No. 13A691

In the Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

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

The temporary injunction issued Tuesday night saved Mother Provincial Loraine Marie Maguire from the choice of violating her faith by executing the government's required form, or exposing the Little Sisters' ministry to decimation by IRS penalties. She exercised her religion that night, and each day since, by acting in accordance with God's will as she understands it. The temporary injunction protected, and continues to protect, that religious exercise.

That injunction should remain in place. First, in 18 of 19 other cases raising this issue, the lower courts have granted similar injunctions. An injunction here would standardize the cases, preserve the status quo and allow them to proceed without any other religious groups being coerced to violate their consciences. The Little Sisters' chance to exercise religion *now*—a right guaranteed by federal law—will be lost forever if not protected today. It will be cold comfort to the Little Sisters to learn that they may be able to resume exercising their religion in the future.

In response to this request for normalized treatment across an important group of cases—which would save the Applicants from being forced to violate their religion or suffer enormous fines—the government argues, essentially, that its form is meaningless and Mother Loraine should just sign it. That argument rests on the spurious claim that the certification form at issue is merely an "orderly means of permitting eligible individuals and entities to declare that they intend to take advantage of" an "exemption" from the mandate. Resp. 33. That claim is false: it is contradicted by Respondents' public statements, by the text of the regulations, by the text of the form, and by Respondents' more forthcoming discussion of the form's legal effect in other courts. *See* Application at 9-11.[1] Tellingly, Respondents require no such "orderly means" for those religious organizations (unlike the Little Sisters) whom they have *actually* "exempted" from the mandate. Resp. 11. Yet Respondents continue to insist that their minimalist characterization of the form must control the Little Sisters' *religious* determination about whether they can execute the form, even though six of the seven church plan cases have now

[1] For example, in the *Reaching Souls* case, the government acknowledged that its form was also the key to the "carrot" part of its regulations, in that the form entitles its holder to generous federal repayments, complete with ten percent additions for margin and overhead. Application at 10 n.6. Respondents nowhere deny that effect here—they simply ignore it.

entered injunctions protecting those plaintiffs from having to fill out the forms in violation of plaintiffs' religious faith.[2]

Respondents are simply blind to the religious exercise at issue: the Little Sisters and other Applicants cannot execute the form because they cannot deputize a third party to sin on their behalf. Respondents' casual dismissal of that religiously forbidden act as a mere "stroke of their own pen," Resp. 21, perpetuates their claim below that the Little Sisters are fighting an "invisible dragon." Dkt. 44 at 1. But minimizing someone's religious beliefs does not make them disappear.

Alternatively, this Court should consider a grant of *certiorari* before judgment. This dispute is unique: it is playing out in dozens of courts across the country, with most having obtained the protection of injunction, but not all. Allowing this to run its course without this Court's supervision means some religious organizations will be forced into either hypocrisy or financial ruin, while others are protected. This state of affairs is not tolerable. Religious organizations rightfully receive "special solicitude" in our system, *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 706, because of their important role as

[2] As further discussed below (at I.A), Respondents cite the Application's then-correct statement that, as of the afternoon of New Year's Eve, church plan cases had split 3-3. Resp. 25-26. Respondents must know, however, that later that night injunctions were entered in some of those cases, meaning that now their characterization has been rejected in six of seven cases where it has been proffered. *See Roman Catholic Archbishop of Washington, et al. v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (entering injunction pending appeal in church plan case); *Michigan Catholic Conference, et al. v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Catholic Diocese of Beaumont* v. *Sebelius*, No. 1:13-cv-709 (E.D. Tex. Jan. 2, 2014) (granting permanent injunction in church plan case); *see also Roman Catholic Archdiocese of New York* v. *Sebelius*, No. 12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (granting preliminary injunction in church plan case); *Reaching Souls Int'l, Inc.* v. *Sebelius*, No. 5:13-cv- 1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *E. Texas Baptist Univ. v. Sebelius*, No. 12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013) (granting permanent injunction in church plan case).

"critical buffers between the individual and the power of the State." *Id.* at 712 (Alito, J., concurring). Particularly where the Court is already poised to consider other religious liberty challenges to the same mandate in the *Hobby Lobby* and *Conestoga Wood* cases, these factors make this a case "of such public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Alternatively, the Court could hold the petition, with the injunction in place, and either wait for the *Hobby Lobby* decision or consider the petition with other non-profit cases that will eventually arrive.

The only solution that makes no sense is the one the government seeks—letting the injunction expire and exacting from the Little Sisters huge fines as the price of continuing to exercise their religion. That outcome would be wrong even if the government claimed its form mattered. But here—where the government openly admits that executing the form is, from the government's perspective, meaningless paperwork—that outcome is indefensible.

I. An Injunction Should Be Granted Under the All Writs Act

A. Applicants' Right to Relief is Indisputably Clear

While the Court will not issue a writ of injunction unless the legal rights at issue are "indisputably clear," that threshold has been met. As of the filing of this Reply, lower courts have granted injunctive relief covering 95% of other cases challenging the application of the Mandate's contraceptive coverage requirement to non-profit religious organizations.[3] This rate

[3] At the time the Application was filed, 12 district courts had enjoined the Mandate and one had issued a temporary restraining order. *See* Application n.10. Since the Application was filed on Wednesday, the Sixth and D.C. Circuits have entered injunctions pending appeal in four additional cases. *Priests for Life, et al.* v. *Health and Human Services*, No. 13-5368 (D.C. Cir., Dec. 31, 2013); *Roman Catholic Archbishop of Washington, et al.* v. *Sebelius*, No. 13-5371 (D.C. Cir., Dec. 31, 2013); *Catholic Diocese of Nashville* v. *Sebelius*, No. 13-6640 (6th Cir., Dec. 31, 2013); *Michigan Catholic Conference, et al.* v. *Sebelius*, No. 13-2723 (6th Cir., Dec. 31, 2013). And one additional district court has entered a permanent injunction in a church plan case involving two Christian Brothers plan participants. *Catholic Diocese of Beaumont* v.

of unanimity among lower courts – under the time constraints imposed by the Mandate – is extraordinary and more than sufficient to meet the "indisputably clear" standard. *Cf. In re Chicago, Rock Island and Pacific R.R Co.*, 794 F.2d 1182, 1185 (7th Cir. 1986) (Easterbrook, J.) ("[T]here is an unavoidable rate of error in all legal decision making.").

The most telling overstatement of the "divergence of opinion" and "conflicting results" in the lower courts appears in the government's description of the split on church plan cases. The government accurately quotes Applicants' early Tuesday evening statement that "the split on outcome has been three to three." Resp. at 25-26. The government does add the *Beaumont* decision, in which the court granted a permanent injunction in a church plan case.[4] That moved the "split on outcome" to 4-3. But the government neglects to count the D.C. Circuit and Sixth Circuit decisions issued late Tuesday evening (in which Respondents are, of course, parties, and which were supplied by Applicants as supplemental authority to both this Court and the government the same night). Both of those decisions granted injunctions in "church plan" cases. *See supra* n.2. In this subcategory of cases, then, the "split on outcome" in the lower

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Sebelius, No. 1:13-cv-00709-RC (E.D. Tex. Jan. 2, 2014). Only one religious non-profit plaintiff, the University of Notre Dame, remains without protection. *Univ. of Notre Dame* v. *Sebelius*, No. 13-3853 (7th Cir. Dec. 30, 2013) (emergency motion for injunction denied and expedited briefing schedule set). Thus 18 out of 19 or 94.7% of other cases have resulted in preliminary injunctions allowing the religious organization to litigate its claim without facing the existential choice between fidelity to religious belief and financial catastrophe.

[4] The injunction in *Beaumont* was permanent (not preliminary as the government states, Resp. at 26 n.5). *See Catholic Diocese of Beaumont* v. *Sebelius*, No. 1:13-cv-00709-RC (E.D. Tex. Jan. 2, 2014) ("Plaintiffs are entitled to a permanent preliminary injunction. To re-state the Order signed on December 31, 2013 [Doc. # 32], the government is enjoined from applying or enforcing the regulations that require the Plaintiffs, their health plans, TPAs, or issuers, to provide or execute the self-certification forms that enable or require the TPA or issuer to provide health insurance coverage for Plaintiff's employees for FDA-approved contraceptives, emergency contraceptives, products, or services . . . .). Moreover, the *Beaumont* decision created a split among participants in the Christian Brothers Employee Benefits Trust because two Trust participants are beneficiaries of that injunction. *See* Application 39 n.19.

courts is actually 6-1 (an eighty-six percent loss for the government on injunctions in church plan cases).

These splits highlight the anomalous treatment to which the government seeks to expose the Little Sisters. In church plan cases, the Little Sisters of the Poor and other plan members of the Christian Brothers Trust stand alone as potentially exposed by lower courts to the government's fines as the price of litigating their case to conclusion. This Court's temporary injunction has prevented that hammer from dropping, and keeping the injunction in place would essentially standardize the cases, preserve the *status quo*, and allow for an orderly litigation process. But the government asks this Court to lift that injunction and let the government drop the hammer on the Little Sisters alone among all the church plan plaintiffs that have sought relief under RFRA. That is inequitable. The uniform treatment accomplished by the existing temporary injunction—and not the singling out of the Little Sisters for immediate and harsh differential treatment unshielded by the judiciary—is much closer to the "ordinary course," Resp. at 24, that this Court's supervision can provide.

B. Applicants Face Irreparable Harm That Cannot Be Avoided by Respondents' Claim That Applicants Should Sign the Form.

Absent relief, Applicants' civil liberties will be irreparably violated, and this Court will have lost its ability to provide full and complete relief at a later date. *See Lucas* v. *Townsend*, 486 U.S. 1301 (1988) (Kennedy, J.) enjoining referendum pending appeal of denial of Voting Rights Act challenge); *American Trucking Ass'n* v. *Gray*, 483 U.S. 1306 (1987) (Blackmun, J.) (granting injunction pending final decision). Notably, Respondents nowhere dispute that Applicants face ruinous fines for their religious refusal to sign the forms. Nor do they offer this Court even a rational basis (much less a compelling one) for putting the Little Sisters and other Christian Brothers plan members to this choice.

Respondents' only answer on irreparable harm is to tell the Little Sisters that they should just go ahead and do what their religion forbids: sign the forms. The government's repetition of that false solution does nothing to extinguish the irreparable harm Applicants face if the injunction is lifted. Nor does that same "sign the forms" argument work to make Applicants' right to relief under RFRA any less "indisputably clear" than it is. Under a properly conducted substantial burden analysis, the threat of massive fines is of course a substantial burden on religious exercise. Application at 18-20.[5]

Respondents attempt to justify overriding Applicants' religious beliefs by arguing that the forms are needed "to provide for regularized, orderly means of permitting eligible individuals or entities to declare that they intend to take advantage of them. That is what the self-certification under the regulations accomplishes, and it does so by requiring only that employer-applicants say something that they have said repeatedly in this litigation, namely, that they object on religious grounds to providing contraceptive coverage to their employees." Resp. at 33. This justification

[5] The government uses *Hobby Lobby v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers), to argue that this Court can deny the Applicants relief and the Applicants can still live to fight another day. Resp. at 24. This is wrong. First, Hobby Lobby was only able to afford to "continue[] to litigate [its] claim," Resp. at 23, because it changed the start of its plan year date and thus staved off the application of the fines for six more months. *See* Brief of Appellants at 11, *Hobby Lobby v. Sebelius*, No. 12-6294 (10th Cir. Feb. 2, 2013) (noting that, after their application's denial, plaintiffs "learned they could delay the effective date of the Mandate by retroactively modifying Hobby Lobby's health plan"). Second, unlike the application denial in *Hobby Lobby*, which came on December 26, 2012—five days before the HHS Mandate's deadline for for-profit entities—the deadline for religious non-profits to comply with the HHS Mandate has already passed. Even if Applicants *could* change their plan year dates, it is too late. If this Court removes the relief it has granted, Applicants' fines will at least start immediately—and perhaps could have already started. Finally, the harm to Applicants comes from applying overwhelming government pressure to do something that violates their faith (signing the government's permission slip). The moment that illegal pressure is brought to bear, the harm will be irreversible. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *Korte* v. *Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) ("RFRA protects First Amendment free-exercise rights"). Thus, denying Applicants relief will immediately and irreparably injure them.

is pure litigator-penned fiction – it bears no relation to the form's purpose and effect as set forth in federal law. Respondents do not need this form to provide the accommodation. The Court need only look to the Mandate's exemption for "religious employers"; absolutely no form of any kind is needed to account for or elect the "religious employers" exemption. Clearly, if "religious employers" do not need to supply a form, such forms are not needed to declare an exemption or accommodation.

Respondents' Self-Certification Form is not merely an "opt-out." As the overwhelming majority of courts have recognized, Respondents have designed a regulatory scheme in which the Form acts as a "permission slip" that authorizes and in some cases commands another organization to provide objectionable drugs to the Little Sisters' employees within the terms of the Little Sisters' health plan. *See, e.g., Southern Nazarene Uni*v., 2013 WL 6804265, at * 8; *see also* Application n.10 (collecting cases). Yesterday, the district court in *Diocese of Beaumont*, a church plan case involving two Catholic organizations that receive benefits through the Christian Brothers Trust, put it this way:

> According to the Government [the Bishop] need only sign EBSA Form 700, which contains a true statement of his, and the Church's, objection to contraceptive services. But, the regulations provide that "the self-certification **will be treated as a designation** of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits . . . ." 78 FR 39879 (emphasis added). The rule drafters have chosen to be their own lexicographers, and the Government is bound by that choice. Like Humpty Dumpty, politicians may ascribe varied nuances of meaning and intent to their statements. Judicial interpretation of federal regulations requires a more consistent, plain meaning approach."

Catholic Diocese of Beaumont v. *Sebelius*, No. 1:13-cv-00709, at 13-14 (E.D. Tex. Jan. 2, 2014) (emphasis in original) (citing *U.S. v. Woods*, ___ U.S. ___, 134 S. Ct. 557, 566-67 (2013)).

Respondents seek to avoid the plain language of their rule in 78 Fed. Reg. at 39879 by changing the subject: they correctly note that the Little Sisters are part of an ERISA-exempt church plan, but wrongly assert that "'[t]here is no enforceable obligation -- through ERISA or otherwise -- for [a third party administrator of a church plan] to provide any of the objectionable coverage.'" Resp. Br. at 27-28. (quoting Court of Appeals Order 2). That is false. The Self-Certification Form commands third party administrators to obey regulations promulgated under both ERISA and the Internal Revenue Code.[6] Treasury Regulations apply to church plans as much as they apply to all other plans, and the Treasury Regulations cited in the Self-Certification Form state that third party administrators that receive a Self-Certification Form "shall provide or arrange payments for contraceptive services."[7] The plain language of Respondents' Treasury Regulations applies equally to all third party administrators, regardless of whether they serve church plans. Respondents have no answer, and simply ignore their own regulations.

The effect of the Self-Certification Form does not end there. *First*, Respondents admit that once the administrators have the Forms—and only once they have the forms—they are *authorized* to provide the objectionable contraceptive services. Respondents thereby admit that upon receiving the Form, a TPA "could theoretically choose to provide contraceptive coverage in the manner set out in the regulations . . . ." Resp. at 20.

[6] Ex. 5, Dkt. 37-3, Self-Certification Form ("the provision of this certification to a third party administrator for the plan * * * constitutes notice to the third party administrator that * * * [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A [Treasury Regulations], 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.").

[7] "If a third party administrator receives a copy of the self-certification * * * and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services[.]" 26 C.F.R. § 54.9815–2713A(b)(2).

Second, Respondents admit that they will reimburse administrators who have received the Forms and pay them a 10% additional fee for all provided contraceptive services.[8] Accordingly, Respondents admit that the Mandate is structured to provide a financial incentive for TPAs to do so by offering reimbursement plus ten percent *if the TPA gets the form*. Application at 9-10; 45 C.F.R. § 156.60. *Third*, Respondents admit that their regulations forbid church plan participants like the Little Sisters from telling their third party administrators not to act on the authorization contained in the Form.[9]

Finally, Respondents' regulations require the Little Sisters to give a copy of the Self-Certification Form to "all third party administrators with which it or its plan has contracted" and expressly contemplates that a plan may have more than one and expressly contemplate that a 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." 78 Fed. Reg. at 39879 & n.40. "Third party administrator" is a term of art in benefits law and is left largely undefined in Respondents' regulations. Despite months of litigation, Respondents have never clarified whether they expect Little Sisters to provide forms to Express Scripts, Inc. as well as Christian Brothers Services. The Little Sisters and other

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[8] In a December 16 hearing in another church plan case, Respondents admitted that the form can be used by the third party administrators of church plans to seek reimbursement plus 10% from the federal government, and that without the form, federal reimbursement is not available. Dkt. 51-1 at 10 (Dec. 16, 2013 Hrn'g Tr. at 96:15-18, *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092 (W.D. Okla.)) (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."), *id.* at 91:12-25 (district court noting that the TPA "not only gets to be reimbursed but [it] get[s] a 10-percent bump for their margin as well").

[9] Dkt. 51-1 at 12-13 (Applicants may not make statements "caus[ing] the TPA to—to forgo providing coverage when they otherwise would have" and would "prevent [Applicants] from saying something like, Don't do this or we're going to fire you").

Christian Brothers participants receive pharmacy benefits administered by Express Scripts, Inc., a secular organization that does not share their Catholic beliefs.[10] Christian Brothers Services may be brave enough to defy Respondents' direct regulatory command, and strong enough to resist the lure of federal reimbursement. Other organizations, such as the secular pharmacy benefits provider Express Scripts, may not be.[11] If the Little Sisters must tender the form, and if either one of them gives way, the Little Sisters have no recourse, because Respondents' regulations forbid them from directly or indirectly

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[10] Contrary to Respondents' allegations, Brother Quirk of Christian Brothers filed a declaration on Christian Brothers' relationship with Express Scripts below:

> Express Scripts, Inc. ("ESI") provides on behalf of Christian Brothers Services certain administrative services in connection with pharmaceutical benefits under the Christian Brothers Trust. It is not clear to Plaintiffs whether ESI is a third party administrator under the Mandate for the Christian Brothers Trust. It is also not clear to Plaintiffs whether or not ESI will provide contraceptives to employees (and beneficiaries of such employees) of employers that have adopted the Christian Brothers Trust and provide ESI with a copy of a self-certification form pursuant to 26 U.S.C. § 54.9815-2713A before December 31, 2013, or thereafter. 3. This great uncertainty with how contraceptive coverage may be handled under the Christian Brothers Trust is a matter of immediate and urgent concern for Plaintiffs.

Application Ex. 10, Dkt. 42-2 ¶ 2; *see also* Dkt. 42-4 (same); Dkt. 42-2 at 36 (noting that the gag rule prevented Applicants from fully communicating with ESI).. ESI also factored in other filings by the Applicants. *See* Dkt. 37-1 at ¶9 (noting uncertainty as to the identity of the Little Sisters' TPA and the Little Sisters religious belief that they cannot provide self-certification to *any* TPA, Christian Brothers or otherwise); Dkt. 42-4.

[11] *Reaching Souls* v. *Sebelius*, No. 5:13-cv-1092-D, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013) (noting, in a church plan case involving the largest church plan in the nation, GuideStone Financial Services of the Southern Baptist Convention, that "at least one TPA for GuideStone, Highmark, has adopted a plan to carry out the accommodation. Regardless whether Highmark is compelled to comply or does so voluntarily, Plaintiffs' concern for apparent complicity in the accommodation is not unfounded"); *see also* Dkt. 51-1 at 5 (noting that HighMark, a major third party administrator for the largest church plan in the nation, GuideStone Financial Services of the Southern Baptist Convention, could choose to give the now-authorized contraceptive benefits to plan beneficiaries if it received the Forms from GuideStone plan participants).

seeking to influence a third party administrator's decision to provide or arrange" payments for contraceptive services. 78 Fed. Reg. at 39879-80.

Respondent acknowledges that Applicants do not currently contractually offer this coverage, Resp. at 20. But by law that situation changes the moment the form is tendered and becomes incorporated as **"an instrument under which the plan is operated**" and notifies TPAs that their obligations are set forth under IRS regulation 26 C.F.R. 2590.715-2713A, which authorizes and requires payment under the IRS regulations for contraceptives and abortion-inducing drugs. Dkt. 37-3 (reproduced as Appdx. Ex. 5) (emphasis added). But for Applicants signing and submitting these self-certification forms, there would be no contractual or statutory basis for providing contraceptives and abortion-inducing drugs under Applicants' plan. To make matters worse, Respondents have acknowledged that Applicants can neither instruct their TPAs not to provide contraceptives, sterilization, and abortion-inducing drugs nor can they terminate a TPA for doing so. Dkt. 51-1 at 112-13 (Respondents' counsel noting that nonprofit religious entities cannot take action "that would cause the TPA to -- to forgo providing this coverage when they otherwise would have" and cannot say or do "something like, Don't do this or we're going to fire you, from threatening them."). Hence, by requiring Applicants to sign and utilize these certification forms, Applicants are forced to initiate and facilitate the very thing which they religiously oppose and become morally complicit in sin.[12]

[12] As Judge Rosenthal explained in the *East Texas Baptist University* case:

> The act of self-certification does more than simply state the organization's religious objection to covering or paying for its employees to get emergency contraception. The self-certification act designates the organization's TPA as the

As Applicants have noted, the specific religious exercise at issue that is protected by this Court's temporary injunction and that Applicants seeks to maintain is the refusal to sign the form that the government insists Applicants must sign (even though all the other church plan plaintiffs are protected by an injunction). If the government's threat of massive fines causes Mother Loraine Marie Maguire and other Little Sisters to sign a form for each home, the harm of that forced choice cannot be undone. Nor is it reasonable to be confident that this litigation would continue to its conclusion if the Little Sisters were to refuse to sign the forms. *See* Dkt. 15 at 4-5 (listing the estimated fines for the two named Little Sisters Applicants to be nearly $4.5 million per year, the total harm to all Trust-participant applicants to be $402,741,000 per year, and the estimated $130,000,000 in annual medical plan contribution losses and $10,400,000 in net revenue losses for Christian Brothers Services and the Trust). The government states that "challenges to the Departments' accommodations for religious non-profits with religious objections to contraceptive coverage are pending in multiple courts of appeals." Resp. at 24. But the government does not acknowledge that, *in all of the other church plan cases that are pending*, those challenges are proceeding under the protection of injunctive relief.

II. Certiorari Before Judgment is Appropriate

> TPA for contraception coverage. The act tells the TPA or issuer that it must provide the organization's employees coverage that gives those employees free access to emergency contractive devices and products. That act tells the TPA or issuer that it must notify the employees of that benefit. ... But the self-certification form requires the organizations to do much more than simply protest or object. The purpose of the form is to enable the provision of the very contraceptive services to the organization's employees that the organization finds abhorrent. The form designates the organization's chosen TPA as the administrator for such benefits and requires the organization's chosen issuer or TPA to pay for the religiously offensive contraceptive services. The purpose and effect of the form is to accomplish what the organization finds religiously forbidden and protests.

__F. Supp. 2d__, 2013 WL 6838893, at *20 (S.D. Tex. Dec. 27, 2013).

The government offers garden-variety reasons for this Court to follow its usual approach of waiting for judgment in the court of appeals. Resp. at 23-24. This is not a garden-variety situation. For several reasons, this is a "case of such public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

First, this case concerns the ability of religious organizations to operate according to their sincere religious beliefs and to do so without facing crushing government fines imposed for failing to fill out what the government considers meaningless paperwork. While most lower courts have now come to the correct conclusion that preliminary injunctive relief is appropriate, this Court's intervention can stop a situation in which the Nation's religious institutions face dramatically different requirements, with some forced into either hypocrisy or financial ruin, while others receive the shelter of (at least temporary) judicial protection. Religious institutions play an important role in society, and leaving them subject to such differential treatment by the government, on such important issues, is harmful to the Nation. *See Hosanna-Tabor*, 132 S. Ct. at 706 (noting our system's "special solicitude" for such organizations). Allowing the injunction to expire and leaving Applicants without protection would mean hundreds of organizations would remain subject to illegal government coercion that jeopardizes their continued ministries. The slight advantages that could be gained from waiting for further percolation of this issue—which has already generated more than 20 lower court opinions—do not outweigh the significant disruption and distortion to the religious landscape Respondents would impose, especially for something Respondents claim to view as meaningless.

Second, there is a two-two circuit split on the requests for preliminary injunction pending appeal. The existence of such a split is an important marker of the need for this Court's review.

But looking only at the circuit court level understates the national importance of promptly and definitely resolving the issues presented by this case. Although the number of cases in which injunctions have now been granted is extremely high relative to injunctions denied (18-1 in other cases), those numbers together with the two-two circuit split still understate the importance of the issue. Almost all of the twenty cases in which federal district courts have ruled on injunctions involve multiple plaintiffs. And two of the cases are putative class actions in which there are hundreds of non-exempt religious nonprofits as absent class members. One of those is this case, in which the proposed class consists of almost five hundred Catholic organizations that participate in the health benefits plan supplied by applicant Christian Brothers Employee Benefits Trust. The other putative class action is *Reaching Souls, Inc. v. Sebelius*, No. 5:13-cv-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013), in which the proposed class consists of nearly two hundred non-exempt Southern Baptist nonprofits who participate in a health benefits plan supplied by GuideStone. These two class actions are on the opposite sides of the above-described split. (In fact, the preliminary injunctive relief supplied in *Reaching Souls* was issued by a federal district court in the same circuit in which Applicants have been denied the same relief.)

"[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States . . . suggest[s] the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved." *Cohens v. Virginia*, 19 U.S. 264, 417 (1821). The authorization of review via writ of certiorari before judgment is an important tool in this Court's jurisdictional toolkit for carrying out this function of ensuring uniformity and correctness in federal-law decisions. Notably, the federal government has not yet appealed, or even sought stays, in any of the 18 cases it has lost. Whatever Respondents' reasons

for (a) not seeking stays when they lose (thus allowing some religious objectors to avoid signing the forms) but (b) aggressively resisting even temporary protection for the Little Sisters here, a grant of *certiorari* before judgment would provide much needed uniformity. The government has offered no explanation of its conduct, but remains adamant that this Court lift Justice Sotomayor's order and put the Little Sisters of the Poor in a different category than all of those other non-exempt religious nonprofits whose conscience is protected while they litigate their claims. That is inequitable and unfair, and the government's silence speaks volumes: it is unjustifiable.

At present, there are a total of forty-five cases in which non-exempt religious nonprofits seek relief from the Mandate. That is about the same as the number of cases (forty-six) in which for-profit corporations have also sought relief. The same reasons that justified the Court's two grants of *certiorari* to address the Mandate's application to for-profit corporations also justify a grant of certiorari to decide the permissibility under RFRA of the federal government's scheme for non-exempt religious nonprofits.

The government argues in its response that the for-profit cases present some different issues from the nonprofit cases. As we acknowledged in our application, that much is true. But there is also considerable overlap. If this case is sent back to the Tenth Circuit or the district court, the RFRA analysis will be controlled by the *Hobby Lobby* case that this Court has granted and set for argument in March. In the alternative to granting this case and setting it for argument, Applicants request the Court to hold the case pending the disposition of *Hobby Lobby* and *Conestoga Wood*.

CONCLUSION

Applicants respectfully request that the temporary injunction remain in place to protect them during the course of further litigation. Respondents have offered no substantive reason to subject the Little Sisters or other Applicants to disparate treatment as the only church plan in the nation in which employers are forced to violate their religion. This is an extraordinary case, and Applicants respectfully request continued relief.

Respectfully submitted,

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