

Case No. 13-1540

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, et al.,

Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the
United States Department of Health and
Human Services, et al.,

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 67 CATHOLIC THEOLOGIANS AND ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are individuals, not corporations. Accordingly, no *amicus* has any parent corporation that owns 10 percent or more of stock.

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INTEREST OF AMICUS CURIAE^{1 2}

Amici curiae are 67 Catholic theologians and ethicists. A complete list of *amici*, with their qualifications and institutional affiliations for identification purposes, is included in the Addendum to this Brief. *Amici* believe that the religious-liberty claims of Appellants Little Sisters of the Poor Home for the Aged, Denver Colorado; Little Sisters of the Poor, Baltimore, Inc. (collectively, “Little Sisters”); Christian Brothers Services; and Christian Brothers Employee Benefit Trust (collectively, “Christian Brothers”) are well founded. Appellants’ objections to complying with the Government’s directive (“the Mandate”) that the Little Sisters execute and deliver EBSA Form 700 (“the Form”) to the Christian Brothers and any other third-party administrators and providers reflect a reasonable application of principles of Catholic moral theology. The Little Sisters may reasonably conclude, based on the Catholic tradition, that executing and delivering the Form would violate their Catholic faith.

Amici Curiae file this Brief with the consent of all parties.

¹ No party’s counsel authored the brief in whole or in part, and no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Counsel for *amici curiae* have applied for a grant from the Alliance Defending Freedom to cover a portion of the costs of preparing this brief, but no funds have been awarded as of the filing date.

² This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

This district court erred by substituting its judgment for that of the Little Sisters on the quintessentially theological question whether executing and delivering the Form in compliance with the Mandate would violate the Little Sisters' religious conscience. The religious objections of the Little Sisters and the Christian Brothers to the Mandate reflect a reasonable application of principles of Catholic moral theology and ethics.

First, the Little Sisters and Christian Brothers can reasonably conclude, based on the Catholic moral tradition, that compliance with the Mandate would involve them in "formal" cooperation with wrongdoing, which is never permissible under Catholic doctrine. "Formal" cooperation in wrongdoing occurs when one commits an action that contributes to or assists another's wrongful act, in such a way that the cooperator shares in the wrongful intention of the other actor. Many theologians in the Catholic tradition have concluded that one who knowingly obeys a command to act in furtherance of a wrongful objective typically shares in the intention to achieve the wrongful objective, even if the cooperation is performed reluctantly or under duress. On this view, obedience to such a command constitutes formal cooperation with wrongdoing, and it is not permissible, regardless of whether the wrongful objective is actually achieved. The Little Sisters may reasonably conclude that, by obeying the Government's directive to

execute and deliver the Form, they would come to share in the Government's intention to achieve the wrongful objectives of providing coverage for, and promoting the use of, abortifacients, contraceptives, and sterilization.

Similarly, applying principles of Catholic moral theology, the Little Sisters can reasonably conclude that executing the Form would involve formal cooperation in wrongdoing, because the Form is a means that is specifically designated and intended for a unique wrongful purpose. The Little Sisters may reasonably infer from the Catholic tradition that executing a form whose sole purpose is to designate and authorize another to perform a forbidden action would necessarily involve sharing in the intention to perform the action. Again, this would constitute formal cooperation with wrongdoing.

Importantly, formal cooperation with wrongdoing is impermissible regardless of whether the wrongdoing actually succeeds. In other words, the Little Sisters may reasonably conclude that their Catholic faith forbids them to execute the Form even if it were true (as the Government contends) that the Form may not trigger any contraceptive coverage because the Government currently lacks a means for enforcing that requirement against some third-party administrators.

Moreover, the Little Sisters can also reasonably conclude that executing the Form would involve impermissible material cooperation in wrongdoing, in violation of Catholic teaching. Material cooperation in wrongdoing occurs when

the cooperator facilitates or assists in the performance of a forbidden action without sharing in the wrongful intention. Material cooperation must be justified by a “proportionate reason” to perform the cooperative action. In this case, the Little Sisters can reasonably conclude that their execution and delivery of the Form would cooperate in or assist in the forbidden actions of providing coverage for, and promoting the use of, abortifacients, contraceptives, and sterilization. The Little Sisters have every reason to doubt the Government’s claim that the Form will not trigger the provision of contraceptive coverage, now or in the future.

Several factors support the Little Sisters’ determination that such material cooperation is impermissible. First, the forbidden actions in this case—abortion, contraception, and sterilization—are grave wrongs under the Catholic faith. The use of abortifacient drugs, in particular, involves the taking of innocent human life in the Catholic view, and is thus particularly grave. Second, the Little Sisters can reasonably conclude that the Form threatens to make them a “but-for” or essential cause of providing such services, which is viewed as an aggravating factor by many Catholic theologians. Third, the Little Sisters may reasonably infer from the Catholic bishops’ categorical denunciations of the Mandate that Church authorities counsel against compliance with the Mandate. Fourth, the Little Sisters can reasonably conclude that there is no proportionate reason that would justify their material cooperation in grave wrongs such as the taking of human life.

In addition, the Little Sisters can reasonably conclude that their compliance with the Mandate would cause “scandal,” or encouraging others to engage in wrongdoing. Scandal is an independent wrong under Catholic doctrine. In particular, the Little Sisters can be reasonably concerned that executing the Form would create the appearance of complicity in the Mandate and would authorize and encourage others to comply with the Mandate. This provides an independently reasonable justification for their objection to compliance with the Mandate, according to the Catholic faith.

In sum, the Little Sisters and Christian Brothers have asserted well-founded objections to compliance with the Mandate from the perspective of Catholic theology. Their view that compliance with the Mandate would violate their religious conscience reflects a reasonable interpretation of the Catholic faith.

ARGUMENT

I. The Little Sisters' Conclusion That Executing and Delivering the Form Would Violate Their Catholic Faith Reflects a Reasonable Application of Principles of Catholic Moral Theology.

The district court in this case improperly substituted its own judgment for that of the Little Sisters on the quintessentially theological question whether compliance with the Mandate would violate their religious conscience. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, Civil Action No. 13-cv-2611-WJM-BNB, 2013 U.S. Dist. LEXIS 180867, at *31 (D. Colo. Dec. 27, 2013) (“*Little Sisters*”). This ruling contravened the Supreme Court’s guidance in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). In *Thomas*, the Supreme Court stated that it would defer to a religious believer’s interpretation of the dictates of his or her own religion unless the claim was “so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.” *Id.* at 715. The judgment of the Little Sisters that compliance with the Mandate would violate their religious conscience is neither “bizarre” nor “clearly nonreligious in motivation.” *Id.* Rather, it reflects a reasonable application of basic principles of Catholic moral theology. Under such principles, the Little Sisters can reasonably conclude that executing and delivering the Form would render them impermissibly complicit in actions that are gravely objectionable under Catholic doctrine, such as abortion, contraception,

elective sterilization, and education and counseling designed to promote such forbidden actions.

Theologians and ethicists in the Catholic tradition employ a well-developed set of concepts to analyze issues of complicity in the immoral actions of others. In ascertaining whether knowingly facilitating or contributing to forbidden actions is morally permissible, Catholic moral theology speaks of “cooperation” in the forbidden actions. “Cooperation,” in this context, is understood broadly as “the participation of one agent in the activity of another agent to produce a particular effect or joint activity.” Russell E. Smith, *The Principles of Cooperation in Catholic Thought*, in *THE FETAL TISSUE ISSUE: MEDICAL AND ETHICAL ASPECTS* 81, 84 (Peter J. Cataldo & Albert S. Moraczewski eds., 1994).

The Catholic tradition draws a distinction between “formal” and “material” cooperation. “Formal” cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. See Orville N. Griese, *CATHOLIC IDENTITY IN HEALTH CARE: PRINCIPLES AND PRACTICE* 387-88 (1987) (“Griese”); Germain Grisez, *THE WAY OF THE LORD JESUS, VOL. 3: DIFFICULT MORAL QUESTIONS* 872-73 (1997) (“Grisez”). “Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending.” Grisez, at 873. “Material” cooperation occurs when the believer foresees that his action will facilitate or assist the performance of the objectionable

action by the third party, but does not share in the principal agent's intention to commit the action. Grisez, at 873; Griese, at 388. Material cooperation is sometimes permissible, and sometimes impermissible. To determine whether it is permissible, one must balance the good one hopes to achieve by cooperating against the nature of the bad action and the closeness of one's contribution to it. Grisez, at 876. A "proportionate reason"—i.e., some good to be achieved that is significant enough to counterbalance the bad action and the closeness of one's complicity in it—is required to justify material cooperation in a forbidden action. Grisez, at 876; *accord* Gary Atkinson et al., A MORAL EVALUATION OF CONTRACEPTION AND STERILIZATION 79-80 (1979) ("Atkinson").

A. The Little Sisters Can Reasonably Conclude That Executing and Delivering the Form Would Involve Formal Cooperation In Wrongdoing, Which Is Never Permissible.

First, the Little Sisters can reasonably conclude that, under Catholic moral theology, executing and delivering the Form would constitute impermissible "formal" cooperation in forbidden actions such as abortion, contraception, sterilization, and the education and counseling programs designed to promote them. Such formal cooperation in grave wrongs would be itself gravely wrongful.

First, the Little Sisters and Christian Brothers have attested that it would violate their religious conscience to "authorize anyone to arrange or make payments for contraceptives, sterilization, and abortifacients"; to "take action that

triggers the provision of contraceptive, sterilization, and abortifacients”; or to “participate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters’ plan employees and other beneficiaries.” *Little Sisters*, 2013 U.S. Dist. LEXIS 180867, at *29-30. These objections are consistent with the judgment that participation in the Government’s regulatory scheme by executing the Form would constitute formal cooperation in grave wrongdoing—a conclusion which reflects a reasonable interpretation of the Catholic faith.

Many theologians in the Catholic tradition have concluded that an agent who obeys a command to perform an action in furtherance of an immoral objective typically comes to share in the immoral intention of the commander, even if the objective is contrary to the agent’s personal preferences or the action is performed under duress. On this view, such an agent engages in formal cooperation with wrongdoing, which is never permissible. For example, since at least the seventeenth century, Catholic moral theologians have discussed the case of a servant who is ordered by his master to hold a ladder against a house so that the master may ascend and enter a window to commit a forbidden action, such as burglary or adultery. *See, e.g.*, G.E.M. Anscombe, *War and Murder*, in *NUCLEAR WEAPONS AND THE CHRISTIAN CONSCIENCE* 58 (Walter Stein ed. 1981) (“Anscombe”) (discussing this hypothetical); *see also, e.g.*, Juan Cardenas, *Crisis*

theologica, in qua plures selectae difficultates ex morali theologia ad Lydium veritatis lapidem revocantur. Ex regula morum posita à ss. D.N. Innocentio 11. P. M. in diplomate damnante sexaginta quinque propositiones (Cologne: Joannis Widenfelt & Godefridi de Berges, 1690), diss. 31, ¶1. Many Catholic theologians have concluded that such a hypothetical servant, by obeying the command, formally cooperates in the master’s scheme, and thus shares in the master’s immoral intention of committing burglary or adultery. *See* Anscombe, at 58. Under Catholic moral theology, such formal cooperation is impermissible, even when committed under duress, and regardless of whether the master actually succeeds in perpetrating the wicked action. Thus, many Catholic theologians and philosophers (including G.E.M. Anscombe) would reject the view that “it is all right for a servant to hold the ladder for his criminous master so long as he is merely avoiding the sack by doing so.” *Id.* Indeed, as Anscombe notes, Pope Innocent XI issued a bull in 1679 that rejects this view as well. *See id.*

The Little Sisters can reasonably conclude that the Mandate places them in a situation analogous to the servant who obeys a command to participate in the master’s immoral scheme. On this view, from the Little Sisters’ perspective, the “criminous master,” *id.*, is the Government, which is attempting to implement a program designed to promote the use of contraceptives and abortifacients. Indeed, it is beyond dispute that the purpose of the Mandate is to promote the availability

and usage of contraceptives, abortifacients, and elective sterilization, as the district court conceded. *See Little Sisters*, 2013 U.S. Dist. LEXIS 180867, at *6. This objective is plainly impermissible under Catholic doctrine. *See infra*, Part I.B.1. Moreover, it is eminently reasonable for the Little Sisters to conclude that the Government's directive to execute and deliver the Form is for the purpose of furthering this plainly impermissible objective. Accordingly, the Little Sisters can reasonably conclude, based on Catholic principles, that executing and delivering the Form would constitute formal cooperation in wrongdoing.

If performed, such formal cooperation would be impermissible no matter how strongly the Little Sisters might object to such actions in their hearts. This is because it would amount to choosing an immoral means (formally cooperating with wrongdoing) to achieve an otherwise acceptable end (being in compliance with the law), which, no matter how reluctantly performed, is never permissible under Catholic doctrine. *See Catechism of the Catholic Church* ¶ 1753 (1994) (“Catechism”). By submitting the Form with knowledge of the Government's objectives, on this view, the Little Sisters would be joining the Government's intention to promote the use of abortifacients, contraceptives, and sterilization, and thus become complicit in that action.

Moreover, such formal cooperation would be impermissible *regardless of whether the Government actually succeeds* in its objective of promoting the use of

contraceptives, abortifacients, and sterilization. *Compare Roman Catholic Archdiocese of New York v. Sebelius*, No. 12-cv-2542, 2013 U.S. Dist. LEXIS 176432 (Dec. 16, 2013) (“This alleged spiritual complicity is independent of whether the scheme actually succeeds in providing contraceptive coverage.”). The district court rejected the Little Sisters’ RFRA claim principally because the delivery of the Form may (supposedly) not actually succeed in promoting the forbidden actions. *Little Sisters*, 2013 U.S. Dist. LEXIS 180867, at *48-*49. The district court reasoned: “The purpose of the Little Sisters and the Trust executing and delivering the Form to their third party administrator is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters’ plan employees or other beneficiaries. It is clear that these services will not be offered to the employees regardless of whether the Form is executed and delivered to Christian Brothers Services.” *Id.* at *49. The district court’s reasoning plainly confuses “purpose” with “effect.” Regardless of whether the *effect* of delivering the Form is actually to trigger the provision of services, the Little Sisters may reasonably conclude that promoting such services is the *purpose* of the Form. And they may reasonably conclude that, by executing the Form, they would come to share in that impermissible purpose, and thus become formally complicit in wrongdoing. In other words, the Little Sisters’ claim that it would violate their religious conscience to “participate in a scheme, the sole purpose of which is to provide contraceptives,

sterilization, and abortifacients to the Little Sisters’ plan employees and other beneficiaries,” *id.* at *30, regardless of whether the scheme actually succeeds, reflects a reasonable application of Catholic theological principles.

For similar reasons, under principles of Catholic moral theology, the Little Sisters can reasonably conclude that executing the Form that is specifically designated and intended to authorize others to engage in gravely wrongful actions would involve formal cooperation with wrongdoing, regardless of whether the others actually perform those actions.

The Little Sisters assert that it would violate their conscience to “sign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters’ employees and other beneficiaries now.” *Id.* at *29. Again, this conclusion reflects a reasonable application of Catholic moral principles. In the Government’s regulatory scheme, the Form is, in effect, a certificate that designates and authorizes a third party to engage in forbidden actions. Catholics may reasonably conclude that providing such a certificate is analogous to providing a means that is specifically tailored for use in forbidden action, and thus involves formal complicity in the intention to perform such actions, regardless of whether the actions are carried out by the third party. In other words, if you provide someone with an item that is specifically designed for a specific use (such as a gift certificate for a specific product, or a

form that authorizes a specific act), one may reasonably conclude that you consent to the performance of the designated action. If that action is wrongful, your consent is immoral under Catholic doctrine.

An illustrative example of this principle arose in Germany in the late 1990s. In 1995, Germany legalized abortion during the first trimester, “provided that the woman had a certificate that she had attended ... an approved counseling center” before seeking the abortion. Bishop Anthony Fisher, O.P., *Cooperation in evil: understanding the issues, in COOPERATION, COMPLICITY & CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW, AND PUBLIC POLICY 27, 54* (Helen Watt ed., 2005). The certificate of the counselor authorized the woman to receive an abortion. Certain German bishops, while condemning the abortion law, sought to have Catholic counselors participate in the state-approved counseling program. *Id.* at 47. These bishops anticipated that Catholic counselors would tend to dissuade women from having abortions, and that the participation of Catholic counselors would thus reduce the overall number of abortions. *Id.* Thus, these bishops reasonably anticipated that the participation of Catholic counselors in the program would actually prevent abortions from happening.

Notwithstanding these beneficial anticipated effects, the program came under papal scrutiny. In 1998, Pope John Paul II authored a letter to the German bishops, calling on them to “take care that ... ecclesiastical institutions do not

become co-responsible for the killing of innocent children” by issuing such counseling certificates that were designed under German law to authorize women to receive abortions. Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference ¶ 4 (Jan. 11, 1998), at http://www.vatican.va/holy_father/john_paul_ii/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany_en.html (“Papal Letter”).³ Though he applauded the well-meaning intentions of the Catholic pregnancy counselors, *id.* ¶ 6, the Pope expressed grave concern that, by providing women with certificates that authorized the women to receive abortions, Catholic counselors “are involved in carrying out a law that leads to the killing of innocent human beings.” *Id.* ¶ 7. Because such involvement made Catholics morally complicit in abortion, the Pope “urgently” exhorted the German bishops to ensure that the practice would cease. *Id.* Notably, the Pope’s directive against Catholic participation in the program was not dissuaded by the anticipated beneficial effects of such participation.

From such papal guidance, the Little Sisters can reasonably conclude that they would share in the intention to promote abortion and contraception if they were to execute the Form authorizing (and creating a legal obligation on the part of) third parties to provide the forbidden insurance coverage, regardless of whether the third party actually engages in the forbidden action. As one Catholic

³ All internet sources were last visited March 3, 2014.

commentator stated in a related context, moral complicity may be greater where there is an “essential tie” or “intelligible link” between the cooperator’s action and the wrongdoing. Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2013), <http://www.thepublicdiscourse.com/2013/01/7403/>. There is such an “essential tie” or “intelligible link” between the Form and the forbidden action—the sole function of the Form in the Government’s regulatory scheme is to designate, authorize, and obligate another to perform the forbidden action.

B. The Little Sisters May Reasonably Conclude That Executing and Delivering the Form Would Constitute Unjustifiable Material Cooperation In Grave Wrongdoing.

The Little Sisters can also reasonably conclude from Catholic principles that executing the Form would involve unjustifiable material cooperation with wrongdoing.

As an initial matter, contrary to the district court’s assertions, the Little Sisters can reasonably anticipate that their execution of the Form could in fact result in forbidden contraceptive coverage for certain employees, for at least three reasons. First, as noted in the Appellants’ opening brief, the non-religious for-profit corporation Express Scripts, Inc. is involved in providing pharmaceutical claim administrative services under Appellants’ plan and is required by regulation to receive the Form. Br. of Appellants, at 22. Second, the Government shows every intention of closing the enforcement loophole in the future and compelling

even “church plans” to comply with the Mandate. Third, the Form, once issued, cannot be retracted, and thus executing and delivering the Form permits the Government to exert regulatory pressure on the Form’s recipients to provide the forbidden coverage at a later date. *See id.* at 42 (noting that “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”). Indeed, the Government’s vigorous litigation of this very case belies its contention that the Little Sisters’ execution of the Form will have no practical effect.

Because the Little Sisters may reasonably conclude that the Form could very well have the practical effect of increasing contraceptive coverage and promoting the use of contraceptives and abortifacients, they may also reasonably conclude that executing the Form would involve unjustifiable material cooperation with such wrongdoing. Several objective criteria are frequently invoked in the Catholic theological tradition to determine whether material cooperation in another’s bad action is permissible. These criteria are supported by commonsense moral intuitions, and many have close parallels in the manner that our laws allocate legal responsibility.

1. Compliance With the Mandate Requires Cooperation in Actions That Are Gravely Wrongful Under Catholic Doctrine.

One important criterion for assessing the permissibility of material

cooperation is how grave or serious is the wrongdoing that the believer is assisting. The graver the wrongdoing, the more problematic is cooperation in that wrongdoing. In general, “the more serious the harm from the sin, the more significant must be the good sought to justify cooperation.” Atkinson, at 80. A proportionately stronger justification is required “the graver ... the evil of the principal agent’s act in itself,” and “the graver ... is the harm which may be caused to third parties, especially the innocent,” by the objectionable action. Fisher, at 27, 54 (Helen Watt ed., 2005).

The Mandate requires employers to cooperate in actions that are gravely wrongful according to Catholic teachings. First, under Catholic doctrine, the use of abortifacient drugs and devices is a moral wrong of the first order. The Catholic Church teaches that “[h]uman life must be respected and protected absolutely from the moment of conception.” CATECHISM OF THE CATHOLIC CHURCH ¶ 2270 (1994) (“Catechism”). “From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.” *Id.* Under Catholic doctrine, the destruction of innocent human life—including embryonic human life—is a violation of the Fifth Commandment, “Thou shalt not kill,” and thus a serious moral wrong. *Id.* ¶ 1858. “Since it must be treated from conception as a person, the [human] embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other

human being.” Id. ¶ 2274.

The United States Conference of Catholic Bishops has authoritatively applied this teaching against destroying human life to Catholic health care providers:

Abortion ... is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation.

United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 45 (5th ed. 2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf> (“Directives”). Regardless of the Government’s definition of “abortion,” the Catholic faith views the destruction of a human embryo at any time after conception—including during “the interval between conception and implantation of the embryo,” *id.*—as an abortion, and gravely wrongful.

The Catholic Church also deems elective sterilization and contraception to be seriously wrongful. “[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible” is impermissible. Catechism ¶ 2370. “Any sterilization which ... has

the sole immediate effect of rendering the generative faculty incapable of procreation ... remains absolutely forbidden according to the doctrine of the Church.” Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization in Catholic Hospitals (Quaecumque Sterilizatio)* ¶ 1 (March 13, 1975), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html.

The Mandate also requires the financing of “patient education and counseling” for covered employees and their dependents in the use of abortifacients and contraceptives. 77 Fed. Reg. 8724, 8725 (Feb. 15, 2012); see also 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2013); Health Res. & Serv. Admin., *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, <http://www.hrsa.gov/womensguidelines/>. In the report upon which the Mandate’s contraceptive requirements are based, the Institute of Medicine made clear that the intended purpose of the contraceptive education and counseling requirement is to increase the use of contraceptives, including those that function as abortifacients:

[S]tudies show that postpartum contraceptive counseling increases contraceptive use ..., that counseling increases method use among adolescents in family planning clinics, that counseling decreases nonuse of contraception in older women of reproductive age who do not want a future baby, and that counseling of adult women in primary care settings is associated with greater contraceptive use....

Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011); see also Gina M. Secura et al., *The Contraceptive CHOICE Project: reducing barriers to long-acting reversible contraception*, AM. J. OBSTETRICS & GYNECOLOGY, Aug. 2010, at 115e.1, 115e.4 (attributing increased use of abortifacient contraceptive methods to increased patient education, among other factors). There can be no doubt that the Government-mandated “education and counseling” programs, which are financed by employer-provided health insurance plans, will be designed to instruct and encourage women to use abortifacients and contraceptives. Any participation in such programs by Catholic employers could constitute the independent wrong of “scandal” under Catholic doctrine, as discussed further below. *See infra* Part I.C.

2. Compliance With the Mandate Could Cause the Little Sisters To Become Necessary or “But-For” Causes of Gravely Wrongful Actions.

In weighing the material cooperator’s degree of moral responsibility for the forbidden action of a third party, many Catholic moral theologians consider whether the forbidden action would have happened anyway if the believer had not facilitated it. In the parlance of Catholic theology, one considers whether the believer is a “necessary” or “essential” contributor to the objectionable action. One important factor in assessing material cooperation is “how indispensable is the cooperation for the sinful action to occur.” Atkinson, at 80. Material cooperation

is particularly problematic when one “participate[s] in the evil act by doing something necessary for the actual performance of the evil act,” such that “one’s action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator.” Benedict M. Ashley, O.P. et al., *HEALTH CARE ETHICS: A CATHOLIC THEOLOGICAL ANALYSIS* 56 (5th ed. 2006); *see also* The Ethicists, The National Catholic Bioethics Center, *Cooperating with Non-Catholic Partners*, in *Catholic Health Care Ethics: A Manual for Ethics Committees* 27/2 (Peter J. Cataldo & Albert S. Moraczewski eds., 2009) (stating that a Catholic hospital would be morally responsible when “immoral procedures would not be taking place but for the collaboration” of the hospital). A much stronger justification is required “[i]f forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects.” Grisez, at 882-83. “[T]he more difficult it would be for the principal agent to proceed without the cooperator’s involvement,” the more serious the justification required to cooperate. Fisher, at 55.

In this case, the Little Sisters have attested that it would violate their religious conscience to take an action that serves as “the but-for cause of the provision of contraceptives, sterilization, and abortifacients.” *Little Sisters*, 2013 U.S. Dist. LEXIS 180867, at *29. This statement accurately reflects the concern in

Catholic moral theology with becoming the essential cause of forbidden actions. If the Little Sisters execute the Form, there is a reasonable possibility that the Form will trigger the coverage of contraceptives for the Little Sisters' employees, either by Express Scripts or by subsequent pressure of the Government on the Little Sisters' providers. The Little Sisters can reasonably conclude that compliance with the Mandate would threaten to make them the "but-for" causes of grave moral wrongs, including the taking of innocent human life.

3. The Little Sisters Can Reasonably Conclude That the Catholic Bishops Have Counseled Against Complying With the Mandate.

Furthermore, in assessing whether compliance with the Mandate would involve impermissible cooperation in wrongdoing, the Little Sisters have an additional reason for concern. For Catholics, the judgment of their bishops on religious matters of faith and morals is entitled to deference, respect, and obedience. The bishops are "authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice." Catechism ¶ 2034. The Catholic's individual conscience "should take account of ... the authoritative teaching of the Magisterium on moral questions," and "[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church." Id. ¶ 2039. Specific guidance from the bishops on moral questions, therefore, is to be

treated as highly persuasive by Catholic believers.

In this case, the United States Conference of Catholic Bishops has expressed “vigorous and united opposition” to the Mandate as infringing upon the religious freedom of Catholic employers. United States Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, at <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf>. Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already instructed that “Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.” Directives ¶ 70. Though the bishops have not addressed the Little Sisters’ specific circumstance of being required to execute and deliver the Form to an ERISA-exempt “church plan,” the Little Sisters can reasonably infer that the Catholic bishops’ categorical condemnations of the Mandate counsel against their compliance in these circumstances.

4. The Little Sisters May Reasonably Conclude That No Proportionate Reason Justifies Material Cooperation In Grave Wrongdoing, Including the Taking of Human Life.

As noted above, in certain cases of material cooperation, the Catholic tradition calls for the cooperator to consider whether there is a “proportionate

reason” that might justify one’s facilitation of another’s wrongdoing. Grisez, at 876. As multiple factors discussed above are satisfied, however, an increasingly compelling proportionate reason is required to justify the cooperation. See Griese, at 400-01. This is particularly true where the wrongdoing includes the destruction of innocent human life, viewed as a moral wrong of the highest gravity by the Catholic faith. As discussed above, Pope John Paul II’s letter to the German Bishops in 1998 reflected a similar judgment. In Germany, Catholics were participating in the abortion counseling program “in order to be able by goal-directed counseling to save many unborn babies from being killed.” Papal Letter ¶ 6. According to the Pope, not even that vitally important purpose was sufficient to justify the grave evil of becoming “involved in carrying out a law that leads to the killing of innocent human beings.” Id. ¶ 7. See also Griese, at 401-02 (noting that “it is difficult to suggest a reason which might justify” proximate and necessary “cooperation in an intrinsically evil procedure” such as abortion). Relatedly, due to the moral gravity of abortion, the Directives of the United States Conference of Catholic Bishops categorically forbid immediate material cooperation in abortion procedures. Directives ¶ 70. Thus, the Little Sisters can reasonably conclude that no proportionate reason would justify their delivery of the Form in compliance with the Mandate.

C. The Little Sisters Can Reasonably Conclude That Executing the Form and Complying With the Mandate Would Cause Scandal.

Furthermore, the Little Sisters can reasonably conclude that their execution and delivery of the Form would cause “scandal” by creating the appearance of complicity in the provision of abortifacient and contraceptive services, and thus encouraging others to comply with the Mandate. As noted above, the Catholic tradition forbids “scandal,” defined as encouraging or exhorting other persons to engage in wrongdoing: “Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor’s tempter.” Catechism ¶ 2284. “Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged.” *Id.* ¶ 2287. Moreover, “scandal is grave when given by those who by nature or office are obliged to teach and educate others,” *id.* ¶ 2285. Thus, the Little Sisters and Christian Brothers, because they are religious orders, have reason to be especially cautious about causing scandal. The Little Sisters can reasonably conclude that the execution and delivery of the Form would create the appearance of complicity in the Mandate and would authorize and encourage others to comply with the Mandate. This provides an independent reason for their objection to compliance with the Mandate.

* * *

For all these reasons, Appellants’ objections to the Mandate reflect a reasonable interpretation and application of the Catholic faith. This Court should

reverse the judgment of the district court and hold that Appellants are entitled to a preliminary injunction against the enforcement of the Mandate.

Dated: March 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,870 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman.

Dated: March 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will send notification of such filing to the following:

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All other case participants will be served via the Court's electronic filing system as well.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec (updated February 10, 2014), and according to the program are free of viruses.

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