ORAL ARGUMENT REQUESTED

No. 13-1540

In the United States Court of Appeals for the Tenth Circuit

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated, CHRISTIAN BROTHERS SERVICES, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Appellants,

v.

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

Appellees.

On Appeal from the United States District Court for the District of Colorado
Judge William J. Martinez
Civil Action No. 1:13-cv-02611-WJM-BNB

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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Appellants' motion and application for an injunction pending appeal may be found here:

Little Sisters of the Poor v. Sebelius, No. 13-1540 (10th Cir.);

Little Sisters of the Poor v. Sebelius, No. 13A691 (U.S.).

The following appeal is a class action brought by a church plan and church plan employers raising similar claims against the same defendants:

Reaching Souls Int'l v. Sebelius, No. 14-6028 (10th Cir.).

The following appeals involve church plan employers raising similar claims against the same defendants:

Southern Nazarene Univ. v. Sebelius, No. 14-6026 (10th Cir.);

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Michigan Catholic Conference v. Sebelius, No. 13-2723 (6th Cir.).

The following appeals involve religious non-profits raising similar claims against the same defendants:

Priests for Life v. Health and Human Services, No. 13-5368 (D.C. Cir.), *consolidated with* Nos. 13-5371, 14-5021;

Catholic Diocese of Nashville v. Sebelius, No. 13-6640 (6th Cir.);

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Univ. of Notre Dame v. Sebelius, No. 13-3853 (7th Cir.).

A list of appeals involving for-profit corporations raising similar claims against the same defendants is available at HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/.

JURISDICTIONAL STATEMENT

Appellants filed their complaint on September 24, 2013, challenging a federal regulatory mandate under the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and the Administrative Procedure Act. JA11a. On October 24, 2013, they filed a motion for preliminary injunction. JA127a. The district court had jurisdiction over Appellants' lawsuit under 28 U.S.C. §§ 1331 and 1361 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 2000bb, *et seq*.

The district court denied Appellants' motion for a preliminary injunction on December 27, 2013, and Appellants timely filed their notice of appeal to the Tenth Circuit later that day. JA683a, 717a. This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

Appellants are Catholic non-profit employers and the Catholic benefits providers through which they provide employee health benefits that are consistent with their shared Catholic faith. A federal regulation ("the Mandate") requires employer-provided health coverage to include free access to all FDA-approved contraceptives and sterilization treatments. Appellants can only comply with that requirement by either (1) providing the required coverage in their health plans, or (2) signing and incorporating into their health plans a form authorizing, directing, and creating legal obligations and incentives for third party administrators of their health care plan to provide the coverage. As a matter of religious exercise, Appellants cannot take either action and are therefore subject to severe penalties. The district court denied a preliminary injunction sought under the Religious Freedom Restoration Act ("RFRA") and the First Amendment.

The issues presented are:

(1) *RFRA.* Did the district court correctly conclude that the Mandate does not "substantially burden" Appellants' religious exercise of refusing to provide the coverage or sign the form?

(2) *First Amendment—Religion Clauses.* Does the Mandate impermissibly discriminate among religious organizations by making eligibility for the "religious employer" exemption dependant on the structure of the religious organization and the government's assumptions about the organization's religious beliefs?

(3) *First Amendment—Speech Clause*. Do the Mandate's requirements that Appellants (a) must sign and deliver the form, and (b) "must not, directly or indirectly, seek to influence the third party administrator's decision" to provide the coverage at issue, violate the First Amendment?

(4) *Preliminary Injunction.* Did the district court correctly deny Appellants' motion for preliminary injunction?

STATEMENT OF THE CASE

INTRODUCTION

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. They provide care for the elderly of every race and religion, love and respect them as if each elderly person were Jesus Christ himself, and treat them with dignity and compassion until they die. The Little Sisters perform this ministry in homes throughout the world, including almost thirty in the United States. Although they have operated their homes in this country for over a century in the highly regulated sector of elder care, federal law has never before put them to the impossible choice of either violating their faith or violating the law.

Yet because the district court denied preliminary injunctive relief, the Little Sisters were within hours of having to make that choice on New Year's Eve 2013. Only the Supreme Court's extraordinary grant of injunctive relief pending appeal has thus far spared the Little Sisters from having to decide whether to violate their religion or to incur massive federal fines that could cripple their ministry.

The government seeks to compel the Little Sisters to comply with a federal mandate requiring their employee health plans to include free coverage for contraceptives, sterilizations, and abortion-inducing drugs. But it is undisputed that the Little Sisters cannot comply with the Mandate without violating their religion, and that the government will impose massive penalties if they do not comply. That

is a textbook substantial burden under RFRA. *See Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). Because the government concedes strict scrutiny, this straightforward burden analysis should dispose of the case.

Undeterred, the government claims that it should *still* be able to force the Little Sisters to violate their religion by making them execute and deliver a government form—EBSA Form 700—that designates, authorizes, incentivizes, and obligates the provision of contraceptive coverage. The government's argument for requiring this specific act hinges on the fact that the Little Sisters have associated with religious benefits providers to provide employee benefits consistent with their shared Catholic faith. Congress has excluded this type of arrangement (known as a "church plan") from the Employee Retirement Income Security Act of 1974 (ERISA). The government argues that because ERISA enforcement of the Mandate is not available, filling out EBSA Form 700 is a meaningless exercise, to which the Little Sisters should have no objection.

This argument—which the government also made to the Supreme Court—fails for three key reasons. First, even without ERISA enforcement, EBSA Form 700 designates, authorizes, incentivizes, and obligates third parties to provide or arrange contraceptive coverage in connection with the plan. Once the Little Sisters

execute and deliver the Form, the Mandate purports to make it *irrevocably* part of the plan by forbidding the Little Sisters to even talk to the outside companies that administer their health plan, "directly or indirectly," to ask them not to provide the coverage. The government has admitted in a parallel church plan case that signing the form enables such companies to provide contraceptives and seek federal reimbursement.

The contraceptive coverage form obviously matters to the government and to the Little Sisters. Indeed, if the government actually believed EBSA Form 700 to be legally meaningless, it would make no sense at all for the government to have contested the issue all the way to the Supreme Court, and to still be contesting the issue here. Nor would it make sense to threaten the Little Sisters with *millions* of dollars in fines to get them to sign a supposedly meaningless form. Actions speak louder than briefs, and the government's actions demonstrate that they view their Form as very important.

Second, regardless of whether the *government* sincerely believes EBSA Form 700 is morally meaningful, the relevant legal question is whether the Little Sisters do. And on that point, there is no dispute: the Little Sisters cannot execute and deliver the contraceptive coverage form without violating their religious conscience. The government may think the Little Sisters *should* reason differently about law and morality, but their actual religious beliefs—the beliefs that matter in

this case—have led them to conclude that they cannot sign or send the government's Form.

Third, the government's scheme violates the First Amendment. Although the government is not allowed to discriminate among religious groups, it has exempted a large class of religious organizations based on unfounded guesswork about the likely religious characteristics of different religious organizations. The government has no power to discriminate in this fashion, allowing some religious organizations to survive while crushing others with fines for the identical religious exercise. This violation of the Free Exercise and Establishment Clauses is compounded by a clear violation of the Free Speech Clause: the Mandate both compels the Little Sisters to engage in government-required speech against their will, and prohibits them from engaging in speech they wish to make. These First Amendment violations—coupled with the government's concession that the Mandate fails strict scrutiny—also require an injunction.

The Little Sisters are joined as appellants by the Catholic health benefits provider with whom they work to provide employee benefits consistent with their shared Catholic faith, Christian Brothers Employee Benefits Trust (the "Trust"), and the Catholic organization that administers the Trust, Christian Brothers Services. The motion for preliminary injunction also sought relief on behalf of a class of the other non-exempt employers who provide benefits through the Trust,

all of which are Catholic non-profit organizations. The government has agreed that any preliminary relief entered for the named plaintiffs can protect the class.[1] Accordingly, Appellants respectfully request that this Court reverse the district court's denial of preliminary injunctive relief and order Defendants not to enforce the Mandate against the Little Sisters of the Poor, the Trust, Christian Brothers Services, and the other organizations that provide benefits through the Trust.

BACKGROUND

I. THE LITTLE SISTERS, CHRISTIAN BROTHERS, AND THEIR SHARED RELIGIOUS EXERCISE.

The Little Sisters of the Poor Home for the Aged, Denver, Colorado, and Little Sisters of the Poor, Baltimore (collectively the "Little Sisters"), are part of an international order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. JA148a. Each Little Sister takes a vow of obedience to God, and a vow of hospitality "through which she promises to care for the aged as if they were Christ himself." JA149a, 151a. The Little Sisters strive to treat each elderly "individual with the dignity they are due as a person loved and created by God," and also to "convey a public witness of respect for life, in the hope that we can build a Culture of Life in our society." JA152a.

[1] Because the government made this agreement, the named plaintiffs agreed to postpone their motion to certify the class until after the preliminary injunction proceedings. Def's Unopposed Mot. for Extension, Dkt. 35 at 2-3; JA296a.

The Little Sisters provide employee health benefits through the Trust. The Trust is a self-insured non-ERISA "church plan,"[2] open only to non-profit organizations operated under the auspices of the Roman Catholic Church, in good standing thereof, and listed or approved for listing in The Official Catholic Directory. JA165a. The Trust is administered by Christian Brothers Services, a Catholic organization designed to serve Catholic organizations by helping them to "remain faithful to [their] mission and the universal mission of the Catholic Church." JA166a.

The Little Sisters, the Trust, and Christian Brothers Services (collectively, "Appellants"), along with hundreds of other Catholic non-profit organizations that also provide employee benefits through the Trust, have deliberately come together to provide benefits in accordance with their shared Catholic religious beliefs. JA151a, 172a-73a. As a matter of religious exercise, these organizations have always excluded coverage of sterilization, contraceptives, and abortifacients from the health benefits plan they offer through participation in the Trust. JA151a, 156a, 172a. Appellants adhere to well-established Catholic teaching that prohibits

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

encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion. JA153a-56a, 166a-68a (citing *Catechism of the Catholic Church* §§ 2270-2271, 2274, 2284, 2286, & 2370; *Compendium of the Social Doctrine of the Church* § 234; *Evangelium Vitae* § 91; and U.S. Conference of Catholic Bishops, *Directives for Catholic Health Care Services* Nos. 3, 45, 52-53, 67-72). Following this teaching, they believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services. JA156a-57a, 169a-70a. Appellants' religious beliefs require them to avoid participating in a system requiring the provision of such things. *Id.* Appellants cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme. JA157a-58a, 166a-70a. This is religiously necessary not only to avoid complicity in wrongdoing, but also to avoid appearing to condone wrongdoing, which would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public. JA154a-155a, 157a-58a, 169a-70a, 344a-45a, 352a-53a. These religious beliefs are deeply held, sincere, and well-documented parts of Appellants' Catholic faith. *See, e.g.*, JA153a-155a, 166a-170a. The sincerity of these religious objections is not in dispute. JA699a, 702a.

II. THE MANDATE

The Affordable Care Act ("ACA") mandates that any "group health plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). Congress did not define "preventive care" but instead allowed the Health Resources and Services Administration ("HRSA"), a division of Appellee Department of Health and Human Services ("HHS"), to define the term. 42 U.S.C. § 300gg-13(a)(4). HRSA's definition includes all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, including abortifacient "emergency contraception" such as Plan B (the "morning-after" pill) and ella (the "week-after" pill). JA79a-80a, 91a-92a. The FDA's Birth Control Guide notes that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. JA91a-92a.

Failure to provide this coverage triggers a variety of penalties, including crippling daily and annual penalties. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ("$100 for each day in the noncompliance period with respect to each person to whom such failure relates" if coverage is provided that does not comply with the Mandate); 26 U.S.C. § 4980H(c)(1) ($2000 annually for each full-time employee if no coverage is provided beginning in 2015 (2016 for certain employers with 50 to 99 average full-time employees)).

A. "Exempt" Employers

Many employers are exempt from the Mandate and need not provide the objectionable coverage. Nor are they required to sign and deliver forms designating, authorizing, incentivizing, or obligating anyone else to provide the coverage. (As discussed *infra*, the government insists that the Little Sisters sign such a form, EBSA Form 700, or pay large penalties.)

Employers who provide "grandfathered" health care plans, which cover tens of millions of Americans, are exempt from the Mandate. *See* 42 U.S.C. § 18011 (2010); JA120a; *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013) (en banc), *cert. granted* 134 S. Ct. 678 (2013) ("Grandfathered plans may remain so indefinitely."). These employers must state that their healthcare plan is grandfathered, 26 C.F.R. 54.9815-1251T(a)(2), but they are not required to sign EBSA Form 700, to make it part of their healthcare plan, or to deliver it to anyone. Grandfathered employers are not required to designate, authorize, incentivize, or obligate anyone else to provide contraceptive coverage to claim their exemption.

Employers with fewer than fifty employees, covering an estimated 31 million Americans, also may avoid fines under the Mandate by not offering insurance at all. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); JA126a.

"Religious employers" are also exempt from the Mandate. HHS granted HRSA "discretion" to create an exemption for "certain religious employers." 76 Fed. Reg.

46621 (Aug. 3, 2011); 45 C.F.R. 147.130(a)(1)(iv)(A)-(B). On June 28, 2013, HHS and the Departments of the Treasury and of Labor issued their final rules regarding religious exemptions. 78 Fed. Reg. 39870 (July 2, 2013). The rule exempts only a very narrow subset of "religious employers"—namely, institutional churches, their integrated auxiliaries and the exclusively religious activities of a religious order—that are "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a).[3] These government-designated "religious employers" are not required to sign EBSA Form 700, to make it part of their plan, or to deliver it to anyone. "Religious employers" are automatically exempt; they are not required to certify their religious beliefs to anyone, or to designate, authorize, incentivize, or obligate anyone else to provide the objectionable services.

B. "Non-Exempt" Employers and EBSA Form 700

Despite widespread concerns about the scope of the religious employer exemption, the government announced in February 2012 that it would not expand the exemption, but would instead develop an "accommodation" for "non-exempt" religious organizations. 77 Fed. Reg. 16501. Unlike the grandfathering and

[3] Whether an entity is an "integrated auxiliary" of a church turns primarily on the degree of the church's control over and funding of the entity. *See* 26 C.F.R. 1.6033-2(h)(2) & (3) (affiliation); *id.* at 1.6033-2(h)(4) (internal support). The definition was for tax considerations, not religious conscience concerns, and thus can arbitrarily turn on whether a religious non-profit receives 49% or 50% of financial support from a formal church in a given year. *Id.*

religious employer exemptions, the government said that its planned accommodation for "non-exempt" employers would "assur[e] that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." *Id.* at 16503.

The accommodation in the resulting final rule is available if a non-exempt religious organization (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(b). But objecting entities can only self-certify in one government-designated way: by executing EBSA Form 700 and delivering it to their insurer or third party administrators ("TPAs"). 78 Fed. Reg. at 39875; 26 C.F.R. 54.9815–2713A.

The government imposed the requirement to sign and deliver EBSA Form 700 as part of its effort to ensure that beneficiaries of plans of non-exempt employers "will still benefit from separate payments for contraceptive services without cost sharing or other charges." 78 Fed. Reg. at 39874. Non-exempt employers with self-insured plans are required to use the Form to expressly designate their TPA as the "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id.* at 39879; 26 C.F.R. 54.9815–2713A. Receipt of an executed EBSA Form 700

triggers a TPA's legal obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. 147.131(c)(2)(i)(B); 26 C.F.R. 54.9815–2713A(b)(2). According to the government, forcing the non-exempt employer to designate the TPA in this manner "ensures that there is a party with legal authority" to make payments to beneficiaries for contraceptive services, 78 Fed. Reg. at 39880, and ensures that employees of employers with religious objections receive these drugs "so long as [they remain] enrolled in [the] group health plan." *See* 26 C.F.R. 54.9815–2713A(d); 29 C.F.R. 2590.715–2713A(d); *see also* 45 C.F.R. 147.131(c)(2)(i)(B).

EBSA Form 700—a complete copy of which is reproduced at Addendum 1—includes the following legally operative language:

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

See also JA357a. By means of this language, the Form (a) directs the TPA to portions of the Mandate that require that the TPA "shall provide" payments for

contraceptive services, (b) instructs the TPA that these regulations set forth the TPA's "obligations," and (c) purports to make the Form, including the Notice section thereof, "an instrument under which the plan is operated."

These "obligations"—both for the non-exempt employer to execute the Form and the TPA to provide the coverage upon receiving the Form—are replicated in two sections of the Code of Federal Regulations, giving enforcement authority both to the Department of Treasury via the Internal Revenue Code (26 C.F.R. 54.9815–2713A), and also to the Department of Labor via its ERISA enforcement authority (as described in 29 C.F.R. 2590.715–2713A).

Furthermore, to induce TPAs to provide the coverage, the regulations also offer a "carrot": an extra government payment to make the scheme profitable. In particular, a separate, non-ERISA-based regulation provides that, if a TPA obtains EBSA Form 700 from a non-exempt employer, the TPA becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead.[4] 45 C.F.R. 156.50. The government has acknowledged in parallel litigation that this bonus payment is dependent on receipt of the Form. JA672a-73a, 677a.

[4] HHS has issued a proposed rule setting this payment rate at 15% for 2014. *See* 78 Fed. Reg. 72322, 72364 (Dec. 2, 2013).

Finally, the regulations command non-exempt religious organizations that they "must not, directly or indirectly seek to influence the third party administrator's decision" whether to provide the coverage. *See* 26 C.F.R. 54.9815–2713A(b)(iii). The government has acknowledged in parallel litigation that this provision prohibits a religious organization from discouraging a TPA from using the form to distribute contraceptives to collect reimbursement from the government. *See* JA677, 679a-80a.

III. APPELLANTS' RELIGIOUS OBJECTIONS TO THE MANDATE

The Little Sisters do not qualify for any exemption from the Mandate. The Trust is not a grandfathered plan, JA41a, which would be exempt from the preventative services requirement entirely. 42 U.S.C. § 18011; 75 Fed. Reg. 41726, 41731 (July 19, 2010). And although they share the same religious beliefs as exempt Catholic "religious employers," the Little Sisters do not fall within the Mandate's exemption for "religious employers" because they are not formal churches (or integrated auxiliaries) and in the eyes of the IRS, their care for the elderly poor of all faiths is not an "exclusively religious activity." *See* 26 U.S.C. § 6033(a)(3)(A)(iii).

Because they are non-exempt, there are only two ways the Little Sisters could comply with the Mandate. First, they could provide the required coverage through the Trust or another plan. Since this would violate their beliefs as Catholics, the

Little Sisters cannot comply with the Mandate in this manner. JA154a-55a, 169a-170a, 343a-45a, 352a-53a. Alternatively, the Little Sisters could "comply" with the Mandate by signing and sending EBSA Form 700. But this too would violate their religious beliefs. JA153a-55a, 166a-70a, 343a-45a, 352a-53a. The Little Sisters believe that executing and delivering the form would make them morally complicit in sin, would contradict their public witness to the value of life, and would immorally run the risk of misleading others. JA155a-158a, 324a. The Little Sisters object on religious grounds to designating, authorizing, incentivizing, and obligating a third party to perform the very act that they refuse to do themselves. JA160a. Thus, each of the two ways through which the Little Sisters could comply—distributing the drugs and signing the form—would require them to do something they understand to be forbidden by their religion.

The Mandate's burden on Appellants' religious exercise is severe. To assist in their religious mission of caring for the elderly poor of any race, sex, or religion, each of the two Little Sisters homes employs more than 50 lay employees and provides health benefits via the Trust. JA148a, 150a. Little Sisters of Denver, which currently has approximately 67 full time employees, could incur penalties of approximately $6,700 per day and nearly $2.5 million per year—which constitutes over a third of its annual $6 million budget—unless it gives up its religious exercise and complies with the Mandate. JA 159a. Likewise, non-exempt class

members of the Trust face estimated penalties of $402,741,000 per year, while Christian Brothers Services and the Trust face losses of approximately $130,000,000 in medical plan contributions and $10,400,000 in net revenue per year if the class members are effectively forbidden from participating in the Trust because of their religious exercise. JA173a, 175a.

IV. PROCEDURAL HISTORY

In response to Appellants' motion for a preliminary injunction, the government argued for the first time that a portion of the enforcement mechanism for the Mandate was not yet fully functional.[5] The government explained that the Department of Labor's ERISA enforcement authority does not apply to self-insured church plans. For this reason, the government claimed that it could not force the TPA of a church plan to comply with the obligations imposed by the Little Sisters' Form.

[5] This was a new position. Before Appellants filed their lawsuit, the government publicly asserted that it *could* make its scheme work against church plan participants, such as Houston Baptist University. *See* Def's Mot. to Dismiss, Dkt. 79, *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex. Sept. 20, 2013). As another court observed, "[i]t is unclear how citizens like plaintiffs and their [TPAs] are supposed to know what the law requires of them if the Government itself is unsure. After almost 18 months of litigation, the Departments now effectively concede that the regulatory tale told by the Government was a *non-sequitur*." *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 WL 6579764, *6 (E.D.N.Y. Dec. 16, 2013).

The government explained that its claimed inability to enforce compelled use of the Little Sisters' Form was (a) temporary, and (b) something that it is actively trying to work around:

> While *defendants continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans*, they acknowledge that, *at this time*, they lack authority to require the TPAs …to make the separate payments for contraceptive services….

JA283a (emphasis supplied). While the government emphasized limitations on its ERISA authority, JA288a, it claimed no similar gap in the Department of Treasury's authority, despite the fact that the same regulatory language has been issued by Treasury in the tax regulations independent of ERISA. 26 C.F.R. 54.9815–2713A (listing Code section 7805 (26 U.S.C. § 7805) as the statutory basis for its authority, but not ERISA). Nor did it argue that the Form would not still trigger the government's generous program to incentivize TPAs by qualifying the TPA for cost and bonus payments. 45 C.F.R. 156.50.[6] Nor did the government provide any reason why, if its form is meaningless, it continued to insist on forcing the Little Sisters execute the form or pay severe penalties. Instead, it simply argued that the Little Sisters' religious refusal to sign and deliver the form is akin to

[6] In another church plan case in this Circuit, the government acknowledged that reimbursement depends on whether the religious organization submits the form. JA677a (Counsel for the government: "I will concede that the TPA . . . if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.").

"fighting an invisible dragon," JA622a, and that the government should therefore be able to force the Little Sisters to sign the form. JA635a.

The government's new position did not change Appellants' conclusion that they cannot comply with the Mandate without violating their religious beliefs. JA343a-45a, 352a-54a. Thus, Appellants remain unable to comply by providing the coverage at issue. And the Little Sisters remain unable to execute and deliver EBSA Form 700 to any TPA, because even if the government's enforcement scheme is (temporarily) nonfunctional, they would still be publicly and integrally participating in a scheme that violates their faith and their public witness. JA155a-58a, 160a, 315a-16a.

Further, by delivering Form 700, the Little Sisters would still designate, authorize, incentivize, and obligate recipient TPAs to use their health care plan to deliver contraceptive and abortifacient drugs to their employees. The Little Sisters believe that this is wrong. They believe it is wrong to contract out their conscience to another, and simply hope that the other is strong enough to withstand the pressure and temptation they created (a hope made all the more tenuous by the gag rule placed on the Little Sisters after delivering the form). JA34a, 155a, 342a-47a. They believe it is wrong to issue a designation, authorization, and obligation which the government may later enforce against the recipients. JA157-58a, 342a-47a. And even if the TPAs stood strong and the drugs, devices, and procedures never

flowed out under their plan, the Little Sisters believe that it is wrong for them to create such obligations in the first place. JA 34a, 157a-158a, 176a, 342a-47a.

This is all true even when the recipient TPA shares their religious beliefs. JA 155a, 157a-58a, 343a-45a. It is doubly true where, as here, a recipient TPA may not. In addition to Christian Brothers Services, the Trust uses Express Scripts, Inc. ("ESI"), a large public company, to provide pharmaceutical claim administrative services under the Trust. JA495a. Appellants have received no assurance that ESI would not use an executed Form to make payments and seek reimbursement and bonus payments from the government. *Id*. In short, Appellants' religious objections remain unchanged, and they cannot participate in the government's scheme without violating their sincere and undisputed religious beliefs. JA342a-47a, 352a-54a.

On December 27th, however, the district court denied Appellants' motion for a preliminary injunction. The court found that the Little Sisters' religious belief that they cannot execute and deliver EBSA Form 700 "reads too much into the language of the Form." JA710a. The district court also dismissed religious beliefs about delivering or accepting the contraceptive coverage form as "pure conjecture, one that ignores the factual and legal realities of this case." JA713a. Ultimately, the district court found Appellants faced no substantial burden because they should

just sign and send the form and trust that it would have no practical effect. JA708a, 713a-14a.

Appellants filed their notice of appeal that same day, and filed their Motion for Injunction Pending Appeal on December 28, 2013. A motions panel denied Appellants' Motion for Injunction Pending Appeal on December 31, 2013. Early that evening, Appellants filed an emergency injunction application with Circuit Justice Sotomayor. That same night, Justice Sotomayor entered an order temporarily enjoining the government from enforcing the Mandate against Appellants. On January 24, 2014, the full Court ruled that:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, [Appellants] need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

JA725a. Appellants provided the required notice to the Secretary and are currently protected by the Supreme Court's injunction pending the outcome of this appeal.

SUMMARY OF THE ARGUMENT

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. As part of their religious mission, the Little Sisters join with the Trust, Christian Brothers Services, and a class of other Catholic non-profit organizations to provide employee benefits that are consistent with their shared Catholic faith. That faith prohibits these organizations from participating in the government's program to distribute, subsidize, and promote the use of contraceptives, sterilization, or abortion-inducing drugs and devices.

This appeal arises from the government's determined and persistent effort to force the Little Sisters and their fellow appellants to give up that shared religious exercise. The government has fought all the way to the Supreme Court, and continues to fight in this Court, to force the Little Sisters to execute and deliver its mandatory contraceptive coverage form, EBSA Form 700. If the Little Sisters refuse, the government promises to impose severe financial penalties.

The government claims it has not burdened the Little Sisters at all, because it cannot use ERISA to force third parties—namely the administrators of the church plan through which the Little Sisters provide benefits— to act on the Little Sisters' EBSA Form 700. As the government sees it, this absence of ERISA enforcement authority against others should fully resolve the Little Sisters' religious concerns.

The district court denied preliminary injunctive relief, essentially agreeing with the government that the Little Sisters should not object to the form in the absence of ERISA enforcement authority. That approach was error, both because it overstates the importance of ERISA—even apart from ERISA enforcement, the Little Sisters' form would designate, authorize, incentivize, and obligate administrators to provide coverage—and because it essentially re-writes the Little Sisters' religious beliefs for them. Standard moral reasoning underpins the Little Sisters' refusal to designate, authorize, incentivize, and obligate a third party to do that which the Little Sisters may not do directly. And regardless of what the trial court and the government think the Little Sisters *should* believe, the undisputed fact is that they *do* believe their religion forbids them from signing EBSA Form 700. It was not for the district court to disagree with the line drawn by the Little Sisters. *See Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. Jan. 23, 2014) ("Even if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, even if some may find it illogical, that doesn't take it outside the law's protection.").

Under this Court's RFRA precedents, this state of affairs easily qualifies as a "substantial burden" on the Little Sisters. *See Yellowbear*, 741 F.3d at 55; *Hobby Lobby*, 723 F.3d at 1137-45; *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). The required analysis is straightforward: "Our only task is to determine

whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137. Here, the mandate's severe financial penalties impose enormous pressure on the Little Sisters to give up their religious exercise and sign and send. *Id.* at 1140 ("[I]t is difficult to characterize the pressure as anything but substantial."). And because the government has conceded strict scrutiny, JA290a-91a, the Appellants are likely to succeed under RFRA. Indeed, in every single other church plan case in the nation, and in 19 of the 20 non-profit challenges to the Mandate and its accommodation system, federal courts have entered the type of relief sought here. *See infra* n.8.

The government has also violated the Appellants' rights under the Religion Clauses and the Free Speech Clause of the First Amendment. As to the former, the government is unconstitutionally discriminating among religious organizations. As to the latter, the government is unconstitutionally compelling the Little Sisters both to say things that they do not want to say and *not* to say things that they *do* want to say. The First Amendment does not permit any of these violations.

LEGAL STANDARDS

This Court reviews the denial of a preliminary injunction for abuse of discretion. *See Hobby Lobby*, 723 F.3d at 1128. "A district court abuses its discretion by denying a preliminary injunction based on an error of law." *Id.*

Legal conclusions are reviewed *de novo*. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). Thus, this Court "review[s] the meaning of the RFRA *de novo*, including the definitions as to what constitutes substantial burden and what constitutes religious belief, and the ultimate determination as to whether the RFRA has been violated." *United States v. Myers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (citation omitted). Both RFRA and the First Amendment require this Court to make an "independent examination of the whole record" to avoid impermissible intrusions on religious expression. *United States v. Wilgus*, 638 F.3d 1274, 1284 (10th Cir. 2011); *United States v. Friday*, 525 F.3d 938, 949 (10th Cir. 2008).

Finally, this Court may determine for itself whether the Appellants deserve a preliminary injunction. *See Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). An injunction is appropriate if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby*, 723 F.3d at 1128.

ARGUMENT

I. THE LITTLE SISTERS AND CHRISTIAN BROTHERS ARE LIKELY TO SUCCEED ON THEIR RFRA CLAIMS.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the

person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[7] 42 U.S.C. § 2000bb-1(b).

When applying RFRA, this Court engages in a four-step process. First, the Court must "identify the religious belief" at issue. *Hobby Lobby*, 723 F.3d at 1140. Second, it must "determine whether this belief is sincere." *Id*. Third, the Court must determine "whether the government places substantial pressure on the religious believer." *Id*. Finally, if there is substantial pressure, the government action must survive strict scrutiny—*i.e.*, the government must prove that forcing the religious believer to violate her own conscience is "'the least restrictive means of advancing a compelling interest.'" *Id*. at 1143 (citation omitted); 42 U.S.C. § 2000bb-1(b).

The government has not challenged the sincerity or religiosity of the Little Sisters' and Christian Brothers' religious belief that they cannot comply with the Mandate by providing coverage or executing EBSA Form 700. JA697a. And it has conceded that its strict scrutiny argument is foreclosed by this Court's precedent. JA290a-91a. Thus, the only remaining question is whether the Mandate "places substantial pressure" on the Little Sisters and Christian Brothers to make them

[7] This claim was raised at JA56a-57a and ruled on at JA714a-16a.

comply with the Mandate by providing coverage or executing the form. *Hobby Lobby*, 723 F.3d at 1140.

The government argues that there is no substantial pressure on the Appellants to sign the Form because Christian Brothers Services has said that it would not voluntarily take advantage of the authorization and incentives provided by the Form, and the government cannot use ERISA to force them to do so "at this time." JA 283a. But despite this claimed inability to make other parts of its system work, the government is plainly exerting "substantial pressure" on the Little Sisters to make them sign and send the Form. Indeed, the government fought the Little Sisters and Christian Brothers all the way to the Supreme Court to force them to execute and deliver the Form, and it continues to fight here. If Appellants refuse to comply with the Mandate in this way, the government seeks to punish them with massive penalties. For the same reasons those penalties constituted substantial pressure in *Hobby Lobby*, they constitute substantial pressure here. 723 F.3d at 1140 ("It is difficult to characterize the pressure as anything but substantial.").

A. It is undisputed that the Little Sisters and Christian Brothers sincerely exercise religion by excluding certain drugs and devices from their health benefits plan and by refusing to sign EBSA Form 700.

The Little Sisters and Christian Brothers exercise religion by joining together to offer health benefits consistent with their shared Catholic faith. It is undisputed that the Little Sisters and Christian Brothers both exercise religion by excluding certain

types of drugs and devices from their health plan. And it is undisputed that, despite the government's claim that parts of the accommodation system do not work "at this time," the Little Sisters and Christian Brothers have a sincere religious objection to complying with the proposed "accommodation" based on EBSA Form 700.

The Little Sisters and Christian Brothers engage in these religious exercises because of their Catholic religious beliefs based on longstanding and well-documented Catholic doctrine concerning both contraception and the value of all human life, even when that life is small and vulnerable. JA154a (affirming that, under Catholic teaching, "life begins at conception," "directly intending to take innocent human life is gravely immoral," and "contraception and sterilization are intrinsic evils."); JA168a (affirming papal teaching that "Catholics may never 'encourage' the use of 'contraception, sterilization, and abortion.'"). As a religious matter, it is not enough for Appellants to simply exclude these services from their health plan—they must also refrain from authorizing, directing, incentivizing, or obligating others to provide these services. JA 160a-61a, 170a. And they may not take any action that would make it appear that they had either provided these services or authorized someone else to provide them. *Id.* For these reasons, the Little Sisters and Christian Brothers provided sworn and undisputed affidavit testimony that they cannot comply with the Mandate either by providing the

coverage at issue, or by participating in the government's "accommodation" system based on EBSA Form 700 (even after the government's claim that part of that system is not yet functional "at this time.") JA342a-47a, 352a-54a.

RFRA plainly protects religious exercises of this nature. As this Court recently explained, "Congress has directed courts to protect '*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Yellowbear*, 741 F.3d at 54 (quoting 42 U.S.C. § 2000cc-5(7)(A)). Religious exercise involves "not only belief and profession but the performance of (*or abstention from*) physical acts." *Id.* (quoting *Employment Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)) (emphasis added). Indeed, this Court recently recognized RFRA protection for the religious exercise of abstaining from participation in the Mandate in *Hobby Lobby*. 723 F.3d at 1140.

In sum, as an exercise of their religion, the Little Sisters and Christian Brothers cannot participate in the Mandate by either providing coverage, or by complying with the "accommodation" using EBSA Form 700.

B. The Mandate substantially burdens Appellants' religious exercise.

The Mandate substantially burdens the Appellants' religious exercise by requiring them to give up their religious exercise or pay massive penalties. To date, twenty decided cases have raised similar claims of substantial burden by non-profit religious organizations. In virtually all of those cases—nineteen out of twenty non-

profit cases, including each of the seven other cases involving church plans—courts have granted preliminary relief so that the religious organization would be able to litigate the case to conclusion without accruing massive penalties for its religious exercise.[8]

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[8] **Church Plan Cases:** Order, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (S. Ct. Jan. 24, 2014) (injunction pending appeal); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (same); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (permanent injunction in case involving two participants in the Christian Brothers' plan); *E. Tex. Baptist Univ. v. Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013) (permanent injunction); *Southern Nazarene Univ. v. Sebelius*, No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (preliminary injunction); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv- 1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (preliminary injunction in class action involving church plan and its participants); *Archdiocese of New York*, 2013 WL 6579764 (preliminary injunction).

Other Non-Profit Cases: *Priests for Life v. Health & Human Services*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (preliminary injunction); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (same); *Sharpe Holdings, Inc. v. United States Dep't of Health & Human Srvs.*, No. 2:12-cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Grace Schools v. Sebelius*, No. 3:12-CV-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23 2013) (same); *Legatus v. Sebelius*, No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Persico v. Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same). *But see Univ. of Notre Dame v. Sebelius*, No. 13-3853 (7th Cir. Feb. 22, 2013) (denying injunction).

A law imposes a "substantial burden" on religious exercise when it:

> (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, [or]
>
> (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or
>
> (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.

Yellowbear, 741 F.3d at 55 (citing *Abdulhaseeb*, 600 F.3d at 1315); *see also Hobby Lobby*, 723 F.3d at 1138 (same). The Mandate substantially burdens the Appellants' religious exercise in all three ways.

First, the Mandate requires the Little Sisters to choose between participating in one religiously forbidden activity (covering sterilization and contraceptives in their health plan) or another (executing and delivering EBSA Form 700). *Yellowbear*, 741 F.3d at 55. Either way, the Little Sisters are being "require[d] . . . to participate in an activity prohibited by a sincerely held religious belief." *Id.* The same is true of Christian Brothers which, if it receives the Form as a TPA, faces an express legal requirement that it "shall provide" the coverage its religion prohibits. 26 C.F.R. 54.9815–2713A(b)(2).

Second, the Mandate prevents the Little Sisters and Christian Brothers "from participating in an activity motivated by a sincerely held religious belief," namely providing benefits consistent with their shared Catholic faith, and without

authorizing, directing, obligating, or incentivizing anyone else to provide the drugs and devices at issue in their place. *Yellowbear*, 741 F.3d at 55.

Third, the Mandate "places substantial pressure on [the Little Sisters and Christian Brothers] . . . to engage in conduct contrary to a sincerely held religious belief," by imposing crippling penalties or loss of business unless the Little Sisters and Christian Brothers comply with the Mandate by providing the services or participating in the "accommodation" scheme. *Abdulhaseeb*, 600 F.3d at 1315. The price for exercising their faith will be steep: the Mandate threatens the Little Sisters and Christian Brothers with crippling financial losses. *See, e.g.*, JA159a (daily penalties of $6,700 and annual penalties of nearly $2.5 million for one Little Sisters home out of almost thirty); JA172a (non-exempt religious entities in the Trust could sustain penalties exceeding $400 million over the course of a year)); JA175a-76a (estimated loss of $130 million in plan contributions to Christian Brothers' Trust)). In each of the three ways recognized by this Circuit, the Appellants have shown a substantial burden.

The district court reached a contrary conclusion based on three key errors. First, the court disregarded the substantial burden that these penalties impose on the Appellants' religious exercise. Second, the court misinterpreted federal regulations and ignored important aspects of the Departments' accommodation scheme. Third,

the court substituted its own judgment about the level of moral complicity for the Little Sisters and Christian Brothers. These legal errors require reversal.

1. *The district court erroneously disregarded the substantial burden created by the penalties.*

The district court's first error was failing to recognize that Appellants will be penalized millions of dollars for persisting in their chosen religious exercise, which is a classic substantial burden. The district court acknowledged that these penalties created a "Hobson's choice" for the for-profit businesses and their owners in *Hobby Lobby*, but it reasoned that the Little Sisters and Christian Brothers could "avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form." JA699a.

This reasoning is circular. The Little Sisters' undisputed religious exercise consists precisely in *not* "signing the self-certification form." It is cold comfort for the Little Sisters to be told that they can avoid penalties for one religious exercise (not providing coverage) so long as they give up another religious exercise (not executing and delivering the contraceptives coverage Form). A proper substantial burden analysis would have asked—as this Court did in both *Yellowbear* and *Hobby Lobby*—whether the government is imposing substantial pressure on the believer to give up a religious exercise. *Yellowbear*, 741 F.3d at 55; *Hobby Lobby*, 723 F.3d at 1141. Had the district court conducted that straightforward inquiry, the answer would have been obvious: the Mandate's massive penalties, and the

government's vigorous and rigid insistence that the Little Sisters and other non-exempt members of the Trust sign and send EBSA Form 700, obviously impose (and are obviously designed to impose) substantial pressure on them to give up their religious exercise.

2. The district court erred when it misinterpreted the government's accommodation scheme.

The district court compounded its errors by wrongly interpreting the government's regulations. First, although the court claimed to defer to the government's regulatory interpretation, it ignored the government's binding admissions—made in the parallel church plan case *Reaching Souls International*—that the Form *does* authorize church plan TPAs to provide the religiously-objectionable services. JA677a. Second, the district court also ignored the regulatory requirement to deliver the Form to *all* TPAs, not just those who agree with the Little Sisters' religious objections. And third, it ignored the fact that, under the government's own regulations, the purpose of EBSA Form 700 is to trigger and provide legal designation, legal authorization, financial incentive, and legal obligation for recipients of the Little Sisters' executed form to provide or arrange the very services that the Little Sisters object to providing or arranging themselves.

Religious beliefs do not need to be logical or coherent to merit protection. But the plain text of the regulations at issue, and the government's statements about its

own system, make it entirely logical and coherent for the Little Sisters and Christian Brothers to refrain from participating in the government's scheme.

a. EBSA Form 700 designates, authorizes, incentivizes, and obligates church plan TPAs to provide religiously objectionable services.

The district court asserted that "Little Sisters' execution of the Form does not authorize any organization to deliver contraceptive coverage to Little Sisters' employees," because "[t]he regulations cited in the notice direct the third party administrator to ERISA regulations outlining the obligations of a plan administrator under ERISA." JA711a. That is incorrect.

First, the Form directs TPAs to *two* sets of regulations—one set issued under ERISA and codified at Title 29 of the Code of Federal Regulations, and a second set issued under the Internal Revenue Code and codified at Title 26. *See* AD2 ("Obligations of the third party administrator are set forth in 29 C.F.R. 2510.3–16 and 26 C.F.R. 54.9815–2713A."). Unlike regulations issued under ERISA, Treasury Regulations such as 26 C.F.R. 54.9815–2713A—which do not purport to be based on ERISA—are fully binding on church plans and their participating employers. And the cited Treasury regulation mandates that a TPA who receives an executed EBSA Form 700 "shall provide or arrange payments for contraceptive services." 26 C.F.R. 54.9815-2713A(b)(2).

Second, the Departments themselves admit that the contraceptive coverage form designates and authorizes church plan TPAs to provide these services if they wish to do so and renders them eligible for the financial incentive of a guaranteed minimum ten percent additional payment for doing so. In the parallel case *Reaching Souls International*, counsel for the government stated that if church plan TPAs "receive the certification, they are eligible for reimbursement" for providing religiously objectionable services to church plan beneficiaries. JA677a. He also admitted that, without the Form, "[t]hey would not otherwise be eligible" to receive federal reimbursement. *Id.* Indeed, the Form is central to the government's scheme: TPAs intending to seek federal reimbursement through a "participating issuer" must notify HHS within 60 days of receiving the Form, 45 C.F.R. 156.50 (d)(2)(ii), and the Form itself is part of the documentation that TPAs must maintain for ten years after seeking reimbursement. *Id.* at 156.50(d)(7)(i). This reimbursement carries with it the financial incentive of a minimum payment of ten percent of costs. *See id.* at 156.60(d)(3)(ii). No form, no payment (and no bonus).

Third, immediately after directing TPAs to their "obligations" under the regulations, the contraceptive coverage form states that it is "an instrument under which the plan is operated." AD2. In this manner, EBSA Form 700 overrides existing plan documents that exclude religiously objectionable services. Thus the Mandate would force the Little Sisters to amend their plan documents to authorize,

incentivize, and obligate recipient TPAs to begin providing coverage that has been deliberately excluded for religious reasons. Without this Form, there is no statutory, regulatory, or contractual basis for providing this coverage against Appellants' wishes.[9]

Altering the plan documents in this way could have consequences that the government may not have foreseen or intended. Although church plan beneficiaries do not have a private right of action under ERISA, they may be able to use state contract law to enforce the terms of the plan documents. *See, e.g., Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1131 (D. Minn. 2011) (allowing church plan beneficiaries to go forward with breach of contract claims against a church plan on the basis of "written statements that they would receive pension benefits when they retired"). Thus, once the Forms are signed and delivered, a plan beneficiary might sue under state contract law and argue that the plan documents now created a right to sterilization and contraceptive services.

[9] *Notre Dame* held otherwise (Slip Op. 14), but this was error: the regulations acknowledge that the Form is necessary to "ensure" TPAs have "legal authority" to provide contraceptives that are otherwise excluded from a self-insured plan. 78 Fed. Reg. at 39880.

b. The Little Sisters must deliver the Form to all TPAs, not just those that share their religious objections.

The district court asserted that the "accommodation" scheme does not burden the Little Sisters because they are "not required to deliver the Form to any organization other than [their] current third party administrator, Christian Brothers Services." JA712a. This, too, is a legal error. Under the government's "accommodation" scheme, the Little Sisters must provide the Form "to *all* third party administrators with which it or its plan has contracted." 78 Fed. Reg. at 39879 (emphasis added); 26 C.F.R. 549815-2713A. And under the government's "gag rule," if a TPA voluntarily decides to rely on the Form and provide contraceptive services against the Little Sisters' wishes, the Little Sisters may not try to persuade a TPA to stop providing the services or threaten to leave that TPA. 78 Fed. Reg. at 39880; 26 C.F.R. 54.9815–2713A(b)(1)(iii).

The government has explained that "one plan may contract with a pharmacy benefit manager (PBM) to handle claims administration for prescription drugs and another third party administrator to handle claims for inpatient and outpatient medical/surgical benefits." *Id.* at 39879 n.40. Under the terms of the "accommodation," each of these TPAs must receive a copy of the Form. *Id.* at 39879. Here, Christian Brothers Services has contracted with pharmacy benefit manager ESI, a Fortune 100 company that is already providing contraceptive coverage to other religious non-profits that have chosen to comply with the

accommodation scheme.[10] It is not clear whether the government will take the position that ESI is a TPA for the Christian Brothers health plan. *See e.g.*, JA599a. If ESI is a TPA, then the Little Sisters must deliver the Form not just to Christian Brothers but also to ESI as well.[11]

The government's "gag rule"—which the district court also ignored—raises the stakes even higher. Once the Form has been delivered to a TPA, there is no way for the Little Sisters to prevent it from providing religiously objectionable drugs to its employees. That is because the government's regulations prohibit the Little Sisters from "directly or indirectly seeking to influence a third party administrator's decision to provide or arrange such payments." 78 Fed. Reg. at 39879-80. In *Reaching Souls*, the government admitted that these regulations prohibit a church plan employer from threatening to walk away from a TPA that uses its Form to provide coverage and collect bonus payments from the government. *See* JA679a-80a. Tellingly, the Mandate makes no provision for an employer to revoke EBSA

[10] Fortune 500 (2013), http://money.cnn.com/magazines/fortune/fortune500/2013/full_list/index.html?iid=F500_sp_full; KentuckyOne Online, Benefits Update (Jan. 16, 2014), http://kentuckyoneemployees.org/News-Article/ID/2264/Benefits-Update-Delay-in-Coverage-for-Contraceptive-Services-Prescriptions#.UwUePIWfb8a (noting that ESI is providing contraceptive coverage for employees of a Jewish-Catholic medical system).

[11] Regardless, as noted above, the Little Sisters object to providing the Form to any TPA, including one who shares their religious beliefs such as Christian Brothers Services, and further object to being forced to trigger a legal requirement under which their TPA "shall provide" the coverage at issue. 26 C.F.R. 54.9815–2713A(b)(2); JA155a, 157a-58a, 343a-45a.

Form 700 once executed and delivered. So signing and sending the Form is a one-way street: once the Little Sisters have delivered the Form authorizing their TPAs to provide religiously objectionable drugs, they have no way to go back and prevent them from acting on that authorization. The district court erred when it ignored these aspects of the government's scheme.

c. The purpose of the Form is to authorize the provision of contraceptive services to the Little Sisters' employees.

The district court concluded that the "accommodation" scheme did not burden Appellants' religious exercise because "the 'sole purpose' of the execution and delivery of the Form is to comply with the Mandate and avoid the substantial penalties for non-compliance." JA 714a. This, too, was legal error, because the district court both re-wrote the Appellants' religious objection and mischaracterized the Form.

In particular, according to federal law, EBSA Form 700:

- Authorizes the Little Sisters' third-party administrators to offer contraceptives to "participants and beneficiaries" in the Little Sisters' health plan, "so long as they remain enrolled in the plan." 78 Fed. Reg. at 39893; *see* 26 C.F.R. 54.9815–2713A(d); 45 C.F.R. 147.131(c)(2)(i)(B).
- Notifies each TPA of its legal "obligations" to offer contraceptive coverage by citing regulations issued under both ERISA and the Internal Revenue

Code. *See* AD2 (citing 26 C.F.R. 54.9815-2713A)); *see also* 78 Fed. Reg. at 39879.

- Incorporates these new instructions into the Little Sisters' existing health plan. AD2 ("This certification is an instrument under which the plan is operated.").
- Enables any TPA who receives the Form to use it to seek federal reimbursement and bonus payments for voluntarily providing contraceptive services to participants in the Little Sisters' health plan. 45 C.F.R. 156.50 (d)(2)(ii).

Without the Form, TPAs have no authority, incentive, or obligation to provide the objectionable drugs and devices. Indeed, the Departments adopted this Form-dependent scheme because they believed that it "best ensure[d] that plan participants and beneficiaries receive contraceptive coverage without cost sharing." 78 Fed. Reg. at 39880. *That* is the "purpose" of the Form.

Finally, the district court erred by ignoring the fact that the government's alleged inability to force TPAs to act on the Little Sisters' contraceptive coverage form is only temporary. While the government claims it lacks authority "at this time" to force TPAs to act on the Little Sisters' Form, it avowed that it would "*continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans*."

JA283a. This two-step approach—"sign the form now, Sister, and we will tell you how we will use it later"—only reinforces Appellants' religious objections to complying with the Mandate. JA343a-45a, 351a-53a.

3. The district court erroneously reinterpreted the Appellants' religious exercise.

The district court's third error is related to its first: instead of accepting the line that Appellants drew, it reinterpreted their objection to explain why the Little Sisters and Christian Brothers *should* feel no religious qualms in signing the papers. To be sure, the district court acknowledged that it was not allowed to "question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief." JA703a. Yet it went on to explain at length why the "particular act" the Little Sisters object to—participating in the government's accommodation scheme by signing and delivering the Form—does not violate their religion after all. *See, e.g.*, JA710a (finding that religious refusal to sign "reads too much into the language of the Form"). The district court concluded that, because the government claimed a lack of authority under ERISA to compel Christian Brothers Services to obey the "shall provide" part of the accommodation scheme, the Little Sisters' objection to signing and delivering the Form is based on "pure conjecture, one that ignores the factual and legal realities of this case." JA713a.

This was error. As this Court has repeatedly held, "it isn't for judges to decide whether a claimant who seeks to pursue a particular religious exercise has correctly perceived the commands of his faith or to become 'arbiters of scriptural interpretation.'" *Yellowbear*, 741 F.3d at 54-55 (citation omitted). It is up to the Little Sisters, not the courts, to decide whether *this level* of participation in the accommodation scheme—executing and delivering the Form—violates their faith.

Other federal courts agree, and have granted injunctions in all seven decided cases involving church plan employers like the Little Sisters. *See supra* n.8. Thus, in *Reaching Souls International*, the Western District of Oklahoma held that the government's accommodation scheme imposed a substantial burden on a church plan and its participating employers because "[r]egardless whether the self-certification form actually results in the provision of . . . contraceptive coverage or services, Plaintiffs believe that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out ACA's contraceptive mandate." 2013 WL 6804259, at *7. And in *East Texas Baptist University*, the district court held that the government's accommodation scheme burdened a church plan employer because "[t]he mandate and accommodation will compel them to engage in an affirmative act and that they find this act—their own act—to be religiously offensive. That act is completing and

providing to their issuer or TPA the self-certification forms." 2013 WL 6838893, at *20. In *Roman Catholic Archdiocese of New York*, the court explained that:

> [P]laintiffs' alleged injury is that the [accommodation] renders them complicit in a scheme aimed at providing coverage to which they have a religious objection. *This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage.* It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. . . . Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, *regardless of the effect on plaintiffs' TPAs*, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

2013 WL 6579764, at *7 (emphasis added) (rejecting the government's argument that its inability to enforce part of its accommodation scheme deprived the religious non-profit organizations of standing).[12]

These courts correctly accepted the religious organizations' *religious* judgment that signing and delivering the Form made them morally and spiritually "complicit" in the government's scheme. The court below erred when it substituted its own judgment for the Little Sisters' and Christian Brothers' to conclude otherwise.

[12] The government made a similar standing argument below, which the district court properly rejected. JA696a-97a.

* * *

"[R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit" legal protection. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). And the Little Sisters and Christian Brothers should prevail on their RFRA claims even if their sincere religious exercise concerning EBSA Form 700 were illogical and unreasonable, because the government is obviously exerting substantial pressure to make them stop. But in light of the Form's status as a grant of legal authority, an instrument of Appellants' plan, an incentive to TPAs, a trigger of obligations under Treasury regulations, and the trigger for the government's gag rule, the religious objection here is entirely reasonable.

II. THE MANDATE VIOLATES THE FIRST AMENDMENT'S RELIGION CLAUSES.

The government's dogged insistence that the Little Sisters and other non-exempt employers in the Trust sign the Form or pay the penalties is also illegal under the Free Exercise and Establishment Clauses of the First Amendment.[13]

[13] These claims were raised at JA60a-62a. The district court denied Appellants' First Amendment claims because it found that "the only argument [Appellants] ma[d]e is that a RFRA violation is always irreparable harm," citing to a portion of Appellants' brief that cited *Hobby Lobby*. JA714a, 716a. The cited analysis in *Hobby Lobby*, however, expressly based the RFRA irreparable injury finding on the undisputed legal principle that the deprivation of First Amendment rights, even for a short period, constitutes irreparable harm. *Hobby Lobby*, 723 F.3d at 1146. Indeed, the court explained that "our case law analogizes RFRA to a constitutional

While the government has exempted other religious objectors from the Mandate (primarily churches and their "integrated auxiliaries"), it has refused to exempt the Little Sisters and similar members of the Trust, even though they are engaged in the exact same religious exercise, seek the exact same relief, *and in some cases use the exact same Trust*[14] as the exempted religious organizations. To put the matter bluntly: if the Little Sisters simply handed their homes over to Catholic bishops, to be funded and controlled directly by their local dioceses, the government would exempt them entirely as "integrated auxiliary[ies]," without requiring them to sign, deliver, or file any form of any kind. *See* 78 Fed. Reg. at 39874; 45 C.F.R. 147.131(a); 26 C.F.R. 1.6033-2(h). But because the Little Sisters instead fund, operate, and control their ministry themselves, they face millions of dollars in penalties.

This type of discrimination among religious organizations is impermissible under the Free Exercise and Establishment Clauses, which prohibit the government from making such "explicit and deliberate distinctions between different religious

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right." *Id.* In light of these well-established principles, and in light of the fact that both parties fully briefed the First Amendment claims below, this Court should reach them here.

Appellants raised additional claims under the Free Exercise Clause (and other laws) that were not part of the preliminary injunction motion, and are not part of this appeal.

[14] *See* JA173a ("The Christian Brothers Trust encompasses both exempt religious non-profit entities and non-exempt religious non-profit entities.").

organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012), namely whether a religious mission is best achieved by ceding control to centralized church authorities. Doing so also requires "discrimination… [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Such discrimination is forbidden by the Religion Clauses.

The government does not deny that it has engaged in this type of discrimination. Instead, the final regulations explicitly depend on the government's assumptions about the likely religious beliefs of people who work for religious organizations like the Little Sisters:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people to

> use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). The government cites no factual authority for these assumptions. The employees of the Appellants all work for openly Catholic institutions that are listed or approved for listing in The Official Catholic Directory and that use a religious benefits provider that does not cover contraceptives. There is no reason to believe Little Sisters' employees are less likely to share their religious beliefs than a Catholic bishop's employees. And the government cites no legal authority for the proposition that it is permitted to discriminate among different religious institutions, giving religious liberty to some and not to others, based on government guesswork about the likely religious beliefs of individuals who work for various ministries. The government has no power to do so. *See Weaver*, 534 F.3d at 1259 (stating that distinguishing religious organizations based on their internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*" and that government cannot engage in such "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]").

The government's discrimination among religious institutions favors those that exercise their beliefs primarily through "houses of worship," "integrated auxiliaries," or "the exclusively religious activities of any religious orders," 78

Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavors denominations that, like the Catholic Church, *also* exercise their religion via other ministries such as health care services. *See, e.g.*, JA241a. But just as a law may not privilege a denomination with "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminat[e] between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), a law cannot prefer denominations that exercise religion principally through "houses of worship[] and religious orders," 78 Fed. Reg. at 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F.3d at 1259. Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (rejecting "the government's argument [that] . . . [r]eligious exercise is protected in . . . the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way").

None of this is permissible. The government is prohibited by the First Amendment from selectively handing out religious exemptions based on the government's views of which organizations are "religious enough" to deserve them.

III. THE MANDATE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

The First Amendment protects Appellants' rights to be free from governmentally compelled speech or silence. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). The Mandate violates both rights.[15]

A. The Mandate compels the Little Sisters to speak against their will, and in a way that contradicts their beliefs.

The Mandate's proposed accommodation requires the Little Sisters to make statements designed to trigger payments for the use of contraceptive and abortion-inducing drugs and devices, and for "education and counseling" about using such products. JA80a, 157a, 161a, 342a-47a; 26 C.F.R. 54.9815-2713A(b)(2). This compels the Little Sisters to engage in speech they wish to avoid: speech furthering a message and activities that contradict their public witness to their religious faith. JA152a, 155a, 158a. And the government cannot "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view" that is "repugnant to [her] moral [and] religious . . . beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707-08, 715 (1977).

[15] These claims were raised at JA63a-64a and denied by the district court at JA 714a, 716a.

It is irrelevant that the government assumes that, since Christian Brothers will not act on the speech and the government cannot (currently) use its ERISA enforcement authority to force them to, there will be no practical effect of the compelled speech. Being compelled to "utter what is not in [one's] mind" is itself the harm, regardless of whether that utterance triggers other actions. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943). When West Virginia forced a school boy to salute the flag, that salute did not trigger any legal authorization, financial incentive, or legal obligation. *Id.* at 627-29. When New Hampshire forced its citizens to bear its message on their license plates, nothing "practical" happened as result. *Wooley*, 430 U.S. at 715; *accord Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013). Yet the Court still rejected the states' "inva[sion of] the sphere of intellect and spirit" as violating "the purpose of the First Amendment." *Barnette*, 319 U.S. at 642; *accord Frudden v. Pilling*, __F.3d__, 2014 WL 575957 (9th Cir. Feb. 14, 2014) (protecting school children from being compelled to wear a public school's "Tomorrow's Leaders" message).

Further, the government bears the burden of demonstrating why it may massively penalize the Little Sisters for declining to speak through the government's contraceptives coverage form, EBSA Form 700. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality

of its actions."). If the government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike [it]," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000), it certainly cannot compel speech *for no purpose at all*. Yet the gravamen of the government's argument is that the speech it is compelling Appellants to utter is essentially meaningless. Surely the government has no interest (and certainly no *compelling* interest) in requiring the Little Sisters to engage in meaningless speech.

Nor does it matter that the Little Sisters can tell their fellow Catholics that the words the government forces them to utter are "words without belief" or are a "gesture barren of meaning." *Barnette*, 319 U.S. at 633. It was no answer in *Wooley* that "plaintiffs could have 'place[d] on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess [the state message they were forced to speak] and that they violently disagree with the connotations of that'" message. *Frudden*, 2014 WL 575957, at *5 (quoting *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting)). Government may not force citizens to lie or to speak out of both sides of their mouths. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement, even for recipients of government funds, because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy").

This is particularly true where, as here, the Little Sisters' faith and pro-life witness instructs them not to mislead others by taking public action that apparently condones abortion or contraception. JA155a, 344a-46a.

Finally, it is likewise irrelevant that the government might believe that the speech it compels here is "non-ideological." The Little Sisters strongly disagree with that, but even if it were true, "[t]he right against compelled speech is not, and cannot be, restricted to ideological messages." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013); *accord Cressman*, 719 F.3d at 1152 ("[I]deological speech is not the only form of forbidden compelled speech.").

B. The Mandate compels the Little Sisters to be silent on specific topics to specific audiences.

The Mandate also expressly prohibits the Little Sisters from engaging in speech with a particular content and viewpoint: they are barred by federal law from talking to their TPAs and instructing them not to provide contraceptive and abortion-inducing drugs and devices, or from saying they will terminate their relationship with them and find a different TPA. *See* JA346a, 26 C.F.R. 54.9815-2713A(b)(iii) (the Little Sisters "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"); JA679a-80a (Counsel for the government stating, in a church plan case, that church plan employers cannot take action "that would cause the TPA to . . . forgo providing this coverage when they otherwise would have," and cannot say "something like, Don't do this

or we're going to fire you," or otherwise "threaten[] them" with ending their contract).

It is no answer to say, as the government did below, that the Little Sisters may tell everyone *but* their TPAs that they do not want their TPA to provide the coverage. A ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech").

Each violation—compelled speech and compelled silence—triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994), which the Mandate fails for the reasons discussed above.[16]

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS

Irreparable Harm. A potential violation of Appellants' rights under RFRA and the First Amendment constitutes irreparable harm. *See Hobby Lobby*, 723 F.3d at 1146; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Without relief, that harm will occur as soon as the Supreme Court's injunction lifts.

[16] Further, even if the Mandate's speech requirements were "unrelated to the content of speech," they would still be "subject to an intermediate level of scrutiny," which they would fail due to the same infirmities that cause them to fail strict scrutiny. *TBS*, 512 U.S. at 642. Having repeatedly argued that its Form has no effect, the government cannot possibly have substantial interest, or even a rational interest, in compelling the Little Sisters to sign it.

The Balance of Harms. The Tenth Circuit has recognized the considerable importance of an entity's religious liberty interests, the substantial burden that the Mandate places on those interests, and the government's lack of a compelling interest in enforcing the Mandate. *See Hobby Lobby*, 723 F.3d at 1141, 1143-44, 1145-46. Thus, it has upheld determinations that the balance of harms favors religious claimants. *See Newland v. Sebelius*, __F. App'x__, 2013 WL 5481997, at *3 (10th Cir. Oct. 3, 2013). First Amendment speech interests are equally important. Granting preliminary injunctive relief will merely preserve the status quo and extend to Appellants what the government has already categorically given numerous other employers, *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), and has acquiesced to in many related cases. *See*, *e.g.*, Order, *Tyndale House Publishers v. Sebelius*, No. 13-5018 (D.C. Cir. May 3, 2013); Order, *Bick Holdings Inc. v. Sebelius*, No. 4:13-cv-00462 (E.D. Mo. April 1, 2013). Further, the government's litigation position makes this factor particularly easy: the government asserts that forcing the Appellants to sign and deliver the form would have no effect of advancing the government's objectives.

Public Interest. As courts have recognized when granting injunctions against the Mandate for similar religious objectors, "there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]." *Newland*, 881 F. Supp. 2d at 1295 (quoting *O Centro v.*

Ashcroft, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd*, *Gonzales v. O Centro*, 546 U.S. 418 (2006). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights," including those protected by RFRA. *Hobby Lobby*, 723 F.3d at 1147. In any case, the government's arguments about the effect of EBSA Form 700 foreclose it from arguing there is any serious public interest in forcing the Little Sisters to sign it.

V. SCOPE OF RELIEF

This Court should enter an injunction protecting all non-exempt Catholic ministries that receive health benefits through the Trust. This case was filed as a class action on behalf of all non-exempt Trust participants, JA16a, and the government did not object to a classwide injunction below. JA296a ("[D]efendants do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint."). In fact, the government asked the district court to delay briefing of Appellants' motion for class certification based on its agreement to class-wide relief at the preliminary injunction stage. Def's Mot. for Extension, Dkt. 35 at 2-3.

Even without the government's express agreement, classwide relief would be appropriate here in light of the scope of the harm to be prevented during the pendency of the matter. *See O Centro*, 389 F.3d at 977 (explaining that "[t]he underlying purpose of the preliminary injunction is to 'preserve the relative

positions of the parties until a trial on the merits can be held'" (citation omitted)). In this case, preservation of the *status quo* is to prevent the impermissible government pressure to give up the religious exercise of providing, administering, and offering a health benefits plan consistent with Appellants' faith. For the Little Sisters, an injunction is required that permits them to continue participation in the Trust without application of the Mandate. For the Trust and Christian Brothers Services, preserving the status quo requires an injunction permitting them to continue offering the Trust to all class members without facilitating access to the products and services at issue, and without risk of penalty to participants of the Trust. A preliminary injunction allowing the Trust to continue offering its plan—and allowing employers to continue using it without facing penalties—is necessary to spare the Trust from the illegal coercion imposed by the Mandate and described above.[17] *See Kansas Health Care Assoc. v. Kansas Dept. of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994); *see e.g. O Centro*, 546 U.S. 418 (affirming preliminary injunctive relief that protected not only the plaintiff church and its

[17] *See* 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1785.2 (1986 & Supp. 1994); *Washington v. Reno*, 35 F.3d 1093, 1103-04 (6th Cir. 1994); *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1304-05, 1308-09 (4th Cir. 1992); *Bresgal v. Brock*, 843 F.2d 1163, 1165, 1169-71 (9th Cir. 1987); *see also Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 283 F. Supp. 2d 1151, 1158, 1171 (D. Colo. 2003) (permanently enjoining the FTC from enforcing regulation against anyone, nationwide), *rev'd on other grounds*, 358 F.3d 1228 (10th Cir. 2004).

members, but also separately protected any other "bona fide participants in [church] ceremonies for religious use of hoasca."); JA227a-37a.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument in order to clarify the issues in this appeal and respond to questions presented by this appeal. Appellants submit that oral argument is necessary because this appeal presents issues of exceptional importance currently pending before this and several other circuits.

Respectfully submitted this 24th day of February 2014,

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CERTIFICATE OF SERVICE

I certify that on February 24, 2014, I caused the foregoing to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,774** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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