No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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DIOCESE OF CHEYENNE; CATHOLIC CHARITIES OF WYOMING, SAINT JOSEPH'S CHILDREN'S HOME; ST. ANTHONY TRI-PARISH CATHOLIC SCHOOL; AND WYOMING CATHOLIC COLLEGE,

*Applicants,*

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY,

*Respondents.*

**Application from the U.S. Court of Appeals for the Tenth Circuit (No. 14-8040)**

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# EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW


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## RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicants the Diocese of Cheyenne, Catholic Charities of Wyoming, Saint Joseph's Children's Home, St. Anthony Tri-Parish Catholic School, and Wyoming Catholic College, 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: June 27, 2014

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TO THE HONORABLE SONIA M. SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT:

On July 1, 2014, a regulatory mandate (the "Mandate") will expose Applicants, all Catholic nonprofit organizations, to draconian fines unless they abandon their religious convictions and participate in a scheme to provide their employees with coverage for abortion-inducing products, contraceptives, and sterilization. 78 Fed. Reg. 39,870 (July 2, 2013). When confronted with an analogous situation in January, this Court intervened and granted the applicants an injunction pending appeal. *See Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (U.S. Jan. 24, 2014) (mem.). Notwithstanding that extraordinary action on the part of this Court, both the Government and the district court refused to afford similar relief to these Applicants, who in all material respects are similarly situated to the applicants in *Little Sisters*.

The Government's basis for this disparate treatment is, moreover, clearly wrong. The Government does not dispute that Applicants sincerely believe the regulations at issue force them to act in violation of their religious beliefs. It has further conceded that circuit precedent bars the conclusion that those regulations can satisfy strict scrutiny.[1] In other words, the Government has adopted, and the lower courts have ratified, the unprecedented position that it can force believers to violate their religious beliefs based on nothing more than its own ipse dixit. This remarkable conclusion violates the Religious Freedom Restoration Act ("RFRA")

[1] App'x D (Defs.' Mem. in Opp'n to Mot. for Preliminary Injunction at 16–17 (Dist. Ct. Doc. 31)).

and flies in the face of this Court's clear precedent, which establishes that absent interests of the highest order, the Government cannot compel an individual "to perform acts undeniably at odds" with his religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *see also Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

The Government's position obscures what should be a straightforward case. RFRA prohibits the Government from imposing a "substantial burden" on "any" exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. §§ 2000bb-1, 2000bb-2(4), 2000cc-5(7)(A). It thus requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. In identifying the relevant exercise of religion, a court must accept the "line" drawn by plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs. *Id.* at 718.

Here, there is no dispute that Applicants sincerely believe that their Catholic faith forbids them from, among other things, (1) offering a health plan under this regulatory scheme, and (2) signing the self-certification. If they undertake either of these actions, they will have violated the Catholic doctrines or material cooperation with evil and "scandal." It is likewise undisputed that if Applicants fail to take

those actions, they will be subject to severe penalties. Because the Mandate cannot survive strict scrutiny, that should end the inquiry. As this Court has repeatedly held, coercing believers to act contrary to their sincerely held beliefs is the very definition of a "substantial burden" on religious exercise. *Thomas*, 450 U.S. at 717; *Yoder*, 406 U.S. at 218; *Sherbert*, 374 U.S. at 404.

The district court reached a contrary conclusion only by rejecting Applicants' undisputed testimony that, under their Roman Catholic religious beliefs, taking the actions required of them by the challenged regulations makes them complicit in a grave moral wrong. Effectively informing Applicants that they "misunderstand their own religious beliefs," the district court assured Applicants that, "despite [their] protestations to the contrary," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988), the so-called "accommodation" "permits Plaintiffs to refuse to be complicit," App'x A (District Court Order and Opinion ("Dist. Ct.") at 12). This approach is irreconcilable with this Court's precedent, which squarely holds that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982). Although courts can question whether *pressure* placed on parties to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action in fact transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715. And here, the undisputed record establishes that, if Applicants were to take the actions required of them under the Mandate,

they will engage in material cooperation with evil and give rise to "scandal,"[2] in violation of their religious beliefs.

In short, Applicants believe compliance with the Mandate violates their religious beliefs. The district court said it does not. As such determinations are for individuals and religious institutions, not courts, and because the Mandate cannot survive strict scrutiny, it is indisputably clear that Applicants are entitled to injunctive relief. Indeed, that is exactly what courts have held in twenty-two of the twenty-five other cases to consider the Mandate's application to nonprofit entities like Applicants.[3] Since the district court denied their motion and the U.S. Court of

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

[3] *See 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 U.S. Dist. LEXIS 75949 (W.D. Okla. June 4, 2014); *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100-MWB, 2014 BL 143805 (N.D. Iowa May 21, 2014); *Fellowship of Catholic Univ. Students v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, No. 13-cv-03326, 2014 WL 1571967 (D. Colo. Apr. 17, 2014); *Roman Catholic Archdiocese of Atl. v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 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*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. 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*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius ("RCNY")*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Ave Maria Found. v. Sebelius*,

Appeals for the Tenth Circuit has yet to rule on Applicants' request for an injunction pending appeal, only an order from this Court can protect Applicants from the irreparable harm that will befall them on July 1 if they are forced to choose between violating their religious beliefs and suffering onerous penalties.

Accordingly, Applicants respectfully request an injunction barring the Government from enforcing the Mandate against Applicants while the Tenth Circuit and ultimately this Court consider the merits of Applicants' claims. Given the impending enforcement deadline, Applicants file this application provisionally, in the event that the Tenth Circuit fails to rule on their motion prior to July 1. At a minimum, Applicants respectfully request entry of a temporary, administrative stay to allow further briefing and decision on the present Application.

## OPINIONS BELOW

The District Court's opinion and order denying Applicants' Motion for a Preliminary Injunction is attached as Appendix A. The district court's subsequent denial of Applicants' motion for an injunction pending appeal is attached as

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(continued…)

No. 2:13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2013); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, 134 S. Ct. 1022 (U.S. Jan. 24, 2014) (mem.); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius* ("*RCAW*"), No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Mich. Catholic Conference v. Burwell*, No. 13-2723, 2014 WL 2596753 (6th Cir. June 11, 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2013); *Eternal Word Television Network v. Burwell*, No. 13-0521 (S.D. Ala. June 17, 2013) (Doc. 61).

Appendix B. Applicants moved in the Tenth Circuit for an injunction pending appeal on May 29, 2014, *see Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir.) (Doc. 9), but that court has not yet ruled on Applicants' motion. Applicants will update this Court on any developments in the Tenth Circuit.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over Applicants' claims challenging the Mandate under RFRA pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction over this dispute under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

## STATEMENT OF THE CASE

### A. The Mandate

Under the auspices of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13(a)(4), the Government enacted a Mandate requiring group health plans to cover all "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited June 26, 2014); *see* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). FDA-approved contraceptive methods and sterilization procedures include intrauterine devices (IUDs), the morning-after pill (Plan B), and Ulipristal (Ella),

all of which can induce an abortion.[4] 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. Exemptions from the Mandate

From its inception, the Mandate has exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). 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); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013).

Acknowledging the burden the Mandate places on religious exercise, the Government also created an exemption for plans sponsored by so-called "religious employers." That exemption, however, is narrowly defined to protect only "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725, 8727–28,

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[4] *E.g.*, Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

8730 (Feb. 15, 2012). For religious entities that do not qualify as a "house of worship," there is no exemption from the Mandate.

Despite sustained criticism, the Government refused to expand this "religious employer" exemption. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Instead, it devised an inaptly named "accommodation" for nonexempt religious organizations, which went into effect "for plan years beginning on or after January 1, 2014." 78 Fed. Reg. at 39,870.

### 2. The "Accommodation"

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

When an "eligible organization" submits the self-certification form, it confers upon its insurance company or TPA the authority to provide or arrange "payments for contraceptive services" for beneficiaries enrolled in the organization's health plan pursuant to the accommodation. *See* 26 C.F.R. § 54.9815-2713A(a)–(c). Absent the self-certification, neither an insurance company nor a TPA may provide such payments under the accommodation. These payments, moreover, 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 "self-certification [also] notifies the [TPA] or issuer of their obligations [1] to provide contraceptive-coverage to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain these benefits." *E. Tex. Baptist*, 2013 WL 6838893, at *11.

For self-insured organizations, such as Applicants, the Mandate has additional implications. The self-certification form "designat[es] the [TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. Indeed, the Government concedes that "'in the self-insured [context], the contraceptive coverage is part of the [self-insured organization's health] plan.'" *RCAW*, 2013 WL 6729515, at *22; 29 C.F.R. § 2510.3-16 (stating that the certification is "an instrument under which the plan is operated"). Moreover, TPAs are under no obligation "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently, religious organizations must find and contract with a TPA willing to provide the coverage. Once the self-insured organization signs and submits the self-certification, it is prohibited from "directly or indirectly, seek[ing] to influence [its TPA's] decision" to provide contraceptive coverage, 26 C.F.R. § 54.9815-2713A(b)(iii), or from terminating its contractual relationship with the TPA because of the TPA's provision of objectionable coverage, *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-1276, 2013 WL 6804773, at *21 (N.D. Ind. Dec. 20, 2013). A TPA that receives the self-certification and provides the mandated payments is eligible for Government funds to cover its payments plus ten percent. *See* 45 C.F.R. § 156.50.

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

### B. The Parties

Applicants provide a range of spiritual, charitable, educational, and social services to the citizens of Wyoming, Catholic and non-Catholic alike.[5] 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. Accordingly, they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling in a manner that violates the teachings of the Catholic Church—and in particular, the Catholic doctrines involving material cooperation with evil

[5] It was recently discovered that John Paul II Catholic School, one of the initial parties to this suit, was improperly joined as a plaintiff. It is therefore not a party to this Application.

and "scandal."[6] Despite their avowedly religious missions, aside from the Diocese, Applicants do not qualify as exempt "religious employers."

Historically, Applicants have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching.[7] The Diocese offers its employees a health plan through the RETA Trust, a nongrandfathered, self-insurance trust established by the Catholic bishops of California. Applicants Catholic Charities, St. Joseph's Home, and St. Anthony School also offer coverage through the Diocese's self-insurance plan.[8] Wyoming Catholic College ("WCC") offers its employees health coverage through a nongrandfathered, self-funded church plan provided by Christian Brothers Employee Benefit Trust.[9] In accordance with Catholic beliefs, none of these health plans provide or facilitate coverage for abortion-inducing products, contraception, sterilization, or related

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[6] *See* App'x D (Ex. A, Decl. of the Diocese of Cheyenne ("Diocese Decl.") ¶¶ 6–7, 12–19; Ex. B, Decl. of Catholic Charities of Wyoming ("Catholic Charities Decl.") ¶¶ 7–13; Ex. C, Decl. of St. Joseph's Children's Home ("St. Joseph's Decl.") ¶¶ 7–13; Ex. E, Decl. of St. Anthony Tri-Parish Catholic School ("St. Anthony Decl.") ¶¶ 7–13; Ex. F, Decl. of Wyoming Catholic College ("WCC Decl.") ¶¶ 10–18).

[7] Diocese Decl. ¶ 12; Catholic Charities Decl. ¶ 9; St. Joseph's Decl. ¶ 9; St. Anthony Decl. ¶ 9; WCC Decl. ¶ 12.

[8] Diocese Decl. ¶¶ 8–11; Catholic Charities Decl. ¶ 9; St. Joseph's Decl. ¶ 9; St. Anthony Decl. ¶ 9.

[9] WCC Decl. ¶¶ 6, 9.

counseling.[10] With the exception of WCC, the Mandate will apply to Applicants as of July 1, 2014, the date their plan years begin.[11]

The so-called "accommodation" does not resolve Applicants' religious objection to participation in this regulatory scheme. Indeed, the Government *knew* this to be the case, because well before the regulations were finalized, the U.S. Conference of Catholic Bishops repeatedly informed the Government that the now-codified proposals were inadequate.[12] Applicants' concerns, however, were ignored.

Left with no other alternative, in order to avoid violating their sincerely held religious beliefs, Applicants filed this suit on January 30, 2014, to enjoin application of the Mandate.[13] On May 13, 2014, a month and a half before the Mandate could be enforced against them, the district court denied Applicants' request for a preliminary injunction. Applicants immediately appealed, *see Diocese of Cheyenne v. Sebelius*, No. 2:14-cv-00021 (D. Wyo.) (Doc. 44), and their motion for an injunction pending appeal was denied by the district court on May 23, 2013. *See* App'x B.

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[10] Diocese Decl. ¶ 12; Catholic Charities Decl. ¶ 9; St. Joseph's Decl. ¶ 9; St. Anthony Decl. ¶ 9; WCC Decl. ¶ 12.

[11] Diocese Decl. ¶ 10; WCC Decl. ¶ 7. As an organization with a self-insured church plan through Christian Brothers, WCC is covered by the injunction pending appeal that this Court issued in *Little Sisters*. Thus, though its plan year begins on July 1, 2014, the Mandate cannot be enforced against the school during the pendency of the *Little Sisters* litigation in the Tenth Circuit. *See Little Sisters of the Poor v. Sebelius*, No. 13-1540 (10th Cir.); Dist. Ct. at 2 n.2. Nonetheless, it now seeks relief during the pendency of this litigation.

[12] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops, *supra* note 4, at 3.

[13] With the exception of the Diocese, it is undisputed that Applicants are subject to the so-called "accommodation."

Applicants then moved for injunctive relief in the U.S. Court of Appeals for the Tenth Circuit on May 29, 2014, but that court has yet to rule on their motion. *See Diocese of Cheyenne*, No. 14-8040 (10th Cir.) (Doc. 9). Given the Mandate's July 1 effective date, Applicants now seek emergency relief from this Court.

## REASONS FOR GRANTING THE APPLICATION

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*, 131 S. Ct. 5 (2010) (Roberts, C.J., in chambers); *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers). In recent months, this Court has twice found injunctive relief warranted where a religious believer faced imminent and irreparable harm. *See Little Sisters*, 134 S. Ct. 1022; *Holt v. Hobbs*, 134 S. Ct. 635 (U.S. Nov. 14, 2013) (mem.) (enjoining, during the pendency of a petition for a writ of certiorari, a prison grooming policy "to the extent that it prohibits applicant from growing a one-half-inch beard in accordance with his religious beliefs").

Here, Applicants' right to relief is similarly clear, because it is hornbook law that under RFRA, a party cannot be compelled to take actions that violate his religious beliefs absent interests of the highest order. Without injunctive relief, Applicants will be forced to choose between violating their religious beliefs and suffering onerous, crippling penalties in the imminent future. This case therefore involves powerful equities in favor of enjoining enforcement of the Mandate while

appellate courts, and eventually, this Court have the opportunity to fully consider the merits of Applicants' claims.

Such relief is all the more appropriate in light of *Little Sisters*, where this Court granted an injunction pending appeal to similarly situated applicants challenging the same regulatory scheme at issue in this litigation. 134 S. Ct. 1022. While that injunction was issued based on the "circumstances of th[at] case," those circumstances are for all present purposes materially indistinguishable from the case at hand. *Id.* Just as in *Little Sisters*, Applicants are nonprofit religious entities challenging the so-called accommodation. And just as in *Little Sisters*, that "accommodation" forces Applicants to choose between taking actions that violate their religious beliefs or suffering massive penalties and other negative consequences. Thus, even though this Court noted that its order "should not be construed as an expression of [its] views on the merits," *id.*, Applicants submit that the same reasons that prompted this Court's extraordinary intervention in *Little Sisters* warrant the entry of similar relief in the case at hand. Indeed, where this Court has provided relief to one set of nonprofit applicants, it would be incongruous to deny comparable relief to similarly situated applicants. At a minimum, Applicants request a temporary, administrative stay to allow for full consideration and briefing of this Application. *E.g.*, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (U.S. Dec. 31, 2013) (Sotomayor, J., in chambers); *Ind. State Police Pension Trust v. Chrysler, LLC*, No. 08A196 (U.S. June 8, 2009) (Ginsburg, J., in chambers).

## I. Applicants' Right to Relief Under RFRA Is Indisputably Clear

### A. The Mandate Substantially Burdens Applicants' Exercise of Religion

When, as here, a claimant's sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").[14]

Under the first step, the court's inquiry is necessarily limited. After all, it is not "within the judicial function" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation"). Courts must therefore accept a plaintiff's description of its religious exercise, regardless of whether the court, or the Government, finds the beliefs animating that exercise to be "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also Lee*, 455 U.S. at 257 (same); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). To that end, "[i]t is

[14] This articulation of the substantial burden test has been repeatedly reaffirmed by appellate courts to considering this question in the context of the Mandate. *Korte v. Sebelius*, 735 F.3d 654, 682–85 (7th Cir. 2013); *Gilardi v. Sebelius*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc).

enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). 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] unreasonable." *Thomas*, 450 U.S. at 715.

Under the second step, the court "evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Specifically, it must determine whether the Government is compelling an individual to "perform acts undeniably at odds" with his beliefs, *Yoder*, 406 U.S. at 218, or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18.

Here, it is clear that the Mandate substantially burdens Applicants' exercise of religion. Just as in *Little Sisters*, Applicants exercise their religion by, among other things, refusing to take certain actions that, in their religious judgment, make them complicit in the provision of objectionable coverage—actions that, if taken, would render Applicants in violation of Catholic doctrine. By threatening Applicants with onerous penalties or other negative consequences unless they take precisely the actions their religious beliefs forbid, the Mandate substantially pressures Applicants to act contrary to those beliefs.

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

RFRA defines "exercise of religion" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674; *Gilardi*, 733 F.3d at 1216 (noting that religious exercise is "broadly defined" under RFRA). As this Court has recognized, religious exercise includes "not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

Here, just as in *Little Sisters*, Applicants exercise their religion by refusing to take certain actions in furtherance of a regulatory scheme to provide their employees with coverage for abortion-inducing products, contraceptives, sterilization, and related education and counseling. As an initial matter, Applicants object to being forced to contract with a third party that is authorized, incentivized, or obligated to provide the objectionable coverage to Applicants' employees. 26 C.F.R. § 54.9815-2713A(b)(2); 78 Fed. Reg. at 39,880. Indeed, until now, Applicants have always done the opposite. *Supra* p. 11. Applicants likewise believe that submitting the self-certification violates their religious beliefs, because doing so makes them "complicit in an immoral act." *Hobby Lobby*, 723 F.3d at 1142. In

short, if Applicants undertake either of these actions, they will be in violation of the Catholic doctrines of prohibiting material cooperation with evil and "scandal."[15]

These religious objections should hardly be surprising. The self-certification is far more than a simple statement of religious objection to the provision of contraceptive coverage. To the contrary, it "designat[es]" Applicants' TPAs "as plan administrator[s] and claims administrator[s] for contraceptive benefits," 78 Fed. Reg. at 39,879, and serves as "an instrument under which [their health] plan[s are] operated," 29 C.F.R. § 2510.3-16(b). It affirmatively enables, obligates, and incentivizes Applicants' TPAs to provide their employees with the mandated coverage, simultaneously "notify[ing] the TPA[s] . . . of their obligations to [(1)] provide contraceptive-coverage to [Applicants'] employees [and (2) to inform them] of their ability to obtain those benefits." *E. Tex. Baptist*, 2013 WL 6838893, at *11. In other words, under the accommodation, Applicants are required to amend the documents governing their health plans to designate a third party to provide the objectionable coverage.

Nor are these the only religiously objectionable actions the Mandate requires Applicants to undertake. Applicants cannot, consistent with their religious beliefs, offer health plans that serve as a conduit for the delivery of the objectionable

[15] Diocese Decl. ¶¶ 16–18; Catholic Charities Decl. ¶¶ 10–13; St. Joseph's Decl. ¶¶ 10–13; St. Anthony Decl. ¶¶ 10–13; WCC Decl. ¶¶ 13–18.

products and services.[16] Yet under this regulatory scheme, that is exactly what Applicants' health plans become. Applicants' TPAs will provide the objectionable coverage to Applicants' employees only by virtue of their enrollment in Applicants' health plans and only "so long as [they] are enrolled in [those] plan[s]." 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B). Indeed, the Government has conceded that once a self-insured organization provides the self-certification, "'the contraceptive coverage is part of the [self-insured organization's health] plan.'" *RCAW*, 2013 WL 6729515, at *22 (citation omitted). In this regard, the Government's vaunted "accommodation" is materially indistinguishable from the Mandate applicable to for-profit companies. Both require employers to offer health plans that cover the objectionable products and services. The only difference is that for Applicants, the coverage is written into their plans in invisible ink.

Finally, once Applicants "turn on the tap" by offering health plans through a third party willing to provide the mandated coverage and authorizing such coverage via the self-certification, they must take numerous additional steps to ensure the pipeline remains open. Thus, among other things, Applicants must:

- Pay premiums or fees to a third party authorized to provide their employees with the mandated coverage.
- Offer enrollment paperwork for employees to enroll in a plan overseen by a third party authorized to provide the objectionable coverage.
- Send (or tell employees where to send) health-plan-enrollment paperwork to a third party authorized to provide the objectionable coverage.

[16] Diocese Decl. ¶¶ 16–18; Catholic Charities Decl. ¶¶ 10–13; St. Joseph's Decl. ¶¶ 10–13; St. Anthony Decl. ¶¶ 10–13; WCC Decl. ¶¶ 13–18.

- Identify health plan beneficiaries for a third party authorized to provide the objectionable coverage.
- Refrain from canceling an insurance arrangement with a third party authorized to provide the mandated coverage.
- Refrain from attempting to influence a third party's decision to provide the mandated coverage.

Applicants have a sincere religious objection to taking these actions, which are necessary to maintain their health plans in compliance with the "accommodation."[17]

In sum, Applicants are required to play an integral role in the delivery of objectionable products and services to their plan beneficiaries. Each of the actions or forbearances detailed above constitutes an exercise of religion, *Smith*, 494 U.S. at 877, because Applicants sincerely believe that taking or refraining from these actions would make them "complicit in an immoral act," *Hobby Lobby*, 723 F.3d at 1142, and would "undermine their ability to give witness to the moral teachings" of the Catholic Church, *Korte*, 735 F.3d at 683. In other words, Applicants "ha[ve] an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religio[us beliefs]." *Id.* (quoting *Thomas*, 450 U.S. at 716).

### 2. The Mandate Places "Substantial Pressure" upon Applicants to Violate Their Religious Beliefs

Once it becomes apparent that Applicants exercise their religious beliefs by, among other things, refusing to take the actions described above, the "substantial burden" analysis is straightforward. As this Court has held, the Government

[17] Diocese Decl. ¶¶ 16–18; Catholic Charities Decl. ¶ 11; St. Joseph's Decl. ¶ 11; St. Anthony Decl. ¶ 11; WCC Decl. ¶ 14.

"substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs" on threat of penalty, *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18. In *Yoder*, for example, this Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 208, 218. Likewise, in *Thomas*, the Court held that denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, just as in *Little Sisters*, the Mandate plainly imposes a "substantial burden" on Applicants' exercise of religion. Failure to take the actions required under the Mandate subjects Applicants to potentially fatal fines of $100 a day per affected beneficiary for failing to provide access to contraceptive coverage through their health plans. *See* 26 U.S.C. § 4980D(b). Dropping health coverage altogether subjects Applicants to fines of $2,000 per year, per full-time employee after the first thirty employees, *id.* § 4980H, and/or inhibits their ability to exercise their faith while "put[ting] them[] at a competitive disadvantage in [their] efforts to recruit and retain employees."[18] *Hobby Lobby*, 723 F.3d at 1140–41 (citation omitted).

[18] Diocese Decl. ¶¶ 19–20; Catholic Charities Decl. ¶¶ 14–15; St. Joseph's Decl. ¶¶ 14–15; St. Anthony Decl. ¶¶ 14–15; WCC Decl. ¶¶ 19–20.

In short, Applicants face the same stark choice that confronted the applicants in *Little Sisters*: violate their religious beliefs or suffer crippling consequences. As this Court has repeatedly held, compelling a plaintiff to act in violation of his religious beliefs is the very definition of a substantial burden. *Thomas*, 450 U.S. at 717 (substantial burden inquiry asks whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 398 (same); *see also Yoder*, 406 U.S. at 218. As Judge Sykes explained in *Korte*: "[t]he contraception mandate forces [Applicants] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." 735 F.3d at 685.

### B. The Mandate Cannot Survive Strict Scrutiny

As Applicants have demonstrated that the Mandate substantially burdens their exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–31. Here, the Government agrees that the asserted governmental interests and least-restrictive means at issue are identical to those in the for-profit cases.[19] And as every court to have considered the question in that context has concluded, the Government cannot meet this demanding standard.[20]

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[19] Hence, in the courts below, the Government conceded that the Tenth Circuit's decision in *Hobby Lobby*, which invalidated the Mandate in the for-profit context, foreclosed the Government's strict scrutiny arguments in this case. *Supra* note 1.

[20] *See Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *RCNY*, 2013 WL 6579764, at *16–19; *Zubik*, 2013 WL 6118696, at *28–32; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402,

### 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." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. "In other words, under RFRA's version of strict scrutiny, the Government must establish a compelling and specific justification for burdening these claimants." *Korte*, 735 F.3d at 685. This, it has not begun to do.

Here, the Government has proffered two generalized interests: (i) "public health" and (ii) "ensuring that women have equal access to health care." 78 Fed. Reg. at 39,872. "[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general

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(continued…)
433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012); *supra* note 3 (citing cases).

applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citiation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Moreover, "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) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "highest order" because the Mandate exempts millions of employees—through, among other things, "grandfathering" provisions and the narrow exemption for "religious employers." *Korte*, 735 F.3d at 686. Indeed, by the government's own estimates, as of the end of 2013, the Mandate exempted health plans covering 90 million employees. *Geneva Coll.*, 941 F. Supp. 2d at 684 & n.12. Simply put, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1144; *see also Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222–23.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges

that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). As this Court has observed, 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, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* p. 23. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at 39,887. In the first place, as the D.C. Circuit stated, "the science [behind that claim] is debatable and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Applicants' employees or that the Mandate would significantly increase contraception use among these employees.[21] The Government provides no evidence on these points

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

and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

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

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "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). A statute or regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Sherbert*, 374 U.S. at 407. The Government, moreover, cannot meet its burden unless it engages in a "serious, good faith consideration of workable . . . alternatives" that would likewise achieve its goals. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citation omitted).

Once again, every court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[22] Indeed, "[t]here are many ways

[22] *RCNY*, 2013 WL 6579764, at *18–19; *Zubik*, 2013 WL 6118696, at *30–32; *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808; *supra* note 3 (citing cases).

to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing nonprofit religious organizations to provide access to free contraception in violation of their sincere religious beliefs. *Korte*, 735 F.3d at 686. These include the same alternatives Applicants identified here: "The Government could provide the contraceptives services or insurance coverage directly to plaintiffs' employees, or work with third parties—be it insurers, health care providers, drug manufactures, or nonprofits—to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products." *RCNY*, 2013 WL 6579764, at *18–19; *see also Korte*, 735 F.3d at 686 (same); *Gilardi*, 733 F.3d at 1222 (same). While Applicants in no way recommend these alternatives, and oppose many of them as a matter of policy, that they remain available to the Government shows the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no possible justification for forcing Applicants to violate their religious beliefs.

### C. The District Court's Holding Was in Error.

The district court, however, ignored this straightforward analysis to hold that the Mandate does not substantially burden Applicants' religious exercise. That conclusion is flawed for numerous reasons.

*First*, the district court's fundamental error lies its disregard of this Court's admonition in *Thomas* to focus on the "pressure" placed on Applicants "to violate [their] beliefs," 450 U.S. at 718, and its choice to instead evaluate the nature of the religious exercise at issue. Indeed, this is the only way to explain its conclusion that the Mandate imposes a "*de minimis*" burden on Applicants' religious exercise.

Dist. Ct. at 17. Again, the substantial burden analysis turns not on the nature of the action that violates Applicants' beliefs—RFRA, after all, protects "*any* exercise of religion"—but on the "coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683; *Hobby Lobby*, 723 F.3d at 1137 (finding "fundamentally flawed" any substantial burden test that looks beyond the "*intensity of the coercion* applied by the government to act contrary to [religious] beliefs"); *supra* Part I.A. Here, if Applicants refuse to take the required actions, they are subject to potentially thousands of dollars in fines and other negative consequences. *Supra* Part I.A.2. Far from being "*de minimis*," "it is difficult to characterize [that sort of] pressure as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140. In short, while it is true that "'[s]ubstantiality'" is a legal question "'for [a] court to decide,'" Dist. Ct. at 9, 15 (citation omitted), as this Court's precedent makes indisputably clear, "substantiality" refers to the degree of pressure placed on plaintiffs to act in violation of their beliefs, not whether the act in question requires significant physical exertion.

*Second*, the district court's conclusion that the accommodation "permits Applicants to refuse to be complicit" in the provision of contraceptive coverage, Dist. Ct. at 12–14, is flatly wrong and rests on an impermissible assessment of Applicants' religious beliefs. Simply put, whether or not compliance with the accommodation makes Applicants "complicit in an immoral act," *Hobby Lobby*, 723 F.3d at 1142, is "a question of religious conscience for [Applicants] to decide." *Korte*, 735 F.3d at 685; *see also Thomas*, 450 U.S. at 714–15 (refusing to question the

moral line drawn by the plaintiff); *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Here, Applicants have made the religious determination that taking the actions required by the accommodation does, in fact, make them "complicit in an immoral act." *Id.*; *supra* Part I.A.1. In other words, Applicants have "dr[a]w[n] a line" between religiously permissible and impermissible conduct. *Thomas*, 450 U.S. at 715. By refusing to accept the line Applicants' drew, the district court "purport[ed] to resolve the religious question underlying these cases: Does [complying with the Mandate] impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church?" *Korte*, 735 F.3d at 685. The court's answer was "no," but "[n]o civil authority can decide that question." *Id.*

*Third*, the district court was wrong to conclude that Applicants object only to the actions of third parties and, hence, erred in relying on the D.C. Circuit's decision in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). Dist. Ct. at 13. Like this Court's decision *Bowen v. Roy*, 476 U.S. 693 (1986), *Kaemmerling* stands for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" 553 F.3d at 679 (emphasis added). In *Kaemmerling*, the plaintiff did not have a religious objection to any action he was forced to take, but only "to the government extracting DNA information from . . . specimen[s]" *it already had*. 553 F.3d at 679. Kaemmerling's claim failed because

he could not "identify any 'exercise' which is the subject of the burden to which he object[ed]." *Id.* Here, in contrast, Applicants "vigorously object on religious grounds to the act[s] that the government requires [*them*] to perform, not merely to later acts by third parties." *E. Tex. Baptist*, 2013 WL 6838893, at *18; *supra* Part I.A.1. Accordingly, unlike *Kaemmerling*, Applicants are required to violate their beliefs by playing an integral role in the provision of the mandated coverage.

Indeed, this Court's decision in *Bowen*, which *Kaemmerling* followed, 553 F.3d at 680, demonstrates that the district court's interpretation of *Kaemmerling* is flawed. *Bowen*, like *Kaemmerling*, draws a distinction between actions taken by third parties and actions taken by plaintiffs themselves. Thus, when this Court considered the plaintiffs' objection to the actions of a third party—the government—it concluded they were not entitled to relief. *Bowen*, 476 U.S. at 700. But when considering the plaintiffs' objection to an action *they* were required to take—submitting a form with their daughter's social security number—"five justices" "expressed the view that the plaintiffs 'were entitled to an exemption' from [this] 'administrative' requirement." *Notre Dame*, 278 F.3d at 566 (Flaum, J., dissenting) (quoting Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1127 (1990)); *see also Bowen*, 476 U.S. at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

*Fourth*, the district court erred in claiming that Applicants could not prevail because the Mandate does "not require[ Applicants] to 'modify [their] behavior.'"

Dist. Ct. at 14–15. As an initial matter, that assertion is simply false. In the past, Applicants always entered into contractual arrangements barring third parties from providing the objectionable coverage to their plan beneficiaries. Now, Applicants must submit a self-certification enabling those third parties to provide the objectionable coverage. Formerly, Applicants would not remain in a contractual relationship with a third party that would provide their employees with the objectionable products and services. Now, they must maintain such relationships. And whereas before, Applicants did not offer a health plan that served as a vehicle for the delivery of the objectionable coverage, now they must offer just such health plans. All of these newly-required actions and forbearances are deeply objectionable to Applicants in light of their Catholic beliefs. *Supra* Part I.A.1.

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

406 U.S. at 218 (same); *Sherbert*, 374 U.S. at 404 (same). Here, Applicants' undisputed testimony establishes that is exactly what is taking place regardless of whether Applicants' actions bear a superficial resemblance to actions they have taken in the past. *Supra* Part I.A.1. Thus, even assuming (wrongly) that the accommodation does not force Applicants to "modify" their behavior, the Mandate still violates RFRA.

*Finally*, the district court's claim that it is "'[f]ederal law, not the religious organization's signing and mailing the [self-certification] form,'" which "'requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services'" does not alter this analysis. Dist. Ct. at 11 (quoting *Notre Dame*, 743 F.3d at 554). Even assuming the district court was correct, it is left to Applicants to decide whether the actions required by the "accommodation" violate their religious beliefs. *Supra* Part I.A. After all, Applicants' objection is based not on principles "of legal causation but of religious faith." *Notre Dame*, 743 F.3d at 566 (Flaum, J., dissenting). But in any event, the district court's understanding of the regulatory scheme is mistaken. Unless Applicants submit the self-certification, the Government cannot require Applicants' TPA to provide the objectionable coverage, as the Government has conceded elsewhere.[23] In other words, the "self-certification and the group health plans

[23] *E.g.*, App'x D (Tr. of Hr'g at 12–13, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) ("THE COURT: But [a TPA's] duty to [provide the mandated coverage] only arises by virtue of the fact that he has a contract with the religious organizations? [THE GOVERNMENT]: Yes. They

[Applicants] put into place *are necessary* to their employees' obtaining the free access to the contraceptive[ coverage]." *E. Tex. Baptist*, 2013 WL 6838893, at *22 (emphasis added).[24]

## II. The Equities Uniformly Favor an Injunction as Petitioners Face Critical and Exigent Circumstances.

In addition, the equities uniformly favor a stay. *First*, it is well settled that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The same is true of rights afforded under RFRA, which protects the same types of rights safeguarded by Free Exercise Clause of the First Amendment. *See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418; *see also Korte*, 735 F.3d at 666 (stating that "RFRA protects First Amendment free exercise rights," and "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury").

On July 1, Applicants will be put to the painful choice of adhering to their religious beliefs or subjecting themselves to serious legal penalties. Once that harm

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(continued…)
become a plan administrator and are required to make these payments by virtue of the fact that they receive the self-certification form from the employer.")).

[24] Finally, although the Diocese itself is exempt from the requirement to issue a "self-certification," it is still injured by the Mandate because many of the Diocese's nonexempt Catholic affiliates offer their employees health coverage through the Diocese's plan. Under the Mandate, the Diocese must either maintain a health plan with a third-party administrator authorized to provide contraceptive benefits to its affiliates' employees, or else decline to extend its heath plan to those affiliates. App'x E (Diocese Decl. ¶¶ 15–19).

is imposed, it cannot be undone. Indeed, coercing Applicants to violate their beliefs is the epitome of irreparable injury.

*Second*, the irreparable harm to Applicants far outweighs any harm to the Government, which in any event has no interest in enforcing an illegal regulation. In addition, given that the Mandate already contains exemptions affecting over 90 million individuals, *see supra* p. 7, the Government can hardly claim it will be harmed by a temporary exemption for Applicants approximately 250 employees.

*Third*, "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). In particular, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010; *see also Hobby Lobby*, 723 F.3d at 1147 (plurality op.) (concluding that because the parties had "demonstrated a likely violation of their RFRA rights, an injunction would be in the public interest"). Again, the Government cannot claim that a temporary delay in enforcement of the mandate will harm the public in the face of the numerous exemptions it has already created. *See supra* pp. 7, 24–25. And even if the public interest were served by widespread free access to abortion-inducing products, contraception, and sterilization, these products and services are widely available, and the Government has adduced no evidence that the Mandate will make them more widely available in the relatively short period of time that will be required to adjudicate this case on the merits.

## III. Injunctive Relief Would Aid This Court's Jurisdiction

Issuance of 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) (stating that 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 has recently granted injunctive relief in cases, such as this, where a religious believer faced the threat of imminent and irreparable harm. *See Little Sisters*, 134 S. Ct. 1022; *Holt*, 134 S. Ct. 635 (granting injunction during the pendency of a petition for a writ of certiorari). In *Little Sisters*, this Court granted injunctive relief to ensure that it retained jurisdiction to prevent the Government from forcing the Applicants to violate their religious beliefs by complying with the accommodation. 134 S. Ct. at 1022. And in *Holt*, injunctive relief was granted to prevent the Government from forcing the Applicant to violate his religious beliefs by shaving his beard. 134 S. Ct. at 635. For the same reasons, injunctive relief here would ensure this Court retains jurisdiction to safeguard the specific religious exercise at issue here—the choice Applicants face as of July 1, 2014, as to whether to violate their religious beliefs through compliance with the Mandate.

Moreover, absent injunctive relief from this Court, as of July 1, significant and potentially ruinous penalties will mount against Applicants during the appellate process should they decline to comply with the Mandate. *See, e.g.*, 26 U.S.C. § 4980D(b) (fines of $100 per day per affected beneficiary). Those potentially staggering penalties could eventually preclude Applicants from completing the

appellate process, defeating this court's jurisdiction. *See McClellan v. Carland*, 217 U.S. 268, 280 (1910) ("We think it the true rule that where a case is within the appellate jurisdiction of a higher court a writ . . . may issue in aid of the appellate jurisdiction which might otherwise be defeated); *cf. Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J., in chambers) (issuing injunction).

## CONCLUSION

On July 1, Applicants will face the same choice the applicants in *Little Sisters* confronted on January 1. They will be forced to choose between onerous penalties or "becom[ing] complicit in a grave moral wrong." *Gilardi*, 733 F.3d. at 1217–18. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may a Catholic violate the moral law in certain circumstances by cooperating in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

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

723 F.3d at 1152 (Gorsuch, J., concurring). Here, Applicants "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the firm conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. That line is theirs to draw, and it was not for the district court or the Government to question. *Id.* By placing substantial pressure on the

Applicants to cross this line, the Government has substantially burdened Applicants' exercise of religion.

Accordingly, for the foregoing reasons, Applicants respectfully request that, like the applicants in *Little Sisters*, they be awarded injunctive relief while the Tenth Circuit considers the merits of Applicants' claims. At a minimum, Applicants request a temporary, administrative stay to allow for full consideration and briefing of this Application.

Dated: June 27, 2014

Respectfully submitted,

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## CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Noel J. Francisco, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application was served via electronic mail June 27, 2014 and by Federal Express on June 27, 2014 on:

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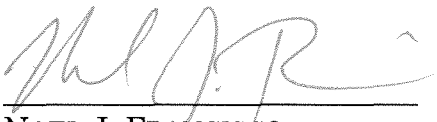

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