No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MOST REVEREND DAVID A. ZUBIK ET AL.;
MOST REVEREND LAWRENCE T. PERSICO, ET AL.

Applicants,

v.

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

Respondents,

Application from the U.S. Court of Appeals for the Third Circuit

(Nos. 14-1376 & 14-1377)

EMERGENCY APPLICATION TO RECALL AND STAY MANDATE OR ISSUE INJUNCTION PENDING RESOLUTION OF CERTIORARI PETITION

PAUL M. POHL
Counsel of Record
JOHN D. GOETZ
LEON F. DEJULIUS, JR.
IRA M. KAROLL
ALISON M. KILMARTIN
MARY PAT STAHLER
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
(412)391-3939
pmpohl@jonesday.com

Counsel for Applicants

NOEL J. FRANCISCO
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

PARTIES TO THE PROCEEDINGS

The Applicants are the following:

- The Most Reverend David A. Zubik is the Bishop of The Roman Catholic Diocese of Pittsburgh, and is the Trustee of The Roman Catholic Diocese of Pittsburgh, a Pennsylvania Charitable Trust. Bishop Zubik also acts as Chairman of the Membership Board of Catholic Charities of the Diocese of Pittsburgh, Inc ("Catholic Charities").

- The Roman Catholic Diocese of Pittsburgh provides pastoral care and spiritual guidance for approximately 700,000 Catholics across 6 counties in Southwestern Pennsylvania, while overseeing the mission of spiritual, educational, and social service to Catholics and non-Catholics throughout the region. The Diocese operates a self-insured health plan through the Catholic Benefits Trust and makes its health insurance plan available to the employees of its nonprofit religious affiliates, including Catholic Charities.

- Catholic Charities of the Diocese of Pittsburgh, Inc. is the primary social service agency of the Diocese of Pittsburgh. It serves approximately 81,000 needy, underserved, and underprivileged people in Southwestern Pennsylvania by providing adoption, counseling, safety net and stability services, health care for the uninsured, housing and homeless assistance, pregnancy and parenting support, and refugee and senior services. Catholic Charities is insured through the Diocese of Pittsburgh's Catholic Benefits Trust.

- The Most Reverend Lawrence T. Persico is the Bishop of the Roman Catholic Diocese of Erie, and is the Trustee of The Roman Catholic Diocese of Erie, a Charitable Trust. Bishop Persico also acts as Chairman of the Membership Boards of St. Martin Center, Inc. and Prince of Peace Center, Inc. Bishop Persico serves on the board of directors of Erie Catholic Preparatory School and has reserved powers in that role.

- The Roman Catholic Diocese of Erie provides pastoral care and spiritual guidance for 187,500 Catholics across 13 counties, while serving many Northwestern Pennsylvania residents, Catholic and non-Catholic, through schools and charitable programs such as its prison ministry, family ministry, disability ministry, and international Diocesan missions. The Diocese makes its self-insured health insurance plan available to the employees of its nonprofit religious

affiliates, including St. Martin Center, Inc., Prince of Peace Center, Inc., and Erie Catholic Preparatory School.

- St. Martin Center, Inc. is an affiliate nonprofit corporation of Catholic Charities of the Diocese of Erie, which has been providing individuals and families with resources to gain self-sufficiency for the last fifty years. The Diocese of Erie provides health insurance to St. Martin Center's employees.

- Prince of Peace Center, Inc. is an affiliate nonprofit corporation of Catholic Charities of the Diocese of Erie, which provides various social and self-sufficiency services to the needy in the greater Mercer County, Pennsylvania community. The Diocese of Erie provides health insurance to Prince of Peace Center's employees.

- Erie Catholic Preparatory School is an affiliate nonprofit corporation of The Roman Catholic Diocese of Erie, made up of the all-female Villa Maria Academy and the all-male Cathedral Preparatory School, provides a Christ-centered, co-institutional, college preparatory Catholic school in the Diocese of Erie serving approximately 870 students. The Diocese of Erie provides health insurance to Erie Catholic Preparatory School's employees.

The Respondents are the following:

- The United States Department of Health and Human Services

- Sylvia Mathews Burwell in her official capacity as Secretary of the United States Department of Health & Human Services

- The United States Department of Labor

- Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor

- The United States Department of the Treasury

- Jacob J. Lew in his official capacity as Secretary of the United States Department of the Treasury

RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicants hereby submit the following corporate-disclosure statement.

1. No Applicant has a parent corporation.

2. No publicly held corporation owns any portion of any of the Applicants, and none of the Applicants is a subsidiary or an affiliate of any publicly owned corporation.

Date: April 15, 2015

/s/ Paul M. Pohl

PAUL M. POHL
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Telephone: (412)391-3939

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Applicants seek an emergency recall and stay of the Third Circuit's mandate to keep in place the district court's permanent injunction and maintain the status quo while Applicants fully pursue certiorari before this Court. Alternatively, Applicants request injunctive relief pending their forthcoming petition for certiorari, or at the least, a temporary administrative stay to allow for full briefing on this Application. Without such relief, Applicants will today be forced by the Government to choose between violating their religious beliefs or potentially ruinous fines. This Court has already granted injunctive relief pending appeal to similar plaintiffs in *Wheaton* and *Little Sisters of the Poor*, and recall of the mandate pending resolution by this Court is appropriate.

Applicants are religious nonprofits whose sincerely-held religious beliefs prohibit them from providing, paying for, or facilitating access to abortifacients, contraception, and sterilization. Applicants hereby request emergency relief to prevent the Government from forcing them to comply with regulations requiring them to violate these beliefs. Specifically, the regulations would compel Applicants to (1) sign and submit the self-certification form designating and authorizing third parties to provide the objectionable coverage through Applicants' employee benefits plans, and (2) maintain a contractual relationship with those third parties, keeping open the conduit through which the objectionable products and services are delivered. Taking the required actions would violate Applicants' religious beliefs, and they will be subject to substantial penalties if they refuse.

On November 21, 2013, the United States District Court for the Western District of Pennsylvania granted Applicants' Motions for Preliminary Injunction, concluding—based on joint stipulations and witness credibility determinations—that Applicants had shown they were likely to succeed on the merits and otherwise satisfied the requirements set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). App. D.[1] The district court later granted Applicants' Unopposed Motion to Convert the Preliminary Injunction to a Permanent Injunction, based in part on the Government conceding that it had no additional evidence. App. E. On February 11, 2015, despite this Court's decision in *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, (2014), and order in *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (mem.), a panel of the Third Circuit reversed the district court, holding that Applicants did not show a likelihood of success on the merits of their claim under the Religious Freedom Restoration Act (RFRA). App. A. On March 9, 2015, this Court granted certiorari, vacated, and remanded the decision in *Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). *Notre Dame v. Burwell*, 135 S. Ct. 1528 (Mar 9, 2015). Yet, on April 6, 2015, the court below denied *en banc* review, App. B, even though its decision was heavily rooted in the now vacated reasoning of the Seventh Circuit. And today, April 15, 2015, the Third Circuit denied Applicants' motion to stay its mandate. App. C. Though Federal Rule of Appellate Procedure 41(b) indicates that mandates will typically issue "7 days after entry of an order denying

[1] The injunction was entered after a two day evidentiary hearing at which six witnesses testified. Extensive stipulations and exhibits were entered. This case, thus, presents a well-developed record.

a timely . . . motion for stay of mandate," Fed. R. App. P. 41(b), the Court issued its mandate immediately. App. C. Consequently, absent relief from this Court, Applicants will today be forced to choose between violating their religious beliefs or incurring substantial fines.

In order to prevent this irreparable harm, Applicants request that this Court recall the Third Circuit's mandate. This would allow the district court's injunction to remain in place. Alternatively, Applicants request that this Court grant an injunction pending consideration of Applicants' forthcoming petition for certiorari. At a minimum, Applicants request that this Court issue a temporary administrative stay to allow for full consideration and briefing of this Application before the challenged regulations can be enforced. *See, e.g., Wheaton*, 134 S. Ct. 2898; *Little Sisters of the Poor*, 134 S. Ct. 893 (2013) (Sotomayor, J., in chambers).

OPINIONS BELOW

The district court's opinion granting Applicants' preliminary injunctive relief is attached as Appendix D and its order converting the preliminary injunction to a permanent injunction is attached as Appendix E. The Third Circuit's merits opinion is attached as Appendix A, its denial of Applicants' petition for rehearing is attached as Appendix B, and its denial of Applicants' motion to stay the mandate is attached as Appendix C.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and the Court of Appeals had jurisdiction under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(f).

STATEMENT OF THE CASE

A. The Mandate Requiring The Objectionable Coverage

Under the Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13(a)(4), the Government promulgated a Mandate requiring group health plans and the insurers of fully-insured 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," HRSA, Women's Preventive Services, http://www.hrsa.gov/womensguidelines (last visited April 9, 2015); *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). The third-party administrator (TPA) of a self-insured plan has no statutory obligation to provide such coverage. 42 U.S.C. § 300gg-13(a). FDA-approved contraceptive methods and sterilization procedures include intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella), all of which can—according to Applicants' sincerely-held religious beliefs—induce an abortion. *Hobby Lobby*, 134 S.Ct. at 2762-63 n.7. If an employer's health plan does not include the required coverage, the employer is subject to penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping employee health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

1. Religious and Secular Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain pre-existing plans are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).

Indeed, as of the end of 2013, by the Government's own estimates, over 90 million individuals participated in health plans excluded from the scope of the Mandate. 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010).

Acknowledging the burden the Mandate places on religious exercise, the Government also created a narrow exemption for plans sponsored by so-called "religious employers," which include "churches, their integrated auxiliaries, and conventions or associations of churches" under 26 U.S.C. § 6033(a)(3)(A)(i). 45 C.F.R. § 147.131(a). Those entities are allowed to offer employee health coverage that does not violate their religious beliefs. But that narrow exemption protects 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); 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). For other religious entities, such as Applicants Catholic Charities, St. Martin Center, Price of Peace Center, and Erie Catholic Preparatory School, and for churches that provide coverage to the employees of certain religious affiliates, there is no exemption.[2]

[2] This new definition of religious employer, which gives an exemption to houses of worship, but not other religious organizations that operate as part of the exercise of the Catholic faith, was found to be impermissible by the district court. *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 606-08 (W.D. Pa. 2013). It is one of the only district court cases to address that issue, which is yet another reason to grant the requested relief.

2. The "Accommodation" Requiring Religious Objectors To Act

Instead, the Government has relegated other equally-religious entities to an inaptly named "accommodation." 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). Unlike the exemption, the accommodation does not allow religious objectors to provide employee health coverage without violating their religious beliefs. Instead it forces self-insured objectors, such as the Applicants here, to take specific action to authorize and designate a TPA to provide the objectionable coverage through the objectors' employee health plan. If such objectors do not take this action, their plans and TPAs cannot provide the objectionable coverage to their employees.

To be eligible for the "accommodation," a self-insured entity must (1) "oppose[] providing coverage for some or all of [the] contraceptive services"; (2) be "organized and operate[] as a nonprofit entity"; (3) "hold[] itself out as a religious organization"; and (4) self-certify that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a). If a self-insured organization meets these criteria and wishes to avail itself of the accommodation, it must provide a "self-certification" to its TPA, *id.* § 54.9815-2713A(a)(4).[3]

[3] After this Court temporarily enjoined enforcement of the accommodation in *Wheaton*, the Government revised its regulations yet again. 79 Fed. Reg. 51,092 (Aug. 27, 2014). Under the revised regulations, objecting religious nonprofits may choose to submit a new "notice" to the federal government containing their health plan information, which creates the same legal obligations and incentives for their TPA to provide contraceptive benefits as the self-certification form. *Id.* at 51,094-95. This superficial revision does not remove the burden on Applicants' religious exercise. Applicants must still maintain a contractual relationship with a third party authorized to deliver the mandated coverage to their plan beneficiaries, and Applicants must still submit a document that they believe wrongfully facilitates the

The Government requires Applicants to take specific actions to enable the Government to commandeer their health plans for the delivery of the objectionable coverage. If a self-insured "eligible organization" submits the self-certification form, its TPA is authorized to arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan. *See id.* § 54.9815-2713A(a)-(c). Payments for the objectionable 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).

The certification authorizes, obligates, and incentivizes Applicants' TPA to provide the objectionable coverage. The self-certification form "designat[es] . . . the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. Because "'[i]n the self-insured [context], technically, 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 omitted) (alterations in

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delivery of such coverage. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993) (regulatory changes do not moot suit where "gravamen of [the] complaint" remains, and new rule "disadvantages [plaintiffs] in the same fundamental way").

Moreover, despite the Government's claims to the contrary, the new notification is not "consistent with" the notice in *Wheaton*. 75 Fed. Reg. at 51,094. Most obviously, the *Wheaton* notice did not trigger regulatory authority and incentives for the plaintiff's TPA to provide the objectionable coverage. Rather, upon filing the *Wheaton* notice, the plaintiff and its private insurance arrangement became fully exempt. 134 S. Ct. at 2807. Nor did the *Wheaton* notice require plaintiffs to include information such as "the name and contact information for [their TPAs] and health insurance issuers," 79 Fed. Reg. at 51,095—information that serves no purpose but to facilitate what Applicants believe to be an immoral regulatory scheme.

original), without the form, a TPA has no obligation or authorization to provide the contraceptive coverage. 29 C.F.R. § 2510.3-16(b)(1), (b)(2) (the signed self-certification requires that the TPA "shall be responsible for," *inter alia*, "providing contraceptive coverage that complies with" the Mandate); *see also RCAW*, 19 F. Supp. 3d at 79 ("the [TPA's] obligation to provide contraceptive coverage arises only if it receives a copy of the self-certification"); 29 C.F.R. § 2510.3-16(b) (the certification to the TPA is the "instrument under which the plan is operated"). The accommodation, moreover, incentivizes TPAs to provide the mandated coverage by reimbursing them for 115% of the full cost of coverage—but only if the organization first provides its TPA with the mandated self-certification. *See* 45 C.F.R. § 156.50.

B. Applicants Serve Their Communities Consistent With Their Religious Beliefs

Applicants are nonprofit religious organizations in Western Pennsylvania that provide a range of spiritual, charitable, educational, and social services to members of their communities, Catholic and non-Catholic alike. As entities affiliated with the Catholic Church, Applicants sincerely believe that life begins at the moment of conception, and that certain "preventive" services that interfere with conception or terminate a pregnancy are immoral. *Zubik*, 983 F. Supp. 2d at, 590-91, 594, 599-600. Applicants adhere to the Catholic doctrines regarding material cooperation with evil and "scandal."[4] *Id.* at 594. Accordingly, they believe they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion,

[4] "Scandal" involves leading, by words or actions, other persons to engage in wrongdoing. *See* Catechism of the Catholic Church ¶ 2284.

or related counseling. *Id.* In particular, Applicants' religious beliefs prohibit them from signing a form or letter that authorizes or designates their TPA to provide their plan beneficiaries with coverage for abortifacients, contraceptives, and sterilization, all of which are prohibited by their religious beliefs. *Id.* at 594-95. Applicants believe that signing such a form or letter facilitates moral evil. *Id.* at 594, 605. This is true whether or not Applicants pay for the objectionable coverage. The Government stipulated to the sincerity of all of Applicants' articulated beliefs. JA152 ¶¶ 52-56 (stipulating to the *Persico* declarations); JA160 ¶¶ 114-17 (stipulating to the *Zubik* declarations).

Historically, Applicants have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. *Zubik*, 983 F. Supp. 2d at 591-94 (describing the Dioceses' historical provision of health insurance in accordance with Catholic beliefs). In particular, they have contracted with TPAs that would provide health coverage consistent with their religious beliefs to their plan beneficiaries. Under the Government's regulations, when Applicants sign the self-certification form, under the guise of an accommodation based on religious objection, the carefully structured provisions of their insurance policies change: their TPAs for the first time are authorized to deliver the objectionable coverage to the insureds of the religious objector, through Applicants' health plans.

This affects all of the Applicants. Despite their religious missions, the Applicants that are not Dioceses do not qualify as exempt "religious employers" under the Government's definition. Even the Dioceses, which qualify as "religious

employers," are not truly exempt because they offer their health plans to the employees of their non-exempt charitable and educational affiliates. The regulations require the Dioceses' health plans to provide objectionable coverage to enrolled affiliates' employees.

C. Procedural History

To protect their rights of religious exercise, the Applicants separately filed suits on October 8, 2013. On November 12 and 13, 2013, the district court held an evidentiary hearing where it admitted 172 joint stipulations, testimony from six witnesses including one Roman Catholic Cardinal and two Bishops, and 64 exhibits, of which the Government proffered only nine unique exhibits. On November 21, 2013, the district court issued an opinion addressing both cases and granting a preliminary injunction on behalf of all Applicants. On December 20, 2013, the district court converted that preliminary injunction into a permanent injunction because, *inter alia*, the Government admitted that it had no additional evidence. On February 11, 2014, the Government appealed to the Third Circuit.

On February 24, 2014, the Third Circuit consolidated the Government's appeals of the Applicants' cases. Then, on April 2, 2014, at the Government's request, the Third Circuit further consolidated these appeals with the Government's appeals in two similar cases. *See Geneva College v. Sec'y U.S. Dep't of Health & Human Servs.*, Nos. 13-3536, 14-1374 (3d Cir.). On February 11, 2015, a panel of the Third Circuit reversed the district court's grant of injunctive relief. Applicants timely sought panel rehearing and rehearing *en banc*, but their petition was denied on April 6, 2015. On April 9, 2015, Applicants moved to stay the Third Circuit's

issuance of its mandate pending disposition of their petition for certiorari, which the court denied on April 15, 2015. Notwithstanding Federal Rule of Appellate Procedure 41(b), it then immediately issued its mandate. Thus, absent relief from this Court, Applicants will be forced to violate their sincerely-held religious beliefs or face massive fines.

REASONS FOR GRANTING THE APPLICATION

Supreme Court Rule 23.1 provides that "[a] stay may be granted by a Justice as permitted by law." An individual Justice is authorized to issue a stay of a judgment or decree "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. § 2101(f).

An individual Justice is authorized to stay the lower court's mandate when there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). The same standard applies if the Circuit Justice must order the mandate recalled before staying it. *E.g.*, *Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers).

Likewise, an individual Justice is authorized to issue an injunction in exigent circumstances when the legal rights at issue are "indisputably clear," and when such relief is "necessary or appropriate in aid of [this Court's] jurisdiction[]." 28 U.S.C. § 1651(a); *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (citation omitted); *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542

U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citations omitted).

For the reasons described below, Applicants meet the standard for recalling the mandate, or alternatively, injunctive relief.

I. APPLICANTS HAVE A CLEAR RIGHT TO RELIEF UNDER RFRA OR, AT THE VERY LEAST, A "REASONABLE PROBABILITY" OF CERTIORARI AND A "FAIR PROSPECT" OF REVERSAL

RFRA prohibits the Government from imposing a "substantial[] burden" on Applicants' exercise of religion unless the Government shows that such a burden is the "least restrictive means" of advancing a "compelling governmental interest." 42 U.S.C. § 2000bb-1. As discussed below, the Government's regulations violate RFRA and the opinion below contradicts this Court's analysis and reasoning in its recent decisions in *Hobby Lobby* and *Holt v. Hobbs*, 135 S. Ct. 853 (2015). As a result, there is a "reasonable probability" that this Court will grant Applicants' forthcoming certiorari petition and a "fair prospect" of reversal.

A. Reasonable Probability This Court Will Grant Certiorari

There is a "reasonable probability" that this Court will grant certiorari. This case presents an "important" issue affecting thousands of nonprofit religious groups and, as explained below, the decision below plainly "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). On three occasions in recent months, this Court has granted injunctive relief—extraordinary relief compared to the relief Applicants are seeking here—to protect religious believers from imminent and irreparable harm. *See Wheaton*, 134 S. Ct. 2806 (mem.); *Little Sisters*, 134 S. Ct. 1022 (mem.); *Holt v. Hobbs*, 134 S. Ct. 635 (2013) (mem.) (temporary enjoining a prison grooming policy requiring prisoner to violate his religious beliefs). And, recently, in *Notre*

Dame v. Burwell, 135 S. Ct. 1528 (Mar 9, 2015), this Court granted certiorari, vacated, and remanded the decision in *Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), for reconsideration in light of *Hobby Lobby*.

The requested relief is particularly appropriate in light of *Wheaton* and *Little Sisters*, where this Court granted injunctions pending appeal to applicants with similar religious objections to the accommodation. *Wheaton*, 134 S. Ct. 2806; *Little Sisters*, 134 S. Ct. 1022. In *Wheaton* and *Little Sisters*, the applicants sought and were granted injunctive relief under the higher standard required by the All Writs Act, 28 U.S.C 1651. *See, e.g.*, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) ("an applicant must demonstrate that the legal rights at issue are 'indisputably clear.'").

Relief is even more appropriate here. A district court's permanent injunction is already in place and Applicants are respectfully seeking recall of the Third Circuit's mandate. Moreover, Applicants, like in *Wheaton* and *Little Sisters*, are nonprofit religious entities that object to taking actions that they believe make them complicit in the delivery of objectionable coverage to their employees. And just as in *Wheaton* and *Little Sisters*, the Government's regulations force Applicants to choose between taking actions that violate their religious beliefs or suffering severe penalties. Thus, the same reasons that prompted this Court's intervention in those cases warrant similar relief under the lower standard here.

There are dozens of similar cases involving hundreds of plaintiffs currently pending in the district courts and Courts of Appeals. Applicants here are the only

ones currently exposed to millions of dollars in fines for exercising their faith. The equities strongly favor preserving the status quo and protecting Applicants' religious exercise pending resolution of their petition for certiorari. Indeed, that is why enforcement of the Mandate has been enjoined in nearly thirty cases considering the Mandate's application to nonprofit entities like Applicants.[5]

[5] *See Wheaton*, 134 S. Ct. 2806; *Little Sisters*, 134 S. Ct. 1022; *Ass'n of Christian Schs. Int'l v. Burwell*, No. 14-1492 (10th Cir. Dec. 19, 2014) (Doc. 14); *Catholic Charities Archdiocese of Phila. v. HHS*, No. 14-3126 (3d Cir. Sept. 2, 2014); *Eternal World Television Network, Inc. v. HHS* ("*EWTN*"), 756 F.3d 1339 (11th Cir. 2014); *Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir. June 30, 2014) (Doc. 27); *Insight for Living Ministries v. Burwell*, No. 14-cv-00675, 2014 U.S. Dist. LEXIS 165228 (E.D. Tex. Nov. 25, 2014); *Ave Maria Univ. v. Burwell*, No. 2:13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014); *Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-795, 2014 WL 5471054 (M.D. Fla. Oct 28, 2014); *La. College v. Sebelius*, No. 12-0463, 2014 U.S. Dist. LEXIS 113083 (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*, No. C 13-4100, 2014 WL 2115252 (N.D. Iowa May 21, 2014); *FOCUS 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); *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).

B. The Mandate Substantially Burdens Applicants' Exercise of Religion

This Court is likely to reverse the Third Circuit. This Court recently granted certiorari, vacated, and remanded the decision in *Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), for reconsideration in light of *Hobby Lobby*. *Notre Dame v. Burwell*, 135 S. Ct. 1528 (Mar 9, 2015). In GVR-ing the *Notre Dame* decision, this Court necessarily found a "reasonable probability that [*Notre Dame*] rest[ed] upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Because the Third Circuit's decision here is explicitly rooted in *Notre Dame*'s reasoning, there is a reasonable probability that it too will be deemed contrary to *Hobby Lobby*.

When, as here, a claimant's sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a 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" *Hobby Lobby*, 134 S. Ct. at 2775-76; *Holt*, 135 S. Ct. at 862.

Under the first step, the court's inquiry is necessarily limited to accepting the sincere beliefs as credibly stated. After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981). Courts must thus accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714; *Hobby Lobby*, 134 S. Ct. at 2777-78 (rejecting the

Government's "attenuat[ion]" argument as "dodg[ing] the question that RFRA presents"). In other words, it is left to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] an unreasonable one." *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.

For the reasons discussed below, it is clear that the regulations at issue here substantially burden Applicants' religious exercise and, therefore, there is a "fair prospect of reversal."

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

Hobby Lobby confirms that the "exercise of religion" "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 "mandat[es] that this concept 'be construed in favor of broad protection of religious exercise.'" *Id.* at 2762 (quoting 42 U.S.C. §§ 2000cc-3(g), 2000cc-5(7)(A)) (emphasis added); *Holt*, 135 S. Ct. at 862 (same).

Here, part of the exercise of religion by Applicants is "abst[aining] from" at least two specific "acts" required by the regulations. *First*, Applicants object to submitting the self-certification required under the accommodation because of what is caused by that action. Two Bishops—as Plaintiffs and the final arbiters of religious matters for the other Plaintiffs—testified unequivocally that they cannot sign the self-certification form required by the accommodation, because doing so would violate their faith, as "the facilitation of evil." JA565:1-8 (Bishop Persico); JA522:2-9 (Bishop Zubik); *see also* JA199-200 (Cardinal Dolan); *Zubik*, 983 F. Supp. 2d at 594-95, 599-600 (District Court finding). It is undisputed that, by signing the self-certification form, Applicants authorize and designate their TPAs to provide the morally objectionable coverage and allow their health plans to be used as a vehicle to bring about a morally objectionable wrong. JA379-80 ¶ 13; JA380 ¶ 14. Although "it takes a few minutes to sign" the self-certification form, "the ramifications are eternal." JA566:24-25 (Bishop Persico); *Zubik*, 983 F. Supp. 2d at 594-95 (District Court finding). Indeed, without the signed form, Applicants' TPAs cannot provide the coverage, as the Government stipulated. JA401¶ 25; JA442¶ 22) ("[w]ithout the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to [the Affiliates'] employees."). The Government

stipulated to these beliefs, did not challenge their sincerity, and the District Court found them credible. JA152 ¶¶ 52-56 (stipulating to beliefs of the Persico plaintiffs); JA160 ¶¶ 114-17 (stipulating to beliefs of the Zubik plaintiffs); *Zubik*, 983 F. Supp. 2d at 599-600 (District Court finding).

In this respect, the self-certification puts Applicants 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).

Second, Applicants likewise object to complying with the accommodation because it would require them to maintain a contractual relationship with a third party that is obligated, authorized, and incentivized to provide contraceptive coverage to the beneficiaries enrolled in Applicants' health plans. Among other things, this would include providing their TPAs with the names of employees and beneficiaries of non-exempt affiliate entities to allow the objectionable coverage to be provided as part of their health plans. JA520:17-19 (Bishop Zubik); *Zubik*, 983 F. Supp. 2d at 583-84 n.10, 605 (District Court) ("After providing the signed self-certification, the Dioceses would be obliged to provide the TPA with the names of

individuals insured through the Diocesan health plan who are employees of non-exempt entities . . . .").

By way of illustration, the regulations here are akin to a law requiring all schools, on pain of substantial fines, to offer free lunches to their students. If ham sandwiches were required to be on the menu, such a law could substantially burden the religious exercise of a Kosher school. And the burden would remain even if the Government offered an "accommodation" whereby the school's lunch vendor paid for and served the sandwiches. In that scenario, the school may well object to its forced participation in the lunch program—namely, to the fact that it would have to hire and maintain a relationship with a vendor that would serve non-kosher food to its students in its facilities—even though it would not be placing the sandwiches on the students' plates. The same is true here. It makes no difference whether Applicants 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.

There should be no dispute that Applicants' religious objections—refusing to sign and submit the objectionable form or maintain the objectionable contractual relationship—fall well within the scope of religious exercise protected by RFRA. These are clearly "physical acts" from which Applicants believe they must "abst[ain]" "for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2770 (citation omitted). While these actions are different from the specific actions compelled in *Hobby Lobby*, that distinction is irrelevant because RFRA protects "'*any* exercise of religion.'" *Id.* at

2762 (emphasis added) (citation omitted). What matters is that *Applicants* "believe" the actions "demanded by the HHS regulations [are] connected to" illicit conduct "in a way that is sufficient to make it immoral for them to" take those actions. *Id.* at 2778. Applicants have "dr[a]w[n]" a "line" "between [actions] consistent with [their] religious beliefs" and actions they "f[i]nd morally objectionable." *Id.* It is not for a court to disagree. *Id.* (quoting *Thomas*, 450 U.S. at 715).

2. The Mandate Places Substantial Pressure upon Applicants 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. The Court noted that the plaintiffs "object[ed] on religious grounds" to complying with the regulations, and proceeded to ask whether the plaintiffs would incur a substantial *penalty* if they did not comply. *Id.* at 2775-79. Because that penalty, millions of dollars in fines, "[was] surely substantial," the Court found a "substantial burden" on the plaintiffs' exercise of religion. *Id.* at 2776, 2779; *see also Holt*, 135 S. Ct. at 862 (petitioner "easily satisfied" the substantial burden standard where he was "put[s] . . . to this choice" of violating his religious beliefs or suffering "serious disciplinary action").

Here, Applicants face the same "consequences" for noncompliance as the plaintiffs in *Hobby Lobby*. 134 S. Ct. at 2776. Just as in *Hobby Lobby*, failure to comply with the regulations at issue subjects Applicants to potentially ruinous fines

of $100 a day per affected beneficiary. *See id.* at 2775 (citing 26 U.S.C. § 4980D). And just as in *Hobby Lobby*, if Applicants drop their health plans, they are subject to incurring fines of $2,000 a year per full-time employee after the first thirty employees and/or ruinous practical consequences due to their inability to offer a healthcare benefit to employees. *See id.* at 2776 (citing 26 U.S.C. § 4980H). Moreover, Applicants' provision of health coverage is itself an exercise of religion, motivated by Catholic social teaching, and dropping coverage would therefore inhibit Applicants' ability to exercise their religion. *See Hobby Lobby*, 134 S. Ct. at 2776 (the option of dropping coverage "entirely ignores the fact that the [plaintiffs] have religious reasons for providing health-insurance coverage."); *id.* at 2777 ("We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put [plaintiffs] to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans."). After *Hobby Lobby*, "these consequences" of non-compliance clearly "amount to a substantial burden" on religious exercise. *Id.* at 2759.

3. The Third Circuit's Substantial-Burden Analysis Conflicts With This Court's Decision in *Hobby Lobby*

The Third Circuit's substantial burden analysis cannot be reconciled with *Hobby Lobby* and this Court's precedent. Rather than assessing the substantiality of the *penalty* threatened by the Government to compel Applicants to act in violation of their religious beliefs, the Third Circuit devoted its analysis to assessing the nature of the *actions* Applicants are compelled to take. The Third Circuit's holding, that the Mandate is <u>not</u> a burden at all on Applicants' free exercise of

religion, is based heavily on the vacated *Notre Dame* decision and its progeny as well as the discredited dissent in *Korte*. Op. at 44 (citing *Notre Dame*, 743 F.3d at 551, 557; *Korte*, 735 F.3d at 705 (Rovner, J., dissenting)). This analysis was improper for at least four separate but related reasons.

First, the panel rested its decision on an improper "qualitative assessment" of "whether [Applicants'] compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." Op. at 44 (citing the *Korte* dissent). After conducting that inquiry, the court concluded that "the submission of the self-certification form does not make [Applicants] 'complicit' in the provision of contraceptive coverage," and indeed "relieves [Applicants'] of any connection" to such conduct.

Hobby Lobby squarely rejected such analysis, explaining that it:

> dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).

134 S. Ct. at 2778. In other words, *Hobby Lobby* commands that Applicants, not courts, determine whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." *Id.* Here, it is undisputed that Applicants believe they cannot sign the self-certification form, and cannot participate in the accommodation, because doing so facilitates and authorizes the provision of the objectionable coverage. *See* JA379-80 ¶ 13; JA380 ¶ 14. In the face of this undisputed evidence, it was manifest error for the Third Circuit to substitute its

religious judgment for that of Applicants in order to proclaim that the compliance with the accommodation does not make Applicants "complicit" in a moral evil or, indeed, require them to take "any action that interferes with [their] religious activities." Op. at 37.

Second, the Third Circuit concluded that the accommodation amounts to an "opt out" that "relieves [Applicants] of any obligation to . . . arrange . . . for access to contraception." Op. at 43 (citing *Priests for Life*, 772 F.3d at 252). In doing so, the Third Circuit decided for itself that signing the form allows Applicants to "wash[] [their] hands of any involvement in contraceptive coverage." Op. at 44 (citing *Notre Dame*, 743 F.3d at 557). The determination of complicity in wrongdoing, however, is itself a religious judgment rooted in Catholic teachings regarding material cooperation and "scandal." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) (objection 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. Here, Applicants have concluded that the accommodation simply offers them a different way to violate their religious beliefs. That 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 both.

Third, the Third Circuit's re-characterization of Applicants' religious objections inaccurately treated them as objections to third parties' conduct. Op. at 43. On the contrary, the record is clear, and the Government stipulated that Applicants object to actions they are required to take thereby authorizing or designating a TPA to provide the objectionable coverage through Applicants' plans. *See* JA379-80 ¶ 13; JA380 ¶ 14; *Zubik*, 983 F. Supp. 2d at 594-95 (District Court finding); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 765 (S.D. Tex. 2013) (plaintiffs "vigorously object on religious grounds to the act[s] that the government requires *them* to perform, not merely to later acts by third parties.") (emphasis added). Among other things, Applicants have repeatedly reiterated their objection to signing the form that designates or authorizes their TPA to provide the objectionable coverage through their plan. *Supra* pp. 14-16.

Based on this error, the Third Circuit cited an inapposite line of cases dealing with objections solely to third parties' conduct, without any conduct by the objector. Op. at 40-43 (citing *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008) (government extraction of DNA from blood sample in its possession); *Bowen v. Roy*, 476 U.S. 693 (1986) (government use of Social Security number in its possession); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (government building road on public land)). Unlike those cases, this case does not involve a situation where Applicants play "no role." *Kaemmerling*, 553 F.3d at 679. Significantly, when the *Bowen* Court considered the plaintiffs' objection to an action they were required to take—transmitting their daughter's social security number to

the government—"'five justices . . . expressed the view that the plaintiffs '[would have been] entitled to an exemption' from [that] 'administrative requirement.'" *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting).

Fourth, the Third Circuit's decision rests in part on the premise that Applicants' TPAs have an "independent obligation" to provide the objectionable coverage to Applicants' employees. Op. at 39. This is wrong. Applicants' TPAs have no independent obligation to provide the objectionable coverage *unless and until* Applicants sign and submit the self-certification form. It is undisputed and stipulated that "[w]ithout the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to [the Affiliates'] employees." JA401¶ 25; JA442¶ 22); *see*, *e.g.*, 26 C.F.R. § 54.9815-2713AT(b)-(c) (obligations arise only "[w]hen" and "[i]f" an objector offers a health plan, contracts with an insurer or TPA, and provides the notification). Because the Diocesan plans specifically exclude the objectionable coverage and do not allow the TPAs to provide such coverage, *see, e.g.*, JA388-89¶ 9; JA428¶ 7, the TPAs have no legal authority to provide it; a TPA can provide only the coverage that the plan administrator has deemed appropriate. *See* JOHN C. GARNER, HEALTH INSURANCE ANSWER BOOK Q 10:50 (11th ed. 2013 ("[L]egally the TPA is just a paper pusher. All power and responsibility rest with the official 'plan administrator,' which is usually the sponsoring employer or a board of trustees of the plan."). A TPA "bears the legal obligation to provide contraceptive coverage *only* upon receipt of a valid self-certification." *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting) (emphasis

added). Indeed, the Government admitted that here. *See, e.g.*, JA160 ¶ 117; JA401 ¶ 25.

C. The Mandate Cannot Survive Strict Scrutiny

Because the Third Circuit erroneously found the accommodation does not impose a burden, let alone a substantial one, it did not consider whether the accommodation survives strict scrutiny. Op. at 48-49. But, because the accommodation *does* substantially burden Applicants' exercise of religion, the "burden is placed squarely on the Government" to show that it satisfies strict scrutiny. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). *Hobby Lobby*, *Holt*, and several other decisions confirm that the Government cannot meet this demanding standard. *See, e.g.*, *Korte*, 735 F.3d at 685-87; *Gilardi v. HHS*, 733 F.3d 1208, 1219-24 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc); *supra* n. 5.

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); *Holt*, 135 S. Ct. at 863 (same). "[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." *Id.* 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, a review of the evidence in this record—as opposed to generalized policy claims that were not presented in the record—shows that the Government has failed to establish a compelling interest for at least four reasons.

First, in the district court, the Government asserted only "two compelling governmental interests" in defense of the Mandate: "the promotion of public health" and "assuring that women have equal access to health care services."[6] *Zubik*, 983 F. Supp. 2d at 609. 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 government guarantee[d] that the mandate will flunk the test." *Korte*, 735 F.3d at 686.[7]

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[6] On appeal, the Government for the first time asserted two new compelling interests: "its ability to operate programs while accommodating religious concerns" and "ensuring a comprehensive insurance system with a variety of benefits available to all participants." Gov. 3d Cir. Br. at 29-30 (citing *U.S. v. Lee*, 455 U.S. 252, 258 (1982)). The Government waived these allegedly "compelling" interests by not raising them at the district court. *See, e.g.*, *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 576 (2d Cir. 2002) (appellate court need not consider a compelling interest the government first proffered on appeal). In any event, these interests, like the ones asserted before the district court, are overly broad and not specific to Applicants. Further, the Government offered no evidence to support these new interests, and it therefore cannot establish them because it failed to provide any "evidence of a concrete problem." *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012); *see also Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 556-7 (4th Cir. 2012) (Government cannot succeed if "the record establishes, at most, only . . . speculative evidence").

[7] The district court, similarly to *Hobby Lobby* and *Korte*, correctly held that the Government's two asserted interests were too "broadly stated . . . [to] overbalance legitimate claims to the free exercise of religion." *Zubik*, 983 F. Supp. 2d at 609 (quoting *Yoder*, 406 U.S. at 215).

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 the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted); *O Centro*, 546 U.S. at 433. As of the end of 2013, the Government exempted health plans covering 90 million employees through a variety of exemptions, including those for grandfathered plans. *Korte*, 735 F.3d at 683; *Geneva Coll.*, 941 F. Supp. 2d at 684 & n.12. And the Government has stipulated in this case that approximately 100 million people are on grandfathered health plans that can remain exempt from the preventive services requirement in perpetuity. JA482 ¶¶ 5-6. Simply put, "the interest here cannot be compelling because the [regulations] presently do[] not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Korte*, 735 F.3d at 686; *see also Holt*, 135 S. Ct. at 865-66.

The Government's interest also cannot be compelling because it exempted its narrow class of "religious employers" without any—let alone a compelling—basis to deny a similar exemption for Applicants, who are equally religious. *See supra* pp. 4-5. If there is, in the eyes of the Government, no compelling interest in applying the Mandate to religious employers operating houses of worship, there cannot be a compelling interest to apply the Mandate to religious employers operating the Church's charitable and educational counterparts. *See Zubik*, 983 F. Supp. 2d at 610. Indeed, the Government stipulated that worship, good works, and education are all equally essential to the Catholic faith and "cannot be separated," JA382 ¶ 21;

JA404-05 ¶ 37; JA413-14 ¶ 18; JA422 ¶ 19; JA443 ¶ 28, even though the regulations at issue attempt to limit the free exercise of religion to just what occurs in houses of worship. Thus, "[e]verything the Government says about" exempt religious employers "applies in equal measure to" non-exempt religious non-profits like Applicants, and therefore "it is difficult to see how" the Government can "preclude any consideration of a similar exception for" Applicants. *O Centro*, 546 U.S. at 433. The Government has no justification for "distinguishing between different religious believers—burdening one while [exempting] the other—when it may treat both equally by offering both of them the same [exemption]." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

In an attempt to justify treating equally valid religious entities differently, the Government has asserted, without evidence, that religious nonprofits such as Applicants that do not qualify as "religious employers" do not merit an exemption because their employees are less likely to object to contraceptives. 78 Fed. Reg. at 39,874; JA682:13-JA683:13. But, as the district court found, this claim is "speculative, and unsubstantiated by the record and, therefore, unpersuasive." *Zubik*, 983 F. Supp. 2d at 610. Moreover, this claim is directly contradicted by the record. For example, all Diocese of Pittsburgh employees, including all Catholic Charities employees, make an annual pledge to perform their duties in accordance with Catholic teaching. JA548:22-JA549:2.

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 has acknowledged that contraceptives are widely available at free and reduced cost through various government programs, and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, with contraceptives so readily available to practically anyone who wants them, the Government has not "identif[ied] an 'actual problem' in need of solving." *Brown*, 131 S. Ct. at 2738 (citation omitted). 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.

Finally, RFRA requires the Government to identify a compelling need for enforcement against the "particular claimant[s]" filing suit, not among the general population. *Hobby Lobby*, 134 S. Ct. at 2779. The Government fails to make this showing and instead relies on the general proposition that "women who receive their health coverage through employers *like [Applicants]* would face negative health and other outcomes . . . ." *Zubik*, 983 F. Supp. 2d at 610 (district court opinion); 77 Fed. Reg. at 8728; 78 Fed. Reg. at 39,887. As a factual matter, the district court found that the Government "failed to offer any testimony or other evidence . . . to support [its] claim" that Applicants' employees have suffered, or will suffer, "any 'negative health or other outcomes' without the enforcement of the contraceptive mandate." *Zubik*, 983 F. Supp. 2d at 610. The district court found "the evidence was to the contrary." *Id.* Indeed, Applicants are not aware of any employee complaints regarding the absence of the objectionable coverage. JA540:18-25; JA578:24-JA579:7; JA596:23-JA597:12. Nor is there any record

evidence that Applicants' employees have suffered, or will suffer, any negative health effects. JA541:1-5; JA579:8-11.

Simply put, no evidence establishes a significant lack of access among Applicants' plan beneficiaries or that the Mandate would significantly increase contraception use among those individuals. Since the Government provides no evidence on these points—and admitted it had no further evidence—it cannot show that enforcing the Mandate here is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

To be clear, the Government's failure to "satisfy the . . . 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 ("[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 its regulations are "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. If it acts at all, it must choose 'less drastic means.'" *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Holt*, 135 S. Ct. at 864 (same). A regulation is the least restrictive means only 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).

The *Government* bears the burden of proof here. As the Solicitor General recently 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 29, 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"; where a plaintiff "identifies [acceptable] less restrictive alternatives," the Government must "demonstrate that they have considered and rejected the efficacy of' those alternatives." *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. *Holt*, 135 S. Ct. at 864 (the government must "not merely explain" its exemption denial, but must "prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest").

The Government has not come close to meeting this burden. The district court correctly found that the Government "failed to present any credible evidence tending to prove" that the accommodation is the least restrictive means of advancing its stated interests. *Zubik*, 983 F. Supp. 2d at 612. The Government exclusively relied on one page in the Federal Register, *see* JA686:12-JA689:15, that simply states "various alternatives . . . were considered" but would not be "feasible" or "as effective[]." 78 Fed. Reg. at 39,888. There were no affidavits or any evidence that would demonstrate why it cannot grant an exemption for these Applicants. Under this Court's precedent, simply stating that other means are less effective, without evidence of robust and serious consideration, is not enough. *See Holt*, 135 S. Ct. at 864.

Moreover, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than using religious objectors' health plans as a conduit to deliver free contraception. *Korte*, 735 F.3d at 686. Most obviously, as 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 under their health-insurance policies due to their employers' religious objections." 134 S. Ct. at 2780. The Government, however, chose to ignore this alternative—despite Applicants making this very argument since the beginning of this case, *Zubik*, No. 2:13-cv-1459, Doc. No. 6 at 30—and never presented any evidence that it would be cost-prohibitive to do so.

The Government could provide free contraceptive coverage without using Applicants' plans as a conduit in numerous ways: it "could provide the contraceptives services or insurance coverage directly to [Applicants'] employees, or work with third parties—be it insurers, health care providers, drug manufactures, or non-profits—to do so without requiring [Applicants'] active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *Roman Catholic Archdiocese of New York v. Sebelius*, 987 F. Supp. 2d 232, 255-56 (E.D.N.Y. 2013); *Korte*, 735 F.3d at 686 (same). This could be accomplished through the vast federal machinery that already exists for providing health care subsidies on a massive scale—whether by adjusting the eligibility requirements of the Title X family planning program or any number of other 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 permitting employees of religious objectors to purchase fully subsidized coverage (either for contraceptives alone, or full plans) on those exchanges. While Applicants 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 Applicants 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. It has submitted no evidence to show that its interests would be negatively impacted by extending the religious

employer exemption to Applicants. And even had the Government attempted to shoulder its burden, it would not be able to meet this test. Absent evidence to substantiate its claims, the Government cannot claim that the cost of providing coverage—which likely "would be minor when compared with the overall cost of ACA"—would be prohibitive. *Hobby Lobby*, 134 S. Ct. at 2781. Indeed, the Government is already paying for this coverage as it will reimburse TPAs 115% of the costs under the accommodation. 79 Fed. Reg. at 13,809.

Finally, any suggestion that *Hobby Lobby* endorsed the Accommodation as a viable least-restrictive means in all cases is mistaken. In fact, this Court expressly did "not decide" that question. 134 S. Ct. at 2782 & n.40; *id*. at 2763 n.9. Instead, it simply found the accommodation *less* restrictive than requiring plaintiffs to pay for contraceptives where the plaintiffs *did not object* to the accommodation. *Id*. at 2782 & n.40; *id*. at 2786 (Kennedy, J., concurring). While the accommodation may "effectively exempt[]" such plaintiffs, *id*. at 2763 (majority op.), it does not "effectively" exempt Applicants, who do object to compliance. As this Court stated in *Hobby Lobby*, this Court "[did] not decide . . . whether an approach of this type complies with RFRA for purposes of all religious claims." *Id*. at 2782. Moreover, this Court's order in *Wheaton* dispelled any notion that *Hobby Lobby* somehow blessed the accommodation.

II. THE EQUITIES FAVOR RECALLING THE MANDATE OR, ALTERNATIVELY, AN INJUNCTION PENDING CERTIORARI

The equities here also favor recall or an injunction. *First*, if relief is denied, Applicants will suffer irreparable harm because they will be forced to choose

between paying potentially ruinous fines and violating their religious beliefs. Whichever course they choose, they and the communities they serve will suffer damage that cannot be undone.

Applicants believe their signing of the form would impermissibly authorize or designate their TPAs to provide the objectionable coverage. Doing so would make Applicants complicit in sin. JA565:1-8 (Bishop Persico); JA522:2-9 (Bishop Zubik); *see also* JA199-200 (Cardinal Dolan); *Zubik*, 983 F. Supp. 2d at 594-95, 599-600 (District Court finding). By signing the form, Applicants authorize and designate their TPAs to provide the morally objectionable coverage and allow their health plans to be used as a vehicle to bring about a morally objectionable wrong. JA379-80 ¶ 13; JA380 ¶ 14; *see also* Appellees' Br. at 30-32.

After the mandate issues, if Applicants do not act as required by the accommodation, they can either keep their current plans and be subject to fines of $100 a day per affected beneficiary, *see* Op. at 24; JA151¶ 50(a); JA484¶ 13 (citing 26 U.S.C. § 4980(b)), or they can drop coverage altogether, violating Catholic social teaching and facing potentially ruinous consequences, including potential annual fines. *See, e.g.,* Op. at 22 n.8 ("We recognize that the appellees believe providing health insurance to their employees . . . is part of their religious commitments."). Thus, absent recall of the Third Circuit's mandate, Applicants will have to undertake specific actions that make them complicit in conduct that they believe to be immoral.

Second, the irreparable harm to Applicants far outweighs any harm to the

Government, which has gone for over two centuries without forcing religious non-profits to provide free contraceptive coverage, and has no urgent need to do so now. Indeed, given that the Mandate already contains religious exemptions and other exemptions affecting roughly 90 million individuals, the Government can hardly claim its interests will be unduly harmed by granting temporary relief here.

Finally, the public interest is best served by allowing Applicants a full opportunity to seek review from this Court before requiring them to comply with the mandate. Just as "there is the highest public interest in the due observance of all the constitutional guarantees," *United States v. Raines*, 362 U.S. 17, 27 (1960), so too, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2014) (per curiam); *see also Hobby Lobby,* 723 F.3d at 1147.

This Court has said that dropping employer health plans altogether is not a "tolerable result." *Hobby Lobby*, 134 S. Ct. 2776-77. And the record shows that would harm Applicants and their employees. *See, e.g.*, *Zubik*, 983 F. Supp. 2d at 590; JA404¶ 34; JA442-43¶ 25. Moreover, the substantial tax penalties to which Applicants will be exposed could severely impede, if not entirely foreclose, the charitable services Applicants provide, leaving a gap in the network of critical social services relied on by many in their communities. *See, e.g.*, JA600:21-601:10 ("Our community of Erie counts on St. Martin Center. . . . It just – it – it isn't something that we could cope with."); JA547:3-25 ("[F]amilies would be in homes that were not heated, no electricity, no lights, emergency food assistance wouldn't be available.");

JA584:9-10 ("As a school with a budget, limited resources, we would close our doors."). This would be destructive not just to Applicants, but to the communities that they serve.

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION

The foregoing discussion establishes why it is appropriate for this Court to enter an order recalling the Third Circuit's mandate. If this Court instead decides to consider issuing an injunction pending certiorari, the issuance of such an injunction would also be in aid of this court's jurisdiction. *See United States v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263 (1948) (the writ power "protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved"). Indeed, this Court recently granted injunctive relief in three similar cases wherein religious believers faced the threat of imminent and irreparable harm. *See Little Sisters*, 134 S. Ct. 1022; *Wheaton***,** 134 S. Ct. 2806; *Holt*, 134 S. Ct. 635. For the same reasons, injunctive relief here would be appropriate.

CONCLUSION

For the foregoing reasons, Applicants respectfully ask this Court to recall the Third Circuit's mandate or, alternatively, enter an injunction pending consideration of Applicants' forthcoming petition for certiorari, to be filed soon after this Application. At the very minimum, the Court should grant a temporary administrative stay to allow full briefing and consideration of this application.

Respectfully submitted,

April 15, 2015

/s/ Paul M. Pohl

PAUL M. POHL
Counsel of Record
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Telephone: (412) 391-3939
pmpohl@jonesday.com

Counsel to Applicants

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, John M. Gore, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application was served via electronic mail on April 15, 2015 and by Federal Express on April 15, 2015 on:

Donald B. Verilli, Jr.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., NW, Rm. 5614
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Mark B. Stern
Alisa B. Klein
Adam C. Jed
Patrick G. Nemeroff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW, Rm. 7240
Washington, DC 20530
(202) 514-8280
Mark.Stern@usdoj.gov
Alisa.Klein@usdoj.gov
Adam.C.Jed@usdoj.gov
patrick.g.nemeroff@usdoj.gov

Date: April 15, 2015

_____

JOHN M. GORE
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

APPENDIX CONTENTS

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-3536, 14-1374, 14-1376, 14-1377

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1374

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust; THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust; CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC., an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES

DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1377

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court Nos.: 1-13-cv-00303; 2-12-cv-00207 and 2-13-cv-01459)
District Judges: Honorable Joy Flowers Conti; Honorable Arthur J. Schwab

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Argued on November 19, 2014

Before: McKEE, Chief Judge, RENDELL, SLOVITER, Circuit Judges

(Opinion filed: February 11, 2015)

Stuart F. Delery, Esquire
David J. Hickton, Esquire
Beth S. Brinkmann, Esquire
Mark B. Stern, Esquire **(ARGUED)**
United States Department of Justice
Civil Division
Room 7531
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Michael A. Comber, Esquire
Office of United States Attorney
700 Grant Street
Suite 4000
Pittsburgh, PA 15219

Bradley P. Humphreys, Esquire
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Room 7130
Washington, DC 20530

Adam C. Jed, Esquire
United States Department of Justice
Civil Division
Appellate Section, Room 7240
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Alisa B. Klein, Esquire
United States Department of Justice
Civil Division
Appellate Section, Room 7325
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Patrick Nemeroff, Esquire
United States Department of Justice
Civil Division, Room 7217
950 Pennsylvania Avenue, N. W.
Washington, DC 20530

Eric R. Womack, Esquire
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N. W.
Room 7130
Washington, DC 20530

Counsel for Appellants Secretary United States Department of Health and Human Services; Secretary United States Department of Labor; Secretary United States Department Of Treasury; United States Department of Health and Human Services; United States Department of Labor; United States Department of the Treasury

Steven H. Aden, Esquire
Gregory S. Baylor, Esquire **(ARGUED)**
Matthew S. Bowman, Esquire
Alliance Defending Freedom
801 G Street, N.W.
Suite 509
Washington, DC 20001

Erik W. Stanley, Esquire
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Kevin H. Theriot, Esquire
Alliance Defending Freedom
15192 Rosewood Street
Leawood, KS 66224

David A. Cortman, Esquire
Alliance Defending Freedom
1000 Hurricane Shoals, N.E.
Building D - Suite 1100
Lawrenceville, GA 30043

David J. Mongillo, Esquire
Bradley S. Tupi, Esquire
Tucker Arensberg
1500 One PPG Place
Pittsburgh, PA 15222

Counsel for Appellees Geneva College; Seneca Hardwood Lumber Company, Inc.; Carrie E. Kolesar; Wayne Hepler

Paul M. Pohl, Esquire **(ARGUED)**
John D. Goetz, Esquire
Leon F. DeJulius, Jr., Esquire
Ira M. Karoll, Esquire
Alison M. Kilmartin, Esquire
Mary Pat Stahler, Esquire
Jones Day
500 Grant Street, Suite 4500
Pittsburgh, PA 15219

Counsel for Appellees Most Reverend Lawrence T. Persico, Bishop Of The Roman Catholic Diocese of Erie, as Trustee of the Roman Catholic Diocese Of Erie, a Charitable Trust; The Roman Catholic Diocese of Erie; ST. Martin Center, Inc., an affiliate Nonprofit Corporation of Catholic Charities of the Diocese of Erie; Prince of Peace Center, Inc.,

an Affiliate Nonprofit Corporation Of Catholic Preparatory School, an Affiliate Nonprofit Corporation Of The Roman Catholic Diocese of Erie; Most Reverend David A. Zubik, Bishop of the Roman Catholic Diocese of Pittsburgh, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust, Roman Catholic Diocese of Pittsburgh, Catholic Charities Diocese Of Pittsburgh

Deborah J. Dewart, Esquire
Liberty, Life and Law Foundation
620 East Sabiston Drive
Swansboro, NC 28584

Counsel for Amicus Liberty, Life and Law Foundation

Witold J. Walczak, Esquire
Sara J. Rose, Esquire
American Civil Liberties Union
313 Atwood Street
Pittsburgh, PA 15213

Brigitte Amiri, Esquire
Jennifer Lee, Esquire
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Daniel Mach, Esquire
American Civil Liberties Union Foundation
915 15th Street, 6th Floor
Washington, DC 20005

Counsel for Amicus Julian Bond, The American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania

Charles E. Davidow, Esquire
Andree J. Goldsmith, Esquire
Karin Dryhurst, Esquire
Paul, Weiss, Rifkind, Wharton & Garrison
2001 K Street, N.W., Suite 600
Washington, DC 20006

Marcia D. Greenberger, Esquire
Judith G. Waxman, Esquire
Emily J. Martin, Esquire
Gretchen Borchelt, Esquire
Leila Abolfazli, Esquire
National Women' Law Center
11 DuPont Circle, NW, Suite 800
Washington, DC 20036

Counsel for Amicus National Women's Law Center and Twenty Other National, State and Local Organizations

Ayesha N. Khan, Esquire
American United For Separation of Church and State
1301 K Street, NW, Suite 850, East Tower
Washington, DC 20005

Counsel for Amicus American United for Separation of Church and State

Sarah Somers, Esquire
Martha Jane Perkins, Esquire
Dipti Singh, Esquire
National Health Law Program
101 East Weaver Street, Suite G-7
Carrboro, NC 27510

Counsel for National Health Law Program, American Public Health Association, National Family Planning & Reproductive Health Association, National Women's Health Network, National Latina Institute For Reproductive Health, National Asian Pacific American Women's Forum, Asian Americans Advancing Justice, AAJC, Asian Americans Advancing Justice, Los Angeles, Asian & Pacific Islander American Health Forum, National Hispanic Medical Association, Forward Together, IPAS, Sexuality Information and Education Council of the U. S. (Siecus), HIV Law Project, and California Women's Law Center as Amici Curiae

Kimberlee Wood Colby, Esquire
Center for Law & Religious Freedom
Christian Legal Society
8001 Graddock Road, Suite 302
Springfield, VA 22151

The Association of Gospel Rescue Missions, Prison Fellowship Ministries, Association of Christian Schools International, National Association of Evangelicals, Ethics & Religious Liberty Commission of the Southern Baptist Convention, American Bible Society, The Lutheran

Church – Missouri Synod, Institutional Religious Freedom Alliance, and Christian Legal Society in Support of Appellees and Urging Affirmance

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O P I N I O N

RENDELL, Circuit Judge:

The appellees in these consolidated appeals challenge the preventive services requirements of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. Particularly, the appellees object to the ACA's requirement that contraceptive coverage be provided to their plan participants and beneficiaries. However, the nonprofit appellees are eligible for an accommodation to the contraceptive coverage requirement, whereby once they advise that they will not pay for the contraceptive services, coverage for those services will be independently provided by an insurance issuer or third-party administrator. The appellees urge that the accommodation violates RFRA because it forces them to "facilitate" or "trigger" the provision of insurance coverage for contraceptive services, which they oppose on religious grounds. The appellees affiliated with the Catholic Church also object on the basis that the application of the accommodation to Catholic nonprofit organizations has the impermissible effect of dividing the Catholic Church, because the Dioceses themselves are eligible for an actual exemption from the

contraceptive coverage requirement. The District Courts granted the appellees' motions for a preliminary injunction, and, in one of the cases, converted the preliminary injunction to a permanent injunction. Because we disagree with the District Courts and conclude that the accommodation places no substantial burden on the appellees, we will reverse.

I. BACKGROUND

A. Statutory and Regulatory Background

1. The Affordable Care Act, the Preventive Services Coverage Requirement, and the Accommodation for Religious Nonprofit Organizations

In 2010, Congress passed the ACA, which requires group health plans and health insurance issuers offering health insurance coverage[1] to cover preventive care and screenings for women, without cost sharing (such as a copayment, coinsurance, or a deductible), as provided for in guidelines established by the Department of Health and

[1] Eligible organizations may be either "insured" or "self-insured." An employer has an "insured" plan if it contracts with an insurance company to bear the financial risk of paying its employees' health insurance claims. An employer has a "self-insured" plan if it bears the financial risk of paying its employees' claims. Many self-insured employers use third-party administrators to administer their plans and process claims. *See* Cong. Budget Office, Key Issues in Analyzing Major Health Insurance Proposals 6 (2008). The appellees here fall into both categories.

Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(4).[2] HHS requested assistance from the Institute of Medicine ("IOM"), a nonprofit arm of the National Academy of Sciences, to develop guidelines regarding which preventive services for women should be required. 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, 8726 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147). The IOM issued a report recommending a list of preventive care services, including all contraceptive methods approved by the Food and Drug Administration ("FDA"). The regulatory guidelines accordingly included "[a]ll Food and Drug Administration . . . approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. 77 Fed. Reg. at 8725 (alteration in original). The relevant regulations require coverage of the contraceptive services recommended in the guidelines. *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).

[2] The ACA's preventive care requirements apply only to non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage. *See* 45 C.F.R. § 147.140 (exempting "grandfathered" plans—"coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled as of March 23, 2010," the date on which the ACA was enacted "for as long as it maintains that status under the rules of this section").

The implementing regulations authorize an exemption from contraceptive coverage for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). The regulations define a religious employer as a nonprofit organization described in the Internal Revenue Code provision referring to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

After notice-and-comment rulemaking, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (the "Departments") published final regulations in July 2013 that provided relief for organizations that, while not "religious employers," nonetheless oppose coverage on account of their religious objections. These regulations include an "accommodation" for group health plans established or maintained by "eligible organizations" (and group health coverage provided in connection with such plans). *See* 26 C.F.R. § 54.9815-2713A(a), 29 C.F.R. § 2590-2713A(a), 45 C.F.R. § 147.131(b); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pts. 147 & 156). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." 45 C.F.R. § 147.131(b). To invoke this accommodation, an employer must certify that it is such an organization. *Id*. § 147.131(b)(4). Here, there is no dispute that the nonprofit religious organization appellees are eligible organizations under these regulations.

To take advantage of the accommodation to the contraceptive coverage requirement, the eligible organization must complete the self-certification form, EBSA Form 700, issued by the Department of Labor's Employee Benefits Security Administration, indicating that it has a religious objection to providing coverage for the required contraceptive services. The eligible organization then is to provide a copy of the form to its insurance issuer or third-party administrator. 78 Fed. Reg. at 39,875.[3]

[3] After these suits had been filed, the Supreme Court granted an injunction pending appeal in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and ordered that the eligible organization applicant need not use EBSA Form 700 to notify its insurance issuer or third-party administrator of its religious objection to the contraceptive coverage requirement; instead, if the organization notifies the government in writing of its objection, the government is enjoined from enforcing the contraceptive coverage requirement against the organization. *Id.* at 2807. In response, interim final regulations were issued in August 2014 allowing an eligible organization to opt out by notifying HHS directly, rather than notifying its insurance issuer or third-party administrator; the eligible organization also need not use EBSA Form 700. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pt. 147); *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). We conclude here that the accommodation, even when utilizing EBSA Form 700, poses no substantial burden. To the extent that the Supreme Court's order in *Wheaton* may be read to signal that the alternative

The submission of the form has no real effect on the plan participants and beneficiaries. They still have access to contraception, without cost sharing, through alternate mechanisms in the regulations.[4] Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it objects on religious grounds. 78 Fed. Reg. at 39,874. As a result, either the health insurance issuer or the third-party administrator is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. The ACA's prohibition on cost sharing for preventive services, including contraception, bars the insurance issuer or third-party administrator from imposing any premium or fee on the group health plan, or plan participants and beneficiaries. Furthermore, the accommodation prohibits the insurance issuer or third-party administrator from imposing such fees on the eligible organization. *See* 42 U.S.C.

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notification procedure is less burdensome than using EBSA Form 700, we also conclude that the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden.

[4] The Supreme Court has recognized that the accommodation ensures that employees of entities with religious objections have the same access to all FDA-approved contraceptives as employees of entities without religious objections to providing such coverage. "The effect of the HHS-created accommodation on the women employed . . . would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

§ 300gg-13(a); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii). The insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the [eligible organization's] group health plan" and "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)(i)(A), (ii); 45 C.F.R. § 147.131(c)(2)(i)(A), (ii). The third-party administrator may seek reimbursement for payments for contraceptive services from the federal government. 29 C.F.R. § 2590.715-2713A(b)(3).

Furthermore, the health insurance issuer or third-party administrator, *not* the eligible organization, provides notice to the plan participants and beneficiaries regarding contraceptive coverage "separate from" materials that are distributed in connection with the eligible organization's group health coverage, specifying 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." *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).[5] This is in accordance with the preventive services requirement of the ACA.

[5] As part of this separate notice regime, eligible organizations do not need to provide the names of their beneficiaries to their insurance issuers or third-party administrators, or otherwise coordinate notices with them. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254 (D.C. Cir. 2014) (agreeing that "[n]o regulation related to the

2. RFRA Challenge to the Accommodation

The appellees challenge the ACA's contraceptive coverage requirement as posing a substantial burden on their religious exercise, in violation of RFRA. RFRA places requirements on all federal statutes that impact a person's exercise of religion, even when that federal statute is a rule of general applicability. 42 U.S.C. § 2000bb-1(a).[6] Under RFRA, the "[g]overnment 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." *Id.* § 2000bb-1(b).

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accommodation imposes any such duty on Plaintiffs"); *see also* 29 C.F.R. § 2590.715-2713A(b)(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"); *id.* § 2590.715-2713A(c)(1)(i) ("When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage . . . . An issuer may not require any further documentation from the eligible organization regarding its status as such.").

[6] Because the issue was not raised before us, we assume that RFRA is constitutional as applied to federal laws and regulations. *But see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress did not have authority under the Fourteenth Amendment to impose RFRA on state or local laws).

Congress enacted RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court rejected the balancing test for evaluating claims under the Free Exercise Clause of the First Amendment set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), under which the Court asked whether the challenged law substantially burdened a religious practice and, if it did, whether that burden was justified by a compelling governmental interest. The *Smith* Court concluded that the continued application of the compelling-interest test would produce a constitutional right to ignore neutral laws of general applicability and would "open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind," which the First Amendment does not require. 494 U.S. at 888-89. "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.'" *Id.* at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451 (1988)). Making an individual's obligation to obey a generally applicable law contingent upon the individual's religious beliefs, except where the state interest is compelling, permits that individual, "by virtue of his beliefs, 'to become a law unto himself,'" which "contradicts both constitutional tradition and common sense." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

Congress then passed RFRA to legislatively overrule the *Smith* standard for analyzing claims under the Free Exercise Clause of the First Amendment. RFRA's stated purposes are: (1) to restore the compelling-interest test as set forth in *Sherbert* and *Yoder* 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 the government. 42 U.S.C. § 2000bb(b). The Supreme Court has characterized RFRA as "adopt[ing] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

B. Factual Background and Procedural History[7]

We review here the following District Court opinions: two preliminary injunctions issued in *Geneva College v. Sebelius*, and a preliminary injunction and permanent injunction issued in the related cases of *Most Reverend David A. Zubik v. Sebelius* and *Most Reverend Lawrence T. Persico v. Sebelius*. The *Zubik* and *Persico* appeals were consolidated and now have also been consolidated with the *Geneva* appeal.

1. *Geneva* Appellee

Appellee Geneva College ("Geneva") is a nonprofit institution of higher learning established by the Reformed Presbyterian Church of North America. Geneva believes that

[7] The District Courts in these cases had jurisdiction pursuant to 28 U.S.C. § 1331, and this Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 1292(a)(1).

it would be sinful and immoral for it to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion (including emergency contraceptives Plan B and ella, and two intrauterine devices, all of which Geneva characterizes as causing abortion) because such participation violates religious prohibitions on murder. Geneva contracts with an insurance issuer for its student and employee health insurance plans.

2. *Geneva* District Court Opinions

The District Court granted Geneva's motion for a preliminary injunction with respect to its student plan on June 18, 2013, and enjoined the government from applying or enforcing 42 U.S.C. § 300gg-13(a)(4) and requiring that Geneva's student health insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 35-36.) The District Court began by stating that the Supreme Court has cautioned courts to be reluctant to "dissect religious beliefs" when engaging in a substantial burden analysis. (J.A. 24 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)).)

The District Court concluded that Geneva had shown a likelihood of success on the merits with respect to the presence of a substantial burden under RFRA and found that three Supreme Court free exercise cases supported Geneva's argument regarding the presence of a substantial burden under RFRA. First, it noted that in *Yoder*, 406 U.S. at 234-35, a state compulsory education law for children up to age sixteen, with a penalty of a criminal fine, violated the free exercise rights of the Amish plaintiffs. Second, in *Sherbert*, 374 U.S. at 410, the state could not withhold unemployment

benefits from a worker who refused employment on the grounds that working Saturdays violated her religious beliefs. Third, in *Thomas*, 450 U.S. at 719, the state could not deny unemployment benefits to a worker whose religious beliefs forbade his participation in manufacturing tanks for use by the military. The District Court interpreted these cases as standing for the proposition that these indirect burdens on religious exercise are substantial enough to be cognizable under RFRA. The District Court concluded that Geneva had only two choices under the regulations—either provide the objected-to coverage or drop its health insurance—and by being forced to choose between those two options, both repugnant to its religious beliefs,[8] Geneva faced a substantial burden.

The District Court then granted Geneva's second motion for a preliminary injunction, this time with respect to

[8] We recognize that the appellees believe providing health insurance to their employees and students is part of their religious commitments. The appellees urge, at most, that dropping their health insurance coverage would be a violation of their moral beliefs, but they do *not* argue that it would be, in and of itself, another substantial burden imposed on their religious exercise. (Geneva Br. at 5 ("To fulfill its religious commitments and duties in the Christ-centered educational context, the College promotes the spiritual and physical well-being and health of its employees and students. This includes the provision of general health insurance to employees and their dependants and the facilitation of a student health plan."); Zubik/Persico Br. at 6 ("As part of overseeing their affiliates and as part of Catholic social teaching, the Dioceses provide self-insured health plans for Diocesan entities, including the Affiliates.").)

its employee plan, on December 23, 2013. The District Court again enjoined the government from enforcing 42 U.S.C. § 300gg-13(a)(4) and requiring that Geneva's employee health insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 67-68.) The District Court concluded that Geneva had shown a likelihood of success on the merits as to the presence of a substantial burden because the self-certification process forced Geneva to facilitate access to services it finds religiously objectionable. First, the District Court emphasized that a court must assess the intensity of the coercion and pressure from the government, rather than looking at the merits of the religious belief. (J.A. 58 (citing *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013), *cert. denied sub nom. Burwell v. Korte*, 134 S. Ct. 2903 (2014), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir.), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).) The District Court analogized to cases involving the contraceptive coverage mandate for entities *not* eligible for the accommodation, such as the *Hobby Lobby* opinion in the Court of Appeals for the Tenth Circuit, which found that the substantial fines and penalties imposed on an entity that refused to offer health care coverage to its employees at all, or refused to provide coverage for the mandated preventive services, constituted a substantial burden.

The District Court was convinced by Geneva's explanation that, although Geneva must engage in the same conduct that it did before the ACA—namely, notify the insurance carrier that it would not provide coverage for the objected-to services—the effect of that conduct is now different. Before the ACA, Geneva's notification resulted in

its employees being unable to obtain coverage for contraceptive services; after the ACA, Geneva's employees are still provided access to the services as a matter of law. "Under the ACA, Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees, which will result in fines, harm to its employees' well-being and competitive disadvantages. Both options require Geneva to act contrary to its religious duties and beliefs." (J.A. 61 n.12.)

Geneva argues that the District Court was correct that a substantial burden is present here because (1) complying with either the contraceptive coverage requirement or the accommodation would cause Geneva to "trigger," "facilitate," or be "complicit" in the commission of acts that it likens to abortion; and (2) the fines that Geneva faces for its refusal to comply with the contraceptive coverage requirement or the accommodation would pressure it to conform.

3. *Zubik*/*Persico* Appellees

Appellees in the *Zubik* and *Persico* cases include: the Bishop of Pittsburgh, David A. Zubik, and the Bishop of Erie, Lawrence T. Persico; the Diocese of Pittsburgh and the Diocese of Erie, both of which qualify for the exemption to the contraceptive coverage requirement under 45 C.F.R. § 147.131(a); and Catholic Charities of the Diocese of Pittsburgh, Prince of Peace Center, St. Martin Center, and Erie Catholic Cathedral Preparatory School, which are all nonprofit organizations affiliated with the Catholic Church. The Catholic religious nonprofit organizations are controlled by their respective Dioceses and operate in accordance with Catholic doctrine and teachings. The Bishops oversee the

management of the affiliated nonprofits with regard to adherence to Catholic doctrine. The Catholic faith prohibits providing, subsidizing, initiating, or facilitating insurance coverage for sterilization services, contraceptives, other drugs that the Catholic Church believes to cause abortion, and related reproductive educational and counseling services. The Dioceses provide self-insured health plans to the nonprofits and contract with third-party administrators to handle claims administration of the plans. As a result of their provision of coverage to the nonprofits, the Dioceses, which are otherwise exempt, must comply with the contraceptive coverage requirement as to the nonprofits.

4. *Zubik*/*Persico* District Court Opinions

The District Court issued a preliminary injunction that applied to both the *Zubik* and *Persico* cases on November 21, 2013, and converted that injunction into a permanent injunction on December 20, 2013.

The District Court characterized the issue before it as "whether [the appellees], being non-secular in nature, are likely to succeed on the merits of proving that their right to freely exercise their religion has been substantially burdened by the 'accommodation' which requires the Bishops of two separate Dioceses . . . to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling." (J.A. 116.) The *Zubik*/*Persico* appellees conceded that they have provided similar information as is required by the self-certification form to their third-party administrator in the past. However, their past actions barred the provision of contraceptive products, services, or counseling. Now, under the ACA, this information will be used to "facilitate/initiate the provision of

contraceptive products, services, or counseling – in direct contravention to their religious tenets." (*Id.*) Accordingly, the District Court concluded that the government is impermissibly asking the appellees for documentation for what the appellees sincerely believe is an immoral purpose, and thus "they cannot provide it." (J.A. 117.) In conclusion, the District Court acknowledged that the accommodation allows the appellees to avoid directly paying for contraceptive services by shifting responsibility for providing contraceptive coverage. Despite this fact, because the appellees had a sincerely held belief that this shift in responsibility did not exonerate them from the moral implications of the use of contraception, the accommodation imposed a substantial burden.

Furthermore, the District Court held that the differing application of the exemption and the accommodation—the former applying to the Catholic Church, and the latter applying to Catholic nonprofit organizations—has the effect of dividing the Catholic Church, thereby imposing a substantial burden. "[T]he religious employer 'accommodation' separates the 'good works (faith in action) employers' from the 'houses of worship employers' within the Catholic Church by refusing to allow the 'good works employers' the same burden-free exercise of their religion" under the exemption. (J.A. 118.) The District Court questioned why religious employers who share the same religious tenets are not exempt, or why all religious employers do not fall within the accommodation, such that "even though [the appellees] here share identical, religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of [the appellees'] service organizations may not fully exercise their

right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church." (J.A. 118, 120.) The District Court concluded that "the religious employer 'exemption' enables some religious employers to completely eliminate the provision of contraceptive products, services, and counseling through the Dioceses' health plans and third parties," whereas "the religious employer 'accommodation' requires other religious employers (often times the same member with the same sincerely-held beliefs) to take affirmative actions to facilitate/initiate the provision of contraceptive products, services, and counseling – albeit from a third-party." (J.A. 120-21.)

The *Zubik*/*Persico* appellees argue that the District Court was correct in finding a substantial burden because (1) they interpret the accommodation to require them to authorize and designate a third party to add the objectionable coverage to their plans, in violation of their sincerely held religious beliefs that they cannot provide or facilitate that coverage; and (2) the different scope of the religious employer exemption and the accommodation impermissibly splits the Catholic Church.

The government, as appellant in both the *Zubik*/*Persico* and *Geneva* appeals, argues that the District Courts were incorrect and the appellees are not subject to a substantial burden, because the submission of the form is not in itself burdensome and does not give rise to the coverage. Rather, *federal law* requires third parties—insurance issuers and third-party administrators—to provide coverage after the appellees refuse to provide contraceptive coverage themselves. By invoking the accommodation process, the appellees do not facilitate the provision of contraceptive

coverage by third parties. Rather, the third parties providing coverage do so as a result of legal obligations imposed by the ACA.

II. DISCUSSION

A. Standard of Review

We employ a tripartite standard of review for preliminary injunctions. "We review the District Court's findings of fact for clear error. Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002)). The same framework applies to the review of a grant of a permanent injunction. *See United States v. Bell*, 414 F.3d 474, 477-78 (3d Cir. 2005).[9] Because we conclude that the appellees have not demonstrated a likelihood of success on the merits of their

[9] "A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). It is the plaintiff's burden to establish every element in its favor. *P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005). A permanent injunction requires actual success on the merits. *See Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001).

RFRA claim, we need not reach the other prongs of the injunction analysis.

B. Likelihood of Success as to Substantial Burden

1. Trigger/Facilitation/Complicity

Argument

We first must identify what conduct the appellees contend is burdensome to their religious exercise. It is not the act of filling out or submitting EBSA Form 700 itself. The appellees conceded at oral argument that the mere act of completing EBSA Form 700 does not impose a burden on their religious exercise.

The appellees' essential challenge 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 and students. The appellees reframed this proposition at oral argument, stating that the accommodation requires them to be "complicit" in sin. Appellees urge that there is a causal link between providing notification of their religious objection to providing contraceptive coverage and the offering of contraceptive coverage by a third party. That link, they argue, makes them complicit in the provision of certain forms of contraception, which is prohibited by their religious beliefs.

Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of

contraceptive coverage. Through RFRA's adoption of the Supreme Court's pre-*Smith* free exercise jurisprudence, Congress has required qualitative assessment of the merits of the appellees' RFRA claims. *See Korte*, 735 F.3d at 705 (Rovner, J., dissenting).[10] "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985). Furthermore, the Supreme Court has stated that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect; but the nature of the burden is relevant to the standard that the government must meet to justify the burden." *Bowen v. Roy*, 476 U.S. 693, 706-07 (1986) (citation omitted). These principles were applied in *Lyng*, where the Supreme Court recognized that the Native American respondents' beliefs were sincere, and that the government's proposed actions would have severe adverse effects on their religious practice. However, the Court disagreed that the burden on the respondents' belief was "*heavy enough* to violate the Free Exercise Clause unless the

[10] We note that the *Korte* majority opinion may have been undermined by the later decision of the Court of Appeals for the Seventh Circuit in *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *petition for cert. filed*, No. 14-392 (Oct. 3, 2014). The majority opinion in *Notre Dame*, decided after *Korte* but before *Hobby Lobby*, analyzes the mechanics of the accommodation and weakens the *Korte* majority's urge for deference. This type of analysis remains good law after *Hobby Lobby*. *See Priests for Life*, 772 F.3d 229, 247 (D.C. Cir. 2014).

Government can demonstrate a compelling need to complete the . . . road to engage in timber harvesting in the . . . [challenged] area." 485 U.S. at 447 (emphasis added).

While the Supreme Court reinforced in *Hobby Lobby* that we should defer to the reasonableness of the appellees' religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise. This involves an assessment of how the regulatory measure actually works. Indeed, how else are we to decide whether the appellees' religious exercise is substantially burdened? "[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees'] characterization of the regulatory scheme on its face." *Mich. Catholic Conference & Catholic Family Servs.*, 755 F.3d 372, 385 (6th Cir. 2014) (quoting *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 71 (D.D.C. 2013)). We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs. *See, e.g.*, *Korte*, 735 F.3d at 710 (Rovner, J., dissenting). For example, the court in *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008), "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegations, that his religious exercise is substantially burdened." The court further explained: "we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his

religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id.*[11]

The Supreme Court in *Hobby Lobby* evaluated whether the requirement to provide contraceptive coverage absent the accommodation procedure substantially burdened the religious exercise of the owners of closely-held, for-profit corporations. The issue of whether there is an actual burden was easily resolved in *Hobby Lobby*, since there was little doubt that the actual *provision* of services did render the plaintiffs "complicit." And in *Hobby Lobby*, the Court came to its conclusion that, *without any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the religious exercise of the for-profit corporations, because those plaintiffs were required to either provide health insurance that included contraceptive coverage, in violation of their religious beliefs, or pay substantial fines.[12] *See* 134

[11] The *Zubik*/*Persico* appellees argue that we should not independently analyze the burdens imposed on them, or the substantiality of that burden, because the government stipulated to facts contained in the appellees' declarations—particularly, that the appellees believe that participation in the accommodation, including signing the self-certification form, facilitates moral evil in violation of Catholic doctrine. The appellees are mistaken, because the government's factual stipulation does not preclude this Court from determining the contours of the asserted burden or whether the burden is substantial.

[12] Indeed, Justice Alito's majority opinion in *Hobby Lobby* comments favorably on the accommodation procedure at issue here, which separates an eligible organization from the objected-to contraceptive services:

> HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."
>
> We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

S. Ct. at 2775-76; *see also Priests for Life*, 772 F.3d at 245. Here, the appellees are *not* faced with a "provide" or "pay" dilemma because they have a third option—notification pursuant to the accommodation—to avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance with the contraceptive coverage requirement.

The appellees urge that a burden exists here because the submission of the self-certification form triggers, facilitates, and makes them complicit in the provision of objected-to services. But after testing that assertion, we cannot agree that the submission of the self-certification form has the effect the appellees claim. First, the self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law. *Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services. As Judge Posner has explained, this is not a situation where the self-certification form enables the provision of the very contraceptive services that the appellees find sinful. Rather, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured plans, to cover contraceptive services." *Notre Dame*, 743 F.3d at 554. Thus, federal law, not the submission of the self-certification form, enables the provision of contraceptive coverage.

Hobby Lobby, 134 S. Ct. at 2782 (alterations in original) (footnotes omitted) (citations omitted).

The Court of Appeals for the Sixth Circuit adopted Judge Posner's logic that the obligation to cover contraception is not triggered by the act of self-certification. Rather, it is triggered by the force of law—the ACA and its implementing regulations. *See Mich. Catholic Conference*, 755 F.3d at 387 ("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."). Most recently, and after the Supreme Court's opinion in *Hobby Lobby*, the Court of Appeals for the D.C. Circuit agreed with these courts' explanations of the mechanics of the accommodation. *See Priests for Life*, 772 F.3d at 252 ("As the Sixth and Seventh Circuits have also concluded, the insurers' or [the third-party administrators'] obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice."). Thus, submitting the self-certification form means only that the eligible organization is not providing contraceptive coverage and will not be subjected to penalties. By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services.[13]

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[13] Geneva argues that there is no guarantee that its employees and students would obtain the objected-to contraceptive coverage if they were not enrolled in Geneva's health plans. Therefore, Geneva asserts, the obligation to provide contraceptive coverage arises only because it sponsors an employee or student health plan. Geneva cites the following passage from *Notre Dame* in support: "By refusing to fill out

Moreover, the regulations specific to the *Zubik* and *Persico* appellees' self-insured plan are no different in this respect, and in no way cause the appellees to facilitate or trigger the provision of contraceptive coverage. Those Department of Labor regulations state that EBSA Form 700 "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." 29 C.F.R. § 2510.3-16(b). The *Zubik*/*Persico* appellees argue that these regulations cause it to "facilitate" the provision of contraceptives because the signed self-certification form authorizes the third-party administrator to serve as the plan administrator. However, this purported

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the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required by federal law to provide the services to the university's students and employees *unless and until their contractual relation with Notre Dame terminated.*" 743 F.3d at 554 (emphasis added). However, Geneva's argument is unavailing. The provision of contraceptive coverage is not dependent upon Geneva's contract with its insurance company. "Once [the appellees] opt out of the contraceptive coverage requirement, . . . contraceptive services are not provided to women because of [the appellees'] contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception." *Priests for Life*, 772 F.3d at 253. "RFRA does not entitle [the appellees] to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." *Id.* at 256.

causal connection is nonexistent. The eligible organization has no effect on the designation of the plan administrator; instead, it is *the government* that treats and designates the third-party administrator as the plan administrator under ERISA. *See Notre Dame*, 743 F.3d at 555. "[The appellees] submit forms to communicate their decisions to opt out, not to authorize [the third-party administrators] to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to services are made available because of the regulations, not because [the appellees] complete a self-certification." *Priests for Life*, 772 F.3d at 254-55. Indeed, this "opt-out" is just that—an indication that the eligible organization chooses not to provide coverage for the objected-to services.

Moreover, the submission of the self-certification form does not make the appellees "complicit" in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage. Ultimately, the regulatory notice requirement does not necessitate any action that interferes with the appellees' religious activities. "The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement." *Id.* at 249. The appellees "need only reaffirm [their] religiously based opposition to providing contraceptive coverage, at which point third parties will provide the coverage separate and apart from [the appellees'] plan of benefits." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88,

104 (D.D.C. 2013), *aff'd, Priests for Life*, 772 F.3d 229 (D.C. Cir. 2014). The appellees' real objection is to what happens after the form is provided—that is, to the actions of the insurance issuers and the third-party administrators, required by law, once the appellees give notice of their objection. "RFRA does not grant [the appellees] a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties." *Priests for Life*, 772 F.3d at 251. "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 [appellees]." *Mich. Catholic Conference*, 755 F.3d at 389.[14]

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[14] A hypothetical example serves as a useful tool to demonstrate the fallacy in the appellees' characterization of the accommodation: Assume that a person, John Doe, has a job that requires twenty-four-hour coverage, such as an emergency room doctor or nurse. John Doe is unable to work his shift on a certain Tuesday, as that day is a religious holiday that mandates a day of rest. As a result, John Doe believes that it is inappropriate for *anyone* to work on that holiday. John Doe can request time off by filling out a certain form, but he will be penalized if he fails to show up for work without appropriately requesting time off. However, by filling out this form, he believes that he will facilitate or trigger or be complicit in someone else working in his place on the religious holiday. John Doe sincerely believes that the simple filling out of the time-off request imposes a substantial burden on his religious beliefs. In this example, John Doe, like the appellees, is able to *express* his religious objection to working on a religious holiday by declining to work that day.

Thus, we cannot agree with the appellees' characterization of the effect of submitting the form as triggering, facilitating, or making them complicit in the provision of contraceptive coverage. At oral argument, the appellees argued that it was not merely the filing of the form that imposed a burden, but, rather, what follows from it. But free exercise jurisprudence instructs that we are to examine the act the appellees must perform—not the effect of that act—to see if it burdens substantially the appellees' religious exercise. The Supreme Court has consistently rejected the argument that an independent obligation on a third party can

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John Doe's time-off request indicates that he will *not* be complicit in working on the religious holiday. Furthermore, declining to work on that Tuesday does *not* serve as a trigger or facilitator because one of his other colleagues will be forced to work that day, regardless of whether John Doe works or not. However, just because John Doe does not wish to be associated with or play any role in the result (working on a religious holiday), does not mean the conduct to which he objects (filling out the time-off request form) substantially burdens his free exercise of religion. Just as we cannot conclude that John Doe's religious exercise is being burdened by filling out the form, we cannot conclude that the appellees' religious exercise is burdened by filling out the self-certification form. Furthermore, any "coercive" force attached to John Doe's refusal to fill out the time-off request is similar to the fines that the appellees face if they refuse to either participate in the accommodation or provide contraceptive coverage. In any event, such "coercive" force is relevant *only* if the conduct itself actually does substantially burden one's religious exercise. That is not the case in this analogy, and it is not the case for the appellees.

impose a substantial burden on the exercise of religion in violation of RFRA, as we discuss below. Pre-*Smith* free exercise cases, which RFRA was crafted to resurrect, have distinguished between what a challenged law requires the objecting parties to do, and what it permits another party—specifically, the government—to do.

In *Bowen*, the Supreme Court determined that the Free Exercise Clause did not require the government to accommodate a religiously based objection to the statutory requirement that a Social Security number be provided to applicants for certain welfare benefits. Roy, a Native American, argued that the government's use of his daughter's Social Security number would "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. Roy's claim was unsuccessful because "[t]he Federal Government's use of a Social Security number for . . . [his daughter] d[id] not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." *Id.* at 700. Rather, Roy was attempting to use the Free Exercise Clause to dictate how the government should transact its business.

> 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. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist

> that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

Id. at 699-700 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

And, echoing the principles of *Bowen*, in *Lyng*, members of Native American tribes claimed that the federal government violated their rights under the Free Exercise Clause by permitting timber harvesting and construction on land used for religious purposes. 485 U.S. at 441-42. The Supreme Court concluded that the Free Exercise Clause "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

Building on this line of cases, the Court of Appeals for the D.C. Circuit concluded that a federal prisoner failed to

state a RFRA claim when he sought to enjoin application of the DNA Analysis Backlog Elimination Act on the basis that DNA sampling, storage, and collection without limitations violated his religious beliefs about the proper use of the "building blocks of life." *Kaemmerling*, 553 F.3d at 674. Kaemmerling could not state a claim that his religious exercise was substantially burdened because he did not identify any religious exercise that was subjected to the burden to which he objected:

> The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the BOP 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 (alteration in original) (quoting *Thomas*, 450 U.S. at 718). "Like the parents in *Bowen*, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government itself to conduct its affairs in conformance with his religion." *Id.* at 680.

Thus, the case law clearly draws a distinction between what the law may impose on a person over religious objections, and what it permits or requires a third party to do. Although that person may have a religious objection to what the government, or another third party, does with something that the law requires to be provided (whether it be a Social Security number, DNA, or a form that states that the person religiously objects to providing contraceptive coverage), RFRA does not necessarily permit that person to impose a restraint on another's action based on the claim that the action is religiously abhorrent.

These cases confirm that we can, indeed should, examine the nature and degree of the asserted burden to decide whether it amounts to a substantial burden under RFRA. Furthermore, we must assess how the objected-to action relates to the appellees' religious exercise, and whether the appellees' objections focus on the action itself or the result of the action, i.e., the obligations placed upon a third party.

Far from "triggering" the provision of contraceptive coverage to the appellees' employees and students, EBSA Form 700 totally removes the appellees from providing those services. "[T]he regulations provide an opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage to which health insurance beneficiaries are entitled, and that fastidiously relieves [the appellees] of any obligation to contract, arrange, pay, or refer for access to contraception . . . ." *Priests for Life*, 772 F.3d at 252. The self-certification form requires the eligible organization or its plan to provide a copy to the organization's insurance issuer or third-party administrator in

order for the plan to be administered in accordance with both the eligible organization's religious objection and the contraceptive coverage requirement. The ACA already takes into account beliefs like those of the appellees and *accommodates* them. "The accommodation in this case consists in the organization's . . . washing its hands of any involvement in contraceptive coverage, and the insurer and the third-party administrator taking up the slack under compulsion of federal law." *Notre Dame*, 743 F.3d at 557. The regulations accommodate the interests of religious institutions that provide health services, while not curtailing the public interest that motivates the federally mandated requirement that such services shall be provided to women free of charge. *Id.* at 551.

Because we find that the self-certification procedure does not cause or trigger the provision of contraceptive coverage, appellees are unable to show that their religious exercise is burdened. Even if we were to conclude that there is a burden imposed on the appellees' religious exercise, we would be hard-pressed to find that it is substantial. Whether a burden is "substantial" under RFRA is a question of law, not a question of fact. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). RFRA's reference to "substantial" burdens expressly calls for a qualitative assessment of the burden that the accommodation imposes on the appellees' exercise of religion. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting). RFRA calls for a threshold inquiry into the nature of the burden placed on the appellees' free exercise of religion: "substantial" is a term of degree that invites the courts to distinguish between different types of burdens. *Id.* at 708.

We have stated that a substantial burden exists where (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons] versus abandoning one of the precepts of his religion in order to receive a benefit"; or (2) "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *See Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (interpreting a related statute, the Religious Land Use and Institutionalized Persons Act, which applies to prisoner and land use cases). However, a government action does not constitute a substantial burden, even if the challenged action "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," if the government action does not coerce the individuals to violate their religious beliefs or deny them "the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. Under this definition, can the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a "substantial" burden on the appellees' free exercise of religion? We think not. While *Hobby Lobby* rejected the argument that the burden was too attenuated because the actual use of the objected-to contraceptive methods was a matter of individual choice, here, where the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.

The reasoning of the District Courts was misguided in two ways. First, the District Courts accepted the appellees' characterization of the accommodation as causing them to

"facilitate," act as the "central cog," or serve as the "necessary stimulus" for the provision of the objected-to contraceptive services. (J.A. 60-61.) For the reasons we have detailed, we cannot accept that characterization as a matter of fact or law. Second, the District Courts focused on the coercive effect, i.e., the fact that the appellees faced a choice: submit the self-certification form and "facilitate" the provision of contraceptive coverage, or pay fines for noncompliance. However, now that we have dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial, which involves consideration of the intensity of the coercion faced by the appellees. We will accordingly reverse the challenged injunctions.

2. Dividing the Catholic Church Argument in *Zubik*/*Persico*

The appellees in *Zubik*/*Persico* argue that a second substantial burden is imposed on their religious exercise in that the contraceptive coverage regulatory scheme improperly partitions the Catholic Church by making the Dioceses eligible for the exemption, while the Catholic nonprofits can only qualify for the accommodation, even though all the Catholic entities share the same religious beliefs. The District Court agreed with the appellees and concluded that the contraceptive mandate "would cause a division between the Dioceses and their nonprofit, religious affiliated/related spiritual/charitable/educational organizations which fulfill portions of Dioceses' mission. Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant

restructuring of the plans which would adversely affect the benefits received from pooling resources." (J.A. 76 (citation omitted).) We conclude that the inclusion of houses of worship in the exemption and religious nonprofits in the accommodation does not impose a substantial burden on the *Zubik*/*Persico* appellees.

The definition of a "religious employer" who receives an exemption from the contraceptive coverage requirement under the regulations is based on longstanding Internal Revenue Code provisions. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). "[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citation omitted) (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 666, 672-73 (1970)). The Departments chose this definition from the Internal Revenue Code to categorize the entities subject to the exemption and the accommodation because that provision was a bright line that was already statutorily codified and frequently applied: "The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement." 78 Fed. Reg. at 39,874; *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (proposed Feb. 6, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 148, & 156) ("[T]his definition was intended to focus the religious employer exemption on 'the unique relationship between a house of worship and its

employees in ministerial positions.'" (quoting 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, 46,623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147))).

Furthermore, we are not persuaded that the challenged accommodation poses any burden on the *exempted* appellees' religious exercise, particularly a burden that would require the appellees to "expel" the religious nonprofit organizations from the Dioceses' health insurance plans. *See, e.g.*, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232, 252 (E.D.N.Y. 2013) ("First, it is not at all clear why the Diocesan plaintiffs would have to 'expel' their non-exempt affiliates from their health plans. . . . Second, even if the law did pressure the Diocesan plaintiffs to 'expel' their affiliates, plaintiffs do not state that the Diocesan plaintiffs' religious beliefs require them to have all their affiliate organizations on a single health plan, such that 'expelling' the non-exempt affiliates would be an act forbidden by their religion.").

Thus, we cannot agree that the different treatment afforded to the Catholic Church as a house worship versus the Catholic nonprofit organizations imposes a substantial burden in violation of RFRA.

III. CONCLUSION

We will reverse the District Courts' orders granting the challenged injunctions. Because we conclude that the appellees have not shown a likelihood of success on the merits of their RFRA claim, based on the determination that

the accommodation does not impose a substantial burden on their religious exercise, we need not reach the question of whether the accommodation is the least restrictive means of furthering a compelling governmental interest.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 14-1376 and 14-1377

_____

MOST REVEREND LAWRENCE T. PERSICO,
BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE,
AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE,
A CHARITABLE TRUST;
THE ROMAN CATHOLIC DIOCESE OF ERIE;
ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION
OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE;
PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION
OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE;
ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT
CORPORATION
OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;
SECRETARY OF UNITED STATES DEPARTMENT OF LABOR;
SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in Case No.: 14-1376

MOST REVEREND DAVID A. ZUBIK,
BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH,
as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust;
THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH,
as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust;
CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC.,
an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES;
SECRETARY OF UNITED STATES DEPARTMENT OF LABOR;
SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in Case No.: 14-1377

(District Court Nos.: 1-13-cv-00303 and 2-13-cv-01459)

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, and SLOVITER* Circuit Judges

The petition for rehearing filed by **appellees** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, is denied.

* The vote of Judge Dolores K. Sloviter, is limited to Panel Rehearing only.

BY THE COURT,

s/MARJORIE O. RENDELL
Circuit Judge

Dated: April 6, 2015
CJG/cc: All Counsel of Record

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 9, 2015

Nos. 14-1376 & 14-1377

MOST REVEREND LAWRENCE T. PERSICO,
BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE,
AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE;
ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE;
PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE;
ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR;
SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants

(W.D. Pa. Nos. 1-13-cv-00303, 2-13-cv-01459)

Present: MCKEE, Chief Judge, RENDELL and SLOVITER, Circuit Judges

1. Appellees' Motion for Stay of Mandate Pending Petition for Writ of Certiorari.

Respectfully,
Clerk/tmm

ORDER

The foregoing Appellees' Motion for Stay of Mandate Pending Petition for Writ of Certiorari is hereby denied.

By the Court,

s/Theodore A. McKee
Circuit Judge

Dated: April 15, 2015
tmm/cc: all counsel of record

OFFICE OF THE CLERK

MARCIA M. WALDRON

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

April 15, 2015

Mr. Robert V Barth Jr.
United States District Court for the Western District of Pennsylvania
P.O. Box 1820
Erie, PA 16501

RE: Lawrence Persico, et al v. Secretary United States Depart, et al
Case Numbers: 14-1376, 13-3536, 14-1374, 14-1377
District Case Numbers: 1-13-cv-00303, 2-12-cv-00207, 2-13-cv-01459

Dear District Court Clerk,

Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

By: Timothy McIntyre

Timothy McIntyre, Case Manager
267-299-4953

cc: Gregory S. Baylor
Matthew S. Bowman

Kimberlee W. Colby
Charles E. Davidow
Leon F. DeJulius Jr.
Deborah J. Dewart
John D. Goetz
Adam C. Jed
Ira M. Karoll
Ayesha N. Khan
Alison M. Kilmartin
Alisa B. Klein
Patrick Nemeroff
Paul M. Pohl
Sara J. Rose
Sarah Somers
Mary Pat Stahler
Mark B. Stern

APPENDIX D

983 F.Supp.2d 576
United States District Court,
W.D. Pennsylvania.

Most Reverend David A. ZUBIK, Bishop of the Roman Catholic Diocese of Pittsburgh, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust, et al., Plaintiffs,
v.
Kathleen SEBELIUS, In Her Official Capacity as Secretary of the U.S. Department of Health and Human Services, et al., Defendants.
Most Reverend Lawrence T. Persico, Bishop of the Roman Catholic Diocese of Erie, as Trustee of the Roman Catholic Diocese of Erie, a Charitable Trust, et al., Plaintiffs,
v.
Kathleen Sebelius, In Her Official Capacity as Secretary of the U.S. Department of Health and Human Services, et al., Defendants.

Nos. 13cv1459, 13cv0303 Erie. | Nov. 21, 2013.

Synopsis

Background: Trustee of Roman Catholic Diocese, beneficial owner of Catholic benefits trust, and Catholic charities of Diocese commenced action against United States Departments of Health and Human Services, Labor, and Treasury, and their respective Secretaries, challenging application of provisions of Patient Protection and Affordable Care Act (PPACA). Plaintiffs moved for preliminary injunction to enjoin issuance, application, and enforcement of contraceptive mandate.

Holdings: The District Court, Arthur J. Schwab, J., held, on issues of first impression, that:

[1] plaintiffs showed that it was likely that complying with religious employer "accommodation" provision of contraceptive mandate under PPACA would impose substantial burden on their free exercise of religion to not facilitate or initiate provision of contraceptive products, services, or counseling;

[2] plaintiffs showed that it was likely that government did not have compelling interests under contraceptive mandate that overbalanced their legitimate claims to free exercise of religion;

[3] plaintiffs showed that it was likely that religious employer "accommodation" provision was not least restrictive means to meet stated compelling government interests;

[4] plaintiffs showed that it was likely that they would be irreparably harmed by religious employer "accommodation" provision;

[5] plaintiffs showed that it was likely that government would not be irreparably harmed by preliminarily enjoining enforcement of contraceptive mandate against them; and

[6] plaintiffs showed that it was likely that public interest would be furthered by preliminarily enjoining enforcement of contraceptive mandate against them to preserve status quo.

Motion granted.

West Codenotes

Validity Called into Doubt
42 U.S.C.A. § 300gg–13; 45 C.F.R. §§ 147.130(a)(1)(iv), 45 C.F.R. § 147.131(b).

Attorneys and Law Firms

***579** John D. Goetz, Leon F. DeJulius, Paul M. Pohl, Ira M. Karoll, Mary Pat Stahler, Jones Day, Pittsburgh, PA, Jeffrey A. McSorley, Jones Day, Washington, DC, for Plaintiff.

Bradley P. Humphreys, Michelle Bennett, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION RE: PLAINTIFFS' MOTIONS FOR EXPEDITED PRELIMINARY INJUNCTION (13–CV–1459: DOC. NO. 4; 13–CV–0303E: DOC. NO. 6)

ARTHUR J. SCHWAB, District Judge.

I. Introduction

Presently before the Court are two cases which challenge the application of ***580** provisions of the Patient Protection and Affordable Care Act ("ACA"). These cases present the Court with the issue of whether the Dioceses of

Pittsburgh and Erie, which are exempt from provisions of the ACA requiring employers to provide health insurance coverage for contraceptive products, services, and counseling ("the contraceptive mandate"), are divisible from their nonprofit, religious affiliated/related charitable and educational organizations which, under the current provisions, will be compelled to facilitate/initiate coverage of contraceptive products, services, and counseling, beginning January 1, 2014, in violation of their sincerely-held religious beliefs. [1]

On October 8, 2013, in the Pittsburgh division of the United States District Court of the Western District of Pennsylvania, Plaintiffs: Most Reverend David A. Zubik, as Trustee of the Roman Catholic Diocese of Pittsburgh, a charitable trust; the Roman Catholic Diocese of Pittsburgh, as the Beneficial Owner of the Pittsburgh series of the Catholic Benefits Trust; and Catholic Charities of the Diocese of Pittsburgh, Inc. ("Pittsburgh Plaintiffs"), filed a Complaint in which they assert eight causes of action against Defendants: United States Departments of Health and Human Services, Labor, and Treasury, and their respective Secretaries. *Zubik v. Sebelius*, Civil Action 2:13–cv–1459, 983 F.Supp.2d 576, 2013 WL 6118696 (W.D.Pa.2013). Pittsburgh Plaintiffs simultaneously filed a Motion for Expedited Preliminary Injunction, asking this Court to issue a preliminary injunction to enjoin the issuance, application, and enforcement of the contraceptive mandate, as codified in 45 C.F.R. § 147.130(a)(1)(iv). Doc. No. 4.

Also, on October 8, 2013, in the Erie division of this District Court, Plaintiffs: Most Reverend Lawrence T. Persico, as Trustee of the Roman Catholic Diocese of Erie, a charitable trust; the Roman Catholic Diocese of Erie; St. Martin Center, Inc.; Prince of Peace Center, Inc.; and Erie Catholic Preparatory School ("Erie Plaintiffs"), filed a Complaint in which they assert the same eight causes of action against the same Defendants ("the Government") related to the implementation of the contraceptive mandate of the ACA. *Persico v. Sebelius*, Civil Action 1:13–cv–303 (W.D.Pa.2013). Erie Plaintiffs also filed a Motion for Expedited Preliminary Injunction asking the Court to issue a preliminary injunction to enjoin the issuance, application, and enforcement of the contraceptive mandate, as codified in 45 C.F.R. § 147.130(a)(1)(iv). Doc. No. 6.

Plaintiffs allege that the contraceptive mandate, as applied via the "accommodation," requires them to facilitate/initiate the process for providing health insurance coverage for abortion-inducing drugs, sterilization services, contraceptives, and related educational and counseling services ("contraceptive products, services, and counseling"). The Dioceses, as "religious employers," are exempt from these provisions. *See* generally Stipulations of Fact, ¶ 31; 13–cv–1459, Doc. No. 1, ¶ 44–46. A safe harbor for non-grandfathered, non-exempt organizations (including Plaintiffs: ***581** Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) from enforcement of these provisions has been extended until December 31, 2013. Additional Stipulated Facts, ¶ 7, citing 77 Fed. Ref. 8725, 8727 (Feb. 15, 2012). Nonexempt Plaintiffs in both cases must comply with the contraceptive mandate on or before January 1, 2014, or potentially face substantial governmental penalties. 13–cv–303, Doc. No. 1, ¶ 164; Declaration of David Murphy [2] (P–91), ¶ 9.

Plaintiffs allege that facilitating/initiating the process for providing health insurance coverage for contraceptive products, services, and counseling would cause immediate and irreparable injury to their fundamental rights and religious liberties, in violation of the Religious Freedom Restoration Act ("RFRA") and the First Amendment to the United States Constitution. [3] Doc. No. 4, 2.

This Memorandum Opinion will address both cases because the cases (although not consolidated) involve: similar facts (including the same religious tenets), the same counsel, the same causes of action advanced against the same Defendants, and the same legal tests apply to the Motions for Expedited Preliminary Injunction.

After consideration of Plaintiffs' Motions (13–cv–0303: Doc. No. 6; 13–cv–1459: Doc. No. 4), the Parties' submissions, the testimony presented during an evidentiary hearing, the hearing Exhibits, and an *amici curiae* brief, [4] Plaintiffs' Motions for Expedited Preliminary Injunction will be GRANTED.

II. Findings of Fact [5]

A. Plaintiffs

The Pittsburgh Plaintiffs in *Zubik v. Sebelius* are: (1) the Most Reverend David ***582** A. Zubik, Bishop and Trustee of the Roman Catholic Diocese of Pittsburgh ("the Bishop" or "Bishop Zubik"); (2) the Roman Catholic Diocese of Pittsburgh, a Pennsylvania Charitable Trust ("the Diocese" or

"the Diocese of Pittsburgh"); and (3) Catholic Charities of the Diocese of Pittsburgh, Inc. ("Catholic Charities"), an affiliate nonprofit corporation of the Diocese of Pittsburgh. Doc. No. 1, 4.

The Pittsburgh Plaintiffs are interrelated because of their affiliation with the Catholic Church and their shared sincerely-held religious beliefs and mission. Bishop Zubik is the spiritual leader of the Diocese and is responsible for the spiritual, charitable, and educational arms of the Diocese. Catholic Charities is a nonprofit corporation affiliated with the Diocese and with a principal place of administration in Pittsburgh, Pennsylvania. The Diocese of Pittsburgh and Catholic Charities are organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. Doc. No. 1, ¶¶ 11–13.

The Plaintiffs in *Persico v. Sebelius* are: (1) the Most Reverend Lawrence T. Persico, Bishop and Trustee of the Roman Catholic Diocese of Erie ("the Bishop" or "Bishop Persico"); (2) St. Martin Center, Inc. ("St. Martin Center"), a nonprofit corporation affiliated with Catholic Charities, with its principal place of business in Erie, Pennsylvania; (3) Prince of Peace Center, Inc. ("Prince of Peace Center"), a nonprofit corporation affiliated with Catholic Charities, with its principal place of business in Farrell, Pennsylvania; and (4) Erie Catholic Preparatory School ("Erie Catholic"), a nonprofit corporation, with its principal place of business in Erie, Pennsylvania. Doc. No. 1, ¶¶ 11–14.

The Erie Plaintiffs are interrelated because of their affiliation with the Catholic Church and their shared sincerely-held religious beliefs and mission. St. Martin Center, Prince of Peace Center, Erie Catholic, and the Diocese of Erie are organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. Doc. No. 1, ¶¶ 11–14.

B. Immediate Harm Claimed by Plaintiffs

The Dioceses of Pittsburgh and Erie provide health insurance coverage to employees of their nonprofit, religious affiliated/related entities (such as Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) which are directed by the Dioceses to implement the spiritual, charitable, and educational mission of the Dioceses.

1. Immediate Harm as to the Dioceses

Based upon the credible testimony of Bishop Zubik and Bishop Persico, as Trustees for the Plaintiff nonprofit, religious affiliated/related organizations, the practical results of the application of the contraceptive mandate, via the "accommodation," would be that the Dioceses would be required to either:

> (a) provide their nonprofit, religious affiliated/related organizations with a separate insurance policy that covers contraceptive products, services, and counseling (which the Dioceses refuse to do, according to the trial testimony). Hearing Testimony, Bishop Zubik, pg. 43, lines 2–10; Hearing Testimony ***583** Bishop Persico, pg. 80, lines 1–8, pg. 82, lines 14–16, pg. 91, lines 7–9; or
>
> (b) decline to continue offering health coverage to their nonprofit, religious affiliated/related organizations. This would force the nonprofit, religious affiliated/related organizations to enter into their own arrangements with a health insurance provider that would arrange no-cost coverage of contraceptive products, services, and counseling. 13–cv–303, Doc. No. 1, ¶ 118; Doc. No. 1, ¶ 159; Declaration of Susan Rauscher [6] (P–86), [7] ¶¶ 13–15; Declaration of David S. Stewart [8] (P–87), ¶ 18.

The contraceptive mandate would be unequally applied to Plaintiffs and would result in some schools, organizations, *etc.*, being exempt from the mandate, while other organizations would not. 13–cv–1459, Doc. No. 1, ¶ 31. The result would cause a division between the Dioceses and their nonprofit, religious affiliated/related spiritual/charitable/educational organizations which fulfill portions of Dioceses' mission. *Id.* Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant restructuring of the plans which would adversely affect the benefits received from pooling resources. 13–cv–303, Doc. No. 1, ¶ 119; Doc. No. 1, ¶ 159.

2. Immediate Harm as to Nonprofit, Religious Affiliated/Related Organizations

Based upon the credible testimony of Susan Rauscher (Executive Director of Catholic Charities of the Diocese of Pittsburgh), Father Scott William Jabo (President of Erie

Catholic), and Mary Claire Maxwell (Executive Director of Catholic Charities of the Diocese of Erie), and the Stipulations of the Parties, the nonprofit, religious affiliated/related organizations expelled from a Diocese's health plan would be forced to choose one of the following courses of action:

(a) purchase health insurance coverage that includes contraceptive products, services, and counseling [which would violate their sincerely-held religious beliefs, according to the trial testimony]. Cardinal Dolan Deposition [9] (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 25, lines 15–19, 23–25, pg. 26, lines 1–12; Hearing Testimony, Bishop Zubik, pg. 28, lines 16–22; Declaration of Father Ronald P. Lengwin (P–88), ¶¶ 12–13;

(b) provide a self-certification to their third-party administrator ("TPA"), thus facilitating/initiating the process by which the TPA will obtain coverage for the contraceptive products, services, and counseling for the ***584** organizations' employees ("the accommodation" [10]) [which the Bishops would refuse to permit]. Plaintiffs' Exhibit 10 "Certification"; Hearing Testimony, Bishop Zubik, pg. 43, lines 2–10; Hearing Testimony, Bishop Persico, pg. 80, lines 1–8, pg. 82, lines 14–16, pg. 91, lines 7–9;

(c) drop health insurance coverage for employees (*i.e.*, fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan") (*i.e.*, comprehensive coverage), and be subject to annual fines of $2,000 per full-time employee. Stipulations of Fact, ¶ 51; see 26 U.S.C. § 4980H(a), (c)(1); 13–cv–303, Doc. No. 1, ¶ 150. Said assessed payment shall be "paid upon notice and demanded by the Secretary," "assessed and collected in the same manner as taxes"... and provided for "on an annual, monthly or other periodic basis as the Secretary may prescribe." *See* 26 U.S.C. §§ 4980H(d)(1)-(2), 6671(a); or

(d) purchase health insurance coverage for full-time employees without contraceptive products, services, and counseling, and potentially be subject to a tax penalty of $100 per *day* per affected beneficiary. [11] Stipulations of Fact, ¶ 50(a); Additional Stipulated Facts, ¶ 13; see 26 U.S.C. § 4980D(b); 13–cv–303, Doc. No. 1, ¶ 150; Declaration of David Murphy (P–91), ¶ 17; 13–1459: Declaration of Susan Rauscher (P–86), ¶ 22; Doc. No. 1, ¶ 70.

Any of these courses of action would harm the Dioceses and their nonprofit, religious affiliated/related charitable and educational organizations. Potential effects of imposition of fines include: decreased donations, loss of employees to other employers, loss of services, and such fines may "close [the organizations'] doors, ***585** denying thousands in the local community its charitable services." Declaration of Susan Rauscher (P–86), ¶¶ 28–30. During the Injunction Hearing, credible testimony was presented that fines related to the contraceptive mandate will compel Plaintiff nonprofit, religious affiliated/related organizations to limit services or close. Hearing Testimony, Susan Rauscher (re: Catholic Charities of the Diocese of Pittsburgh), pg. 61, lines 17–18 (fines could not be paid "without significant changes to the organization."), pg. 62, lines 21–25; Hearing Testimony Father Jabo (re: Erie Catholic), pg. 99, lines 8–10 ("In essence we'd have to shut our doors completely because we cannot sustain ourselves. As a school with a budget, limited resources, we would close our doors."); Hearing Testimony of Mary Maxwell (re: St. Martin Center and Prince of Peace Center), pg. 115, lines 23–25 (fines "would be devastating for all of our clients, the poor—these are single women, children."); Declaration of Mary Maxwell (P–90), ¶ 20; Declaration of Father Scott Detisch, Ph.D. [12] (P–92), ¶ 32.

Currently, Plaintiffs are experiencing and may continue to experience increased administrative burdens, lost personnel hours, and the fear of increased insurance premiums. Deposition of Cardinal Timothy Michael Dolan (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 40, lines 22–25, pg. 41, 1–7; Declaration of David S. Stewart (P–87), ¶¶ 23–26.

Failure to comply with the contraceptive mandate would expose the organizations, and ultimately the Dioceses, to civil actions by ERISA-covered plan participants for unpaid benefits, and enforcement actions by the Secretary of Labor. Stipulations of Fact, ¶ 50(b)-(c); Doc. No. 1, ¶ 81(c)-(d); see 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(5), and 1132(b)(3). The Secretary of HHS may impose a civil monetary penalty for failure to provide certain required coverage. Stipulations of Fact, ¶ 50(d); 42 U.S.C. § 300gg–22(b)(2)(C)(i). Failure to pay levied fines would subject Plaintiffs to additional fines and potential property liens. *See* 26 U.S.C. §§ 6321, 6672.

C. The Organization and Religious Mission of the Dioceses

1. Organization of Dioceses

Bishop Zubik, in his capacity as Bishop and Trustee of the Diocese of Pittsburgh, manages 200 parishes and their charitable trusts. Stipulations of Fact, ¶ 118. The Diocese provides services throughout six counties in Southwestern Pennsylvania—Allegheny, Beaver, Butler, Greene, Lawrence, and Washington—including a Catholic population of approximately 700,000 people. Stipulations of Fact, ¶ 119; 13–cv–1459, Doc. No. 1, ¶¶ 25–33.

Bishop Persico, in his capacity as the Bishop and Trustee of the Diocese of Erie, is responsible for 117 parishes serving approximately 187,500 people over a thirteen-county region in Northwestern Pennsylvania. Stipulations of Fact, ¶ ¶ 57, 65; 13–cv–303, Doc. No. 1, ¶¶ 26, 29.

2. Religious Mission of the Dioceses through Good Works

Plaintiffs sincerely believe that religious worship, faith, and good works are essential and integral components of the Catholic faith and constitute the core mission of the Catholic Church.[13] Declaration of Susan ***586** Rauscher (P–86), ¶ 21. “The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God (kerygma-martyria), celebrating the sacraments (leitourgia), and exercising the ministry of charity (diakonia). These duties presuppose each other and are inseparable.” Plaintiff's Exhibit 3, “Apostolic Letter Issued ‘Motu Proprio’ on the Supreme Pontiff Benedict XVI on the Service of Charity,” pg. 1; Cardinal Dolan Deposition, (13–cv–303, Doc. No. 52, 13–cv–1459, Doc. No. 53), pg. 36, lines 1–36, pg. 38, lines 11–13 (“That's your daily life. That's everything we do, dream, believe, breathe, wake, sleep, is our—is our faith.”); Hearing Testimony, Bishop Zubik, pg. 21, lines 12–14; Declaration of Father Ronald P. Lengwin[14] (P–88), ¶ 37. “The service of charity is also a constructive element of the Church's mission and an indispensable expression of her very being ...; all the faithful have the right and duty ... to provide charitable services.” Plaintiffs' Exhibit 3, pg. 1.

D. Nonprofit Religious Affiliated/Related Charitable and Educational Organizations of the Dioceses of Pittsburgh and Erie

1. Role of Bishops in Organizations

As the heads of their respective Dioceses, the Bishops carry out the “good works” of the Catholic Church through: educating children regardless of their religion, promoting spiritual growth (including conducting religious services, operating seminaries, and hosting religious orders), and providing community service to others regardless of the recipient's religion or other factors. Stipulations of Fact, ¶¶ 58–61, 120; 13–cv–303, Doc. No. 1, ¶ 27; 13–cv–1459, Doc. No. 1, ¶ 26. “... [T]he duty of charity [is] a responsibility incumbent upon the whole Church and upon each Bishop in his Diocese....” Plaintiffs' Exhibit 3, pg. 1. Bishops have a duty to prevent parishes and “diocesan structures” from taking actions at odds with the Church's teachings. Plaintiffs' Exhibit 3, Article 9, § 3 (“It is the duty of the diocesan Bishop and the respective parish priests to see that in this area the faithful are not led into error or misunderstanding; hence they are to prevent publicity being given through parish or diocesan structures to initiatives which, while presenting themselves as charitable, propose choices or methods at odds with the Church's teaching.”). Bishops also are responsible for “ensur[ing] that in the activities and management of these activities, the norms of the Church's universal, and particular law are respected, as well as the intentions of the faithful who made donations or bequests for these specific purposes.” Plaintiffs' Exhibit 3, Article 4, § 3.

2. Catholic Schools

Education is an integral component of the Catholic faith. Hearing Testimony, Father Jabo, pg. 90, lines 24–25.

a. Diocese of Pittsburgh

The Diocese of Pittsburgh runs, organizes, and supervises approximately 11 high schools, 66 elementary schools, two non-residential schools for individuals with disabilities, and various preschool programs. Stipulations of Fact, ¶ 122. These schools educate approximately 22,000 students. ***587** Stipulations of Fact, ¶ 123; Doc. No. 1, ¶¶ 27–28. The

Diocesan schools are open to and serve all children, without regard to the students' religion, race, or financial condition. Stipulations of Fact, ¶ 125. Some of the schools educate predominantly non-Catholic students. Stipulations of Fact, ¶ 129; Doc. No. 1, ¶ 30.

The contraceptive mandate, as applied via the "accommodation" and the "exemption," will result in elementary schools within the Diocese being treated differently—certain elementary schools within the Diocese will be exempt from compliance with the regulations, while others will not. Stipulations of Fact, ¶ 130.

b. Diocese of Erie

The Diocese of Erie operates approximately 30 elementary schools, 3 middle schools, and 6 secondary schools. These schools educate approximately 6,400 students. Stipulations of Fact, ¶ 62; Doc. No. 1, ¶ 28. Students are accepted regardless of religion. Stipulations of Fact, ¶ 63. Tuition assistance is offered to students based solely on financial need and for those who otherwise would have no alternative to the public school system. Stipulations of Fact, ¶¶ 63–64. These schools include Erie Catholic (an affiliated corporation), a preparatory high school, which was formed in 2010 by the merger of two Catholic schools and has approximately 870 students. Stipulations of Fact, ¶¶ 96, 98, 108; Doc. No. 1, ¶¶ 54, 60. Erie Catholic's vision is "steeped in Gospel values and the mission of the Catholic Church." Stipulations of Fact, ¶ 103. The school's mission is to "form a Christ-centered, co-institutional, college preparatory Catholic school of the Diocese of Erie." Doc. No. 1, ¶ 57.

Erie Catholic implements the Church's teaching mission and has a strong religious component: daily mass is celebrated at the school; four years of theology are required for all students; students are required to perform qualified community service which may include "service to the school and parish community"; and religious retreats are organized. Stipulations of Fact, ¶¶ 104–107; Doc. No. 1, ¶¶ 58–59; Declaration of Father Scott Jabo (P–89), ¶ 4. The school is an affiliated corporation of the Diocese and endeavors to educate students in academic subjects and the Catholic faith as defined by the Diocese. Declaration of Father Scott Jabo (P–89), ¶ 13. Father Jabo, as President of Erie Catholic, is responsible for ensuring that the school and all of its functions are in line with Catholic Church teachings. Hearing Testimony, Father Jabo, pg. 91, lines 18–25, pg. 92, lines 1–4. The Diocese directly oversees the school's management and offers financial aid to its students through the Bishop assistance plan and the STAR Foundation. Stipulations of Fact, ¶¶ 97, 111; Doc. No. 1, ¶¶ 62, 65.

Erie Catholic is exempt from filing Form 990 ("Return of Organization Exempt from Income Tax") (26 C.F.R. § 1.6033–2(g)(vii)). Stipulations of Fact, ¶ 112; Declaration of David Murphy (P–91), ¶ 13; 26 C.F.R. § 1.6033–2(g)(1)(vii). Erie Catholic is not exempt from the contraceptive mandate because it is not an "integrated auxiliary" under the definition in 26 C.F.R. § 1.6033–2(h). Stipulations of Fact, ¶ 113; Doc. No. 1, ¶ 64. If Erie Catholic does not comply with the contraceptive mandate, as applied via the "accommodation," it could face estimated annual fines of approximately $2.8 million against an annual budget of approximately $10 million. Hearing Testimony of Father Jabo, pg. 98, lines 19–20, 23.

3. Social Service Organizations

Providing social services to others is a central tenet of the Catholic faith. Plaintiffs' Exhibit 12, "Catholic Charities of Diocese of Pittsburgh Bylaws"; 13–cv–303, ***588** Doc. No. 1, ¶ 33; Declaration of Susan Rauscher (P–86), ¶ 21. These "good works" are integral to the practice of the Catholic faith. Hearing Testimony, Bishop Persico, pg. 83, lines 6–9 ("... it's faith and good works. You don't have two separate, [ ] they don't co-exist. It's all part of the same."). Social services must be provided in conformity with the Catholic faith. Hearing Testimony, Bishop Zubik, pg. 22, lines 22–23 ("The Catholic teaching and tradition and its teachings has to be observed in all instances.").

Consistent with this tenet, the Dioceses of Pittsburgh and Erie provide social services to the residents of their nineteen-county community. These services are provided without regard to national origin, race, color, sex, religion, age, or disability. Stipulations of Fact, ¶ 131. The Dioceses also assist many other local organizations, including organizations that: provide support to the homeless; provide scholarships to disadvantaged children of all faiths; and provide counseling and support to struggling families. Stipulations of Fact, ¶ 132; 13–cv–303, Doc. No. 1, ¶¶ 31–32; 13–cv–1459, Doc. No. 1, ¶¶ 32–33. These social service programs receive support from the Diocese. 13–cv–303, Doc. No. 1, ¶ 33.

a. Pittsburgh

Plaintiff Catholic Charities is the primary social service agency of the Diocese under the leadership of Bishop Zubik, who serves as the Chairman of the Membership Board. Declaration of Susan Rauscher (P–86), ¶ 4; Declaration of Father Ronald P. Lengwin (P–88), ¶ 5. Per its Bylaws, the Diocese of Pittsburgh "recognizes its obligation to bear witness to the charity of Christ, both in work and deed," and "performs its mission of social welfare through Catholic Charities...." Plaintiffs' Exhibit 12 "Catholic Charities Diocese of Pittsburgh Bylaws, December 5, 2012," pg. 1.

As Chairman of the Membership Board, Bishop Zubik oversees the management of Catholic Charities. Charitable and educational agencies, such as Catholic Charities, must conform with the Bishop's authority. Plaintiffs' Exhibit 3, pg. 4, Article 4, §§ 3–4 ("For agencies not approved at the national level ... the competent authority is understood to be the diocesan Bishop where the agency has its principal office.")

Catholic Charities is required to completely adhere to the Catholic doctrine. Plaintiffs' Exhibit 3, pg. 2 ("... there is a need to ensure that they are managed in conformity with the demands of the Church's teachings and the intentions of the faithful, and that they likewise respect the legitimate norms laid down by civil authorities."). As such, Catholic Charities may not take actions that are inconsistent with the tenets of the Catholic Church. Plaintiffs' Exhibit 3, pg. 3, Article 1, § 3 ("... the collective charitable initiatives to which this *Motu Proprio* refers are required to follow Catholic principles in their activity and they may not accept commitments which could in any way affect the observance of those principles.") (emphasis original.)

Annually, Catholic Charities provides approximately 230,000 acts of service for people in need in Southwestern Pennsylvania. Stipulations of Fact, ¶ 135. The organization has offices in all six counties of the Diocese of Pittsburgh and employs approximately 115 individuals. Stipulations of Fact, ¶¶ 136–137.

Like other charitable and educational organizations affiliated with the Catholic Church, the Diocese provides funding to Catholic Charities, its programs, and the Free Health Care Center. Stipulations of Fact, ¶ 154; 13–cv–1459, Doc. No. 1, ¶ 68. Catholic Charities serves the needy, underserved, and underprivileged through ***589** the efforts of its "Ambassadors of Hope" volunteers. Stipulations of Fact, ¶ 141. Catholic Charities could not exist without its volunteers and donor funding. Stipulations of Fact, ¶ 153. Catholic Charities supports other charitable organizations including Team HOPE (assists the needy to gain independence), St. Joseph House of Hospitality (residential and transitional housing facility), and two senior centers.

Catholic Charities' programs and services include adoption, counseling, safety net and stability services, health care for the uninsured, housing and homeless assistance, pregnancy and parenting support, and refugee and senior services. In 2012, through its various social service programs, Catholic Charities provided approximately 68,141 meals to the hungry, 14,430 hours of case management to struggling individuals and families, and participated in 16,542 patient visits. Stipulations of Fact, ¶¶ 141, 148.

Catholic Charities offers free health services through the Free Health Care Center (a wholly-owned subsidiary of Catholic Charities). The free health services provided at the Free Health Care Center in 2012 are valued at nearly $1.5 million. Stipulations of Fact, ¶ 144–148. The Free Health Care Center is the only facility of its kind in the Pittsburgh region. Stipulations of Fact, ¶ 145. The Center is critical to the region and has provided free preventative and primary care to nearly 15,000 individuals during more than 35,000 patient visits. *Id.* at ¶ 147.

Catholic Charities also supports a pregnancy and parenting support program. In 2012, 2,545 parents utilized the services. Stipulations of Fact, ¶ 149. Catholic Charities also maintains crisis pregnancy assistance and post-abortion healing ministries and offers post-abortion healing retreats. Stipulations of Fact, ¶¶ 138–41.

b. Erie

The Diocese of Erie, through its supported social services organizations, provides aid to approximately 56,000 people per year, including many who would otherwise not receive necessary food, shelter, and other services. Stipulations of Fact, ¶¶ 75–76; Doc. No. 1, ¶¶ 33–34. Residents of Northwestern Pennsylvania are served by the Diocese's prison, family, and disability ministries, as well as respect life organizations, and pregnancy and new mother services.

Stipulations of Fact, ¶¶ 69–70. The Diocese also financially supports numerous secular and religious charities including: St. Elizabeth Center (food pantry and thrift and clothing store); the Good Samaritan Center (homeless shelter and emergency assistance provider); Better Homes for Erie (provider of affordable low-income housing); and Catholic Charities Counseling and Adoption Services (provider of professional, adoption, and pregnancy counseling and refugee resettlement services). Stipulations of Fact, ¶¶ 70–74.

Other Diocese affiliated organizations include Plaintiffs: St. Martin Center and Prince of Peace Center. Doc. No. 1, ¶¶ 41, 47. St. Martin Center is a nonprofit social service organization based in Erie that provides individuals and families with resources to become self-sufficient. Stipulations of Fact, ¶ 79; Doc. No. 1, ¶ 41. The Center is an affiliated corporation of the Diocese, which directly oversees its management. Doc. No. 1, ¶ 46. Services provided include social services, a food pantry, housing services, an early learning center, a job preparation program, and hospitality industry training. Stipulations of Fact, ¶¶ 88–93; Doc. No. 1, ¶ 46. The Center does not qualify as a "religious employer" as defined by the exemption to the contraceptive mandate. Doc. No. 1, ¶ 45.

***590** Prince of Peace Center is a nonprofit social service organization which provides various social services to the needy of greater Mercer County who do not receive all of their necessities from the Government. Stipulations of Fact, ¶ 78; Doc. No. 1, ¶¶ 47, 50. The Center is an affiliated corporation of the Diocese, which directly oversees its management. Doc. No. 1, ¶ 53. Services provided include family support services, emergency assistance programs (funded by private donations), a thrift store, workforce preparation, a soup kitchen (serves approximately 700 individuals a month with groceries to supplement food stamps and 5,700 people per year at the soup kitchen), job preparation programs, computer classes, and various programs and charity drives. Stipulations of Fact ¶¶ 80–87; Doc. No. 1, ¶ 48. The Center does not qualify as a "religious employer" as defined by the exemption to the contraceptive mandate. Doc. No. 1, ¶ 52.

The majority of the individuals served by St. Martin Center and Prince of Peace Center live below the poverty line and would be without food, shelter, and necessary services if not for the Centers. Stipulations of Fact, ¶ 94. The Diocese would not be able to provide all of the social services offered, including at St. Martin Center and Prince of Peace Center, without financial contributions from donors and volunteers. Stipulations of Fact, ¶¶ 77, 95.

Bishop Persico serves as Chairman for the membership boards of the St. Martin Center and Prince of Peace Center. Declaration of Mary Maxwell (P–90), ¶ 3. Both Centers are "required to adhere to Catholic doctrine at all times and in all manners," particularly as defined by the Diocese. *Id.* Bishop Persico is responsible for carrying out that doctrine and implementing the Centers' missions. Declaration of Father Scott Detisch, Ph.D. (P–92), ¶ 5. As such, he is ultimately responsible for ensuring that all of the Centers' policies comply with Catholic doctrine. *Id.* at ¶ 6.

Failure to adhere to the contraceptive mandate, as applied via the "accommodation," could subject St. Martin Center and Prince of Peace Center to "several million" dollars in collective fines against budgets of four million dollars and $800,000.00, respectively. Hearing Testimony, Mary Maxwell, pg. 115, lines 9, 11–13, 16.

E. Plaintiffs' Employee Health Insurance Coverage

1. Religious Components of Employee Health Care

The sanctity of human life from conception to natural death and the dignity of all persons are central tenets of the Catechism of the Catholic Church. Hearing Testimony, Bishop Persico, pg. 75, lines 16–19. The Catholic Church believes that health care is a basic right because of the sanctity and dignity of human life. *See* Cardinal Dolan Deposition (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 28, lines 19–23; Hearing Testimony, Bishop Zubik, pg. 38, lines 23–24; Hearing Testimony, Bishop Persico, pg. 73, lines 23–25; Declaration of Father Scott Detisch, Ph.D. (P–92), ¶ 25; Declaration of Father Ronald P. Lengwin (P–88), ¶ 34.

The Catholic Church also believes that contraception and abortion are prohibited, and Catholics cannot facilitate/ initiate, directly or indirectly, the provision of abortions. Cardinal Dolan Deposition (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 25, lines 15–19, 23–25, pg. 26, lines 1–12; Hearing Testimony, Bishop Zubik, pg. 28, lines 16–22; Declaration of Father Ronald P. Lengwin (P–88), ¶¶ 12–13; Plaintiffs' Exhibit 2 "Ethical and Religious Directives for Catholic Health Care Services, United States Conference of Catholic Bishops November 17, 2009," ¶¶ 45, 52 ("Abortion (that is, the directly intended ***591** 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 implementation 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 [15] in any association with abortion providers.").

This belief necessarily prohibits providing, subsidizing, initiating, or facilitating insurance coverage for abortion-inducing drugs, sterilization services, contraceptives, and related educational and counseling services. Declaration of Father Ronald P. Lengwin (P–88), ¶ 10; Plaintiffs' Exhibit 2, pg. 28, ¶ 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 the methods of natural family planning.").

2. Diocese of Pittsburgh and the Catholic Benefits Trust (Self–Insured Health Plan)—Doc. No. 1, ¶¶ 34–40

The Diocese of Pittsburgh provides health insurance to its employees through a self-insured health plan through the Catholic Benefits Trust ("Trust"). Declaration of David S. Stewart (P–87), ¶ 4. The Trust was formed in June 2013 by an agreement between the Diocese of Pittsburgh, the Diocese of Altoona–Johnstown, and the Diocese of Greensburg (the "Trust Agreement"), in an effort to pool resources with regard to health benefits. Stipulations of Fact, ¶ 133. The Trust was formed by the Diocese of Pittsburgh converting its Catholic Employers Benefits Plan Delaware Trust to a Delaware statutory trust and expanding the Trust to include the Dioceses of Altoona–Johnstown and Greensburg. Doc. No. 1, ¶ 34.

The three Dioceses are the Beneficial Owners of the Trust, which is split into three series: the Pittsburgh series, the Altoona–Johnstown series, and the Greensburg series. Each Diocese is the sole "Beneficial Owner" and sole beneficiary of its respective series. Thus, Plaintiff Diocese of Pittsburgh is the sole Beneficial Owner and sole beneficiary of the Pittsburgh series of the Trust. Declaration of David S. Stewart (P–87), ¶ 5.

The Diocese itself provides health insurance coverage to approximately 200 individuals who are its direct employees and their beneficiaries. Declaration of David S. Stewart (P–87), ¶ 6. The offered plans are self-insured through the Catholic Benefits Trust and administered by TPAs. *Id.* Consistent with the teachings of the Catholic Church, all of the Diocesan plans offered through the Trust, including those for its nonprofit, religious affiliated/related organizations, such as Catholic Charities, do not cover abortion-inducing drugs, contraceptives, or sterilization, except when medically necessary. Declaration of Susan Rauscher (P–86), ¶ 19; Declaration of David S. Stewart (P–87), ¶ 9. In the past, the Diocese has notified its TPAs that it would not cover contraceptive products, services, and counseling. Declaration of David S. Stewart (P–87), ¶ 14.

***592** The Catholic Benefits Trust also provides coverage to "Diocesan Entit [ies]," defined in the Trust Agreement as "an Agency, Parish, School, seminary or other similar entity subject to the supervision, or administrative and pastoral care, of a Diocese." Stipulations of Fact, ¶ 134; Doc. No. 1, ¶ 36. Presently, approximately 230 Catholic organizations, including the Diocese of Pittsburgh, Catholic Charities, all of the parishes and schools with the Diocese, and several other entities affiliated with the Diocese of Pittsburgh, along with the Dioceses of Altoona–Johnstown and Greensburg and affiliated entities within those Dioceses, participate in the Trust. Within these organizations, approximately 3,100 employees and 5,000 participants receive their health insurance through the Trust. This structure allows organizations to benefit from "economies of scale," to be self-insured, and to spread their risks. As a result, each religious organization can offer its employees better benefits at lower costs. Doc. No. 1, ¶ 36.

The three Dioceses do not contract with a separate insurance company that pays for the employee health plans sponsored by the Trust. Instead, the Trust functions as the insurance company underwriting the covered employee's medical costs, with all funding coming from each respective Diocese and its covered affiliates. The health plans sponsored by the Trust are administered by TPAs, who are paid a flat fee for each covered individual for administering the plans but who do not pay for any services received by covered employees. The Trust sponsors one set of group health plans for the Diocese of Pittsburgh and the majority of Diocesan-affiliated entities within the Diocese of Pittsburgh (the "Diocesan Health Plan"). Doc. No. 1, ¶ 39.

The Diocesan health plans offered—except to Catholic Charities—are "grandfathered" and therefore are exempt

from the requirements of the contraceptive mandate. Doc. No. 1, ¶ 166. The Diocese has included a statement describing its "grandfathered" status in plan materials, as required by 26 C.F.R. § 54.9815–1251T(a)(2)(ii). *Id.*

The Trust sponsors separate group health plans for Plaintiff Catholic Charities of the Diocese of Pittsburgh. Catholic Charities provides health insurance coverage to approximately 80 full-time employees and their dependents (300 individuals). Declaration of Susan Rauscher (P–86), ¶ 7. The plan offered to employees of Catholic Charities is not a "grandfathered" health plan, and as such, it did not include a statement describing its "grandfathered" status in plan materials, as required by 26 C.F.R. § 54.9815–1251T(1)(ii) for "grandfathered" plans. Doc. No. 1, ¶ 44; Declaration of David S. Stewart (P–87), ¶ 10. [16] ***593** The next Diocesan Health Plan year begins on January 1, 2014. Declaration of Susan Rauscher (P–86), ¶¶ 7–10; Declaration of David S. Stewart (P–87), ¶ 12. Many Diocesan-affiliated entities currently insured through the Trust likely do not qualify for the religious employer exemption and would be subjected to the accommodation after that date. Doc. No. 1, ¶ 44.

3. Trust Agreement—See Doc. No. 1, ¶¶ 47–50

The Trust Agreement provides that "each Director" of the Board of Directors of the Trust shall be "appointed by the Bishop of each Diocese that is or becomes a Beneficial Owner" of the Trust. The Board of Directors is then responsible for "[t]he management of the Trust[.]"

While "all powers to manage the business and affairs of the Trust and each Series shall be exclusively vested in the Board and the Board may exercise all powers of the Trust[,]" "a majority of the Beneficial Owners may amend [the Trust] Agreement in writing at any time and thereby broaden or limit the Board's power and authority[.]" The Diocese, through the Bishop, has ultimate decision-making authority and has the power to manage, oversee, and direct the Trust. Doc. No. 1, ¶ 46.

Additionally, the Diocese decides whether an entity may participate in the Trust. The Trust Agreement provides that "[e]ach Beneficial Owner may allow such Diocesan Entities to benefit in such Series in respect of which such Beneficial Owner is the holder of the sole interest in accordance with the terms and conditions established by such Beneficial Owner in consultation with its advisors." The Diocese, as sole beneficial owner, also is responsible for the liability and other costs of the Trusts—"[a] particular Series shall be charged with the liabilities of that Series, and all expenses, costs, charges and reserves attributable to any particular Series shall be borne by such Series." Doc. No. 1, ¶ 50.

4. Diocese of Erie

The Diocese of Erie operates a self-insured health plan ("the Diocesan health plan") by which it functions as the insurance company in underwriting the medical costs of its employees and the employees of its affiliated organizations. Doc. No. 1, ¶ 36. As such, the Diocese does not contract with a separate health insurance company. *Id.* The Diocesan health plan is administrated by a TPA. *Id.* The plan provides benefits for approximately 774 employees and 980 individuals, including those who are employed directly by the Diocese as well as by schools and charitable agencies of the Diocese (approximately 280 insured employees are employed by nonexempt entities). Declaration of David Murphy (P–91), ¶¶ 6, 27. Employees of St. Martin Center, Prince of Peace Center, and Erie Catholic (approximately 90 employees) are insured under the Diocesan health plan. *Id.* at ¶¶ 43, 51, 63; Declaration of Father Scott Jabo (P–89), ¶ 5.

Employees, regardless of the specific employer within the plan, are provided three options for health plans. Declaration of David Murphy (P–91), ¶ 18. Consistent with the tenets of the Catholic faith, none of these plans cover abortion-inducing drugs, contraceptives, or sterilization, except when "medically necessary." ***594** Declaration of David Murphy (P–91), ¶ 40. The Diocese has previously notified its TPA that it would not cover contraceptive products, services, and counseling, and has never designated the TPA to provide those products, services, or counseling. Declaration of David Murphy (P–91), ¶ 15. Such actions never triggered the provision of contraceptive products, services, or counseling. *Id.*

The next administrative year for the health plan (the date which all benefits for the July 1, 2014, plan year must be implemented) begins on January 1, 2014. Declaration of David Murphy (P–91), ¶¶ 9, 25. The plan does not meet the ACA's definition of a "grandfathered" plan and therefore is not exempt from provisions of the ACA. Declaration of David Murphy (P–91), ¶ 9. As such, the Diocesan health plan must comply with the provisions of the ACA on or before January

1, 2014 (after the safe harbor provision has elapsed and first date of next administrative year for the plan). *Id.*

F. Plaintiffs' Religious Beliefs as to the Contraceptive Mandate

As previously noted, a tenet of the Catholic faith is the belief that human life must be preserved from conception through natural death. See generally Hearing Testimony, Bishop Zubik, pg. 28, lines 16–20.

The ACA includes the provision that eight categories of preventative services for women must generally be covered by group health plans without cost sharing. Additional Stipulated Facts, ¶ 15, citing HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), available at http://www.hrsa.gov/womens guidelines; 13–cv–303, Doc. No. 54–49; 13–cv–1459, Doc. No. 55–49. Plaintiffs object to only one of the eight categories, "contraceptive methods and counseling," that covers FDA approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Additional Stipulated Facts, ¶¶ 16–17. Plaintiffs object to the "contraceptive methods and counseling" category because such products, services, and counseling violate their belief in the sanctity of human life. *See* generally Hearing Testimony, Bishop Zubik, pg. 28, lines 16–20.

Completing the self-certification form required by the contraceptive mandate's "accommodation" also violates that tenet. Hearing Testimony, Bishop Zubik, pg. 33, lines 19–21 ("... we are being asked to violate a tenet or belief that's important to us and a matter of conscience."). Completing the self-certification also would burden the signer's exercise of religion. Hearing Testimony, Mary Maxwell, pg. 113, lines 15–17.

Completion of the self-certification form would be akin to cooperating with/facilitating "an evil" and would place the Diocese "in a position of providing scandal" because "it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching." Hearing Testimony, Bishop Zubik, pg. 35, lines 17–18, 20–23, pg. 37, lines 7–9; Hearing Testimony, Bishop Persico, pg. 79, lines 24–25, pg. 80, lines 6–8; Hearing Testimony, Father Jabo, pg. 96, lines 4–5. Completing the self-certification form would violate personal religious beliefs and cause "eternal" "ramifications." Hearing Testimony, Father Jabo, pg. 97, lines 2–4; Hearing Testimony, Bishop Persico, pg. 81, line 25.

Bishop Zubik will not complete the self-certification form and would instruct the head of Catholic Charities not to complete the self-certification form. Hearing Testimony, Bishop Zubik, pg. 43, lines 2–10. Bishop Persico stated: "I would have a real moral issue in signing [the self-certification form] because I would be afraid of ***595** giving scandal to the faithful" and "I would have a very difficult time in [directing the heads of St. Martin Center, Prince of Peace Center, or Erie Catholic to complete the self-certification form]. I don't see how I could." Hearing Testimony, Bishop Persico, pg. 80, lines 1–8, pg. 82, lines 14–16, pg. 91, lines 7–9.

III. Statutory and Regulatory History

The applicable statutory and regulatory history, as set forth by the parties in the Stipulations of Fact (¶¶ 1–49) and Addition Stipulations of Fact (as cited), is:

A. Introduction

In March 2010, Congress enacted the ACA. 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).

The ACA established 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).

Section 1001 of the ACA requires all group health plans and health insurance issuers that offer non-grandfathered, non-exempt group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive 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).

The ACA provides that certain of its provisions apply to "grandfathered health plans" and certain of its provisions, including 42 U.S.C. § 300gg–13, do not apply to "grandfathered health plans." 42 U.S.C. § 18011. The

contraceptive mandate does not apply to qualifying "grandfathered" plans, and such plans are not required to comply with the preventive services coverage requirement of 42 U.S.C. § 300gg–13. Additional Stipulated Facts, ¶¶ 1–2.

B. Regulatory Background

1. Rulemaking from July 2010 to March 2012

On July 19, 2010, Defendants issued interim final rules, incorporating the statutory requirement that group health plans provide coverage for women's "preventive care." 75 Fed.Reg. 41,726 (citing 42 U.S.C. § 300gg–13(a)(4)). These initial rules did not define "preventive care," 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. At that time, there were no existing HRSA guidelines relating to preventive care and screening for women.

The Department of Health and Human Services ("HHS") tasked the Institute of Medicine ("IOM"), a non-governmental organization, with "review[ing] what preventive services are necessary for women's health and well-being and should be considered in the development of comprehensive guidelines for preventive services for women." IOM Report at 2. On July 19, 2011, the IOM Committee released a report entitled "Clinical Preventive Services for Women: Closing the Gaps 19–20, 109 (2011)" ("IOM Report"). The IOM Report recommended that the HRSA guidelines include, among other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" ("Preventive Services"). IOM Report at 10–12. FDA-approved contraceptive methods include ***596** diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105. The IOM Report included a dissent from Committee member Anthony Lo Sasso.

On August 1, 2011, HHS issued a press release announcing that it would adopt the recommendations of the IOM Report. 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/2011 pres/08/20110801b.html.

Also, on August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, encompassing all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines").

In August 2011, the Government issued interim final rules implementing the statutory requirement that group health plans provide coverage for women's "preventive care and screenings ... as provided for in comprehensive guidelines supported by [HRSA]." 76 Fed.Reg. 46,621, 46,623 (Aug. 3, 2011).

The August 2011 interim final rules also amended the July 19, 2010 interim rules to provide HRSA additional discretion to exempt "religious employers" from the contraceptive coverage requirement. *Id.* To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

a. The inculcation of religious values is the purpose of the organization;

b. The organization primarily employs persons who share the religious tenets of the organization;

c. The organization serves primarily persons who share the religious tenets of the organization; and

d. 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 [*i.e.*, an organization exempted from filing IRS Form 990].

Id. at 46,623. The Government sought "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." *Id.*

In February 2012, the Government "finalize[d], without change," the "religious employer" exemption as originally proposed in the August 2011 interim final rules. 77 Fed.Reg. at 8,729 (Feb. 15, 2012). In February 2012, the Government also created a "one-year safe harbor from enforcement" for non-grandfathered group health plans

sponsored by certain nonprofit organizations with religious objections to contraceptive coverage. *See* 77 Fed.Reg. 8725, 8726–28 (Feb. 15, 2012). The Government undertook a new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered nonprofit religious organizations with religious objections to covering Preventive Services. *Id.* at 8728.

On March 21, 2012, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM") that stated it was part of the Government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections ***597** to such coverage." 77 Fed.Reg. 16,501, 16,503 (Mar. 21, 2012).

2. Rulemaking from February to July 2013

On February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM"), setting forth a proposal that stated it was to "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed.Reg. 8456 (Feb. 6, 2013).

Defendants received over 400,000 comments (many of them standardized form letters) in response to the proposals set forth in the NPRM. 78 Fed.Reg. 39,870, 39,872 (July 2, 2013).

On June 28, 2013, the Government issued final rules adopting and/or modifying proposals in the NPRM. *See* 78 Fed.Reg. 39,870 ("Final Rule"). The regulations challenged here (the "2013 final rules") include the new regulations issued by the Government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering Preventive Services. *See* 78 Fed.Reg. 39,870; *see also* 77 Fed.Reg. 16,501 (ANPRM); 78 Fed.Reg. 8456 (NPRM).

a. The 2013 Final Rules' "Religious Employer" Exemption

The Final Rule states that it "simplify[ied] and clarify[ied]" the definition of "religious employer." 78 Fed.Reg. at 39,871. Under the new definition, an exempt "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed.Reg. 39874 (codified at 45 C.F.R. § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are:

> (i) churches, their integrated auxiliaries, and conventions or associations of churches, and
>
> * * *
>
> (ii) the exclusively religious activities of any religious order.

26 U.S.C. § 6033(a)(3)(A)(i) or (iii). Section 6033 of the Internal Revenue Code addresses whether and when nonprofit entities that are exempt from paying taxes under the Code must file "annual information [tax] return[s]." 26 C.F.R. § 1.6033–2(a).

The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed.Reg. at 39,874 (citing 78 Fed.Reg. 8461). Entities that are included in Section 6033(a)(3)(A) are exempt from filing an annual Form 990 with the IRS. [17]

***598** The 2013 final rules' amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013. *See id.* at 39,871.

b. The 2013 Final Rules' "Accommodation"

The 2013 final rules establish regulations regarding the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed.Reg. at 39,875–80; 45 C.F.R. § 147.131(b).

An "eligible organization" is an organization that satisfies the following criteria:

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

45 C.F.R. § 147.131(b); see also 78 Fed.Reg. at 39,874–75. The 2013 final rules state that an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed.Reg. at 39,874.

***599** To be relieved of the obligations that otherwise apply to non-grandfathered, non-exempt employers, the 2013 final rules require that an eligible organization complete a self-certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its insurer or TPA. *Id.* at 39,878–79.

For self-insured organizations, the self-certification "will afford the [TPA] notice of [its] obligations" under the 2013 final rules, "and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed.Reg. at 39,879. Section 3(16) of ERISA provides the definition of "administrator" under ERISA. 29 U.S.C. § 1002(16).

Under the 2013 final rules, in the case of an eligible organization with a self-insured group health plan, the organization's TPA, upon receipt of the self-certification, will provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879–80; 26 C.F.R. § 54.9816–2713A(b)(2), (c)(2).

Under the 2013 final rules, costs incurred by TPAs relating to the coverage of Preventive Services for employees of eligible organizations will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See* 78 Fed.Reg. at 39,880. The payments for Preventive Services required by the challenged regulations applicable to employer-sponsored health insurance plans are available to an employee only while the employee is on an organization's health plan. 29 C.F.R. § 2590.715–2713; 45 C.F.R. § 147.131(c)(2)(i)(B).

Self-insured religious employers and eligible organizations are prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure Preventive Services. 26 C.F.R. § 54.9815–2713.

The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. *See id.* at 39,872.

IV. Summation of Findings of Fact

Based upon testimony presented at the Injunction Hearing, credibility determinations of the witnesses by this Court, and the sum of evidence presented in various forms, the Court finds in summary that:

> (1) Plaintiffs hold sincerely to the religious beliefs of the Catholic faith that:
>
> > (a) human life is sacred from conception to natural death;
> >
> > (b) worship, faith, and good works are essential and integral to the practice of Catholicism ("faith without good works is dead"); and
> >
> > (c) the facilitation of evil is as morally odious as the proliferation of evil.
>
> (2) Plaintiffs will refuse to provide, directly or indirectly, employee health insurance coverage for contraceptive products, services, or counseling, because doing so would violate their sincerely-held religious beliefs.
>
> (3) The nonprofit, religious affiliated/related Plaintiffs (Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) will not complete the self-

certification form. These Plaintiffs will partake in this act of civil disobedience because to do otherwise—meaning signing the self-certification form—will initiate ("cause a process of action to begin") and facilitate coverage of contraceptive products, services, and ***600** counseling by a TPA or health insurer. The act of signing the self-certification form will violate these Plaintiffs' sincerely-held religious beliefs. Hearing Transcript, November 13, 2013, pg. 54, lines 23–25, pg. 55, lines 1–9. Further, the Bishops will direct these Plaintiffs not to complete the self-certification form. Hearing Testimony, Bishop Zubik, pg. 43, lines 2–10; Hearing Testimony, Bishop Persico, pg. 80, lines 1–8, pg. 82, lines 14–16, pg. 91, lines 7–9.

(4) The nonprofit, religious affiliated/related Plaintiffs will be subject to substantial fines/penalties/"taxes" and other coercive governmental sanctions.

(5) The effect of the imposition of these fines/penalties/"taxes" will gravely impact Plaintiffs' spiritual, charitable, and educational activities, and the individuals who rely on the Catholic Church's nonprofit, religious affiliated/related organizations for the basic needs of food, shelter, and education, as well as other charitable programs. Cardinal Dolan Deposition, (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 29, lines 5–21. The fines/penalties/"taxes" also will negatively affect Plaintiffs' financial situation as donors to these spiritual/charitable/educational organizations may not wish to donate funds when the funds could be diverted to the Government in the form of fines/penalties/"taxes."

V. Conclusions of Law

A. Overview

As far as this Court is aware, the facts presented by these two cases make them one of first-impression. As of this writing, no appellate court has rendered a decision on the merits of a non-secular, nonprofit organization's rights under the RFRA, as impacted by the ACA's contraceptive mandate, and the "religious employer exemption" and "accommodation" which relate to that mandate. [18]

In reaching its decision in these two cases, this Court has found the recent decisions pertaining to secular, for-profit organizations to be instructive. *See Korte v. Sebelius,* 735 F.3d 654 (7th Cir.2013) (granting preliminary injunction to secular, for-profit corporations finding them to be "persons" who could assert claims under the RFRA alleging that the ACA's contraceptive ***601** mandate placed substantial burden on their exercise of religion); *Gilardi v. U.S. Dept. Health and Human Services,* 733 F.3d 1208 (D.C.Cir.2013) (holding secular, for-profit entity was not a "person" capable of religious exercise, but individual owners were); *Conestoga Wood Specialties Corporation v. Secretary of U.S. Dept. of Health and Human Services,* 724 F.3d 377 (3d Cir.2013) (a secular, for-profit corporation could not assert claim under Free Exercise Clause of First Amendment); and *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir.2013) (in moving for a preliminary injunction, secular, for-profit corporations showed a substantial likelihood of success on the merits as to the substantial-burden element of their claim under the RFRA).

The Court begins its analysis by considering the four criteria Plaintiffs must prove in order to obtain a preliminary injunction.

B. Preliminary Injunction Test

[1] The primary purpose of a preliminary injunction is to maintain the *status quo* until a decision on the merits of the case is rendered. *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

[2] "Four factors determine whether a preliminary injunction is appropriate: '(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.' " *B.H. ex rel. Hawk v. Easton Area School Dist.,* 725 F.3d 293, 301–2 (3d Cir.2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 252 (3d Cir.2002) quoting *Highmark, Inc. v. UPMC Health Plan, Inc.,* 276 F.3d 160, 170 (3d Cir.2001)).

[3] "A plaintiff seeking an injunction must meet all four criteria, as '[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate.' "

Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Svcs., 724 F.3d 377, 382 (3d Cir.2013) (quoting *NutraSweet Co. v. Vit–Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir.1999)); accord, *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431, 1438 (3d Cir.1994) ("The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.").

As to the first criterion, the movant bears the burden of proving a reasonable probability of success on the merits. "[O]n an application for preliminary injunction, the plaintiff need only prove a *prima facie* case, not a certainty that he or she will win." *Highmark, Inc.*, 276 F.3d at 173, citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (Civil 2d ed.1995).

[4] **[5]** The second criterion requires the movant prove that "irreparable injury is *likely* in the absence of an injunction"—the mere "possibility" of such irreparable harm "is too lenient." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). "While the burden rests upon the moving party to make these [first] two requisite showings, the district court ***602** 'should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.' " *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir.1994), quoting *Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919–20 (3d Cir.1974) (footnote omitted).

[6] In order to satisfy the third criterion, this Court must find "that the party seeking the injunction would suffer more harm without the injunction than would the enjoined party if it were granted." *Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co.*, 479 F.2d 607, 609–610 (3d Cir.1973). In *Winter*, the Supreme Court of the United States noted that although it did "not question the seriousness of [the movant's] interests, ... the balance of the equities and consideration of the overall public interest in this case tip[ped] strongly in favor of the [non-moving party]." 555 U.S. at 26, 129 S.Ct. 365. Thus, this criterion requires this Court to employ a balancing test that compares the harms the movant and non-movant would suffer and then weighs them to discern which party would be more greatly harmed by the Court's grant or denial of the injunction.

[7] The fourth and final criterion is closely tied to the third in that it requires this Court to determine if the public's interest will be furthered or harmed by the issuance of a preliminary injunction. *See Trefelner ex rel. Trefelner v. Burrell School Dist.*, 655 F.Supp.2d 581, 597–8 (W.D.Pa.2009) ("With regard to the public interest prong, the court finds that granting the temporary restraining order is in the public interest. The focus of this prong is 'whether there are policy considerations that bear on whether the order should issue,' " citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE § 2948.4 (Civil 2d ed.1995)). " 'The grant or denial of a preliminary injunction is committed to the sound discretion of the district judge, who must balance all of these factors in making a decision.' " *Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 949 (3d Cir.1982), quoting *Penn Galvanizing Co. v. Lukens Steel Co.*, 468 F.2d 1021, 1023 (3d Cir.1972).

Turning to the instant matter, Plaintiffs in these cases have requested that this Court grant them a preliminary injunction, arguing that the ACA and the religious employer "accommodation," which requires them to facilitate/initiate compliance with the contraceptive mandate, violates their rights under the RFRA and the Free Exercise Clause of the First Amendment.

1. Likelihood of Success on the Merits

a. Background

Plaintiffs' Motions for Expedited Preliminary Injunction ask this Court to enjoin the issuance, application, and enforcement of a federal regulation, specifically 45 C.F.R. § 147.130(a)(1)(iv), arguing that they are likely to succeed on their RFRA and First Amendment claims. 13–cv–1459, Doc. No. 4; 13–cv–303, Doc. No. 6.

As noted in Section "III.B.2." above, 45 C.F.R. § 147.130(a)(1)(iv) is the regulation that allows HRSA to "establish exemptions" from group health plans maintained by "religious employers" with respect "to any requirement to cover contraceptive services[.]" *See* 45 C.F.R. § 147.130(a)(1)(iv)(A); *see also Gilardi, supra*, 733 F.3d at 1210–11 (D.C.Cir.2013).

After receiving hundreds of thousands of comments from the public, including religious individuals and entities, concerning the definition of "religious employer" for the

benefit of receiving an "exemption" from the contraceptive mandate, the "final ***603** rule" promulgated by HRSA defined 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...." 45 C.F.R. § 147.131(a).

Again, as noted in Section "III.B.2." above, the nonprofit entities included in the relevant portion of Section 6033 of the Internal Revenue Code are:

> (i) churches, their integrated auxiliaries, and conventions or associations of churches,
>
> * * *
>
> (ii) the exclusively religious activities of any religious order.

26 U.S.C.A. § 6033(a)(3)(A).

Given this description, Plaintiffs in the instant cases (the nonprofit, religious affiliated/related entities) fail to meet the definition of a "religious employer" entitled to the "exemption." As the United States Court of Appeals for the Seventh Circuit noted in *Korte:*

> The religious-employer exemption did not leave room for the conscientious religious objectors other than houses of worship, their integrated affiliate organizations, and religious orders acting as such. In other words the definition of 'religious employer' was so circumscribed that it left out religious colleges and universities; religious hospitals and clinics; religious charities and social-service organizations; other faith—based nonprofits; and for-profit, closely held businesses managed in accordance with a religious mission or creed.

Korte, 735 F.3d at 661. Plaintiffs in the instant cases are akin to the Korte plaintiffs in that the instant Plaintiffs are entities to which the religious employer "exemption" does not apply. If HRSA had stopped here, non-secular, nonprofit entities such as Plaintiffs would have been required to directly provide for contraceptive products, services, and counseling pursuant to the contraceptive mandate.

However, in response to concerns that the application of the religious employer "exemption" was too narrow, and instead of broadening the "exemption," a second regulation was enacted that allowed for non-secular, nonprofit employers to receive an "accommodation," whereby these entities could self-certify that they were "eligible organizations" and thereby avoid *directly* providing contraceptive products, services, and counseling.

As noted above, this "accommodation" is limited to "eligible organizations" which: (1) oppose providing coverage for some or all of any contraceptive services required to be covered under the contraceptive mandate "on account of religious objections[;]" (2) are organized and operate as a nonprofit entity; (3) hold themselves out as a religious organization; and (4) "self-certify," in a form and manner specified by the Secretary, that it satisfies the criteria in (1) through (3) above. *See* 45 C.F.R. § 147.131(b); see also 78 Fed.Reg. at 39,874–75. "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." *Id.*

Since the non-secular, nonprofit Plaintiffs in the instant cases meet the first three criteria of the "accommodation," they need to "self-certify," as required by the fourth criterion, to be deemed an "eligible organization" and thus, entitled to obtain the religious employer "accommodation." It is the fourth criterion of the religious employer "accommodation" which Plaintiffs contend violates their rights under ***604** the RFRA and the First Amendment. [19]

In order to qualify for the religious employer "accommodation," and thus avoid *directly* providing or paying for contraceptive products, services, and counseling through their own health plans, Plaintiffs in these cases must self-certify that they: (1) oppose providing such contraceptive coverage on account of their religious objections; (2) are organized and operate as nonprofit entities; and (3) hold themselves out as a religious organization. This Court found as fact that Plaintiffs' self-certification forms must be executed by the Bishop of Pittsburgh (with respect to the Pittsburgh Plaintiffs in 13–cv–1459) and by the Bishop for the Diocese of Erie (with respect to the Erie Plaintiffs in 13–cv–303), or at their directive.

b. Substantial Burden [20] under RFRA

i. The RFRA

[8] Plaintiffs assert that by requiring self-certification and thereby facilitating or initiating the process of providing contraceptive products, services, and counseling, via a third party, the "accommodation," violates their rights under the RFRA.

The RFRA provides, in pertinent part, as follows:

> (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.

42 U.S.C.A. § 2000bb–1.

As noted by the Government, under the "substantial burden test," this Court must look to what is meant by "substantial burden" under the RFRA. As the Court of Appeals for the Seventh Circuit recently noted in *Korte*, "*[a]t* a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.' " 735 F.3d at 682, citing *Wisconsin v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *Korte* further instructs that "a burden on religious exercise also arises when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " *Id.*, citing *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (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) (citing *Thomas*, 450 U.S. at 718, 101 S.Ct. 1425 (1981)).

The Government argues that the "accommodation" merely requires the Pittsburgh and Erie Bishops (or their designees) ***605** to sign the self-certification form on behalf of their respective nonprofit, religious affiliated/related entities, and does not rise to the level of a "substantial burden," as that term has been defined in connection with the RFRA. The Government argues that any impact on Plaintiffs' sincerely-held religious beliefs created by Plaintiffs' self-certification is too attenuated to rise to the level of creating a substantial burden on Plaintiffs.

The Government acknowledges that the act of self-certification will require the Plaintiff-entities to sign the self-certification and supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling. The Government also concedes that Plaintiffs have sincerely-held religious beliefs with respect to: (1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil.

Given these concessions, the Court disagrees with the Government that Plaintiffs' ability or inability to "merely sign a piece of paper," and thus comport with the "accommodation," is all that is at issue here. Again, as stated by the Court of Appeals in *Korte:*

> ... the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. *See* [*U.S. v.*] *Lee*, 455 U.S. [252] at 257, 102 S.Ct. 1051[, 71 L.Ed.2d 127 (1982)]; *Thomas*, 450 U.S. at 715–16, 101 S.Ct. 1425. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] ... correctly perceived the commands of [his] ... faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425. It is enough that the claimant has an "honest conviction" that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion.

Korte at 683.

Here, the issue is whether Plaintiffs, being non-secular in nature, are likely to succeed on the merits of proving that their right to freely exercise their religion has been substantially burdened by the "accommodation" which requires the Bishops of two separate Dioceses (or their designees) to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling.

ii. The "Accommodation" Creates a New Substantial Burden

The Government contends that the affirmative acts of: (1) signing the self-certification form stating Plaintiffs' religious objections; (2) compiling a list of Plaintiffs' employees; and (3) providing those items to the health insurer or TPA, does not place a substantial burden on Plaintiffs. The Government further argues that these same acts have been undertaken by Plaintiffs in the past. In response, Plaintiffs concede that they have provided similar information in the past to their TPA, and that the physical acts themselves are not onerous. However, in the past, such actions barred the provision of contraceptive products, services, or counseling. Now, this type of information previously submitted to an insurer or TPA will be used to facilitate/initiate the provision of contraceptive products, services, or counseling—in direct contravention to their religious tenets.

Plaintiffs liken this result by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and ***606** the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

The same is true here. In all prior instances where the Government, an insurer, or a TPA has requested employee names or other information from Plaintiffs, the reason the information was sought was of no moment to Plaintiffs. Now, under the "accommodation," the reason the documentation is required is so that contraceptive products, services, and counseling can be provided in direct contravention of Plaintiffs' sincerely-held religious beliefs. The Government is asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose, and thus, they cannot provide it.

In sum, although the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

iii. The "Accommodation" and the "Exemption" Divide the Catholic Church which Creates a Substantial Burden

The Government, by enacting the religious employer "exemption," allowed certain religious employers (*i.e.*, the Dioceses and "houses of worship") to freely exercise the religious 49 belief that "contraception violates the sanctity of human life," by completely exempting them from the contraceptive mandate. Thus, the "exempt" religious employers do not have to directly provide contraceptive products, services, and counseling through their own health plans, nor do they have to provide a list of their employees to a third party and thereby indirectly provide contraceptive products, services, and counseling through that same third party. However, the religious employer "accommodation" separates the "good works (faith in action) employers" from the "houses of worship employers" within the Catholic Church by refusing to allow the "good works employers" the same burden-free exercise of their religion.

Under the "accommodation," Plaintiffs here (*i.e.*, the "good works (faith in action) employers") will be forced to facilitate/initiate the provision of contraceptive products, services, and counseling, through a third party, despite the fact that the sincerity of their religious beliefs—"contraception violates the sanctity of human life" and "facilitation of evil is as morally odious as the proliferation of evil"—are not in question.

Simply put, the Court is constrained to understand why all religious employers who share the same religious tenets—(1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil—are not exempt;

or conversely, why all religious employers do not fall within the confines of the "accommodation." The Court made the factual determination that Plaintiffs sincerely believe that the "good works, or faith-in-action" arms of the Catholic Church implement a core and germane guiding principle in the exercise of their religious beliefs. Why should religious employers who provide ***607** the charitable and educational services of the Catholic Church be required to facilitate/ initiate the provision of contraceptive products, services, and counseling, through their health insurers or TPAs, when religious employers who operate the houses of worship do not?

To this question, the Government does not provide a direct answer. Rather, the Government takes the position that Plaintiffs cannot use the RFRA as a sword to prevent the Government from creating "alternate mechanisms" to essentially protect the rights of employees and to make sure that they are receiving the mandated health services. However, the Government, through its "exemption" regulation, allows the religious employers who operate the houses of worship to do just that, while denying the same benefit to the religious employers who operate on behalf of, and at the direction of, the Catholic Church.

What this Court finds equally problematic with the Government's position is that the Bishops of these two Dioceses may freely exercise those same three religious tenets referred to above, as long as they espouse them within the confines of a "house of worship." When they provide health insurance for the employees who work for the houses of worship, they are not in any moral danger of directly or indirectly providing contraceptive products, services, and counseling. However, these same two individuals, as the spiritual leaders for the Plaintiffs at issue in these cases, must personally take at least three affirmative actions (sign a self-certification form, compile a list of employees, and provide these to an insurer or TPA) in order to escape directly providing contraceptive products, services, and counseling to the employees of the charitable and educational agencies, while knowingly facilitating/initiating the process for the provision of contraceptive services, products, and counseling through a third party. The Bishops, given their three sincerely-held religious beliefs, while wearing their "house-of-worship" hats, are not in any moral peril; yet, when they wear their "head-of-the-'good works'-agencies" hats, they must take affirmative actions which facilitate/initiate the provision of contraceptive products, services, and counseling in violation of their religious tenets.

Thus, the practical application of the two distinct regulations (one an "exemption" and one an "accommodation") allows the same members of the same religion to completely adhere to their religious beliefs at times (when the "exemption" applies), while other times, forces them to violate those beliefs (when the "accommodation" applies). Stated another way, even though Plaintiffs here share identical, religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of Plaintiffs' service organizations may not fully exercise their right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church. The Court finds this enigmatic.

Furthermore, the Court is constrained to understand why religious employers such as Catholic Charities and Prince of Peace Center—which were borne from the same religious faith, and premised upon the same religious tenets and principles, and operate as extensions and embodiments of the Church, but are not subsidiaries of a parent corporation—would not be treated the same as the Church itself with respect to the free exercise of that religion. If the contraceptive mandate creates such a substantial burden on the Dioceses' exercise of religion so as to require the religious employer "exemption," the contraceptive mandate obviously creates the same substantial burden on the nonprofit, religious affiliated/related organizations ***608** like Plaintiffs (*i.e.*, Catholic Charities, Prince of Peace Center, *et al.*), which implement the "good works" of the Dioceses.

The Court concludes that the religious employer "exemption" enables some religious employers to completely eliminate the provision of contraceptive products, services, and counseling through the Dioceses' health plans and third parties; while the religious employer "accommodation" requires other religious employers (often times the same member with the same sincerely-held beliefs) to take affirmative actions to facilitate/ initiate the provision of contraceptive products, services, and counseling—albeit from a third-party.

The application of these two regulations—one an exemption and one an accommodation—has the effect of dividing the Catholic Church into two separate entities. Now, one regulation (the "exemption") applies to the worship arm of the Catholic Church and thus applies to all of those employees who work inside a church's walls. While the other regulation (the "accommodation") applies to the "good works" arms of the Catholic Church, and thus applies to those who stand on

the church steps and pass out food and clothes to the needy. The Court concludes that by dividing the Catholic Church in such a manner with the enactment of these two regulations, the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs.

iv. Conclusion re: Substantial Burden

For the reasons set forth above, the Court concludes that the religious employer "accommodation" places a substantial burden on Plaintiffs' right to freely exercise their religion—specifically their right to not facilitate or initiate the provision of contraceptive products, services, or counseling. Thus, Plaintiffs have met their burden of proving that complying with the "accommodation" provision of the contraceptive mandate is a substantial burden on their free exercise of religion.

c. Compelling Governmental Interest under the RFRA

[9] Given that the Court has concluded (for purposes of these Motions for Expedited Preliminary Injunction) that the "accommodation" places a substantial burden on Plaintiffs' free exercise of religion under the RFRA, the Court will now consider whether the RFRA's exception has been met. Accordingly, the Court must determine whether the contraceptive mandate, as applied to Plaintiffs via the "accommodation": (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.A. § 2000bb–1.

As to the compelling interest test, the Court of Appeals in *Korte* stated:

> The compelling-interest test generally requires a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, ––– U.S. ––––, ––––, 131 S.Ct. 2729, 2741, 180 L.Ed.2d 708 (2011). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Id.* at 2738 (citations omitted). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526. "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation...." *Sherbert* [*v. Verner*], 374 U.S. [398] at 406, 83 S.Ct. 1790[, 10 L.Ed.2d 965 (1963)] (internal quotation marks and alteration omitted). The regulated conduct must "pose[ ] some substantial ***609** threat to public safety, peace[,] or order." *Id.* at 403, 83 S.Ct. 1790. Finally, "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi* [*Babalu Aye, Inc. v. City of Hialeah*], 508 U.S. [520] at 547[, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)] (internal quotation marks omitted).

Korte, 735 F.3d at 685–86.

The "compelling governmental interests" identified by the Government in this case are two-fold: (1) "the promotion of public health," and (2) "assuring that women have equal access to health care services." 13–cv–1459, Doc. No. 23, 20–21; 13–cv–303, Doc. No. 28, 20.

While the Court agrees that these two interests are certainly important governmental interests, the Court concludes that these two interests, as so broadly stated, [21] are not "of the highest order" such that "those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526.

In reaching this conclusion, the Court first notes that the existence of a religious employer "exemption" is an acknowledgment of the lack of a compelling governmental interest as to religious employers who hire employees for their "houses of worship." Simply put, as stated more fully above, the religious employers who qualify for the "exemption" do not have to directly provide, nor indirectly facilitate/initiate, the provision of any contraceptive products, services, and counseling. At a minimum, the existence of the "exemption" is an indication that the Government found its compelling interests to (1) promote public health, and (2) assure that women would have equal access to health care services, could not "overbalance the legitimate claims to the free exercise of religion" asserted by *some* religious employers—*i.e.*, the houses of worship. *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526; *see also Geneva College*, 960 F.Supp.2d at 599–601, 2013 WL 3071481 at *10.

Thus, the Government's argument that its two stated compelling interests will not overbalance the exact same legitimate claims to the free exercise of religion (at times being raised by the same individuals—i.e., Bishop Zubik in the Pittsburgh ***610** case 13–cv–1459) when asserted

on behalf of a different religious affiliated/related employer fails. If the Court were to conclude that the Government's stated interests were sufficiently "compelling" to outweigh the legitimate claims raised by the nonprofit, religious affiliated/related Plaintiffs, the net effect (as noted above) would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and "good works," thereby entangling the Government in deciding what comprises "religion." Accordingly, for purposes of reaching a decision on Plaintiffs' Motions for Expedited Preliminary Injunction, the Court refuses to conclude that the Government has compelling interests which overbalance the legitimate claims to the free exercise of religion raised by the nonprofit, religious affiliated/related Plaintiffs.

The Court also notes that the "exemption" itself (which dictates that certain religious employers can legally decline to directly and indirectly facilitate the provision of contraceptive products, services, and counseling) was not predicated upon a "public health" basis to meet the two purported compelling interests. Instead, a religious employer's qualifications for the "exemption" is predicated upon the unrelated question of whether that religious employer files the IRS Form 990. 45 C.F.R. § 147.131(a) (August 1, 2013).

If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the "houses of worship," then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases.

Despite the fact that the Government contends this analysis is "perverse" (see 13–cv–1459, Doc. No. 29, 24), the only argument it offers to support its position is that "[h]ouses of 56 worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers, including organizations eligible for the accommodation [*i.e.*, Plaintiffs in the instant cases], to employ people of the same faith who share the same objection, and who would therefore be less likely to use contraceptive services even if such services were covered under their plan." The Court finds this statement speculative, and unsubstantiated by the record and, therefore, unpersuasive.

Next, the portions of the Administrative Record offered into evidence by the Government suggest that "women who receive their health coverage through employers *like plaintiffs* would face negative health and other outcomes...." 77 Fed.Reg. at 8728; 78 Fed.Reg., at 39, 887 (emphasis added). Despite this assertion, the Government has failed to offer any testimony or other evidence during the Injunction Hearing to support the Government's claim that employees of these Plaintiffs have, in fact, suffered in the past, or will in the future, any "negative health or other outcomes," without the enforcement of the contraceptive mandate. In fact, the evidence was to the contrary.

Finally, as stated above, whether intended or not, the application of two distinct regulations (one providing a complete "exemption," the other merely providing an "accommodation") to religious employers who hold the same basic religious tenets unnecessarily—and in direct contravention to the RFRA and the Free Exercise Clause of the First Amendment—entangles the Government into determining what constitutes "religion." By having these two, separate regulations "on the books," the Government has essentially detached ***611** worship and faith from "good works" and has determined that a religious employer's complete freedom to exercise religion ends at the church doors. Once outside the church doors, that employer's religious beliefs must take a back seat to the stated compelling governmental interests. The Government thus seeks to restrict the Right to the Free Exercise of Religion set forth in the First Amendment to a Right of Worship only.

For all of the reasons set forth above, the Court concludes that the Government has failed, factually and legally, to establish that its two stated governmental interests are "of the highest order" such that "those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526.

d. Least Restrictive Means under the RFRA

[10] Given that Plaintiffs have met their burden of showing that the "accommodation" creates a substantial burden on their free exercise of religion, and given that the Government has failed to meet its burden of proving that it had a compelling interest to apply the contraceptive mandate, via the "accommodation," to Plaintiffs, the Court need not consider whether the "accommodation" was the least restrictive means of meeting the stated compelling interests. Nevertheless, the Court also concludes that the Government failed to adduce evidence that definitively establishes that it

used the least restrictive means to meet the stated compelling government interests.

First, the Government proffers that the "accommodation" was not only the "least restrictive means," but the "only possible means" of furthering the two compelling governmental interests to: (1) promote public health, and (2) assure that women would have equal access to health services. The Government's position is simply that this "accommodation" (*i.e.*, the acts of signing a self-certification form and gathering/delivering employee list(s) to their health insurer or TPA) was the "least" and the "only possible means," of furthering the two stated compelling governmental interests.

If the Government is correct that the entire fundamental statutory scheme set forth in the ACA will fail, without the participation in the contraceptive mandate by nonprofit, religious affiliated/related Plaintiffs and others like them (*i.e.*, food pantries, homeless shelters, etc.), which operate under the authority of an already exempt religious body (*i.e.*, Plaintiff Erie Diocese), then the foundation of the "statutory scheme" is certainly troubled.

Under the RFRA, the "accommodation" must be the "least restrictive means" to further the two stated compelling governmental interests. The Government neither at the Injunction Hearing, nor in the Administrative Record, offered any evidence concerning: (1) the identity of all other possible "least restrictive means" considered by the Government; (2) the analysis of each of the "means" to determine which was the "least" restrictive; (3) the identity of the person(s) involved in the identification and evaluation of the alternative "means"; or (4) "evidence-based" analysis as to why the Government believes that the "accommodation" is the "least restrictive means."

Instead, the Government argues that all the "accommodation" requires is a signature on a piece of paper. Once the signed document is received by the insurer or TPA, the contraceptive products, services, and counseling will then be made part of the nonprofit, religious affiliated/related Plaintiffs' health care plan at no cost to the Plaintiffs—except, of course, for the incalculable ***612** cost of the loss of their rights to freely exercise their religion.

As noted throughout this Opinion, this Court has found that the Government conceded that Plaintiffs' beliefs are sincerely-held. Despite these concessions, the Government trivializes these sincerely-held beliefs of Plaintiffs throughout its Brief in Opposition, to wit, the "accommodation": (1) "requires virtually nothing of Plaintiffs" (13–cv–1459, Doc. No. 23, 9–10; 13–cv–303, Doc. No. 28, 9–10, 20); (2) "certainly does not require Plaintiffs to modify their behavior in any meaningful way" (*id.*); (3) is "no more than a *de minimis* burden" (*id.*); (4) requires Plaintiffs to "do next to nothing" (*id.*); and (5) Plaintiffs "need only fulfill the self-certification requirement and provide the completed self-certification to their issuers and TPAs" (13–cv–1459, Doc. No. 23, 21). Further, there is nothing in the record to establish, or even hint, that a broader "religious employer" exemption, to include Plaintiffs (*i.e.*, Catholic Charities, Prince of Peace Center, *et al.*), would have any impact at all on "the entire statutory scheme."

During the Injunction Hearing, the Court specifically asked the Government about its stated compelling interests and the means it took to advance them. The Government directed the Court's attention to a precise section of the Administrative Record which reads, in pertinent part:

> Fifth, some commentators asserted that the contraceptive coverage requirement [the contraceptive mandate] is not the least restrictive means of advancing those compelling interests, and proposed various alternatives to these regulations. All of these proposals were considered, and it was determined that they were not feasible and/or would not advance the government's compelling interests as effectively as the mechanisms established in these final regulations and the preventative services coverage more generally.

78 Fed.Reg. 39888 (July 2, 2013).

As to this "argument," the Court first notes that it is not the commentators' responsibility to draft the regulations employing the least restrictive means—that obligation rests with the Government. Second, the regulation itself clearly announces that the alternatives to the current regulations—including the contraceptive mandate—would not advance the Government's interests "as *effectively* as" the contraceptive mandate and the "accommodation." Greater efficacy does not equate to the least restrictive means.

Thus, the Court concludes that the Government failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing those interests.

e. Conclusion—Likelihood of Success

After hearing the testimony of Cardinal Dolan, Bishop Zubik, Bishop Persico, and all of the other witnesses for Plaintiffs, the Court made the factual determination that Plaintiffs possess a sincerely-held belief that the burden imposed by the execution of the self-certification form is not *de minimis.* Plaintiffs sincerely believe that by signing the self-certification form, required by the "accommodation," they will facilitate/initiate the provision of contraceptive products, services, and counseling. Plaintiffs also sincerely believe that this facilitation/initiation is no different than if Plaintiffs directly provided those same products, services, and counseling. The Court concludes that the "accommodation," in effect, causes these Plaintiffs to comply with the contraceptive mandate which violates their sincerely-held religious beliefs—that "the sanctity of human life which begins at conception," and "facilitation of evil is the same as proliferation of ***613** evil"—and thus, places a substantial burden on Plaintiffs' ability to exercise their religion. The Court also concludes that the Government has, thus far, in this litigation, failed to show these regulations meet a compelling governmental interest and are sufficiently narrowly-tailored to meet those interests, and/or to demonstrate that the "accommodation" is the least restrictive means to meet those stated interests.

Based on the foregoing analysis, the Court finds that Plaintiffs are likely to succeed on the merits, and thus, they have met the first element of the preliminary injunction test.

2. Irreparable Harm to Plaintiffs

[11] **[12]** In the context of a preliminary injunction, irreparable harm is harm that cannot be adequately compensated at a later date in the ordinary course of litigation. *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir.1994) (In general, to show irreparable harm a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.) The Supreme Court of the United States has held "[t]he loss of First Amendment freedoms," which implicates the Free Exercise Clause as protected by the RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

Recently, in a First Amendment-free speech case, the United States Court of Appeals for the Third Circuit held that a ban preventing students in a school from exercising their right to free speech, "unquestionably constitute [d] irreparable injury," where "[a]n after-the-fact money judgment would hardly make up for their lost opportunity" to exercise their right to free speech. *B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 323 (3d Cir.2013).

Turning to the instant matter, Plaintiffs need to decide by December 31, 2013, whether or not to sign the self-certification form thereby by violating their sincerely-held religious beliefs. Plaintiffs will not drop health coverage as of January 1, 2014, for their employees—because they believe that health care is a basic human right. *See* Cardinal Dolan Deposition (13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53), pg. 28, lines 19–23; Hearing Testimony, Bishop Zubik, pg. 38, lines 23–24; Hearing Testimony, Bishop Persico, pg. 73, lines 23–25; Declaration of Father Scott Detisch, Ph.D. (P–92), ¶ 25; Declaration of Father Ronald P. Lengwin (P–88), ¶ 34. Plaintiffs cannot sign the self-certification form knowing that their signatures will facilitate/initiate the provision of the contraceptive products, services, and counseling which violate their sincerely-held beliefs.

Plaintiffs also have provided credible testimony and evidence which support their contentions that they will provide health coverage, but will conscientiously object to the contraceptive mandate and the "accommodation" by refusing to sign the self-certification form, thereby potentially suffering financial penalties which would negatively impact those entities that provide services to individuals who depend upon Plaintiffs for food, shelter, educational, and other basic services. Hearing Testimony, Susan Rauscher, pg. 61, lines 17–18, pg. 62, lines 21–25; Hearing Testimony Father Jabo, pg. 99, lines 8–10; Hearing Testimony of Mary Maxwell, pg. 115, lines 23–25; Declaration of Mary Maxwell (P–90), ¶ 20; Declaration of Father Scott Detisch, Ph.D. (P–92), ¶ 32. In addition, Plaintiffs' failure to sign the self-certification form by December 31, 2013, places them in a situation where they may be ***614** faced with enforcement proceedings such as liens on their property, and possible execution on those liens.

Given the evidence presented by Plaintiffs, the Court concludes that the harm to Plaintiffs, and the ripple effect

of that harm impacting members of the public who depend upon Plaintiffs for food, shelter, educational, and other basic services, is such that Plaintiffs could never be adequately compensated at a later date in the ordinary course of this litigation. Accordingly, the Court concludes Plaintiffs stand to suffer irreparable harm if the injunction were not granted.

3. Greater Harm to the Government

[13] Conversely, the Court concludes that there will be no irreparable harm to the Government if the preliminary injunction is granted. [22] In reaching this conclusion, the Court notes that despite the Government's two stated interests: (1) "the promotion of public health," and (2) "assuring that women have equal access to health care services", *any* employers with fifty (50) or less employees do not have to provide their employees with *any health care coverage at all.* 26 U.S.C. § 4980H(c)(2)(A). In addition, religious employers who can meet the criteria for an "exemption" have to provide health coverage to their employees, but do not have to offer contraceptive products, services, and counseling. They do not have to "sign a form" thereby facilitating/initiating the provision of contraceptive products, services, and counseling through a third party. Finally, there are "innumerable" employers who have "grandfathered" health coverage plans which may or may not provide for all of the components required under the ACA, including the contraceptive products, services, and counseling required by the contraceptive mandate.

The Court concludes that the combined nationwide total of all of those employers who fall within an exclusion, an exemption, or whose plans are "grandfathered" (approximately 100 million individuals are on "grandfathered" health plans) creates such an "underinclusiveness" which demonstrates that the Government will not be harmed in any significant way by the exclusion of these few Plaintiffs. *Gilardi*, 733 F.3d at 1222–23; *Geneva College*, 960 F.Supp.2d at 599–601, 2013 WL 3071481, at *10; Additional Stipulated Facts, ¶¶ 4, 6. This conclusion again weighs in favor of the Court granting a preliminary injunction, keeping the parties at *status quo* while the significant issues involved in these cases are resolved in a thoughtful and orderly manner.

4. Public Interest

[14] Lastly, granting the preliminary injunction furthers the public interest. As noted above, the Court concludes that it is in the public interest to have the issues presented herein, considered in a thoughtful and orderly manner. These issues include whether the Government will be permitted to sever the Catholic Church into two parts (*i.e.*, worship and faith, and "good works")—in other words, whether the Government will be successful in restricting the Right to the Free Exercise of Religion as set forth in the First Amendment to a Right to Worship only. This reflective consideration as to nonprofit, religious affiliated/related entities, including Plaintiffs, is all the more in the public interest, because the Free Exercise of Religion is a fundamental right.

***615** The public interest also is best served if Plaintiffs (non-profit, affiliated/related organizations) can continue to provide needed educational and social services, without the threat of substantial fines for non-compliance with the contraceptive mandate as imposed upon them via the "accommodation." As previously noted, such fines would impede the provision of those services to thousands of individuals who have no other means of obtaining necessary food, shelter, and other basic assistance. Hearing Testimony of Mary Maxwell (re: St. Martin Center and Prince of Peace Center), pg. 115, lines 23–25 (fines "would be devastating for all of our clients, the poor—these are single women, children.")

> [I]t would be drastic if—if these fines had to be dealt with.
>
> ... [P]eople would lose jobs. Our community in Erie counts on the St. Martin Center. It—it would be devastating for all concerned, for our church. It just—it—it isn't something that we could cope with.

Id. at pg. 116, lines 5–10. A preliminary injunction, preserving the *status quo*, prevents any reduction in those services and thus is in the best interests of the public.

VI. Conclusion

Based upon the foregoing Findings of Fact, Conclusions of Law, and cited legal authority, the Court concludes that Plaintiffs have met their burden of proving all four criteria of the preliminary injunction test, and thus, for the reasons set forth herein, Plaintiffs' Motions for Expedited Preliminary Injunction will be GRANTED.

Parallel Citations

Med & Med GD (CCH) P 304,695

Footnotes

1 Generally, the three most relevant sincerely-held religious beliefs of the Catholic faith at issue in these cases are: (1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil. *See* Hearing testimony: Bishop Zubik, pg. 21, lines 12–14, pg. 28, lines 17–20, pg. 35, lines 17–18, pg. 42, lines 21–25; Bishop Persico, pg. 73, lines 7–9, pg. 75, lines 16–19, pg. 79, lines 24–25, pg. 80, lines 6–8, pg. 83, lines 6–9. These three sincerely-held religious beliefs and their intersection with the ACA will be more thoroughly discussed, *infra.*

2 David Murphy is employed as the Chief Financial Officer of the Diocese of Erie. P–91, ¶ 2.

3 Plaintiffs also assert violations of the Administrative Procedure Act ("APA"), Count VII, and erroneous interpretation of the exemption with respect to multi-employer plans, Count VIII. 13–cv–303, Doc. No. 1, ¶¶ 240–264; Doc. No. 1, ¶¶ 255–279. For the purposes of this Memorandum Opinion, the Court will focus its analysis on Plaintiffs' arguments related to alleged violations of the RFRA and the First Amendment of the United States Constitution.

4 The American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Pennsylvania have filed a brief of *Amici Curiae* in Opposition to Pittsburgh Plaintiffs' Motion for Expedited Preliminary Injunctions. 13–cv–1459, Doc. No. 29.

5 The Government does not challenge Plaintiffs' factual contentions as set forth in Declarations in Support of the Motions for Expedited Preliminary Injunction or the sincerity of Plaintiffs' religious beliefs as set forth in the Complaints. Stipulations of Fact (filed in 13–cv–303, Doc. No. 39 and 13–1459, Doc. No. 43), ¶¶ 52–56, 114–117; Doc. No. 16, ¶ 5(a)-(b); Declarations re-filed as part of the record as 13–cv–303, Doc. Nos. 54–50–54–56; 13–cv–1459, Doc. Nos. 55–86–55–56. Plaintiffs' Exhibits P–1–P–36, P–46, P–51, P–75, P–79, P–85, P–86–P–92 were admitted without objection (the same Exhibits and Exhibit numbers were used in reference to both cases). The Parties also filed Additional Stipulated Facts. 13–cv–303, Doc. No. 58; 13–cv–1459, Doc. No. 59.

The Court appreciates the Parties' efficient, thorough, and extensive Stipulations of Fact, and the professionalism of counsel throughout this entire matter. Throughout the Opinion, the Court will cite to the Parties' Joint Stipulations, Plaintiffs' respective Complaints, hearing Exhibits, and where possible, to Declarations in Support and hearing testimony.

The burdens imposed on Plaintiffs by the contraceptive mandate, the Government's stated compelling interest, and potential alternatives to the contraceptive mandate, are not agreed upon by the parties, because the Government is unwilling to stipulate to these matters. 13–cv–303, Doc. No. 30, (II)(2)(b); 13–cv–1459, Doc. No. 25, (II)(2)(b).

The Findings of Fact also are founded upon credibility determinations made by this Court based upon the Court's observation of the witnesses.

For ease of reference, when discussing the case pending in Erie, documents referenced are filed in 13–cv303; for the case pending in Pittsburgh, all documents are filed in 13–cv–1459.

6 Susan Rauscher is employed as the Executive Director of Catholic Charities of the Diocese of Pittsburgh. P–86, ¶ 2.

7 All Declarations in these cases were originally filed as attachments to Plaintiffs' Motions for Expedited Preliminary Injunctions. 13–cv–303, Doc. Nos. 9–8, 9–9, 9–10, 9–11; 13–cv–1459, Doc. Nos. 4–10, 4–11, 4–12. During the hearing on Plaintiffs' pending Motions, the Declarations were assigned Exhibit numbers and admitted into evidence. P–86–P–92. The Court will cite to Declarations by the relevant Exhibit numbers. These documents have been filed and can be found at: 13–cv–303, Doc. Nos. 54–50 through 54–56 and 13–cv–1459, Doc. Nos. 55–50 through 55–56.

8 David Stewart is employed as the Risk/Benefits Manager of the Diocese of Pittsburgh. P–87, ¶ 2. 7

9 Cardinal Dolan's testimony was presented at the hearing via video-taped deposition that was taken on November 7, 2013, in New York City, New York. 13–cv–303, Doc. No. 52; 13–cv–1459, Doc. No. 53.

10 Per the "accommodation," the organization must self-certify that it: (1) "opposes providing coverage for some or all of [the] contraceptive services"; (2) is "organized and operates as a nonprofit entity"; and (3) "holds itself out as a religious organization." The organization must then provide a signed self-certification to its insurance company, or if self-insured, to its TPA. 26 CFR § 54.9815–2713A(a).

Per trial testimony, the self-certification would be completed by the head of the respective nonprofit, religious affiliated/related charitable and educational organizations at the direction of the Bishop of the Diocese. Hearing Testimony, Susan Rauscher, pg. 57, line 1, pg. 60, line 15–16; Hearing Testimony, Father Jabo, pg. 95, lines 6–7, pg. 98, lines 7–8; Hearing Testimony, Mary Maxwell, pg. 114, lines 20–23. The Court notes that Bishop Zubik testified that he believed that he would have to sign the self-

certification because of his position as Chairman of the Membership Board of Catholic Charities. Hearing Testimony, Bishop Zubik, pg. 43, lines 5–7.

As a result of the self-certification, the designated insurance company or TPA is required to arrange contraceptive services coverage of the organization's employees. Such services are provided without "cost-sharing requirements (such as copayment, coinsurance, or a deductible.)" *Id.* at § 54.9815–2713A(b)(2), (c)(2); 13–cv–303, Doc. No. 1, ¶¶ 99, 110. After providing the signed self-certification, the Dioceses would be obliged to provide the TPA with the names of individuals insured through the Diocesan health plan who are employees of non-exempt entities and sponsor the insurance. Hearing Testimony, Bishop Zubik, pg. 35, lines 17–19, Doc. No. 4–12, ¶ 31.

11 The Parties have stipulated that "it is not possible to determine the exact amount of tax Plaintiffs could be assessed under this penalty." Additional Stipulated Facts, ¶ 14; 13–cv–303, Doc. No. 58; 13–cv–1459, Doc. No. 59. Where applicable, the Court will refer to testimony presented as to estimated fines that may be levied on various Plaintiffs for non-compliance.

12 Father Detisch is serving as a theological advisor to Bishop Persico on matters of Catholic doctrine, including moral theology. P–92, ¶ 2.

13 Hearing Testimony of Bishop Zubik, pg. 42, lines 21–25, pg. 43, line 1 ("We argue that the purpose of faith is not simply what we do in our churches on the weekend, but what we do at our work places and especially how we have the obligation to be reaching out to people who are in need. So that's an absolute essential to our faith and there is no split between the two."); Hearing Testimony of Bishop Persico, pg. 73, lines 7–9 ("Well, if we look at [S]cripture, faith without good works is dead, so I don't see how we can separate it. It's essential. It's who we are as Christians.").

14 Father Lengwin is the Vicar General and General Secretary of the Diocese of Pittsburgh. P–88, ¶ 2. 12

15 Per testimony, "scandal," within the Catholic faith, means cooperating with an objectionable practice that goes against the faith, or "teaching one thing and behaving in another manner." Hearing Testimony, Bishop Zubik, pg. 35, lines 20–23; Hearing Testimony, Bishop Persico, pg. 81, lines 18–20.

16 The distinction between plans that are "grandfathered" and those that are not is important because as defined in federal regulations, plans that are "grandfathered" do not have to provide coverage without cost sharing of "preventive health services." 45 C.F.R. § 147.140; 26 C.F.R. § 54.9815–125T; and 29 C.F.R. § 2590.7151251. A plan is "grandfathered" if: (1) at least one person was enrolled on March 23, 2010; (2) the plan continuously covered at least one individual since that date; (3) the plan provides annual notice of its grandfathered status; and (4) the plan has not been subject to significant changes as outlined in the regulations. *See* 42 U.S.C. § 18011; 26 C.F.R. §§ 54.9815–1251T(a), (g); 29 C.F.R. §§ 2590.715–1251(a), (g); 45 C.F.R. §§ 147.140(a)(g). A plan may maintain its grandfathered status so long as, if, compared to its existence on March 23, 2010, it does not: eliminate all or substantially all benefits to diagnose or treat a particular condition; increase a percentage cost-sharing requirement; significantly increase a fixed-amount cost-sharing requirement; significantly reduce the employer's contribution; or impose or tighten an annual limit on the dollar value of any benefits. Additional Stipulated Facts, ¶ 3, citing 26 C.F.R. § 54.9815–1251T(a), (g)(1); 29 C.F.R. § 2590.715–1251(a), (g)(1); 45 C.F.R. § 147.140(a), (g)(1).

In July 2013, the Government announced that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin. Plaintiffs' Exhibit 93, Doc. No. 63–1, pg., 2. As of February 2012, 1,200 employers had been granted waivers for certain coverage requirements. *Id.*

17 The IRS has developed a non-exhaustive list of fourteen facts and circumstances that may be considered, in addition to "any other facts and circumstances that may bear upon the organization's claim for church status," in assessing whether an organization is a "church" under section 6033(a)(3)(A)(i) of the Internal Revenue Code. *See Foundation of Human Understanding v. United States*, 88 Fed.Cl. 203, 220 (Fed.Cl.2009); Internal Revenue Manual 7.26.2.2.4. The list of fourteen facts and circumstances includes the following:

(1) a distinct legal existence;
(2) a recognized creed and form of worship;
(3) a definite and distinct ecclesiastical government;
(4) a formal code of doctrine and discipline;
(5) a distinct religious history;
(6) a membership not associated with any church or denomination;
(7) an organization of ordained ministers;
(8) ordained ministers selected after completing prescribed studies;
(9) a literature of its own;
(10) established places of worship;
(11) regular congregations;
(12) regular religious services;
(13) Sunday schools for the religious instruction of the young; and

(14) schools for the preparation of its ministers.

Id.

In 26 C.F.R. § 1.6033–2(h), the Treasury Regulations provide a 3–factor test to determine whether a group is an "integrated auxiliary" under section 6033(a)(3)(A)(i) of the Internal Revenue Code. According to the Treasury Regulation, the term "integrated auxiliary of a church" means an "organization that is: (i) [d]escribed in both sections 501(c)(3) and 509(a)(1), (2), or (3); (ii) [a]ffiliated with a church or a convention or association of churches; and (iii) [i]nternally supported." 26 C.F.R. § 1.6033–2(h)(1). An organization is "internally supported" for purposes of subparagraph (h)(1)(iii), above, of this section, unless it both,

(i) Offers admissions, goods, services or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and

(ii) Normally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.

An entity's eligibility for exemption as a religious employer is determined on an employer-by-employer basis. *See* 78 Fed.Reg. at 39,886.

An entity that offers a health plan to its employees that is administered by a qualified religious employer must independently qualify for the religious employer exemption to be exempt. 78 Fed.Reg. 39,886; see also 78 Fed.Reg. at 8456, 8463.

18 In *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir.2013), the Court of Appeals upheld the constitutionality of two provisions of the ACA—the "individual mandate," which requires individuals to purchase a minimum level of health insurance coverage, and the "employer mandate," which requires certain employers to offer such coverage to their employees and their dependents. Following a remand by the United States Supreme Court, and while on appeal to the Court of Appeals for the Fourth Circuit, Liberty University, for the first time, challenged as abortifacients all forms of FDA-approved contraception that "may act after fertilization," including emergency contraceptive pills and intra-uterine devices. 733 F.3d at 103. Because this claim had never been raised before, the Court of Appeals refused to "consider an issue not passed upon below" and declined to rule on the merits of this claim. *Id.* Thus, assuming Liberty University is a non-secular, nonprofit educational institution, the appellate court did not reach the merits of its "contraceptive mandate" claim.

The Court further notes that there are other United States District Courts addressing whether the contraceptive mandate applies to non-secular, nonprofit organizations via the "accommodation." *See, i.e., Geneva College v. Sebelius,* 960 F.Supp.2d 588, 2013 WL 3071481 (W.D.Pa. June 18, 2013) (granting preliminary injunction preliminary injunction to religious college, protecting it from complying the ACA's contraceptive mandate), notice of appeal filed, United States Court of Appeals for the Third Circuit, Case Number 13–2814; and the recently re-opened *East Texas Baptist University v. Sebelius,* Civil Action No. H–12–3009, 2013 WL 4678016 (S.D.Tex. Aug. 30, 2013).

19 Notably, subpart "(c)" of same regulation provides that entities who meet all four criteria, thereby entitles them to an "accommodation," and will not have to pay for the contraceptive products, services, and counseling. A third party will. *See* 45 C.F.R. § 147.131(c).

20 The Government declined to stipulate to the "substantial burden" portion of this test. 13–cv–303, Doc. No. 30, 4; 13–cv–1459, Doc. No. 25, 4.

21 This Court further notes that, the Court of Appeals in *Korte* took great offense to the Government's identification of its two "compelling" interests stating:

> The government identifies two public interests—"public health" and "gender equality"—and argues that the contraception mandate furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities. This argument seriously misunderstands strict scrutiny. By stating the public interests so generally, the government guarantees that the mandate will flunk the test. Strict scrutiny requires a substantial congruity-a close "fit"-between the governmental interest and the means chosen to further that interest. Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty. Other Courts have deemed these to be too broad to be held to be compelling.

735 F.3d at 685–86.

See also Gonzales v. O Centro Espirita, 546 U.S. 418, 420, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) in which the Supreme Court of the United States held that Courts must look beyond "broadly formulated interests" justifying the application of Government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants. Invocation of general characteristics "cannot carry the day." *Id.*

22 Plaintiffs seek narrowly-tailored injunctive relief—only as to one of the eight categories of preventive services for women required by the ACA and its implementing regulations. Additional Stipulations of Fact, ¶¶ 15–17.

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APPENDIX E

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

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, et al., PLAINTIFFS v. KATHLEEN SEBELIUS, et al., DEFENDANTS.	CIVIL ACTION NO. 1:13-00303 JUDGE ARTHUR J. SCHWAB
MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, et al., PLAINTIFFS, v. KATHLEEN SEBELIUS, et al., DEFENDANTS.	CIVIL ACTION NO. 2:13-cv-001459 JUDGE ARTHUR J. SCHWAB

[redacted] FINAL JUDGMENT AND ORDER

Upon consideration of the Unopposed Motion to Convert Preliminary Injunction Into Permanent Injunction, Plaintiffs' Memorandum in support, and the Government's Notice of Non-Opposition, as well as the Memorandum and declarations in support and in opposition to Plaintiffs' Motions for Expedited Preliminary Injunction (13-cv-1459: Doc. No. 4; 13-cv-0303: Doc. No. 6), the testimony and evidence received at the November 12 and 13, 2013 Preliminary Injunction Hearing, the Parties' oral argument during the Preliminary Injunction Hearing and for the reasons set forth in the Court's November 21, 2013 Memorandum Opinion which includes

the Court's Findings of Fact and Conclusions of Law (Doc. No. 75),

THE COURT hereby expressly incorporates, adopts, re-affirms, and follows its November 21, 2013 Memorandum Opinion (Doc. No. 75).

THE COURT hereby finds:

- Defendants have conceded that they would not present any additional evidence if the Court ordered briefing and a hearing before granting a permanent injunction;
- The Court's November 21, 2013 Memorandum Opinion is a sufficient basis to grant a permanent injunction;

THE COURT further hereby finds, based on the Government's concession that it would not present additional evidence and for the reasons stated in the Court's November 21, 2013 Memorandum Opinion:

- Plaintiffs have met their burden of demonstrating a substantial burden on their religious exercise;
- The Government has not met its burden of demonstrating that it used the least restrictive means of achieving any compelling governmental interest; and
- Therefore, Plaintiffs have established actual success on their claim that the requirements imposed upon the Plaintiffs in 42 U.S.C. § 300gg-13(a)(4), and as further regulated by 45 C.F.R. § 147.130(a)(1)(iv), violate the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1;

THE COURT hereby finds that Plaintiffs have satisfied all four elements of the permanent injunction standard as articulated in *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001), based on the foregoing Findings, based on the Government's concession that it would not present additional evidence, and for the reasons stated in the Court's November 21, 2013 Memorandum Opinion.

IT IS HEREBY ORDERED that Plaintiffs' Unopposed Motion to Convert Preliminary Injunction Into Permanent Injunction is hereby GRANTED;

IT IS FURTHER ORDERED that Defendants, their agents, officers, and employees are hereby ENJOINED from applying or enforcing the requirements imposed in 42 U.S.C. § 300gg-13(a)(4) and as further regulated by 45 C.F.R. § 147.130(a)(1)(iv) upon the Plaintiffs, including:

(a) Plaintiffs Most Reverend David A. Zubik and Most Reverend Lawrence T. Persico shall not have to sign or authorize any entity under their control to sign the self-certification form;

(b) Plaintiffs The Roman Catholic Diocese of Pittsburgh and The Roman Catholic Diocese of Erie shall be allowed to continue sponsoring their health plans, including through the Pittsburgh Series of the Catholic Employers Benefits Trust, without having to comply with the Mandate, including the accommodation;

(c) Plaintiffs Catholic Charities of the Diocese of Pittsburgh, Inc.; St. Martin Center, Inc.; Prince of Peace Center, Inc.; and Erie Catholic Preparatory School shall not have to comply with the Mandate, including the accommodation;

IT IS FURTHER ORDERED that Defendants shall send Notice of this permanent injunction to Plaintiffs' Third Party Administrators, Highmark, Inc. and UPMC, on or before December 30, 2013 (~~10 days from entry of this Order~~), with a copy to Plaintiffs' counsel and to the Court; and

IT IS FURTHER ORDERED that a bond in the amount of zero (0) dollars is appropriate.

THIS COURT shall retain jurisdiction to enforce this Final Judgment and Order.

SO ORDERED, this 20th day of December, 2013.

Hon. Arthur J. Schwab
United States District Judge