" the rights of Plaintiffs and other religious organizations. Contrary to the Government's previous assurances, however, the NPRM adopted the proposals contained in the ANPRM. The NPRM, like the Government's previous proposals, was once again met with strenuous opposition, including over 400,000 comments. For example, the U.S. Conference of Catholic Bishops stated that "the 'accommodation' still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage. Such organizations and their employees remain deprived of their right to live and work under a health plan consonant with their explicit religious beliefs and commitments." Comments of U.S. Conference of Catholic Bishop (Mar. 20, 2013), at 3, *available at http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf* Likewise, Plaintiff Archdiocese noted

that the NPRM's proposed "accommodation" was nothing more than "an accounting maneuver" and did not redress the burden that the U.S. Government Mandate imposes on religious liberty and that, as a result, the Archdiocese had no choice but to "continue[] to strenuously oppose the Mandate, including the proposed changes." Comments of Archdiocese of Washington, at 2 (Apr. 4, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/04/Comments-4-4-13-Archdiocese-of-Washington.pdf.

163. Despite this opposition, on June 28, 2013, the Government issued a final rule that adopted substantially all of the NPRM's proposal without significant change. *See* 78 Fed. Reg. 39,870 (July 2, 2013) ("Final Rule").

164. The Final Rule makes three changes to the Mandate. As described below, none of these changes relieves the unlawful burdens placed on Plaintiffs and other religious organizations. Indeed, one of them significantly *increases* that burden by greatly increasing the number of religious organizations subject to the U.S. Government Mandate.

165. *First*, the Final Rule makes what the Government concedes to be a non-substantive, cosmetic change to the definition of "religious employer." In particular, it eliminates the first three prongs of that definition, such that, under the new definition, an exempt "religious employer" is simply "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. at 39,874 (codified

at 45 C.F.R. § 147.131(a)). As the Government has admitted, this new definition does "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. at 8,461. Instead, it continues to "restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* In this respect, the Final Rule mirrors the intended scope of the original "religious employer" exemption, which focused on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. Religious organizations that have a broader mission are still not, in the Government's view, "religious employers."

166. The "religious employer" exemption, moreover, creates an official, Government-favored category of religious groups that are exempt from the U.S. Government Mandate, while denying this favorable treatment to all other religious groups. The exemption applies only to those groups that are "referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." This category includes only (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." The IRS has adopted an intrusive fourteen (14)-factor test to determine whether a group meets these qualifications. *See Foundation of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). Among these fourteen (14) factors is whether the group has " a recognized creed and form of worship," "a definite and distinct ecclesiastical government," "a formal code of doctrine and

discipline," "a distinct religious history," "an organization of ordained ministers" "a literature of its own," "established places of worship," "regular congregations, "regular religious services," "Sunday schools for the religious instruction of the young," and "schools for the preparation of its ministers." *Id.* Not only do these factors favor some religious groups at the expense of others, but they also require the Government to make intrusive judgments regarding religious beliefs, practices, and organizational features to determine which groups fall into the favored category.

167. *Second*, the Final Rule establishes an illusory "accommodation" for certain nonexempt objecting religious entities that qualify as "eligible organizations." To qualify as an "eligible organization," a religious entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services," (2) be "organized and operate[] as a non-profit entity"; (3) "hold[] itself out as a religious organization," and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if the religious organization is self-insured, to its third-party administrator. 26 C.F.R. § 54.9816-2713A(a). The provision of this self-certification then automatically requires the insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for the organization's employees, without imposing any "cost-sharing requirements (such as a copayment, coinsurance, or a deductible)." *Id.* § 54.9816-2713A(b)(2), (c)(2). The objectionable coverage, moreover, is directly tied to the organization's health plan, lasting only as long as the employee remains on that plan. *See* 29 C.F.R.

§ 2590.715-2713; 45 C.F.R. § 147.131(c)(2)(i)(B). In addition, self-insured organizations are prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure contraceptive services. 26 C.F.R. § 54.9815-2713.

168. This so-called "accommodation" fails to relieve the burden on religious organizations. Under the original version of the U.S. Government Mandate, a non-exempt religious organization's decision to offer a group health plan resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, a non-exempt religious organization's decision to offer a group health plan still results in the provision of coverage—now in the form of "payments"—for abortion-inducing products, contraception, sterilization, and related counseling. *Id.* § 54.9816-2713A(b)-(c). In both scenarios, Plaintiffs' decision to provide a group health plan triggers the provision of "free" contraceptive coverage to their employees in a manner contrary to their beliefs. The provision of the objectionable products and services are directly tied to Plaintiffs' insurance policies, as the objectionable "payments" are available only so long as an employee is on the organization's health plan. *See* 29 C.F.R. § 2590.715-2713 (for self-insured employers, the third-party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers that offer insured plans, the insurance issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for

so long as they remain enrolled in the plan"). For self-insured organizations, moreover, the self-certification constitutes the religious organization's "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). Thus, employer health plans offered by non-exempt religious organizations are the vehicle by which "free" abortion-inducing products, contraception, sterilization, and related counseling are delivered to the organizations' employees.

169. Needless to say, this shell game does not address Plaintiffs' fundamental religious objection to improperly facilitating access to the objectionable products and services. As before, Plaintiffs are coerced, through threats of crippling fines and other pressure, into facilitating access to contraception, abortion-inducing products, sterilization, and related counseling for their employees, contrary to their sincerely held religious beliefs.

170. The so-called "accommodation," moreover, requires Plaintiffs to cooperate in the provision of objectionable coverage in other ways as well. For example, in order to be eligible for the so-called "accommodation," Plaintiffs must provide a "certification" to their insurance provider setting forth their religious objections to the U.S. Government Mandate. The provision of this "certification," in turn, automatically triggers an obligation on the part of the insurance provider to provide Plaintiffs' employees with the objectionable coverage. A religious organization's self-certification, therefore, is a trigger and but-for cause of the objectionable coverage.

171. The U.S. Government Mandate also requires Plaintiffs to subsidize the objectionable products and services.

172. For organizations that procure insurance through a separate insurance provider, the Government asserts that the cost of the objectionable products and services will be "cost neutral" and, therefore, that Plaintiffs will not actually be paying for it, notwithstanding the fact that Plaintiffs' premiums are the only source of funding that their insurance providers will receive for the objectionable products and services.

173. The Government's "cost-neutral" assertion, however, is implausible. It rests on the assumption that cost "savings" from "fewer childbirths" will be at least as large as the direct costs of paying for contraceptive products and services and the costs of administering individual policies. 78 Fed. Reg. at 8,463. Some employees, however, will choose not to use contraception notwithstanding the U.S. Government Mandate. Others would use contraception regardless of whether it is being paid for by an insurance company. And yet others will shift from less expensive to more expensive products once coverage is mandate and cost-sharing is prohibited. Consequently, there can be no assurance that cost "savings" from "fewer childbirths" will offset the cost of providing contraceptive services.

174. More importantly, even if the Government's "cost-neutral" assertion were true, it is irrelevant. The so-called "accommodation" is nothing more than a shell game. Premiums previously paid by the objecting employers to cover, for example,

"childbirths," will now be redirected to pay for contraceptive products and services. Thus, the objecting employer is still required to pay for the objectionable products and services.

175. For self-insured organizations, the Government's "cost-neutral" assumption is likewise implausible. The Government asserts that third-party administrators required to provide or procure the objectionable products and services will be compensated by reductions in user fees that they otherwise would pay for participating in federally-facilitated health exchanges. *See* 78 Fed. Reg. at 39,882. Such fee reductions are to be established through a highly regulated and bureaucratic process for evaluating, approving, and monitoring fees paid in compensation to third-party administrators. Such regulatory regimes, however, do not fully compensate the regulatory entities for the costs and risks incurred. As a result, few if any third party administrators are likely to participate in this regime, and those that do are likely to increase fees charged to the self-insured organizations.

176. Either way, as with insured plans, self-insured organizations likewise will be required to subsidize contraceptive products and services notwithstanding the so-called "accommodation."

177. For all of these reasons, the U.S. Government Mandate continues to require Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of their sincerely held religious beliefs.

178. *Third*, the Final Rule actually *increases* the number of religious organizations that are subject

to the U.S. Government Mandate. Under the Government's initial "religious employer" definition, if a nonexempt religious organization "provided health coverage for its employees through" a plan offered by a separate, "affiliated" organization that was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." 77 Fed. Reg. at 16,502.

179. For example, Plaintiff Diocese offers fully-insured health plans that cover not only the Diocese itself, but other affiliated Catholic organizations—including Plaintiffs Catholic Charities and Camp Marymount. Under the religious employer exemption that was originally proposed, if the Diocese was an exempt "religious employer," then Plaintiffs Catholic Charities and Camp Marymount received the benefit of that exemption, regardless of whether they independently qualified as "religious employers," because they could continue to participate in the Diocese's exempt plan. These affiliated organizations, therefore, could benefit from the Diocese's exemption even if they, themselves, could not meet the Government's unprecedentedly narrow definition of "religious employer." The same is true for Plaintiffs St. Cecilia Congregation and Aquinas College—Aquinas College would have received the benefit of The Dominican Campus Health Plans' exemption.

180. The Final Rule eliminates this safeguard. Instead, it provides that "each employer" must "independently meet the definition of eligible organization or religious employer in order to take

advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents." 78 Fed. Reg. at 39,886. *See also* 78 Fed. Reg. at 8,467 (NPRM). Because Plaintiffs Catholic Charities, Camp Marymount, and Aquinas College do not appear to meet the Government's narrow definition of "religious employers," they are now subject to the U.S. Government Mandate.

181. Although Plaintiff Diocese is a "religious employer," the U.S. Government Mandate still requires it either to (1) sponsor a plan that will provide Plaintiffs Catholic Charities and Camp Marymount, and other affiliated Catholic organizations, with access to the objectionable products and services, or (2) no longer extend its plans to these organizations, subjecting these organizations to massive fines if they do not contract with another insurance provider that will provide the objectionable coverage.

182. The same is true for Plaintiff St. Cecilia Congregation—an exempt "religious employer." The U.S. Government Mandate forces St. Cecilia Congregation to either (1) sponsor a healthcare plan that will provide Plaintiff Aquinas College, and other affiliated Catholic organizations, with access to the objectionable products and services, or (2) no longer extend The Dominican Campus Health Plans to Plaintiff Aquinas College and other equally religious organizations, subjecting these organizations to substantial fines if they do not contract with another insurance provider to offer the objectionable coverage.

183. The first option forces the Diocese and St. Cecilia Congregation to act contrary to their sincerely held religious beliefs.

184. The second option not only makes the Diocese and St. Cecilia Congregation complicit in the provision of objectionable coverage, by forcing its affiliates out of its plans and to obtain the objectionable coverage through another insurance provider, but also compels the Diocese and St. Cecilia Congregation to submit to the Government's interference with their structure and internal operations by accepting a construct that divides churches from their ministries and religious vocations.

185. In this respect, the U.S. Government Mandate seeks to divide the Catholic Church. The Church's faith in action, carried out through its charitable and educational arms, is every bit as central to the Church's religious mission as is the administration of the Sacraments. In the words of Pope Benedict XVI, "[t]he Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Yet the U.S. Government Mandate seeks to separate these consubstantial aspects of the Catholic faith, treating one as "religious" and the other as not. The U.S. Government Mandate therefore deeply intrudes into internal Church governance.

186. In sum, the Final Rule not only fails to alleviate the burden that the U.S. Government Mandate imposes on Plaintiffs' religious beliefs; it in fact makes that burden significantly worse by increasing the number of religious organizations that are subject to the U.S. Government Mandate. The

U.S. Government Mandate, therefore, requires Plaintiffs to act contrary to their sincerely held religious beliefs or submit to the Government's interference with their structure and internal operations—both of which severely burden Plaintiffs' exercise of religion.

III. THE U.S. GOVERNMENT MANDATE IMPOSES A SUBSTANTIAL BURDEN ON PLAINTIFFS' RELIGIOUS LIBERTY

A. The U.S. Government Mandate Substantially Burdens Plaintiffs' Religious Beliefs

187. Responding to the U.S. Government Mandate, Donald Cardinal Wuerl has declared that "what is at stake here is a question of human freedom." And indeed it is. Since the founding of this country, our law and society have recognized that individuals and institutions are entitled to freedom of conscience and religious practice. Absent a compelling reason, no government authority may compel any group or individual to act contrary to their religious beliefs. As noted by Thomas Jefferson, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."

188. The U.S. Government Mandate violates Plaintiffs' rights of conscience by forcing them to participate in an employer-based scheme to provide insurance coverage to which they strenuously object on moral and religious grounds.

189. It is a core tenet of Plaintiffs' religion that abortion, contraception, and sterilization are serious moral wrongs.

190. Plaintiffs' Catholic beliefs therefore prohibit them from providing, paying for, and/or facilitating access to abortion-inducing products, contraception, or sterilization.

191. As a corollary, Plaintiffs' Catholic beliefs prohibit them from contracting with an insurance company or third party administrator that will, as a result, provide or procure the objectionable products and services to Plaintiffs' employees.

192. Plaintiffs' beliefs are deeply and sincerely held.

193. The U.S. Government Mandate, therefore, requires Plaintiffs to do precisely what their sincerely held religious beliefs prohibit—provide, pay for, and/or facilitate access to objectionable products and services or else incur crippling sanctions.

194. The U.S. Government Mandate therefore imposes a substantial burden on Plaintiffs' religious beliefs.

195. The U.S. Government Mandate's exemption for "religious employers" does not alleviate the burden.

196. The "religious employers" exemption does not apply to Plaintiff Catholic Charities, Camp Marymount, MQA, St. Mary Villa, or Aquinas College.

197. Although Plaintiffs the Diocese and St. Cecilia Congregation are "religious employers," the U.S. Government Mandate still burdens their sincerely held religious beliefs by requiring them either to (1) sponsor a plan that will provide employees of Plaintiffs Catholic Charities, Camp Marymount, Aquinas College, and their other

affiliated Catholic organizations, with access to the objectionable products and services; or (2) expel these affiliates from their insurance plans, thereby forcing their affiliates into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable products and services.

198. The first option forces the Diocese and St. Cecilia Congregation to act contrary to their sincerely held religious beliefs.

199. The second option not only makes the Diocese and St. Cecilia Congregation complicit in the provision of objectionable coverage, by forcing their affiliates out of their plans and to obtain the objectionable coverage through another insurance provider, but also compels the Diocese and St. Cecilia Congregation to submit to the Government's interference with their structure and internal operations by accepting a construct that divides churches from their ministries and religious vocations.

200. The so-called "accommodation" does not alleviate the burden on Plaintiffs' sincerely held religious beliefs.

201. Notwithstanding the so-called "accommodation," Plaintiffs are still required to provide, pay for, and/or facilitate access to the objectionable products and services.

202. Plaintiffs' Catholic beliefs do not simply prohibit them from using or directly paying for the objectionable coverage. Their beliefs also prohibit them from facilitating access to the objectionable products and services in the manner required by the U.S. Government Mandate.

203. Finally, Plaintiffs cannot avoid the U.S. Government Mandate without incurring crippling fines. If they eliminate their employee health plans, they are subject to annual fines of $2,000 per full-time employee. If they keep their health plans but refuse to provide or facilitate the objectionable coverage, they are subject to daily fines of $100 a day per affected beneficiary. The fines therefore coerce Plaintiffs into violating their religious beliefs.

204. In short, while the President claims to have "found a solution that works for everyone" and that ensures that "religious liberty will be protected," his promised "accommodation" does neither. Unless and until this issue is definitively resolved, the U.S. Government Mandate does and will continue to impose a substantial burden on Plaintiffs' religious beliefs.

B. The U.S. Government Mandate Is Not a Neutral Law of General Applicability

205. The U.S. Government Mandate is not a neutral law of general applicability. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for abortion-inducing products, sterilization, contraception, and related education and counseling. It was, moreover, implemented by and at the behest of individuals and organizations who disagree with Plaintiffs' religious beliefs regarding abortion and contraception, and thus targets religious organizations for disfavored treatment.

206. For example, the U.S. Government Mandate exempts all "grandfathered" plans from its requirements, thus excluding tens of millions of people from the mandated coverage. As the

Government has admitted, while the numbers are expected to diminish over time, "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. at 41,732. Elsewhere, the government has put the number at 87 million. *See* "Keeping the Health Plan You Have" (June 14, 2010), http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html. And according to one district court last year, "191 million Americans belong[ed] to plans which may be grandfathered under the ACA." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012).

207. Similarly, small employers (*i.e.*, those with fewer than 50 employees) are exempt from certain enforcement mechanisms to compel compliance with the U.S. Government Mandate. *See* 26 U.S.C. §§ 4980D(d) (exempting small employers from penalties imposed for failing to provide the objectionable services), 4980H(a) (exempting small employers from the assessable payment for failure to provide health coverage).

208. In addition, the U.S. Government Mandate exempts an arbitrary subset of religious organizations that qualify for tax-reporting exemptions under Section 6033 of the Internal Revenue Code. The Government cannot justify its protection of the religious-conscience rights of the narrow category of exempt "religious employers," but not of Plaintiffs and other religious organizations that remain subject to the U.S. Government Mandate.

209. The U.S. Government Mandate, moreover, was promulgated by Government officials, and supported by non-governmental organizations,

who strongly oppose certain Catholic teachings and beliefs. For example, on October 5, 2011, Defendant Sebelius spoke at a fundraiser for NARAL Pro-Choice America. Defendant Sebelius has long supported abortion rights and criticized Catholic teachings and beliefs regarding abortion and contraception. NARAL Pro-Choice America is a pro-abortion organization that likewise opposes many Catholic teachings. At that fundraiser, Defendant Sebelius criticized individuals and entities whose beliefs differed from those held by her and the other attendees of the NARAL Pro-Choice America fundraiser, stating: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much." In addition, the U.S. Government Mandate was modeled on a California law that was motivated by discriminatory intent against religious groups that oppose contraception.

210. Consequently, Plaintiffs allege that the purpose of the U.S. Government Mandate, including the narrow exemption, is to discriminate against religious institutions and organizations that oppose abortion and contraception.

C. The U.S. Government Mandate Is Not the Least Restrictive Means of Furthering a Compelling Governmental Interest

211. The U.S. Government Mandate is not narrowly tailored to serve a compelling governmental interest.

212. The Government has no compelling interest in forcing Plaintiffs to violate their sincerely held religious beliefs by requiring them to participate in a scheme for the provision of abortion-inducing

products, sterilization, contraceptives, and related education and counseling. The Government itself has relieved numerous other employers from this requirement by exempting grandfathered plans and plans of employers it deems to be sufficiently religious. Moreover, these services are widely available in the United States. The U.S. Supreme Court has held that individuals have a constitutional right to use such services. And nothing that Plaintiffs do inhibits any individual from exercising that right.

213. Even assuming the interest was compelling, the Government has numerous alternative means of furthering that interest without forcing Plaintiffs to violate their religious beliefs. For example, the Government could have provided or paid for the objectionable products and services itself through other programs established by a duly enacted law. Or, at a minimum, it could have created a broader exemption for religious employers, such as those found in numerous state laws throughout the country and in other federal laws. The Government therefore cannot possibly demonstrate that requiring Plaintiffs to violate their consciences is the least restrictive means of furthering its interest.

214. The U.S. Government Mandate, moreover, would simultaneously undermine both religious freedom—a fundamental right enshrined in the U.S. Constitution—and access to the wide variety of social and educational services that Plaintiffs provide. The Diocese serves a wide variety of people in need—including the poor, elderly, and disabled. Catholic Charities provides a range of social services to the citizens of Middle Tennessee. Camp Marymount provides a spiritual and educational

summer camp experience to school age children. MQA provides housing to low-income, elderly individuals while St. Mary Villa provides affordable daycare options to a diverse range of families in need of quality childcare. Likewise, as part of its vocation, St. Cecilia Congregation administers The Dominican Campus which educates students from preschool through college level in the Dominican tradition. Aquinas College provides its students with a high-quality education in numerous fields of study while addressing the critical nationwide shortage of nurses. As President Obama acknowledged in his announcement of February 10, 2012, religious organizations like Plaintiffs do "more good for a community than a government program ever could." The U.S. Government Mandate, however, puts these good works in jeopardy.

215. That is unconscionable. Accordingly, Plaintiffs seek a declaration that the U.S. Government Mandate cannot lawfully be applied to Plaintiffs, an injunction barring its enforcement, and an order vacating the U.S. Government Mandate.

IV. THE U.S. GOVERNMENT MANDATE THREATENS PLAINTIFFS WITH IMMINENT INJURY THAT SHOULD BE REMEDIED BY A COURT

216. The U.S. Government Mandate is causing serious, ongoing hardship to Plaintiffs that merits relief now.

217. On June 28, 2013, Defendants finalized the U.S. Government Mandate, including the narrow "religious employer" exemption and the so-called "accommodation" proposed in the NPRM. By the terms of the Final Rule and its transitional safe

harbor, Plaintiffs must comply with the U.S. Government Mandate by the beginning of the next plan year on or after January 1, 2014.

218. For Plaintiffs the Diocese, Catholic Charities, and Camp Marymount, the next plan year begins on January 1, 2014.

219. For the Mary Entities (MQA and St. Mary Villa), the next plan year begins on August 1, 2014.

220. For St. Cecilia Congregation and Aquinas College, the next plan year begins on September 1, 2014.

221. Defendants have given no indication that they will not enforce the essential provisions of the U.S. Government Mandate that impose a substantial burden on Plaintiffs' rights. Consequently, absent the relief sought herein, Plaintiffs will be required to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization, and related education and counseling, in violation of their sincerely held religious beliefs.

222. The U.S. Government Mandate is also harming Plaintiffs in other ways.

223. Health plans do not take shape overnight. A number of analyses, negotiations, and decisions must occur each year before Plaintiffs can offer a health benefits package to their employees. For example, Plaintiffs the Diocese, the Mary Entities, and St. Mary Villa—as employers using outside insurance issuers—must work with actuaries to evaluate their funding reserves, and then negotiate with the insurer to determine the cost of

the products and services they want to offer to their employees.

224. Under normal circumstances, Plaintiffs must begin the process of determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the U.S. Government Mandate make this already lengthy process even more complex.

225. In addition, if Plaintiffs do not comply with the U.S. Government Mandate, they may be subject to government fines and penalties. Plaintiffs require time to budget for any such additional expenses.

226. The U.S. Government Mandate and its uncertain legality, moreover, undermine Plaintiffs' ability to hire and retain employees, thus placing them at a competitive disadvantage in the labor market relative to organizations that do not have a religious objection to the U.S. Government Mandate.

227. Plaintiffs therefore need judicial relief now in order to prevent the serious, ongoing harm that the U.S. Government Mandate is already imposing on them.

V. CAUSES OF ACTION

COUNT I
Substantial Burden on Religious Exercise in Violation of RFRA

228. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

229. RFRA prohibits the Government from substantially burdening an entity's exercise of religion, even if the burden results from a rule of

general applicability, unless the Government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

230. RFRA protects organizations as well as individuals from Government-imposed substantial burdens on religious exercise.

231. RFRA applies to all federal law and the implementation of that law by any branch, department, agency, instrumentality, or official of the United States.

232. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate access to products, services, practices, and speech that are contrary to their religious beliefs.

233. The U.S. Government Mandate substantially burdens Plaintiffs' exercise of religion.

234. The Government has no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

235. Requiring Plaintiffs to comply with the U.S. Government Mandate is not the least restrictive means of furthering a compelling governmental interest.

236. By enacting and threatening to enforce the U.S. Government Mandate against Plaintiffs, Defendants have violated RFRA.

237. Plaintiffs have no adequate remedy at law.

238. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT II
Substantial Burden on Religious Exercise in Violation of the Free Exercise Clause of the First Amendment

239. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

240. The Free Exercise Clause of the First Amendment prohibits the Government from substantially burdening an entity's exercise of religion.

241. The Free Exercise Clause protects organizations as well as individuals from Government-imposed burdens on religious exercise.

242. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs.

243. The U.S. Government Mandate substantially burdens Plaintiffs' exercise of religion.

244. The U.S. Government Mandate is not a neutral law of general applicability, because it is riddled with exemptions for which there is not a consistent, legally defensible basis. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling.

245. The U.S. Government Mandate is not a neutral law of general applicability because it was passed with discriminatory intent.

246. The U.S. Government Mandate implicates constitutional rights in addition to the right to free exercise of religion, including, for

example, the rights to free speech, free association, and freedom from excessive government entanglement with religion.

247. The Government has no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

248. The U.S. Government Mandate is not narrowly tailored to further a compelling governmental interest.

249. By enacting and threatening to enforce the U.S. Government Mandate, the Government has burdened Plaintiffs' religious exercise in violation of the Free Exercise Clause of the First Amendment.

250. Plaintiffs have no adequate remedy at law.

251. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT III
Compelled Speech in Violation of the Free Speech Clause of the First Amendment

252. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

253. The First Amendment protects against the compelled affirmation of any religious or ideological proposition that the speaker finds unacceptable.

254. The First Amendment protects organizations as well as individuals against compelled speech.

255. Expenditures are a form of speech protected by the First Amendment.

256. The First Amendment protects against the use of a speaker's money to support a viewpoint that conflicts with the speaker's religious beliefs.

257. The U.S. Government Mandate would compel Plaintiffs to provide health care plans to their employees that include or facilitate access to products and services that violate their religious beliefs.

258. The U.S. Government Mandate would compel Plaintiffs to subsidize, promote, and facilitate education and counseling services regarding these objectionable products and services.

259. The U.S. Government Mandate would compel Plaintiffs to issue a certification of its beliefs that, in turn, would result in the provision of objectionable products and services to Plaintiffs' employees.

260. By imposing the U.S. Government Mandate, Defendants are compelling Plaintiffs to publicly subsidize or facilitate the activity and speech of private entities that are contrary to their religious beliefs, and compelling Plaintiffs to engage in speech that will result in the provision of objectionable products and services to Plaintiffs' employees.

261. The U.S. Government Mandate is viewpoint-discriminatory and subject to strict scrutiny.

262. The U.S. Government Mandate furthers no compelling governmental interest.

263. The U.S. Government Mandate is not narrowly tailored to further a compelling governmental interest.

264. Plaintiffs have no adequate remedy at law.

265. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT IV
Official "Church" Favoritism and Excessive Entanglement with Religion in Violation of the Establishment Clause of the First Amendment

266. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

267. The Establishment Clause of the First Amendment prohibits the Government from adopting an official definition of a "religious employer" that favors some religious groups while excluding others.

268. The Establishment Clause also prohibits the Government from becoming excessively entangled in the affairs of religious groups by scrutinizing their beliefs, practices, and organizational features to determine whether they meet the Government's favored definition.

269. The "religious employer" exemption violates the Establishment Clause in two ways.

270. First, it favors some religious groups over others by creating an official definition of "religious employers." Religious groups that meet the Government's official definition receive favorable treatment in the form of an exemption from the U.S. Government Mandate, while other religious groups do not.

271. Second, even if it were permissible for the Government to favor some religious groups over others, the "religious employer" exemption would still violate the Establishment Clause because it requires the Government to determine whether groups qualify as "religious employers" based on intrusive

judgments about their beliefs, practices, and organizational features. The exemption turns on an intrusive fourteen (14)-factor test to determine whether a group meets the requirements of section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. These fourteen (14) factors probe into matters such as whether a religious group has "a distinct religious history" or "a recognized creed and form of worship." But it is not the Government's place to determine whether a group's religious history is "distinct," or whether the group's "creed and form of worship" are "recognized." By directing the Government to partake of such inquiries, the "religious employer" exemption runs afoul of the Establishment Clause prohibition on excessive entanglement with religion.

272. Plaintiffs have no adequate remedy at law.

273. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT V
Interference in Matters of Internal Church Governance in Violation of the Religion Clauses of the First Amendment

274. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

275. The Free Exercise Clause and Establishment Clause and the RFRA protect the freedom of religious organizations to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

276. Under these Clauses, the Government may not interfere with a religious organization's internal decisions concerning the organization's religious structure, ministers, or doctrine.

277. Under these Clauses, the Government may not interfere with a religious organization's internal decision if that interference would affect the faith and mission of the organization itself.

278. Plaintiffs are religious organizations affiliated with the Roman Catholic Church.

279. The Catholic Church views abortion, sterilization, and contraception as intrinsically immoral, and prohibits Catholic organizations from condoning or facilitating those practices.

280. Plaintiffs have abided and must continue to abide by the decision of the Catholic Church on these issues.

281. The Government may not interfere with or otherwise question the final decision of the Catholic Church that its religious organizations must abide by these views.

282. Plaintiffs have therefore made the internal decision that the health plans they offer to their employees may not cover, subsidize, or facilitate abortion, sterilization, or contraception.

283. Plaintiff Diocese has further made the internal decision that its affiliated religious entities, including Catholic Charities and Camp Marymount, should offer their employees health-insurance coverage through the Diocesan plan, which allows the Diocese to ensure that these affiliates do not offer coverage for services that are contrary to Catholic teaching.

284. The U.S. Government Mandate interferes with Plaintiffs' internal decisions concerning their structure and mission by requiring them to facilitate practices that directly conflict with Catholic beliefs.

285. The U.S. Government Mandate's interference with Plaintiffs' internal decisions affects their faith and mission by requiring them to facilitate practices that directly conflict with their religious beliefs.

286. Because the U.S. Government Mandate interferes with the internal decision-making of Plaintiffs in a manner that affects Plaintiffs' faith and mission, it violates the Establishment Clause and the Free Exercise Clause of the First Amendment and the RFRA.

287. Plaintiffs have no adequate remedy at law.

288. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VI
Illegal Action in Violation of the APA

289. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

290. The APA condemns agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

291. The U.S. Government Mandate, its exemption for "religious employers," and its so-called "accommodation" for "eligible" religious organizations are illegal and therefore in violation of the APA.

292. The Weldon Amendment states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

293. The Affordable Care Act contains no clear expression of an affirmative intention of Congress that employers with religiously motivated objections to the provision of health plans that include coverage for abortion-inducing products, sterilization, contraception, or related education and counseling should be required to provide such plans.

294. The U.S. Government Mandate nevertheless requires employer-based health plans to provide coverage for abortion-inducing products, contraception, sterilization, and related education. It does not permit employers or issuers to determine whether the plan covers abortion, as the Weldon Amendment requires. By issuing the U.S. Government Mandate, Defendants have exceeded their authority, and ignored the direction of Congress.

295. The U.S. Government Mandate violates the Weldon Amendment, RFRA, and the First Amendment.

296. The U.S. Government Mandate therefore is not in accordance with law and thus violates 5 U.S.C. § 706(2)(A).

297. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

298. Plaintiffs have no adequate remedy at law.

299. Defendants' failure to act in accordance with law imposes an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VII
Failure to Conduct Notice-and Comment Rulemaking in Violation of the APA

300. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

301. The Affordable Care Act expressly delegates to an agency within HHS, the Health Resources and Services Administration, the authority to establish guidelines concerning the "preventive care" that a group health plan and health insurance issuer must provide.

302. Given this express delegation, Defendants were required to engage in formal notice-and-comment rulemaking in a manner prescribed by law before issuing the "preventive care" guidelines that group health plans and insurers must cover. Proposed regulations were required to be published in the Federal Register and interested persons were required to be given an opportunity to participate in the rulemaking through the submission of written data, views, or arguments.

303. Defendants promulgated the "preventive care" guidelines without engaging in formal notice-

and-comment rulemaking in a manner prescribed by law.

304. Defendants, instead, wholly delegated their responsibilities for issuing "preventive care" guidelines to a non-governmental entity, the IOM.

305. The IOM did not permit or provide for the broad public comment otherwise allowed under the APA concerning the "preventive care" guidelines that it would recommend. The dissent to the IOM report noted both that the IOM conducted its review in an unacceptably short time frame, and that the review process lacked transparency.

306. Within two weeks of the IOM issuing its women's "preventive care" guidelines, HHS issued a press release announcing that the IOM's guidelines regarding women's "preventive care" were required to be covered under the Affordable Care Act.

307. Defendants have never indicated reasons for failing to enact the "preventive care" guidelines through notice-and-comment rulemaking as required by the APA.

308. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

309. Plaintiffs have no adequate remedy at law.

310. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under the First Amendment;
3. Enter a declaratory judgment that the U.S. Government Mandate was promulgated in violation of the APA;
4. Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against Plaintiffs;
5. Enter an order vacating the U.S. Government Mandate;
6. Award Plaintiffs attorneys' and expert fees under 42 U.S.C. § 1988; and
7. Award all other relief as the Court may deem just and proper.

Respectfully submitted, this the 22nd day of November, 2013.

/s/ Lauran M. Sturm
Matthew A. Kairis, Trial Attorney (Ohio Bar No. 55502)*
Brandy H. Ranjan (Ohio Bar No. 86984)*
Melissa D. Palmisciano (Ohio Bar No. 80027)*
JONES DAY
325 John H. McConnell Blvd.
Suite 600
P.O. Box 165017
Columbus, OH 43216
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
makairis@jonesday.com
branjan@jonesday.com
mpalmisciano@jonesday.com
Counsel for Plaintiffs

L. Gino Marchetti, Jr. (Tenn. BPR No. 005562) Matthew C. Pietsch (Tenn. BPR No. 024659)
Antonio J. Aguilar (Tenn. BPR No. 029743)
TAYLOR, PIGUE, MARCHETTI & BLAIR, PLLC
2908 Poston Avenue
Nashville, Tennessee 37203-1312
Telephone: (615) 320-3225
Facsimile: (615) 320-3244
marchetti-dc@tpmblaw.com
Local Counsel for The Catholic Diocese of Nashville; Catholic Charities of Tennessee, Inc.; Camp Marymount, Inc.; Mary, Queen of Angels, Inc.; and St. Mary Villa, Inc.

Robb S. Harvey (Tenn. BPR No. 11519)
Lauran Sturm (Tenn. BPR No. 030828)
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
Telephone: (615) 850-8856
robb.harvey@wallerlaw.com
lauran.sturm@wallerlaw.com
Local Counsel for St. Cecilia Congregation and Aquinas College

* *pro hac vice* applications forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2013, I filed the foregoing Plaintiffs' Complaint with the Clerk of the United States District Court for the Middle District of Tennessee and, upon receipt of the returned summonses, will mail the foregoing by registered mail *via* the United States Postal Service to the following:

Kathleen Sebelius, Secretary
U.S. Department of Health & Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

U.S. Department of Health & Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

Thomas Perez, Secretary
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Jacob J. Lew, Secretary
U.S. Department of Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

U.S. Department of Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Department of Justice
Room B103
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

David Rivera, Acting U.S. Attorney
c/o Civil Process Clerk
United States Department of Justice
United States Attorney's Office
Middle District of Tennessee
110 Ninth Avenue South, Suite A961
Nashville, TN 37203

/s/ Lauran M. Sturm
Lauran M. Sturm
One of the Attorneys for Plaintiffs

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN CATHOLIC CONFERENCE, *et al.*, *Plaintiffs*,	)	
	)	Case No.: 1:13-cv-01247
v.	)	The Honorable Gordon J. Quist
KATHLEEN SEBELIUS, *et al.*, *Defendants*.	)	*Electronically Filed*

DECLARATION OF PAUL A. LONG

I, Paul A. Long, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this Declaration. I submit this Declaration in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. I am familiar with and have personal knowledge of the facts set forth in this declaration. If called to testify, I would testify in a manner consistent with the statements set forth below.

2. I am employed as President and Chief Executive Officer for the Michigan Catholic Conference ("MCC"). I have been so employed since November 15, 2010. My responsibilities include

directing the development of short- and long-range objectives, policies, budgets, and operating plans for MCC; overseeing the consistent interpretation, implementation, and achievement of the various objectives, policies, budgets, and plans approved by the Board of Directors; and establishing an organization hierarchy and delegating limits of authority to subordinate executives regarding policies, contractual commitments, expenditures, and personnel matters.

3. Based upon my job responsibilities and experience, I am personally familiar with planning and budgeting relating to health benefits for MCC and Catholic Charities of the Diocese of Kalamazoo ("Catholic Charities") (hereinafter collectively, "Plaintiffs").

I. MCC Health Plan

4. MCC sponsors and administers health benefits programs for participating Catholic institutions in Michigan, including the MCC Second Amended and Restated Group Health Benefit Plan for Employees ("MCC Plan").

5. The MCC Plan offers health benefits to qualifying employees of "Covered Units," and defines "Covered Unit" to mean:

> a parish, school, institution, organization, corporation or other entity in the State of Michigan which is an integral part of the Catholic Church, engaged in carrying out the functions of the Catholic Church, and under the control of an Archbishop or Bishop of a Diocese in the Province of Detroit, unless the Archbishop or Bishop specifically exempts the unit from status

> as a Covered Unit. The Michigan Catholic Conference shall be a Covered Unit. Any parish, school, institution, organization, corporation or other entity listed within the Kenedy Directory which is an integral part of the Catholic Church and which is engaged in carrying out the functions of the Catholic Church, but which is not under the control of an Archbishop or Bishop of a Diocese in the Province of Detroit, may become a Covered Unit pursuant to a written agreement between its governing authority and the Michigan Catholic Conference.

6. As of the date of the Complaint, approximately 827 Catholic institutions and approximately 10,374 participants receive their health insurance through the MCC Plan, including Plaintiff Catholic Charities Dioceses of Kalamazoo ("Catholic Charities").

7. The MCC Plan truly is the group health plan for the Catholic Church in Michigan. The seven Catholic Dioceses in Michigan use the MCC Plan to provide their employees with health insurance. These Dioceses cover the entire State:

> a. The *Archdiocese of Detroit* encompasses over 270 parishes in six counties in the greater Detroit area. Since 2009, it has been led by Archbishop Allen Vigneron.
>
> b. The *Diocese of Grand Rapids* encompasses 98 parishes in eleven counties in western Michigan. Since June 2013, it has been led by Bishop David J. Walkowiak.

c. The *Diocese of Lansing* encompasses 89 parishes in ten counties in central Michigan. Since 2008, it has been led by Bishop Earl A. Boyea.

d. The *Diocese of Kalamazoo* encompasses 69 parishes in nine counties in southwestern Michigan. Since 2009, it has been led by Bishop Paul J. Bradley.

e. The *Diocese of Saginaw* encompasses 83 parishes in eleven counties in Michigan's "thumb and index finger." Since 2009, it has been led by Bishop Joseph R. Cistone.

f. The *Diocese of Gaylord* encompasses 80 parishes in 21 counties in the northern part of Michigan's lower peninsula. It currently has a Vacant See.

g. The *Diocese of Marquette* encompasses 94 parishes in the fifteen counties in Michigan's upper peninsula. It currently has a Vacant See.

8. These seven Dioceses carry out the spiritual, educational, and social-service missions of the Catholic Church in Michigan. The Dioceses, along with their local parishes, provide spiritual ministry to the approximately 2.1 million Catholics in Michigan that represent 21% of Michigan's population. They ensure the availability of the sacraments to all Catholics living in or visiting Michigan. The Dioceses conduct their educational missions, in part, through their various Offices of Catholic Schools and their many affiliated elementary and high schools, most of whom participate in the MCC Plan. The Dioceses perform charitable social services through their various

Diocesan ministries, their offices of Christian Service, and/or their local parishes. These Diocesan and parish programs range from ministering to the prison population, to funding local self-help projects for the poor, to offering low-cost, legal representation to indigent immigrants, to providing meals to the homeless or visits to nursing homes.

9. The MCC Plan provides health benefits for many affiliated nonprofit entities that assist the Dioceses in carrying out the Church's mission. For example, many Catholic schools and charitable organizations rely on the MCC Plan to provide their employees with health insurance. Many of these organizations do not qualify for Defendants' religious-employer exemption and so are instead subject to the so-called "accommodation."

10. The MCC Plan is able to keep its costs (and the costs to individual participants and Covered Units) lower than they otherwise would be by maximizing on the economies of scale resulting from its large size.

11. Covered Units may allow their lay employees to participate in the MCC Plan, which consists of self-funded medical and prescription benefits administered by separate third-party administrators, Blue Cross Blue Shield of Michigan and Express Scripts, respectively. Approximately 6,429 employees (10,374 lives) participate in this program.

12. Qualified priests may also participate in self-funded medical and prescription benefits under the MCC Plan, administered by the same third-party administrators. Approximately 704 clergy throughout Michigan participate in this program.

13. All of MCC's current health benefit programs comply with Catholic teachings. The MCC Plan

expressly indicates that "in no event shall any benefit be provided which violates the tenets of the Catholic Church, including but not limited to expenses relating to sterilizations, abortions, and/or birth control devices." Thus, none of the MCC Plan's programs offers insurance coverage for abortion, sterilization, or contraceptive services.

14. The MCC Plan and its benefit programs do not meet the definition of a "grandfathered" plan within the meaning of the Affordable Care Act. The Michigan Catholic Conference has not included and does not include a statement in the MCC Plan materials provided to participants or beneficiaries informing them that it believes it is a grandfathered plan within the meaning of section 1251 of the Affordable Care Act, as would be required to maintain the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

15. The MCC Plan lost its grandfathered status because the PPO benefit program increased the emergency room co-payment amount from $50 to $100, and increased the prescription co-payment amount for non-formulary brand name drugs from $30 to $50.

16. The next plan year for the MCC Plan begins on January 1, 2014. Accordingly, MCC and its Covered Units must be prepared to comply with the regulations at issue in this lawsuit by January 1, 2014.

II. MCC Is Forced To Offer A Plan That Facilitates Coverage Of The Objectionable Services

17. Consistent with Church teachings regarding the sanctity of life, the MCC Plan has historically excluded coverage for abortion-inducing drugs,

sterilization services, contraceptives, and related counseling services.

18. In the past, the MCC Plan notified its TPA that it would not cover the objectionable services. But it, and the organizations insured through the MCC Plan, never designated the TPA to provide those services to their employees. And, the MCC Plan's notification never before triggered the provision of the objectionable services.

19. The regulations at issue in this lawsuit (the "Mandate"), including the final rules issued by Defendants on July 2, 2013 (the "Final Rule"), injure MCC by requiring it to offer a health insurance plan that may be used to facilitate access to the objectionable services.

20. Though MCC meets the Mandate's definition of an integrated auxiliary of a religious employer and is thus exempt from facilitating access to the objectionable services for its own employees, this exemption does not apply to the employees of non-exempt, affiliated entities, which are insured through the MCC Plan, including Plaintiff Catholic Charities.

21. The originally proposed regulations allowed Catholic organizations such as Plaintiff Catholic Charities, which provide health insurance to its employees through the health plans of an affiliated, exempt "religious employer" (here, MCC), to receive the benefit of that exemption regardless of whether they independently qualified as "religious employers" or as "integrated auxiliaries." However, the Final Rule eliminates that safeguard.

22. The Mandate requires employers, on pain of substantial financial penalties, to facilitate access to abortion-inducing drugs, sterilization services,

contraceptives, and related counseling services through their employee health plans, in violation of Catholic beliefs.

23. As a result, MCC, which provides coverage to employees of non-exempt, affiliated entities such as Catholic Charities, is forced to either: (1) sponsor a plan that will provide Plaintiff Catholic Charities, and other non-exempt Catholic organizations, with access to the objectionable products and services; (2) sponsor a plan that will require the non-exempt organizations to self-certify and facilitate provision of the objectionable services; (3) sponsor a plan that will lead to onerous fines for non-exempt organizations that fail to self-certify and facilitate provision of the objectionable services, *see* 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012); or (4) expel these non-exempt organizations from MCC's health insurance plans, thereby forcing expelled entities into an arrangement with another insurance provider that will, in turn, provide or procure the objectionable products and services.

24. This first alternative violates MCC's sincerely held religious beliefs.

25. The second option constitutes a substantial burden on MCC's religious beliefs by compelling MCC to submit to the government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

26. The third option is not financially feasible.

27. The fourth option also constitutes a substantial burden on MCC's religious beliefs by compelling MCC to submit to the government's interference with its structure and internal operations by accepting a construct that (1) divides

churches from their ministries, and (2) prevents it from ensuring that entities in Michigan do not provide the objectionable products and services.

28. If MCC refuses to continue offering insurance to Plaintiff Catholic Charities, and Catholic Charities does not provide coverage for the objectionable services, Catholic Charities could be subject to fines which could reduce its ability to provide charitable services.

29. If MCC does not expel Catholic Charities from the MCC Plan, and Catholic Charities fails to self-certify and offer the objectionable services, MCC may be liable for any punitive fines leveled against Catholic Charities.

30. The Mandate results in further facilitation harms. MCC also will have to provide its TPA with the names of individuals insured through the MCC Plan, who are employees or dependents of employees of non-exempt organizations, such as Plaintiff Catholic Charities. Providing these names enables, and indeed triggers, the TPA reaching out to these individuals to notify them that the TPA will arrange for coverage and provision of the objectionable services.

III. Injuries Relating To Past And Current Planning And Time Needed For Future Planning And Budgeting

31. Injuries relating to altering the MCC Plan are imminent and impending. Plaintiff Catholic Charities and other non-exempt organizations must have any benefit changes finalized by the next plan year starting on January 1, 2014. Open enrollment was held October 1-15, 2013. Accordingly, MCC is now administering participant changes.

32. MCC and other non-exempt organizations covered under the MCC Plan have already expended and continue to expend significant personnel hours and costs attempting to discern the scope of the Mandate, the parameters of the religious employer exemption, the qualifications for the safe harbor, and how all of these impact Plaintiffs.

33. If the MCC Plan no longer offers coverage to Catholic Charities, the other entities insured through the MCC Plan may well have to pay more for health insurance because each organization would be pooling financial resources in a smaller group. Catholic Charities also would have to pay more to obtain its own insurance, should it choose to do so. To the extent that Plaintiff Catholic Charities is able to continue providing healthcare to its employees, the benefits would certainly not be as cost-efficient nor as comprehensive as what is currently provided.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Paul A. Long

Paul A. Long

Executed on November 20, 2013

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN CATHOLIC CONFERENCE, *et al.*, *Plaintiffs*, **v. KATHLEEN SEBELIUS, *et al.*,** *Defendants*.	Case No.: 1:13-cv-01247 The Honorable Gordon J. Quist *Electronically Filed*

DECLARATION OF MOST REV. MICHAEL BYRNES, S.T.D.

I, Most Rev. Michael Byrnes, S.T.D., pursuant to 28 U.S.C. § 1746, depose and state as follows:

1. I am over the age of 18 and competent to make this declaration in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. I am familiar with and have personal knowledge of the facts set forth in this declaration. If called to testify, I would testify in a manner consistent with the statements set forth below.

2. I have a doctorate degree in Biblical Theology. Having served for eight years as vice rector and assistant professor of Sacred Scripture at Sacred Heart Major Seminary, I am presently an auxiliary bishop of the Archdiocese of Detroit. I am the

Archbishop's delegate to the health ethics committee for the Archdiocese and serve as his liaison to the Catholic hospitals in our area.

3. The Magisterium, which consists of the Pope and the College of Bishops in union with the Pope, decides what is required, allowed, and forbidden regarding the elements of worship, doctrines of faith and morals, and the fulfillment of the Church's mission in the world, including how that mission occurs within the settings of Catholic schools, agencies, and other institutions. The seven Bishops from the seven Dioceses that comprise the Michigan Catholic Conference ("MCC") are responsible for carrying out that mission in the Dioceses and are the final arbiters of ecclesiastic matters in the Dioceses.

4. The Bishops directly oversee the administration of non-exempt organizations, such as Plaintiff Catholic Charities, that receive their healthcare insurance coverage through the healthcare plan covered by MCC Second Amended and Restated Group Health Benefit Plan for Employees MCC ("MCC Plan"). For example, Bishop Bradley is a member of the Board of Plaintiff Catholic Charities, and has certain reserved powers in his role on the Board. The Bishop oversees the management of Catholic Charities, and ensures that they adhere to Catholic doctrine at all times and in all manners.

5. The Bishops are ultimately responsible for ensuring that all policies of organizations affiliated with their respective dioceses comply with Catholic doctrine.

I. Plaintiffs' Religious Objections To The Mandate

6. Catholic religious teaching prohibits subsidizing, providing, and/or facilitating coverage for abortion-inducing drugs, sterilization services, contraceptives, and related counseling services. The term contraceptives refers to artificial contraceptives, as opposed to Natural Family Planning, which is a method of regulating births consistent with Catholic teachings. These well-established religious beliefs flow from a unified system of beliefs articulated in the Catechism of the Catholic Church. One of the central tenets of this system is belief in the sanctity of human life and the dignity of all persons.

7. Thus, Plaintiffs believe, in accordance with the Catechism of the Catholic Church, that the "dignity of the human person is rooted in his creation in the image and likeness of God." *Catechism of the Catholic Church* ¶ 1700.

8. One outgrowth of belief in human life and dignity is Plaintiffs' well-established belief that "[h]uman life must be respected and protected absolutely from the moment of conception." *Id.* ¶ 2270. As a result, Plaintiffs believe that abortion is prohibited and that they cannot facilitate the provision of abortions. *Id.* ¶¶ 2271-72.

9. Furthermore, Plaintiffs adhere to Catholic teachings that prohibit any action which "render[s] procreation impossible" and which, more specifically, regard direct sterilization as "unacceptable." *Id.* ¶¶ 2370, 2399. Plaintiffs also believe that contraception is immoral, and by expressing that conviction they routinely seek to "influence" or persuade their fellow citizens of that view.

10. Consistent with Church teachings regarding the sanctity of human life, the MCC Plan has historically excluded coverage for abortion-inducing drugs, sterilization services, contraceptives (except when used for non-contraceptive purposes), and related counseling services.

11. The regulations at issue in this lawsuit (the "Mandate"), require employers, on pain of substantial financial penalties, to facilitate access to abortion-inducing drugs, sterilization services, contraceptives, and related counseling services through their employee health plans. Freedom of religion includes not just freedom to practice religion, but also freedom from coercion by civil authorities that would violate the principles adhered to by a religion.

12. Plaintiffs have determined that the Mandate violates Catholic doctrine and that complying with the Mandate would result in Plaintiffs facilitating the provision of the objectionable services.

13. It violates Plaintiffs' religious beliefs to facilitate the objectionable coverage and services, even if Plaintiffs do not have to contract, arrange, pay, or refer for the objectionable coverage and services.

14. When Plaintiffs are prohibited from engaging in certain conduct, they are equally prohibited from designating or assisting someone else to do it for them. Here, Plaintiffs are themselves prohibited from providing this coverage, including for abortion-inducing drugs which Plaintiffs believe to be a grave moral evil, and are equally prohibited from designating or assisting their third-party administrator ("TPA") in providing the coverage. This constitutes immoral material cooperation in the

grave moral evil. This is true even though Plaintiffs do not intend the immoral act, since Plaintiffs are being forced to act with knowledge that a grave moral evil will result from their conduct. In past years, however, there have been no religious violations in informing their TPA of Plaintiffs' religious beliefs because it did not trigger the violation of those beliefs.

15. There is no prohibition in paying a salary to Plaintiffs' employees, even if those employees may use the money to act contrary to Catholic doctrine. But that is completely different from the situation here since it does not constitute material cooperation with a grave immoral act. For example, when MCC Plan or Catholic Charities pay an employee's salary, it does not designate the employee to purchase pornography, does not designate the employee to administer a program that supplies pornography, and does not trigger the provision of pornography.

16. Accordingly, Plaintiffs cannot facilitate coverage for the objectionable services through their TPA nor can the Plaintiffs' Membership Boards approve any policies that would result in such facilitation.

17. Moreover, as final arbiter of ecclesiastic matters in the Diocese of Kalamazoo, Bishop Bradley cannot facilitate coverage of the objectionable services for nonexempt entities, such as Plaintiff Catholic Charities.

II. Plaintiffs Are Forced To Facilitate Coverage Of The Objectionable Services

18. The so-called "accommodation" does not resolve Plaintiffs' religious objection. The Mandate forces Catholic Charities to facilitate access to

products and services antithetical to the Catholic faith.

19. Indeed, it is Catholic Charities' decision to provide group health plans to its employees which results in facilitation of the objectionable services in violation of Plaintiff's religious beliefs.

20. In order to be eligible for the so-called "accommodation," Plaintiff Catholic Charities must provide a "certification" to the MCC Plan's third-party administrator ("TPA") setting forth its religious objections to the Mandate. The provision of this "certification," in turn, automatically triggers an obligation on the part of the TPA to provide or obtain the objectionable coverage for the employees of Catholic Charities.

21. The self-certification form also designates the TPA as Plaintiff Catholic Charities' plan administrator for the provision of the objectionable services. Without the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to Plaintiff's employees. Giving notice to the TPA of Plaintiffs' beliefs was not a violation in prior years because it did not trigger the provision of the objectionable services and did not designate the TPA to provide the objectionable coverage.

22. A religious organization's self-certification, therefore, is a trigger and but-for cause of the objectionable coverage. In other words, under the final version of the Mandate, Catholic Charities' decision to participate in the MCC Plan triggers the provision of contraceptive benefits to its employees in a manner contrary to its beliefs. This direct causal connection to immoral activity is material

cooperation in contravention of Plaintiff's religious beliefs. Therefore, it is morally improper for Catholic Charities to execute the self-certification, which will result in facilitating the provision of the objectionable services to its employees.

23. MCC is forced to further facilitate evil by providing the MCC Plan's TPA with the names of individuals insured through the MCC Plan, who are employees or dependents of employees of nonexempt entities, such as Plaintiff Catholic Charities. By providing these names, MCC enables, and indeed triggers, the TPA reaching out to these individuals to notify them that the TPA will arrange for coverage and provision of the objectionable services. This is material cooperation in violation of Catholic beliefs.

24. MCC's provision of health benefits to its employees and to the employees of affiliated entities, such as Plaintiff Catholic Charities, reflects the Catholic social teaching that healthcare is among those basic rights which flow from the sanctity and dignity of human life. For MCC to expel nonexempt entities from the MCC Plan or for nonexempt entities to have to drop healthcare benefits—in order to avoid the provision of the objectionable services—would inhibit Plaintiffs' ability to follow this teaching.

25. As Catholic entities, Plaintiffs believe that they must bear witness, including in their deeds, to the beliefs of the Catholic Church and that it would be scandal to act inconsistently with those beliefs. Plaintiffs bear witness to those teachings not only by word, but also by deed, including their actions regarding the provision of employee health insurance. Were Plaintiffs to comply with the Mandate, in addition to impermissibly facilitating access to the

objectionable services, Plaintiffs would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings. Plaintiffs cannot bear witness to their teachings and at the same time act in a way that thwarts the transmission of life.

26. Moreover, Plaintiffs regularly speak out against abortions and the Mandate requires Plaintiffs to facilitate the provision of abortion-inducing drugs, sterilization services, contraceptives, and related counseling services in direct contradiction of Plaintiffs' speech.

III. The Religious Employer Exemption Does Not Work And Seeks To Divide The Church

27. The Mandate artificially splits the Catholic Church in two, dividing the essential worship component from the equally essential charitable and educational components, the former which receives the exemption and the latter which does not—preventing the Church from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. Religious worship is an indispensable component of the Catholic faith, however, worship cannot be separated from providing good works and education, which are also indispensable and integral components of the Catholic faith and are at the heart of the mission of Catholic Church. Plaintiffs exercise the Catholic faith through worship, good works, and by providing education. In sum, the mission of the Church, which is accomplished through good works and education, necessarily flows from the nature of the Catholic religion and cannot be separated from it.

28. By providing insurance to Catholic Charities through the MCC Plan, the Diocese of Kalamazoo has been able to ensure that the health benefits provided by Catholic Charities was consistent with Catholic teachings. And the same is true for all of the other nonexempt entities in the seven Dioceses in Michigan that provide insurance through the MCC Plan. However, now, MCC is forced to either expel these entities from the MCC Plan or facilitate coverage that does not comply with Catholic teaching. If expelled, the Dioceses will no longer be able to oversee the plans offered by the nonexempt entities that previously were covered through the MCC Plan.

29. MCC may well be forced to expel Plaintiff Catholic Charities from the MCC Plan to avoid facilitating coverage of the objectionable services, beginning January 1, 2014. If so, Plaintiff Catholic Charities would be forced to go out and obtain its own insurance so that its employees would still have access to healthcare benefits.

30. Even if Catholic Charities did obtain insurance separate from the MCC Plan, it would still need to provide the self-certification to its new TPA or insurer. Therefore, it still would be facilitating coverage of the objectionable services in violation of its religious beliefs, while at the same time being subject to higher costs for insurance. In his role as sole member of Catholic Charities, Bishop Bradley could not approve any policies that would result in such facilitation.

31. If Plaintiff Catholic Charities failed to comply with the Mandate, it could be exposed to fines. Such fines would likely cripple Plaintiff Catholic Charities

and its ability to provide social and educational services to thousands in the local community.

I hereby declare under penalty of perjury that the foregoing is true and correct.

_____

Most Rev. Michael Byrnes, S.T.D.

Executed on: November 18, 2013

APPENDIX M

Issued by USCCB, November 17, 2009

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Ethical and Religious Directives for Catholic Health Care Services

Fifth Edition

United States Conference of Catholic Bishops

CONTENTS

PREAMBLE

Health care in the United States is marked by extraordinary change. Not only is there continuing change in clinical practice due to technological advances, but the health care system in the United States is being challenged by both institutional and social factors as well. At the same time, there are a number of developments within the Catholic Church affecting the ecclesial mission of health care. Among these are significant changes in religious orders and congregations, the increased involvement of lay men and women, a heightened awareness of the Church's social role in the world, and developments in moral theology since the Second Vatican Council. A contemporary understanding of the Catholic health care ministry must take into account the new challenges presented by transitions both in the Church and in American society.

Throughout the centuries, with the aid of other sciences, a body of moral principles has emerged that expresses the Church's teaching on medical and moral matters and has proven to be pertinent and applicable to the ever-changing circumstances of health care and its delivery. In response to today's challenges, these same moral principles of Catholic teaching provide the rationale and direction for this revision of the *Ethical and Religious Directives for Catholic Health Care Services*.

These Directives presuppose our statement *Health and Health Care* published in 1981.[1] There we presented the theological principles that guide the Church's vision of health care, called for all Catholics to share in the healing mission of the Church, expressed our full commitment to the health care

ministry, and offered encouragement to all those who are involved in it. Now, with American health care facing even more dramatic changes, we reaffirm the Church's commitment to health care ministry and the distinctive Catholic identity of the Church's institutional health care services.[2] The purpose of these *Ethical and Religious Directives* then is twofold: first, to reaffirm the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person; second, to provide authoritative guidance on certain moral issues that face Catholic health care today.

The *Ethical and Religious Directives* are concerned primarily with institutionally based Catholic health care services. They address the sponsors, trustees, administrators, chaplains, physicians, health care personnel, and patients or residents of these institutions and services. Since they express the Church's moral teaching, these Directives also will be helpful to Catholic professionals engaged in health care services in other settings. The moral teachings that we profess here flow principally from the natural law, understood in the light of the revelation Christ has entrusted to his Church. From this source the Church has derived its understanding of the nature of the human person, of human acts, and of the goals that shape human activity.

The Directives have been refined through an extensive process of consultation with bishops, theologians, sponsors, administrators, physicians, and other health care providers. While providing standards and guidance, the Directives do not cover in detail all of the complex issues that confront Catholic health care today. Moreover, the Directives

will be reviewed periodically by the United States Conference of Catholic Bishops (formerly the National Conference of Catholic Bishops), in the light of authoritative church teaching, in order to address new insights from theological and medical research or new requirements of public policy.

The Directives begin with a general introduction that presents a theological basis for the Catholic health care ministry. Each of the six parts that follow is divided into two sections. The first section is in expository form; it serves as an introduction and provides the context in which concrete issues can be discussed from the perspective of the Catholic faith. The second section is in prescriptive form; the directives promote and protect the truths of the Catholic faith as those truths are brought to bear on concrete issues in health care.

GENERAL INTRODUCTION

The Church has always sought to embody our Savior's concern for the sick. The gospel accounts of Jesus' ministry draw special attention to his acts of healing: he cleansed a man with leprosy (Mt 8:1-4; Mk 1:40-42); he gave sight to two people who were blind (Mt 20:29-34; Mk 10:46-52); he enabled one who was mute to speak (Lk 11:14); he cured a woman who was hemorrhaging (Mt 9:20-22; Mk 5:25-34); and he brought a young girl back to life (Mt 9:18, 23-25; Mk 5:35-42). Indeed, the Gospels are replete with examples of how the Lord cured every kind of ailment and disease (Mt 9:35). In the account of Matthew, Jesus' mission fulfilled the prophecy of Isaiah: "He took away our infirmities and bore our diseases" (Mt 8:17; cf. Is 53:4).

Jesus' healing mission went further than caring only for physical affliction. He touched people at the deepest level of their existence; he sought their physical, mental, and spiritual healing (Jn 6:35, 11:25-27). He "came so that they might have life and have it more abundantly" (Jn 10:10).

The mystery of Christ casts light on every facet of Catholic health care: to see Christian love as the animating principle of health care; to see healing and compassion as a continuation of Christ's mission; to see suffering as a participation in the redemptive power of Christ's passion, death, and resurrection; and to see death, transformed by the resurrection, as an opportunity for a final act of communion with Christ.

For the Christian, our encounter with suffering and death can take on a positive and distinctive meaning through the redemptive power of Jesus'

suffering and death. As St. Paul says, we are "always carrying about in the body the dying of Jesus, so that the life of Jesus may also be manifested in our body" (2 Cor 4:10). This truth does not lessen the pain and fear, but gives confidence and grace for bearing suffering rather than being overwhelmed by it. Catholic health care ministry bears witness to the truth that, for those who are in Christ, suffering and death are the birth pangs of the new creation. "God himself will always be with them [as their God]. He will wipe every tear from their eyes, and there shall be no more death or mourning, wailing or pain, [for] the old order has passed away" (Rev 21:3-4).

In faithful imitation of Jesus Christ, the Church has served the sick, suffering, and dying in various ways throughout history. The zealous service of individuals and communities has provided shelter for the traveler; infirmaries for the sick; and homes for children, adults, and the elderly.[3] In the United States, the many religious communities as well as dioceses that sponsor and staff this country's Catholic health care institutions and services have established an effective Catholic presence in health care. Modeling their efforts on the gospel parable of the Good Samaritan, these communities of women and men have exemplified authentic neighborliness to those in need (Lk 10:25-37). The Church seeks to ensure that the service offered in the past will be continued into the future.

While many religious communities continue their commitment to the health care ministry, lay Catholics increasingly have stepped forward to collaborate in this ministry. Inspired by the example of Christ and mandated by the Second Vatican

Council, lay faithful are invited to a broader and more intense field of ministries than in the past.[4] By virtue of their Baptism, lay faithful are called to participate actively in the Church's life and mission.[5] Their participation and leadership in the health care ministry, through new forms of sponsorship and governance of institutional Catholic health care, are essential for the Church to continue her ministry of healing and compassion. They are joined in the Church's health care mission by many men and women who are not Catholic.

Catholic health care expresses the healing ministry of Christ in a specific way within the local church. Here the diocesan bishop exercises responsibilities that are rooted in his office as pastor, teacher, and priest. As the center of unity in the diocese and coordinator of ministries in the local church, the diocesan bishop fosters the mission of Catholic health care in a way that promotes collaboration among health care leaders, providers, medical professionals, theologians, and other specialists. As pastor, the diocesan bishop is in a unique position to encourage the faithful to greater responsibility in the healing ministry of the Church. As teacher, the diocesan bishop ensures the moral and religious identity of the health care ministry in whatever setting it is carried out in the diocese. As priest, the diocesan bishop oversees the sacramental care of the sick. These responsibilities will require that Catholic health care providers and the diocesan bishop engage in ongoing communication on ethical and pastoral matters that require his attention.

In a time of new medical discoveries, rapid technological developments, and social change, what

is new can either be an opportunity for genuine advancement in human culture, or it can lead to policies and actions that are contrary to the true dignity and vocation of the human person. In consultation with medical professionals, church leaders review these developments, judge them according to the principles of right reason and the ultimate standard of revealed truth, and offer authoritative teaching and guidance about the moral and pastoral responsibilities entailed by the Christian faith.[6] While the Church cannot furnish a ready answer to every moral dilemma, there are many questions about which she provides normative guidance and direction. In the absence of a determination by the magisterium, but never contrary to church teaching, the guidance of approved authors can offer appropriate guidance for ethical decision making.

Created in God's image and likeness, the human family shares in the dominion that Christ manifested in his healing ministry. This sharing involves a stewardship over all material creation (Gn 1:26) that should neither abuse nor squander nature's resources. Through science the human race comes to understand God's wonderful work; and through technology it must conserve, protect, and perfect nature in harmony with God's purposes. Health care professionals pursue a special vocation to share in carrying forth God's life-giving and healing work.

The dialogue between medical science and Christian faith has for its primary purpose the common good of all human persons. It presupposes that science and faith do not contradict each other. Both are grounded in respect for truth and freedom.

As new knowledge and new technologies expand, each person must form a correct conscience based on the moral norms for proper health care.

PART ONE

The Social Responsibility of Catholic Health Care Services

Introduction

Their embrace of Christ's healing mission has led institutionally based Catholic health care services in the United States to become an integral part of the nation's health care system. Today, this complex health care system confronts a range of economic, technological, social, and moral challenges. The response of Catholic health care institutions and services to these challenges is guided by normative principles that inform the Church's healing ministry.

First, Catholic health care ministry is rooted in a commitment to promote and defend human dignity; this is the foundation of its concern to respect the sacredness of every human life from the moment of conception until death. The first right of the human person, the right to life, entails a right to the means for the proper development of life, such as adequate health care.[7]

Second, the biblical mandate to care for the poor requires us to express this in concrete action at all levels of Catholic health care. This mandate prompts us to work to ensure that our country's health care delivery system provides adequate health care for the poor. In Catholic institutions, particular attention should be given to the health care needs of the poor, the uninsured, and the underinsured.[8]

Third, Catholic health care ministry seeks to contribute to the common good. The common good is realized when economic, political, and social conditions ensure protection for the fundamental

rights of all individuals and enable all to fulfill their common purpose and reach their common goals.[9]

Fourth, Catholic health care ministry exercises responsible stewardship of available health care resources. A just health care system will be concerned both with promoting equity of care—to assure that the right of each person to basic health care is respected—and with promoting the good health of all in the community. The responsible stewardship of health care resources can be accomplished best in dialogue with people from all levels of society, in accordance with the principle of subsidiarity and with respect for the moral principles that guide institutions and persons.

Fifth, within a pluralistic society, Catholic health care services will encounter requests for medical procedures contrary to the moral teachings of the Church. Catholic health care does not offend the rights of individual conscience by refusing to provide or permit medical procedures that are judged morally wrong by the teaching authority of the Church.

Directives

1. A Catholic institutional health care service is a community that provides health care to those in need of it. This service must be animated by the Gospel of Jesus Christ and guided by the moral tradition of the Church.

2. Catholic health care should be marked by a spirit of mutual respect among caregivers that disposes them to deal with those it serves and their families with the compassion of Christ, sensitive to their vulnerability at a time of special need.

3. In accord with its mission, Catholic health care should distinguish itself by service to and advocacy for those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination: the poor; the uninsured and the underinsured; children and the unborn; single parents; the elderly; those with incurable diseases and chemical dependencies; racial minorities; immigrants and refugees. In particular, the person with mental or physical disabilities, regardless of the cause or severity, must be treated as a unique person of incomparable worth, with the same right to life and to adequate health care as all other persons.

4. A Catholic health care institution, especially a teaching hospital, will promote medical research consistent with its mission of providing health care and with concern for the responsible stewardship of health care resources. Such medical research must adhere to Catholic moral principles.

5. Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel.

6. A Catholic health care organization should be a responsible steward of the health care resources available to it. Collaboration with other health care providers, in ways that do not compromise Catholic social and moral teaching, can be an effective means of such stewardship.[10]

7. A Catholic health care institution must treat its employees respectfully and justly. This responsibility includes: equal employment opportunities for anyone qualified for the task, irrespective of a person's race, sex, age, national origin, or disability; a workplace that promotes employee participation; a work environment that ensures employee safety and well-being; just compensation and benefits; and recognition of the rights of employees to organize and bargain collectively without prejudice to the common good.

8. Catholic health care institutions have a unique relationship to both the Church and the wider community they serve. Because of the ecclesial nature of this relationship, the relevant requirements of canon law will be observed with regard to the foundation of a new Catholic health care institution; the substantial revision of the mission of an institution; and the sale, sponsorship transfer, or closure of an existing institution.

9. Employees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives. They should maintain professional standards and promote the institution's commitment to human dignity and the common good.

PART TWO

The Pastoral and Spiritual Responsibility of Catholic Health Care

Introduction

The dignity of human life flows from creation in the image of God (Gn 1:26), from redemption by Jesus Christ (Eph 1:10; 1 Tm 2:4-6), and from our common destiny to share a life with God beyond all corruption (1 Cor 15:42-57). Catholic health care has the responsibility to treat those in need in a way that respects the human dignity and eternal destiny of all. The words of Christ have provided inspiration for Catholic health care: "I was ill and you cared for me" (Mt 25:36). The care provided assists those in need to experience their own dignity and value, especially when these are obscured by the burdens of illness or the anxiety of imminent death.

Since a Catholic health care institution is a community of healing and compassion, the care offered is not limited to the treatment of a disease or bodily ailment but embraces the physical, psychological, social, and spiritual dimensions of the human person. The medical expertise offered through Catholic health care is combined with other forms of care to promote health and relieve human suffering. For this reason, Catholic health care extends to the spiritual nature of the person. "Without health of the spirit, high technology focused strictly on the body offers limited hope for healing the whole person."[11] Directed to spiritual needs that are often appreciated more deeply during times of illness, pastoral care is an integral part of Catholic health care. Pastoral care encompasses the full range of spiritual services, including a listening presence; help in dealing with

powerlessness, pain, and alienation; and assistance in recognizing and responding to God's will with greater joy and peace. It should be acknowledged, of course, that technological advances in medicine have reduced the length of hospital stays dramatically. It follows, therefore, that the pastoral care of patients, especially administration of the sacraments, will be provided more often than not at the parish level, both before and after one's hospitalization. For this reason, it is essential that there be very cordial and cooperative relationships between the personnel of pastoral care departments and the local clergy and ministers of care.

Priests, deacons, religious, and laity exercise diverse but complementary roles in this pastoral care. Since many areas of pastoral care call upon the creative response of these pastoral caregivers to the particular needs of patients or residents, the following directives address only a limited number of specific pastoral activities.

Directives

10. A Catholic health care organization should provide pastoral care to minister to the religious and spiritual needs of all those it serves. Pastoral care personnel—clergy, religious, and lay alike—should have appropriate professional preparation, including an understanding of these Directives.

11. Pastoral care personnel should work in close collaboration with local parishes and community clergy. Appropriate pastoral services and/or referrals should be available to all in keeping with their religious beliefs or affiliation.

12. For Catholic patients or residents, provision for the sacraments is an especially important part of

Catholic health care ministry. Every effort should be made to have priests assigned to hospitals and health care institutions to celebrate the Eucharist and provide the sacraments to patients and staff.

13. Particular care should be taken to provide and to publicize opportunities for patients or residents to receive the sacrament of Penance.

14. Properly prepared lay Catholics can be appointed to serve as extraordinary ministers of Holy Communion, in accordance with canon law and the policies of the local diocese. They should assist pastoral care personnel—clergy, religious, and laity—by providing supportive visits, advising patients regarding the availability of priests for the sacrament of Penance, and distributing Holy Communion to the faithful who request it.

15. Responsive to a patient's desires and condition, all involved in pastoral care should facilitate the availability of priests to provide the sacrament of Anointing of the Sick, recognizing that through this sacrament Christ provides grace and support to those who are seriously ill or weakened by advanced age. Normally, the sacrament is celebrated when the sick person is fully conscious. It may be conferred upon the sick who have lost consciousness or the use of reason, if there is reason to believe that they would have asked for the sacrament while in control of their faculties.

16. All Catholics who are capable of receiving Communion should receive Viaticum when they are in danger of death, while still in full possession of their faculties.[12]

17. Except in cases of emergency (i.e., danger of death), any request for Baptism made by adults or for

infants should be referred to the chaplain of the institution. Newly born infants in danger of death, including those miscarried, should be baptized if this is possible.[13] In case of emergency, if a priest or a deacon is not available, anyone can validly baptize.[14] In the case of emergency Baptism, the chaplain or the director of pastoral care is to be notified.

18. When a Catholic who has been baptized but not yet confirmed is in danger of death, any priest may confirm the person.[15]

19. A record of the conferral of Baptism or Confirmation should be sent to the parish in which the institution is located and posted in its baptism/confirmation registers.

20. Catholic discipline generally reserves the reception of the sacraments to Catholics. In accord with canon 844, § 3, Catholic ministers may administer the sacraments of Eucharist, Penance, and Anointing of the Sick to members of the oriental churches that do not have full communion with the Catholic Church, or of other churches that in the judgment of the Holy See are in the same condition as the oriental churches, if such persons ask for the sacraments on their own and are properly disposed.

With regard to other Christians not in full communion with the Catholic Church, when the danger of death or other grave necessity is present, the four conditions of canon 844, § 4, also must be present, namely, they cannot approach a minister of their own community; they ask for the sacraments on their own; they manifest Catholic faith in these sacraments; and they are properly disposed. The diocesan bishop has the responsibility to oversee this pastoral practice.

21. The appointment of priests and deacons to the pastoral care staff of a Catholic institution must have the explicit approval or confirmation of the local bishop in collaboration with the administration of the institution. The appointment of the director of the pastoral care staff should be made in consultation with the diocesan bishop.

22. For the sake of appropriate ecumenical and interfaith relations, a diocesan policy should be developed with regard to the appointment of non-Catholic members to the pastoral care staff of a Catholic health care institution. The director of pastoral care at a Catholic institution should be a Catholic; any exception to this norm should be approved by the diocesan bishop.

PART THREE

The Professional-Patient Relationship

Introduction

A person in need of health care and the professional health care provider who accepts that person as a patient enter into a relationship that requires, among other things, mutual respect, trust, honesty, and appropriate confidentiality. The resulting free exchange of information must avoid manipulation, intimidation, or condescension. Such a relationship enables the patient to disclose personal information needed for effective care and permits the health care provider to use his or her professional competence most effectively to maintain or restore the patient's health. Neither the health care professional nor the patient acts independently of the other; both participate in the healing process.

Today, a patient often receives health care from a team of providers, especially in the setting of the modern acute-care hospital. But the resulting multiplication of relationships does not alter the personal character of the interaction between health care providers and the patient. The relationship of the person seeking health care and the professionals providing that care is an important part of the foundation on which diagnosis and care are provided. Diagnosis and care, therefore, entail a series of decisions with ethical as well as medical dimensions. The health care professional has the knowledge and experience to pursue the goals of healing, the maintenance of health, and the compassionate care of the dying, taking into account the patient's convictions and spiritual needs, and the moral responsibilities of all concerned. The person in need

of health care depends on the skill of the health care provider to assist in preserving life and promoting health of body, mind, and spirit. The patient, in turn, has a responsibility to use these physical and mental resources in the service of moral and spiritual goals to the best of his or her ability.

When the health care professional and the patient use institutional Catholic health care, they also accept its public commitment to the Church's understanding of and witness to the dignity of the human person. The Church's moral teaching on health care nurtures a truly interpersonal professional-patient relationship. This professional-patient relationship is never separated, then, from the Catholic identity of the health care institution. The faith that inspires Catholic health care guides medical decisions in ways that fully respect the dignity of the person and the relationship with the health care professional.

Directives

23. The inherent dignity of the human person must be respected and protected regardless of the nature of the person's health problem or social status. The respect for human dignity extends to all persons who are served by Catholic health care.

24. In compliance with federal law, a Catholic health care institution will make available to patients information about their rights, under the laws of their state, to make an advance directive for their medical treatment. The institution, however, will not honor an advance directive that is contrary to Catholic teaching. If the advance directive conflicts with Catholic teaching, an explanation should be provided as to why the directive cannot be honored.

25. Each person may identify in advance a representative to make health care decisions as his or her surrogate in the event that the person loses the capacity to make health care decisions. Decisions by the designated surrogate should be faithful to Catholic moral principles and to the person's intentions and values, or if the person's intentions are unknown, to the person's best interests. In the event that an advance directive is not executed, those who are in a position to know best the patient's wishes—usually family members and loved ones—should participate in the treatment decisions for the person who has lost the capacity to make health care decisions.

26. The free and informed consent of the person or the person's surrogate is required for medical treatments and procedures, except in an emergency situation when consent cannot be obtained and there is no indication that the patient would refuse consent to the treatment.

27. Free and informed consent requires that the person or the person's surrogate receive all reasonable information about the essential nature of the proposed treatment and its benefits; its risks, side-effects, consequences, and cost; and any reasonable and morally legitimate alternatives, including no treatment at all.

28. Each person or the person's surrogate should have access to medical and moral information and counseling so as to be able to form his or her conscience. The free and informed health care decision of the person or the person's surrogate is to be followed so long as it does not contradict Catholic principles.

29. All persons served by Catholic health care have the right and duty to protect and preserve their bodily and functional integrity.[16] The functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available.[17]

30. The transplantation of organs from living donors is morally permissible when such a donation will not sacrifice or seriously impair any essential bodily function and the anticipated benefit to the recipient is proportionate to the harm done to the donor. Furthermore, the freedom of the prospective donor must be respected, and economic advantages should not accrue to the donor.

31. No one should be the subject of medical or genetic experimentation, even if it is therapeutic, unless the person or surrogate first has given free and informed consent. In instances of nontherapeutic experimentation, the surrogate can give this consent only if the experiment entails no significant risk to the person's well-being. Moreover, the greater the person's incompetency and vulnerability, the greater the reasons must be to perform any medical experimentation, especially nontherapeutic.

32. While every person is obliged to use ordinary means to preserve his or her health, no person should be obliged to submit to a health care procedure that the person has judged, with a free and informed conscience, not to provide a reasonable hope of benefit without imposing excessive risks and burdens on the patient or excessive expense to family or community.[18]

33. The well-being of the whole person must be taken into account in deciding about any therapeutic

intervention or use of technology. Therapeutic procedures that are likely to cause harm or undesirable side-effects can be justified only by a proportionate benefit to the patient.

34. Health care providers are to respect each person's privacy and confidentiality regarding information related to the person's diagnosis, treatment, and care.

35. Health care professionals should be educated to recognize the symptoms of abuse and violence and are obliged to report cases of abuse to the proper authorities in accordance with local statutes.

36. Compassionate and understanding care should be given to a person who is the victim of sexual assault. Health care providers should cooperate with law enforcement officials and offer the person psychological and spiritual support as well as accurate medical information. A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.[19]

37. An ethics committee or some alternate form of ethical consultation should be available to assist by advising on particular ethical situations, by offering educational opportunities, and by reviewing and recommending policies. To these ends, there should be appropriate standards for medical ethical

consultation within a particular diocese that will respect the diocesan bishop's pastoral responsibility as well as assist members of ethics committees to be familiar with Catholic medical ethics and, in particular, these Directives.

PART FOUR

Issues in Care for the Beginning of Life

Introduction

The Church's commitment to human dignity inspires an abiding concern for the sanctity of human life from its very beginning, and with the dignity of marriage and of the marriage act by which human life is transmitted. The Church cannot approve medical practices that undermine the biological, psychological, and moral bonds on which the strength of marriage and the family depends.

Catholic health care ministry witnesses to the sanctity of life "from the moment of conception until death."[20] The Church's defense of life encompasses the unborn and the care of women and their children during and after pregnancy. The Church's commitment to life is seen in its willingness to collaborate with others to alleviate the causes of the high infant mortality rate and to provide adequate health care to mothers and their children before and after birth.

The Church has the deepest respect for the family, for the marriage covenant, and for the love that binds a married couple together. This includes respect for the marriage act by which husband and wife express their love and cooperate with God in the creation of a new human being. The Second Vatican Council affirms:

> This love is an eminently human one. . . . It involves the good of the whole person. . . . The actions within marriage by which the couple are united intimately and chastely are noble and

> worthy ones. Expressed in a manner which is truly human, these actions signify and promote that mutual self-giving by which spouses enrich each other with a joyful and a thankful will.[21]
>
> Marriage and conjugal love are by their nature ordained toward the begetting and educating of children. Children are really the supreme gift of marriage and contribute very substantially to the welfare of their parents. . . . Parents should regard as their proper mission the task of transmitting human life and educating those to whom it has been transmitted. They are thereby cooperators with the love of God the Creator, and are, so to speak, the interpreters of that love.[22]

For legitimate reasons of responsible parenthood, married couples may limit the number of their children by natural means. The Church cannot approve contraceptive interventions that "either in anticipation of the marital act, or in its accomplishment or in the development of its natural consequences, have the purpose, whether as an end or a means, to render procreation impossible."[23] Such interventions violate "the inseparable connection, willed by God between the two meanings of the conjugal act: the unitive and procreative meaning."[24]

With the advance of the biological and medical sciences, society has at its disposal new technologies for responding to the problem of infertility. While we rejoice in the potential for good inherent in many of these technologies, we cannot assume that what is

technically possible is always morally right. Reproductive technologies that substitute for the marriage act are not consistent with human dignity. Just as the marriage act is joined naturally to procreation, so procreation is joined naturally to the marriage act. As Pope John XXIII observed:

> The transmission of human life is entrusted by nature to a personal and conscious act and as such is subject to all the holy laws of God: the immutable and inviolable laws which must be recognized and observed. For this reason, one cannot use means and follow methods which could be licit in the transmission of the life of plants and animals.[25]

Because the moral law is rooted in the whole of human nature, human persons, through intelligent reflection on their own spiritual destiny, can discover and cooperate in the plan of the Creator.[26]

Directives

38. When the marital act of sexual intercourse is not able to attain its procreative purpose, assistance that does not separate the unitive and procreative ends of the act, and does not substitute for the marital act itself, may be used to help married couples conceive.[27]

39. Those techniques of assisted conception that respect the unitive and procreative meanings of sexual intercourse and do not involve the destruction of human embryos, or their deliberate generation in such numbers that it is clearly envisaged that all cannot implant and some are simply being used to maximize the chances of others implanting, may be used as therapies for infertility.

40. Heterologous fertilization (that is, any technique used to achieve conception by the use of gametes coming from at least one donor other than the spouses) is prohibited because it is contrary to the covenant of marriage, the unity of the spouses, and the dignity proper to parents and the child.[28]

41. Homologous artificial fertilization (that is, any technique used to achieve conception using the gametes of the two spouses joined in marriage) is prohibited when it separates procreation from the marital act in its unitive significance (e.g., any technique used to achieve extracorporeal conception).[29]

42. Because of the dignity of the child and of marriage, and because of the uniqueness of the mother-child relationship, participation in contracts or arrangements for surrogate motherhood is not permitted. Moreover, the commercialization of such surrogacy denigrates the dignity of women, especially the poor.[30]

43. A Catholic health care institution that provides treatment for infertility should offer not only technical assistance to infertile couples but also should help couples pursue other solutions (e.g., counseling, adoption).

44. A Catholic health care institution should provide prenatal, obstetric, and postnatal services for mothers and their children in a manner consonant with its mission.

45. Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy

before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.

46. Catholic health care providers should be ready to offer compassionate physical, psychological, moral, and spiritual care to those persons who have suffered from the trauma of abortion.

47. Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.

48. In case of extrauterine pregnancy, no intervention is morally licit which constitutes a direct abortion.[31]

49. For a proportionate reason, labor may be induced after the fetus is viable.

50. Prenatal diagnosis is permitted when the procedure does not threaten the life or physical integrity of the unborn child or the mother and does not subject them to disproportionate risks; when the diagnosis can provide information to guide preventative care for the mother or pre- or postnatal care for the child; and when the parents, or at least the mother, give free and informed consent. Prenatal diagnosis is not permitted when undertaken with the

intention of aborting an unborn child with a serious defect.[32]

51. Nontherapeutic experiments on a living embryo or fetus are not permitted, even with the consent of the parents. Therapeutic experiments are permitted for a proportionate reason with the free and informed consent of the parents or, if the father cannot be contacted, at least of the mother. Medical research that will not harm the life or physical integrity of an unborn child is permitted with parental consent.[33]

52. Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in methods of natural family planning.

53. Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available.[34]

54. Genetic counseling may be provided in order to promote responsible parenthood and to prepare for the proper treatment and care of children with genetic defects, in accordance with Catholic moral teaching and the intrinsic rights and obligations of married couples regarding the transmission of life.

PART FIVE

Issues in Care for the Seriously Ill and Dying

Introduction

Christ's redemption and saving grace embrace the whole person, especially in his or her illness, suffering, and death.[35] The Catholic health care ministry faces the reality of death with the confidence of faith. In the face of death—for many, a time when hope seems lost—the Church witnesses to her belief that God has created each person for eternal life.[36]

Above all, as a witness to its faith, a Catholic health care institution will be a community of respect, love, and support to patients or residents and their families as they face the reality of death. What is hardest to face is the process of dying itself, especially the dependency, the helplessness, and the pain that so often accompany terminal illness. One of the primary purposes of medicine in caring for the dying is the relief of pain and the suffering caused by it. Effective management of pain in all its forms is critical in the appropriate care of the dying.

The truth that life is a precious gift from God has profound implications for the question of stewardship over human life. We are not the owners of our lives and, hence, do not have absolute power over life. We have a duty to preserve our life and to use it for the glory of God, but the duty to preserve life is not absolute, for we may reject life-prolonging procedures that are insufficiently beneficial or excessively burdensome. Suicide and euthanasia are never morally acceptable options.

The task of medicine is to care even when it cannot cure. Physicians and their patients must evaluate the use of the technology at their disposal. Reflection on the innate dignity of human life in all its dimensions and on the purpose of medical care is indispensable for formulating a true moral judgment about the use of technology to maintain life. The use of life-sustaining technology is judged in light of the Christian meaning of life, suffering, and death. In this way two extremes are avoided: on the one hand, an insistence on useless or burdensome technology even when a patient may legitimately wish to forgo it and, on the other hand, the withdrawal of technology with the intention of causing death.[37]

The Church's teaching authority has addressed the moral issues concerning medically assisted nutrition and hydration. We are guided on this issue by Catholic teaching against euthanasia, which is "an action or an omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated."[38] While medically assisted nutrition and hydration are not morally obligatory in certain cases, these forms of basic care should in principle be provided to all patients who need them, including patients diagnosed as being in a "persistent vegetative state" (PVS), because even the most severely debilitated and helpless patient retains the full dignity of a human person and must receive ordinary and proportionate care.

Directives

55. Catholic health care institutions offering care to persons in danger of death from illness, accident, advanced age, or similar condition should provide them with appropriate opportunities to prepare for

death. Persons in danger of death should be provided with whatever information is necessary to help them understand their condition and have the opportunity to discuss their condition with their family members and care providers. They should also be offered the appropriate medical information that would make it possible to address the morally legitimate choices available to them. They should be provided the spiritual support as well as the opportunity to receive the sacraments in order to prepare well for death.

56. A person has a moral obligation to use ordinary or proportionate means of preserving his or her life. Proportionate means are those that in the judgment of the patient offer a reasonable hope of benefit and do not entail an excessive burden or impose excessive expense on the family or the community.[39]

57. A person may forgo extraordinary or disproportionate means of preserving life. Disproportionate means are those that in the patient's judgment do not offer a reasonable hope of benefit or entail an excessive burden, or impose excessive expense on the family or the community.

58. In principle, there is an obligation to provide patients with food and water, including medically assisted nutrition and hydration for those who cannot take food orally. This obligation extends to patients in chronic and presumably irreversible conditions (e.g., the "persistent vegetative state") who can reasonably be expected to live indefinitely if given such care.[40] Medically assisted nutrition and hydration become morally optional when they cannot reasonably be expected to prolong life or when they would be "excessively burdensome for the patient or [would] cause significant physical discomfort, for

example resulting from complications in the use of the means employed."[41] For instance, as a patient draws close to inevitable death from an underlying progressive and fatal condition, certain measures to provide nutrition and hydration may become excessively burdensome and therefore not obligatory in light of their very limited ability to prolong life or provide comfort.

59. The free and informed judgment made by a competent adult patient concerning the use or withdrawal of life-sustaining procedures should always be respected and normally complied with, unless it is contrary to Catholic moral teaching.

60. Euthanasia is an action or omission that of itself or by intention causes death in order to alleviate suffering. Catholic health care institutions may never condone or participate in euthanasia or assisted suicide in any way. Dying patients who request euthanasia should receive loving care, psychological and spiritual support, and appropriate remedies for pain and other symptoms so that they can live with dignity until the time of natural death.[42]

61. Patients should be kept as free of pain as possible so that they may die comfortably and with dignity, and in the place where they wish to die. Since a person has the right to prepare for his or her death while fully conscious, he or she should not be deprived of consciousness without a compelling reason. Medicines capable of alleviating or suppressing pain may be given to a dying person, even if this therapy may indirectly shorten the person's life so long as the intent is not to hasten death. Patients experiencing suffering that cannot be

alleviated should be helped to appreciate the Christian understanding of redemptive suffering.

62. The determination of death should be made by the physician or competent medical authority in accordance with responsible and commonly accepted scientific criteria.

63. Catholic health care institutions should encourage and provide the means whereby those who wish to do so may arrange for the donation of their organs and bodily tissue, for ethically legitimate purposes, so that they may be used for donation and research after death.

64. Such organs should not be removed until it has been medically determined that the patient has died. In order to prevent any conflict of interest, the physician who determines death should not be a member of the transplant team.

65. The use of tissue or organs from an infant may be permitted after death has been determined and with the informed consent of the parents or guardians.

66. Catholic health care institutions should not make use of human tissue obtained by direct abortions even for research and therapeutic purposes.[43]

PART SIX

Forming New Partnerships with Health Care Organizations and Providers

Introduction

Until recently, most health care providers enjoyed a degree of independence from one another. In ever-increasing ways, Catholic health care providers have become involved with other health care organizations and providers. For instance, many Catholic health care systems and institutions share in the joint purchase of technology and services with other local facilities or physicians' groups. Another phenomenon is the growing number of Catholic health care systems and institutions joining or co-sponsoring integrated delivery networks or managed care organizations in order to contract with insurers and other health care payers. In some instances, Catholic health care systems sponsor a health care plan or health maintenance organization. In many dioceses, new partnerships will result in a decrease in the number of health care providers, at times leaving the Catholic institution as the sole provider of health care services. At whatever level, new partnerships forge a variety of interwoven relationships: between the various institutional partners, between health care providers and the community, between physicians and health care services, and between health care services and payers.

On the one hand, new partnerships can be viewed as opportunities for Catholic health care institutions and services to witness to their religious and ethical commitments and so influence the healing profession. For example, new partnerships can help to implement the Church's social teaching. New

partnerships can be opportunities to realign the local delivery system in order to provide a continuum of health care to the community; they can witness to a responsible stewardship of limited health care resources; and they can be opportunities to provide to poor and vulnerable persons a more equitable access to basic care.

On the other hand, new partnerships can pose serious challenges to the viability of the identity of Catholic health care institutions and services, and their ability to implement these Directives in a consistent way, especially when partnerships are formed with those who do not share Catholic moral principles. The risk of scandal cannot be underestimated when partnerships are not built upon common values and moral principles. Partnership opportunities for some Catholic health care providers may even threaten the continued existence of other Catholic institutions and services, particularly when partnerships are driven by financial considerations alone. Because of the potential dangers involved in the new partnerships that are emerging, an increased collaboration among Catholic-sponsored health care institutions is essential and should be sought before other forms of partnerships.

The significant challenges that new partnerships may pose, however, do not necessarily preclude their possibility on moral grounds. The potential dangers require that new partnerships undergo systematic and objective moral analysis, which takes into account the various factors that often pressure institutions and services into new partnerships that can diminish the autonomy and ministry of the

Catholic partner. The following directives are offered to assist institutionally based Catholic health care services in this process of analysis. To this end, the United States Conference of Catholic Bishops (formerly the National Conference of Catholic Bishops) has established the Ad Hoc Committee on Health Care Issues and the Church as a resource for bishops and health care leaders.

This new edition of the *Ethical and Religious Directives* omits the appendix concerning cooperation, which was contained in the 1995 edition. Experience has shown that the brief articulation of the principles of cooperation that was presented there did not sufficiently forestall certain possible misinterpretations and in practice gave rise to problems in concrete applications of the principles. Reliable theological experts should be consulted in interpreting and applying the principles governing cooperation, with the proviso that, as a rule, Catholic partners should avoid entering into partnerships that would involve them in cooperation with the wrongdoing of other providers.

Directives

67. Decisions that may lead to serious consequences for the identity or reputation of Catholic health care services, or entail the high risk of scandal, should be made in consultation with the diocesan bishop or his health care liaison.

68. Any partnership that will affect the mission or religious and ethical identity of Catholic health care institutional services must respect church teaching and discipline. Diocesan bishops and other church authorities should be involved as such partnerships are developed, and the diocesan bishop should give

the appropriate authorization before they are completed. The diocesan bishop's approval is required for partnerships sponsored by institutions subject to his governing authority; for partnerships sponsored by religious institutes of pontifical right, his *nihil obstat* should be obtained.

69. If a Catholic health care organization is considering entering into an arrangement with another organization that may be involved in activities judged morally wrong by the Church, participation in such activities must be limited to what is in accord with the moral principles governing cooperation.

70. Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.[44]

71. The possibility of scandal must be considered when applying the principles governing cooperation.[45] Cooperation, which in all other respects is morally licit, may need to be refused because of the scandal that might be caused. Scandal can sometimes be avoided by an appropriate explanation of what is in fact being done at the health care facility under Catholic auspices. The diocesan bishop has final responsibility for assessing and addressing issues of scandal, considering not only the circumstances in his local diocese but also the regional and national implications of his decision.[46]

72. The Catholic partner in an arrangement has the responsibility periodically to assess whether the binding agreement is being observed and

implemented in a way that is consistent with Catholic teaching.

CONCLUSION

Sickness speaks to us of our limitations and human frailty. It can take the form of infirmity resulting from the simple passing of years or injury from the exuberance of youthful energy. It can be temporary or chronic, debilitating, and even terminal. Yet the follower of Jesus faces illness and the consequences of the human condition aware that our Lord always shows compassion toward the infirm.

Jesus not only taught his disciples to be compassionate, but he also told them who should be the special object of their compassion. The parable of the feast with its humble guests was preceded by the instruction: "When you hold a banquet, invite the poor, the crippled, the lame, the blind" (Lk 14:13). These were people whom Jesus healed and loved.

Catholic health care is a response to the challenge of Jesus to go and do likewise. Catholic health care services rejoice in the challenge to be Christ's healing compassion in the world and see their ministry not only as an effort to restore and preserve health but also as a spiritual service and a sign of that final healing that will one day bring about the new creation that is the ultimate fruit of Jesus' ministry and God's love for us.

Notes

1. United States Conference of Catholic Bishops, *Health and Health Care: A Pastoral Letter of the American Catholic Bishops* (Washington, DC: United States Conference of Catholic Bishops, 1981).

2. Health care services under Catholic auspices are carried out in a variety of institutional settings (e.g., hospitals, clinics, outpatient facilities, urgent care centers, hospices, nursing homes, and parishes). Depending on the context, these Directives will employ the terms "institution" and/or "services" in order to encompass the variety of settings in which Catholic health care is provided.

3. *Health and Health Care*, p. 5.

4. Second Vatican Ecumenical Council, *Decree on the Apostolate of the Laity (Apostolicam Actuositatem*) (1965), no. 1.

5. Pope John Paul II, Post-Synodal Apostolic Exhortation *On the Vocation and the Mission of the Lay Faithful in the Church and in the World (Christifideles Laici)* (Washington, DC: United States Conference of Catholic Bishops, 1988), no. 29.

6. As examples, see Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion* (1974); Congregation for the Doctrine of the Faith, *Declaration on Euthanasia* (1980); Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day (Donum Vitae)* (Washington, DC: United States Conference of Catholic Bishops, 1987).

7. Pope John XXIII, Encyclical Letter *Peace on Earth (Pacem in Terris)* (Washington, DC: United States Conference of Catholic Bishops, 1963), no. 11; *Health and Health Care*, pp. 5, 17-18; *Catechism of the Catholic Church*, 2nd ed. (Washington, DC: Libreria Editrice Vaticana – United States Conference of Catholic Bishops, 2000), no. 2211.

8. Pope John Paul II, *On Social Concern, Encyclical Letter on the Occasion of the Twentieth Anniversary of "Populorum Progressio" (Sollicitudo Rei Socialis)* (Washington, DC: United States Conference of Catholic Bishops, 1988), no. 43.

9. United States Conference of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (Washington, DC: United States Conference of Catholic Bishops, 1986), no. 80.

10. The duty of responsible stewardship demands responsible collaboration. But in collaborative efforts, Catholic institutionally based health care services must be attentive to occasions when the policies and practices of other institutions are not compatible with the Church's authoritative moral teaching. At such times, Catholic health care institutions should determine whether or to what degree collaboration would be morally permissible. To make that judgment, the governing boards of Catholic institutions should adhere to the moral principles on cooperation. See Part Six.

11. *Health and Health Care*, p. 12.

12. Cf. *Code of Canon Law*, cc. 921-923.

13. Cf. ibid., c. 867, § 2, and c. 871.

14. To confer Baptism in an emergency, one must have the proper intention (to do what the Church intends by Baptism) and pour water on the head of the person to be baptized, meanwhile pronouncing the words: "I baptize you in the name of the Father, and of the Son, and of the Holy Spirit."

15. Cf. c. 883, 3º.

16. For example, while the donation of a kidney represents loss of biological integrity, such a donation does not compromise functional integrity since human beings are capable of functioning with only one kidney.

17. Cf. directive 53.

18. *Declaration on Euthanasia*, Part IV; cf. also directives 56-57.

19. It is recommended that a sexually assaulted woman be advised of the ethical restrictions that prevent Catholic hospitals from using abortifacient procedures; cf. Pennsylvania Catholic Conference, "Guidelines for Catholic Hospitals Treating Victims of Sexual Assault," *Origins* 22 (1993): 810.

20. Pope John Paul II, "Address of October 29, 1983, to the 35th General Assembly of the World Medical Association," *Acta Apostolicae Sedis* 76 (1984): 390.

21. Second Vatican Ecumenical Council, *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)* (1965), no. 49.

22. Ibid., no. 50.

23. Pope Paul VI, Encyclical Letter *On the Regulation of Birth (Humanae Vitae)* (Washington,

DC: United States Conference of Catholic Bishops, 1968), no. 14.

24. Ibid., no. 12.

25. Pope John XXIII, Encyclical Letter *Mater et Magistra* (1961), no. 193, quoted in Congregation for the Doctrine of the Faith, *Donum Vitae*, no. 4.

26. Pope John Paul II, Encyclical Letter *The Splendor of Truth (Veritatis Splendor)* (Washington, DC: United States Conference of Catholic Bishops, 1993), no. 50.

27. "Homologous artificial insemination within marriage cannot be admitted except for those cases in which the technical means is not a substitute for the conjugal act but serves to facilitate and to help so that the act attains its natural purpose" (*Donum Vitae*, Part II, B, no. 6; cf. also Part I, nos. 1, 6).

28. Ibid., Part II, A, no. 2.

29. "Artificial insemination as a substitute for the conjugal act is prohibited by reason of the voluntarily achieved dissociation of the two meanings of the conjugal act. Masturbation, through which the sperm is normally obtained, is another sign of this dissociation: even when it is done for the purpose of procreation, the act remains deprived of its unitive meaning: 'It lacks the sexual relationship called for by the moral order, namely, the relationship which realizes "the full sense of mutual self-giving and human procreation in the context of true love"'" (*Donum Vitae*, Part II, B, no. 6).

30. Ibid., Part II, A, no. 3.

31. Cf. directive 45.

32. *Donum Vitae*, Part I, no. 2.

33. Cf. ibid., no. 4. (Washington, DC: United States Conference of Catholic Bishops, 1988), no. 43.

34. Cf. Congregation for the Doctrine of the Faith, "Responses on Uterine Isolation and Related Matters," July 31, 1993, *Origins* 24 (1994): 211-212.

35. Pope John Paul II, Apostolic Letter *On the Christian Meaning of Human Suffering (Salvifici Doloris)* (Washington, DC: United States Conference of Catholic Bishops, 1984), nos. 25-27.

36. United States Conference of Catholic Bishops, *Order of Christian Funerals* (Collegeville, Minn.: The Liturgical Press, 1989), no. 1.

37. See *Declaration on Euthanasia.*

38. Ibid., Part II.

39. Ibid., Part IV; Pope John Paul II, Encyclical Letter *On the Value and Inviolability of Human Life (Evangelium Vitae)* (Washington, DC: United States Conference of Catholic Bishops, 1995), no. 65.

40. See Pope John Paul II, Address to the Participants in the International Congress on "Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas" (March 20, 2004), no. 4, where he emphasized that "the administration of water and food, even when provided by artificial means, always represents a *natural means* of preserving life, not a *medical act*." See also Congregation for the Doctrine of the Faith, "Responses to Certain Questions of the United States Conference of Catholic Bishops Concerning Artificial Nutrition and Hydration" (August 1, 2007).

41. Congregation for the Doctrine of the Faith, Commentary on "Responses to Certain Questions of

the United States Conference of Catholic Bishops Concerning Artificial Nutrition and Hydration."

42. See *Declaration on Euthanasia*, Part IV.

43. *Donum Vitae*, Part I, no. 4.

44. While there are many acts of varying moral gravity that can be identified as intrinsically evil, in the context of contemporary health care the most pressing concerns are currently abortion, euthanasia, assisted suicide, and direct sterilization. See Pope John Paul II's *Ad Limina* Address to the bishops of Texas, Oklahoma, and Arkansas (Region X), in *Origins* 28 (1998): 283. See also "Reply of the Sacred Congregation for the Doctrine of the Faith on Sterilization in Catholic Hospitals" (*Quaecumqu Sterilizatio*), March 13, 1975, *Origins* 6 (1976): 33-35: "Any cooperation institutionally approved or tolerated in actions which are in themselves, that is, by their nature and condition, directed to a contraceptive end . . . is absolutely forbidden. For the official approbation of direct sterilization and, *a fortiori,* its management and execution in accord with hospital regulations, is a matter which, in the objective order, is by its very nature (or intrinsically) evil." This directive supersedes the "Commentary on the Reply of the Sacred Congregation for the Doctrine of the Faith on Sterilization in Catholic Hospitals" published by the National Conference of Catholic Bishops on September 15, 1977, in *Origins* 7 (1977): 399-400.

45. See *Catechism of the Catholic Church*: "Scandal is an attitude or behavior which leads another to do evil" (no. 2284); "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and

responsible for the evil that he has directly or indirectly encouraged" (no. 2287).

46. See "The Pastoral Role of the Diocesan Bishop in Catholic Health Care Ministry," *Origins* 26 (1997): 703.

This fifth edition of the *Ethical and Religious Directives for Catholic Health Care Services* was developed by the Committee on Doctrine of the United States Conference of Catholic Bishops (USCCB) and approved as the national code by the full body of the USCCB at its November 2009 General Meeting. This edition of the *Directives*, which replaces all previous editions, is recommended for implementation by the diocesan bishop and is authorized for publication by the undersigned.

Msgr. David J. Malloy, STD
General Secretary, USCCB

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APPENDIX N

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each

day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding

calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer

under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be

allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as

may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided

by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings

provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available

for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in

accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans—(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage

provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section

is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you

have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f)[Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a)[Reserved]. For further guidance, see § 54.9815-2713A(a).

(b)Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides

benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there

is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any

cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole

responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or

maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated,

shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits

(such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual

involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the

child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for

items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

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

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3)

of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator

shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance

issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The

issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that

the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services.

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices

of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which

has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are

delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later,

for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available

for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection

based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan

participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.