ORAL ARGUMENT SCHEDULED FOR MAY 8, 2014

Nos. 13-5368, 13-5371, 14-5021

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIESTS FOR LIFE, ET AL.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellees.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,

Plaintiffs-Appellants, Cross-Appellees

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, ET AL.,

Defendants-Appellees, Cross-Appellants.

On Appeal from the U.S. District Court for the District of Columbia, No. 13-1261 (Hon. Emmet G. Sullivan) & No. 13-1441 (Hon. Amy Berman Jackson)

JOINT RESPONSE AND REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

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GLOSSARY

Archdiocese	Appellant/Cross-Appellee Roman Catholic Archbishop of Washington
Mandate	The regulatory scheme challenged in this litigation
PFL	Priests for Life; references to Case No. 13-5368
Plaintiffs	All parties challenging the Mandate in these consolidated appeals, including Cross-Appellee Thomas Aquinas College
RCAW	Roman Catholic Archbishop of Washington; references to Case Nos. 13-5371 and 14-5021
RFRA	Religious Freedom Restoration Act
TPA	Third party administrator

INTRODUCTION

Disregarding decades of Supreme Court precedent and this Court's recent decision in *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), the Government advances the remarkable position that it can force nonprofit religious groups to act contrary to their sincerely held religious beliefs based on nothing more than its ipse dixit. That contention flies in the face of the Religious Freedom Restoration Act ("RFRA"), which provides that absent interests of the highest order, the Government cannot place "'substantial pressure on [religious believers] to modify [their] behavior and to violate [their] beliefs.'" *Id.* at 1216 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)). Here, there is no dispute that Plaintiffs sincerely believe they may not take the actions necessary to comply with the Mandate because, under Catholic teaching, doing so would make them "complicit in a grave moral wrong." *Id.* at 1218. Nor is there any doubt that if Plaintiffs fail to comply, they will be subject to severe penalties. Accordingly, because the Government has conceded the Mandate cannot survive strict scrutiny, Plaintiffs are entitled to relief under RFRA.

The Government's principal response is that the so-called "accommodation" allows Plaintiffs to "opt out" of taking any actions that violate their religious beliefs. Gov't Br. at 20-21. But that assertion ignores Plaintiffs' clear, consistent, and undisputed representations that their beliefs preclude them from taking any of

the numerous actions necessary to comply with the "accommodation." For example, Plaintiffs believe that it would violate Catholic teaching to sign and submit the "self-certification" form or to actively maintain a contractual relationship with a third party that will provide the objectionable coverage to their students or employees. Under the "accommodation," however, Plaintiffs have no way to avoid these actions without suffering severe consequences. For that reason, it is plainly incorrect to characterize the "accommodation" as an "opt out." In reality, the "accommodation" offers nothing more than a choice between the frying pan and the fire, allowing Plaintiffs to pick one of two ways to violate their religious beliefs: either provide coverage via payment of a premium (as in *Gilardi*), or else facilitate the same coverage by taking the actions necessary to comply with the "accommodation." Needless to say, imposing such a dilemma does not relieve the burden on Plaintiffs' religious exercise.

The Government also claims that forcing Plaintiffs to comply with the "accommodation" cannot be a "substantial" burden because it requires them to do nothing more than "complete a form." *Id.* at 21. That argument is wrong as a matter of law and fact. As a matter of law, this Court has made clear that a substantial burden arises whenever the Government imposes substantial pressure on a claimant to take *any* action contrary to his sincere religious beliefs. Civil courts are in no position to second-guess whether the required action is religiously

significant. And as a factual matter, Plaintiffs have identified numerous other religiously objectionable actions they must take to comply with the "accommodation," including the active maintenance of objectionable insurance arrangements. Pls.' Br. at 24-28. The Government's response is to falsely imply that Plaintiffs do not *really* object to taking these actions, but instead object only to actions taken by third parties. Gov't Br. at 22-28. Once again, however, that claim boils down to an improper parsing of Plaintiffs' religious beliefs. As *Gilardi* makes clear, whether a particular act violates a plaintiff's beliefs lies well beyond the limits of judicial competence.

For the first time on appeal, the Government further contends that the substantial burden inquiry should somehow turn on whether granting a religious exemption from a challenged law would "burden" third parties. But under *Gilardi*, the substantial-burden inquiry asks only whether the Government has placed substantial pressure on a claimant to violate his sincere religious beliefs. Third-party interests are protected through RFRA's strict-scrutiny test, which allows the Government to burden religious exercise when doing so is truly necessary to protect important third-party rights. Here, that is not the case, as *Gilardi* clearly held.

Perhaps recognizing that the Mandate undeniably imposes a substantial burden, the Government attempts to take back its concession that the Mandate

cannot satisfy strict scrutiny under *Gilardi*. But the Government is bound by the concessions it made below, which were unavoidable for a simple reason: *Gilardi* squarely held that providing free contraceptive coverage is not a compelling interest, and that even if it were, the Government could advance that interest through less-restrictive means.

ARGUMENT

I. THE MANDATE IMPOSES A SUBSTANTIAL BURDEN ON PLAINTIFFS' EXERCISE OF RELIGION

As courts have held in nearly every case to consider application of the Mandate to nonprofit plaintiffs, Pls.' Br. at 2 n.3; *see also Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014), the Mandate substantially burdens Plaintiffs' exercise of religion. Under *Gilardi*, RFRA's substantial burden test involves a straightforward, two-part inquiry. First, the Court must identify the religious exercise at issue. 733 F.3d at 1216. In other words, it must determine whether Plaintiffs "ha[ve] an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religion." *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). It must then assess whether the Government has placed "substantial pressure"—a substantial burden—on Plaintiffs to take that action. *Gilardi*, 733 F.3d at 1216.

Here, Plaintiffs' undisputed testimony establishes their "honest conviction" that they cannot, consistent with their religious beliefs, comply with the "accommodation." Pls.' Br. at 24-28. This Court's only task, therefore, is to determine whether the Government has placed "'substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs.'" *Gilardi*, 733 F.3d at 1216 (citation omitted). Under *Gilardi*, the answer to that question can hardly be in doubt. Though styled as an "accommodation," the Government has offered Plaintiffs the same "Hobson's choice" it offered the plaintiffs in *Gilardi*: they can "abide by the sacred tenets of their faith" and "pay a penalty" that would "cripple" their organizations, or else they must act in a way they believe makes them "complicit in a grave moral wrong." *Id.* at 1218. "If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' [it is difficult to] see how the standard could be met." *Id.* (quoting *Thomas*, 450 U.S. at 718). The Government's contrary arguments, discussed below, are without merit.

A. The Mandate Does Not Allow Plaintiffs to "Opt Out" of Actions That Violate Their Religious Beliefs

The Government insists that the "accommodation" allows Plaintiffs to "opt out" of providing contraceptive coverage. Gov't Br. at 20. This assertion either misunderstands or mischaracterizes Plaintiffs' religious objection. To be sure, Plaintiffs object to facilitating contraceptive coverage via payment. But as their undisputed testimony establishes, Plaintiffs also object to taking the actions

required to comply with the "accommodation." Among other things, Plaintiffs cannot, consistent with their religious beliefs, maintain contractual relationships with entities authorized to provide the objectionable coverage to their employees, submit the self-certification form authorizing such coverage, or offer health plans that serve as conduits for delivery of the mandated coverage. Pls.' Br. at 24-28. Thus, the Government's opt-out argument boils down to the assertion that Plaintiffs can "opt out" of one action that violates their religious beliefs by taking different actions that violate their religious beliefs.

The error of the Government's position is readily apparent. For example, on the Government's theory, the religious exercise of a pacifist would be protected by a law allowing him to "opt out" of military service by working in a munitions factory. *Cf. Thomas*, 450 U.S. 707. Needless to say, the Government cannot relieve a substantial burden by offering an alternative that also requires claimants to act contrary to their beliefs. In essence, the Mandate forces Plaintiffs to pick their poison: provide contraceptive coverage under the arrangement struck down in *Gilardi*, or take the actions necessary to comply with the "accommodation," which Plaintiffs also believe to be morally impermissible. Either option violates Plaintiffs' religious beliefs.

At bottom, the Government's assertion that the "accommodation" relieves the burden on Plaintiffs' religious exercise rests on an improper assessment of

Plaintiffs' religious beliefs. Pls.' Br. at 35-38. The only way to view the "accommodation" as a true "opt out" is to make the *religious judgment* that Plaintiffs do not really object to taking the actions required by the "accommodation." But "question[s] of religious conscience" are for Plaintiffs, not the Government, "to decide." *Korte*, 735 F.3d at 685; *Gilardi*, 733 F.3d at 1216 (deeming theological questions "unchallengeable"). Here, Plaintiffs have determined that taking the actions required by the "accommodation" make them "complicit in a grave moral wrong," *id.* at 1218, and "undermine their ability to give witness to the moral teachings" of the Catholic Church, thereby creating scandal, *Korte*, 735 F.3d at 683. Thus, for the Government to assert that "the accommodation sufficiently insulates [Plaintiffs] from the objectionable services," *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-cv-2452, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013), is to improperly claim that Plaintiffs "misunderstand their own religious beliefs," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988).

In any event, it is inaccurate to assert that the "accommodation" allows Plaintiffs to "opt out" of the process of providing contraceptive coverage. As the Solicitor General recently conceded before the Supreme Court: "nonprofit religious organizations don't get an exemption [from the Mandate]." Tr. of Oral Argument at 57:17-18, *Sebelius v. Hobby Lobby*, No. 13-345 (Mar. 25, 2014), *available at*

http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf. It is therefore not true that Plaintiffs "need only attest to their religious beliefs and step aside." Gov't Br. at 21 (citation omitted). Rather, Plaintiffs must take "affirmative steps" "to qualify their employees for certain contraceptive services." *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-1092, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013).

At the most basic level, Plaintiffs must contract with or maintain a relationship with third parties willing to procure the mandated coverage for Plaintiffs' employees. 26 C.F.R. § 54.9815-2713A(b)(2); 45 C.F.R. § 147.131(b); (*RCAW* Ct. at 40-42 (JA488-90)). Self-insured organizations must amend their plan documents to "designat[e their] third-party administrator [("TPA")] as the plan administrator" for contraceptive services through the self-certification, which is an "instrument under which [Plaintiffs'] plan is operated" and without which the TPA may not provide the mandated coverage. 29 C.F.R. § 2510.3-16; *id.* § 2590.715-2713A(b)(2); (*RCAW* Ct. at 41 (JA489)). Plaintiffs must also "notif[y] the TPA or issuer of their obligations [1] to provide contraceptive-coverage benefits to employees otherwise covered by the plan and [2] to notify the employees of their ability to obtain those benefits." *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893, at *11 (S.D. Tex. Dec. 27, 2013). By taking such actions, Plaintiffs enable and incentivize the third party to provide

the mandated coverage, which the Government admits is then "'technically'" "'part of [a self-insured organization's] plan'" (*RCAW* Ct. at 42 (JA490)), and which in all events will only be available to beneficiaries "so long as [they] are enrolled in [Plaintiffs'] health plan[s]," 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B); *id.* § 156.50 (making TPAs that provide the mandated payments upon receipt of a self-certification eligible for government funds covering the TPA's payments plus ten percent). But Plaintiffs' obligations do not end there. They must continue to maintain their health plans, providing fees, services, and documentation to sustain the infrastructure necessary to deliver the mandated coverage. Pls.' Br. at 27.[1]

If Plaintiffs fail to take these actions, their insurance company or TPA will not provide the mandated coverage to Plaintiffs' employees, and Plaintiffs will incur ruinous penalties. Thus, contrary to the Government's claims, Plaintiffs'

[1] The Government is thus wrong to suggest that exempting Plaintiffs would mean a court must award a similar exemption to a pacifist who objects to his exemption from the military draft because the military will draft another person in his place. Gov't Br. at 25-26 (citing *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014)). First, assuming an individual asserted such a belief, a court would still have to evaluate that individual's sincerity, and then apply strict scrutiny before any exemption could be granted. *See* 42 U.S.C. § 2000bb-1. Moreover, the Government's hypothetical is far afield from this case because, as detailed above, the "accommodation" is not an "exemption." The correct analogy would be to an "accommodation" that would excuse the pacifist from combat service but require him to work in a munitions factory—an occupation that would similarly violate his religious beliefs. *Cf. Thomas*, 450 U.S. 707.

insurance company or TPA will provide the objectionable coverage "because of," not "despite," actions Plaintiffs are forced to take. Gov't Br. at 24. Plaintiffs' "self-certification and the group health plans they put into place *are necessary* to their employees' obtaining the free access to the contraceptives." *E. Tex.*, 2013 WL 6838893, at *22 (emphasis added). "It is the insurance plan [Plaintiffs] put into place, the issuer or TPA [Plaintiffs] contracted with, and the self-certification form[s] [Plaintiffs] complete[] and provide[] the issuer or TPA, that enable the employees to obtain the free access to the" objectionable coverage. *Id.*; *S. Nazarene Univ. v. Sebelius*, No. 13-cv-1015, 2013 WL 6804265, at *8-9 (W.D. Okla. Dec. 23, 2013) (describing the "self certification" as "a permission slip which must be signed by the institution to enable the plan beneficiary to get access" to the mandated coverage); (Tr. of *RCAW* Hr'g at 12-13 (conceding a TPA must receive a self-certification to provide the mandated coverage) (JA442-43)). Far from allowing Plaintiffs to "opt out," the "accommodation" requires them to violate their beliefs by playing an integral role in the delivery of coverage they find objectionable.[2]

[2] Though the Government contends the Archdiocese is "exempt," Gov't Br. at 21, it ignores the argument that the Archdiocese is substantially pressured to violate its beliefs because its plan serves as a conduit for the delivery of the mandated coverage to the employees of non-exempt Plaintiffs participating in its plan, Pls.' Br. at 44 n.13.

B. Courts Cannot Judge the Nature of Plaintiffs' Religious Exercise When Conducting the Substantial Burden Analysis

The Government's entire substantial burden analysis is based on the flawed premise that this Court should assess the nature of the actions the Mandate requires Plaintiffs to take (*i.e.,* determine for Plaintiffs what their religion forbids), rather than analyzing the substantiality of the pressure the Government has placed on Plaintiffs to take those actions. As Plaintiffs have explained, the focus of the substantial burden analysis is on the "'*intensity of the coercion* applied by the government to act contrary to [religious] beliefs.'" *Korte*, 735 F.3d at 683 (citation omitted); Pls.' Br. at 28-31. Indeed, though this Court has squarely held that "[a] 'substantial burden' *is* 'substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs,'" *Gilardi*, 733 F.3d at 1216 (emphasis added), the Government never once discusses the "coercive effect of the [Mandate] on [Plaintiffs'] religious practice." *Korte*, 735 F.3d at 683.

The Government's focus on religious exercise, as opposed to substantial burden, is fatal to its position. It is black-letter law that RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added); *Korte*, 735 F.3d at 674 ("'[E]xercise of religion' should be understood in a generous sense."); *Gilardi*, 733 F.3d at 1216 (religious exercise is "broadly defined"). Indeed, to establish that a religious exercise is protected under RFRA,

"[i]t is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do"—whatever that may be—"conflicts with his religion." *Korte*, 735 F.3d at 683 (quoting *Thomas*, 450 U.S. at 716). To be sure, that does not end the inquiry—a court must still determine whether the plaintiff's representations are sincere, whether the law in question places substantial pressure on the plaintiff to take the required actions, and if so, whether the law passes strict scrutiny. Pls.' Br. at 21-31. But Congress and the courts could not have been clearer in indicating that the nature of the required actions has no bearing on the substantial burden analysis. Instead, RFRA simply asks whether the Government places "'substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs.'" *Gilardi*, 733 F.3d at 1216 (citation omitted).

Indeed, focusing on the nature of the *act*, rather than the degree of *pressure* to take that act, puts courts in the untenable position of judging the relative merits of religiously motivated actions. For example, to say that it is impermissible to force an Orthodox Jew to sell pork at his kosher deli, but permissible to force the same individual to flip a light switch on the Sabbath, is to make the *religious* judgment that adherence to kosher laws is more significant to the Jewish religion than the command of Sabbath rest. By the same token, to say—as this Court has—that it is impermissible to force a plaintiff to pay for contraceptive coverage, *id.* at

1217-18, but permissible to compel Plaintiffs to comply with the "accommodation," would be to conclude that the latter exercise of religion is not as important to the Catholic faith as the former. No "principle of law or logic," *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1989), equips a court to make those determinations, and RFRA and Supreme Court precedent prohibit them from trying, 42 U.S.C. § 2000cc-5(7); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

For that reason, the Government's attempts to minimize the significance of the self-certification are inappropriate. *E.g.*, Gov't Br. at 21 (stating that Plaintiffs "need only complete a form"). The Government's argument "that the simple act of signing a piece of paper" "cannot be morally . . . repugnant [is] belied by too many tragic historical episodes to be canvassed here." *S. Nazarene*, 2013 WL 6804265, at *8. Moreover, the Government's representations are inaccurate. Plaintiffs must do far more than merely "complete a form" to comply with the "accommodation," and the form itself is much more than a statement of Plaintiffs' religious objection to contraceptives.[3] Pls.' Br. at 24-28; *supra* Part I.A.

For similar reasons, the Government is also wrong to insist that the "accommodation" does not require Plaintiffs to modify their behavior. Gov't Br.

[3] Indeed, the Government repeats the *PFL* court's *demonstrably false* assertion "that plaintiffs 'do not allege that the self-certification itself violates their religious beliefs' and that plaintiffs conceded during oral argument that 'they have no religious objection to filling out the self-certification,'" Gov't Br. at 10, despite Plaintiffs' clear showing that the assertions are erroneous, Pls.' Br. at 45-46.

at 22, 28-30. Again, this places an improper focus on the nature of the acts the Mandate forces Plaintiffs to take, rather than the degree of pressure placed on Plaintiffs to take those acts. In any event, as Plaintiffs have explained, Pls.' Br. at 40-41, the "accommodation" clearly "requires [Plaintiffs] to perform a new act [they] did not have to perform before," *Notre Dame*, 743 F.3d at 565 (Flaum, J., dissenting). Moreover, even if one has performed the same act a thousand times, attaching new consequences to that act can obviously affect its morality. Pls.' Br. at 41-44.[4]

C. Plaintiffs Object to Actions They Must Take, Not to the Actions of Third Parties

Struggling mightily to bring this case within the ambit of *Kaemmerling v. Lappin*, the Government attempts to recast Plaintiffs' religious objection as an objection to the actions of third parties. According to the Government, Plaintiffs object not to actions they themselves must take, but rather to "federal law [that]

[4] Abandoning the *RCAW* court's flawed standing argument, the Government asserts that the Mandate does not substantially burden Plaintiffs participating in the Archdiocese's self-insured church plan. Gov't Br. at 27-28. This argument is incorrect for the reasons already expressed by Plaintiffs. Pls.' Br. at 32-35. Regardless, the Government does not dispute that church-plan Plaintiffs must still offer and maintain a health plan and submit the self-certification. As Plaintiffs have explained, taking these actions violates their religious beliefs—even if their TPA ultimately has discretion not to provide the coverage. *Id.*; *see also* Br. of Appellants at 20 & n.6, *Little Sisters of the Poor v. Sebelius*, No. 13-1540 (10th Cir. Feb. 24, 2014) (noting that the Government has conceded that the self-certification provides even church-plan TPAs with authority to provide the mandated payments).

requires insurers and third-party administrators to provide [the mandated] coverage." Gov't Br. at 22-27. This assertion cannot be reconciled with Plaintiffs' clear, consistent, and unrebutted testimony regarding their religious beliefs and is ultimately a thinly veiled attempt to assert that Plaintiffs do not "correctly perceive[] the commands of their" faith. *Thomas*, 450 U.S. at 716.

In any event, the Government's efforts to fit a square peg in a round hole are unavailing. It is of course true that for religious exercise to be protected, it must involve some action on the part of the plaintiff. But unlike *Kaemmerling*, "this is not a case in which the religiously offensive consequence" "occurs only after, and independently of, any act or forbearance on the plaintiffs' part." *E. Tex.*, 2013 WL 6838893, at *22. In *Kaemmerling*, this Court went to great lengths to emphasize that the prisoner did not have a religious objection to any action he was required to take. The prisoner "[did] not allege that his religion require[d] him not to cooperate with collection of a fluid or tissue sample." 553 F.3d at 679. Instead, he objected to "the government extracting DNA information" from biological specimens that could be obtained without any action on his part—such as by "sweeping up his hair after a haircut or wiping up dust that contains particles of his skin." *Id.* at 678-79. Based on these facts, the Court emphasized that the prisoner's religious objection was only to activity of the government—*i.e.*, extracting DNA from a sample through a procedure in which he "play[ed] no role

and which occur[red] after the [government] ha[d] taken his fluid or tissue sample (to which he does not object)." *Id.* at 679.

The Government unearths the pleadings in *Kaemmerling* to contend that, contrary to the clearly stated premise of this Court's holding, the prisoner did assert a religious objection to the requirement that he participate in the collection of blood or tissue samples. Gov't Br. at 41 n.7. But this confuses the remedy the prisoner requested with the religious objection he stated. Although the prisoner sought to enjoin the government from collecting fluids or tissue samples, "he [did] not allege that his religion require[d] him not to cooperate with collection of [those] sample[s]." 553 F.3d at 679.[5] Thus, at most, *Kaemmerling* stands for the unremarkable principle that a plaintiff cannot enjoin government action that does not require him to act in violation of his faith—a principle plainly inapposite here, where Plaintiffs are forced to take actions they find religiously objectionable.[6]

[5] The Government's argument appears to be based on a misreading of the *Kaemmerling*'s language. As this Court clarified, Kaemmerling's objection to "DNA sampling, collection and storage," Gov't Br. at 41, was not an objection to the collection of tissue samples from his person. Instead, it referred to the extraction of DNA from samples in the Government's possession. 553 F.3d at 678 (stating that Kaemmerling's "objection to 'DNA sampling and collection'" was a "specific objection to collection of the DNA information contained within any sample").

[6] *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Board of Education v. Allen*, 392 U.S. 236 (1968), are likewise inapposite because the plaintiffs there did not articulate a religious objection to any actions they were required to take, 403

Indeed, *Bowen v. Roy*, 476 U.S. 693 (1986), which *Kaemmerling* followed, 553 F.3d at 680, demonstrates that the Government's interpretation of *Kaemmerling* is flawed. *Bowen*, like *Kaemmerling*, draws a distinction between actions taken by third parties and actions taken by plaintiffs themselves. Thus, when the Supreme Court considered the plaintiffs' objection to the actions of a third party—the government—it concluded they were not entitled to relief. *Bowen*, 476 U.S. at 700. But when considering the plaintiffs' objection to an action *they* were required to take—submitting a form with their daughter's social security number—"five justices" "expressed the view that the plaintiffs 'were entitled to an exemption' from [this] 'administrative' requirement." *Notre Dame*, 278 F.3d at 566 (Flaum, J., dissenting) (quoting Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1127 (1990)); Pls.' Br. at 39 & n.12.

D. Any "Burden" Placed on Third Parties Has No Bearing on the Substantial-Burden Inquiry

For the first time in this litigation, the Government argues that any assessment of the "substantial burden" the Mandate imposes on religious exercise must account for "the burden on third parties" that would result from a religious exemption. Gov't Br. at 37. But to the extent third-party burdens are relevant to a

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U.S. at 689; 392 U.S. at 249, but objected only to the Government's subsidization of activities they found objectionable as taxpayers.

RFRA claim, they factor into whether the Government can satisfy the compelling interest standard and not whether it has substantially burdened the exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 720-22 (2005) (holding that the "'compelling governmental interest' standard" ensures religious exemptions "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). This is readily apparent from the cases the Government cites. In *United States v. Lee*, 55 U.S. 252 (1982), for example, the Supreme Court found that the challenged law *did* substantially burden religious exercise, but nonetheless upheld the law as the least restrictive means of advancing a compelling governmental interest, including the Government's interest in providing benefits to third parties. The substantial-burden inquiry asks only if the Government has imposed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Gilardi*, 733 F.3d at 1216 (citation omitted). Whether the law in question "benefits" a third party has no impact on that analysis.[7] The Government's attempt to revive its strict scrutiny argument under a different heading must fail. *Infra* Part II.

In any event, the Government is wrong to contend that exempting Plaintiffs would deny their employees "benefits to which they [a]re entitled by federal law."

[7] For example, a law dispossessing the Archdiocese of St. Matthew's Cathedral would substantially burden its religious exercise whether the law required it to "donate" the church to a third party or raze it to the ground.

Gov't Br. at 38. The argument is circular: it assumes employees of religious objectors have a legal entitlement to free contraceptive coverage through their employer-provided health plans, which is the very question in dispute here. In fact, a fair application of RFRA makes clear that employees of religious objectors have no such entitlement. By its express terms, RFRA is incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3(b). Because the Affordable Care Act did not reject RFRA, the Government cannot create any benefit under the Act that violates RFRA. Specifically, the Government cannot force a religious believer to provide a "benefit" to a third party in violation of his conscience unless doing so is the least restrictive means of advancing a compelling governmental interest. For example, a federal regulation requiring the Catholic Church to hand out free birth control during Mass might purport to create a "benefit" for third parties. But any such "benefit" would be plainly unlawful, and thus declining to provide it would not "deprive" anyone of anything to which they were legally entitled.[8]

[8] For similar reasons, amici are wrong to argue that exempting Plaintiffs would violate the Establishment Clause. Americans United Br. at 35-40. First, amici's arguments "stray beyond those [the Government] raised in the district court," and this Court "will not consider for the first time on appeal arguments that a [party] entirely failed to raise in the trial court." *Elliott v. U.S. Dep't of Agric.*, 596 F.3d 842, 851 (D.C. Cir. 2010); *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). In any event, amici's argument is meritless. Amici rely on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), where the Supreme Court struck

* * *

In summary, Plaintiffs do not and have never maintained that "a court is bound to accept their position that the opt-out provision substantially burdens their exercise of religion." Gov't Br. at 39 (citations and alterations omitted). Far from attempting to "collaps[e] the question of substantial burden into the sincerity of their beliefs," *id.*, Plaintiffs have emphasized that the substantial burden analysis as set forth in *Gilardi* and other controlling precedent requires a two-step process: a court must 1) identify the religious exercise at issue, and then 2) determine whether the Government has placed substantial pressure on the plaintiff to forego that exercise. Pls.' Br. at 21-31; *supra* pp. 4-5. This Court is only required to accept Plaintiffs' representations at step one of this process—*i.e.*, that taking the actions required of them by the Mandate violates their Catholic beliefs. Pls.' Br. at 22-38. It must still resolve the legal question of whether the law at issue substantially pressures Plaintiffs to violate those beliefs. *Id.* at 28-31; *see Gilardi*, 733 F.3d at 1216. Here, the answer to that question is straightforward: the "mandate forces [Plaintiffs]"—on pain of substantial penalties—"to do what their religion tells

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down a state statute giving employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." *Id.* at 709. As the Supreme Court explained, the law in *Thornton* was unconstitutional because it "unyielding[ly] weigh[ted]" interests of Sabbatarians "over all other interests." *Cutter*, 544 U.S. at 722 (citation omitted). RFRA is free of that defect because it protects third-party interests through the strict-scrutiny test. *See id.*

them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685; *Gilardi*, 733 F.3d at 1218.[9]

[9] Amici contend Plaintiffs are not substantially burdened because they could allegedly save money by dropping health coverage and paying penalties of $2000 per employee per year. Americans United Br. at 10-17. Again, this argument is forfeited because the Government failed to raise it. *Elliott*, 596 F.3d at 851; *Eldred*, 239 F.3d at 378. It is also meritless. *First,* it is factually wrong. Employers offer health coverage because it produces a net benefit—the "benefits" of providing coverage (*i.e.*, happier employees, tax breaks, etc.) exceed the "costs." Otherwise, no rational employer would offer insurance. By dropping coverage, employers would lose this net benefit and place themselves at a competitive disadvantage with other employers. Pls.' Br. at 29 n.8 Those with more than fifty employees must *also* pay substantial fines. That is clearly a substantial burden. Indeed, courts have concluded that dropping coverage—even absent fines—imposes a substantial burden. *E.g.*, *S. Nazarene*, 2013 WL 6804265, at *8-9; *Geneva Coll. v. Sebelius*, No. 2:12-CV-00207, 2013 WL 3071481, at *8-10 (W.D. Pa. June 18, 2013). *Second,* the premise of amici's argument is flawed. RFRA protects religious adherents in whatever activity they choose to pursue. 42 U.S.C. § 2000cc-5(7)(A). If the Government prohibited Jews from wearing yarmulkes on airplanes, it would substantially burden their religious exercise even though they could choose not to fly. So too here, it does not matter that Plaintiffs could drop their health plans—or, for that matter, shut down their operations altogether. *Third*, amici's argument contradicts cases holding that fines of "$100 per day" per affected beneficiary substantially pressured plaintiffs to include contraceptive coverage in their health plans in violation of their beliefs, even though they too could have dropped coverage entirely. *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1210 & n.2. *Fourth*, being forced to drop coverage would deny Plaintiffs the benefit of the tax exemption for employee health coverage, which allows Plaintiffs to offer better employee compensation at lower cost. *E.g.*, 26 U.S.C. § 106(a); *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (denial of a government benefit imposes a substantial burden). *Finally*, amici rely on *Braunfeld v. Brown* for the sweeping proposition that a burden is not substantial when it "operates so as to make the practice of [one's religion] more expensive." 366 U.S. 599, 605 (1961). But *every* burden on religious exercise makes such exercise more costly, and that has never been an impediment to courts identifying a substantial burden. *E.g.*, *Sherbert*, 374 U.S. 398 (loss of unemployment compensation). The law in

II. THE MANDATE CANNOT SATISFY STRICT SCRUTINY

As the Government acknowledges, it has already "conceded" in the courts below "that *Gilardi* would control the application of RFRA's compelling-interest test if the accommodations were deemed to impose a substantial burden." Gov't Br. at 44. Accordingly, neither the Government nor its Amici can now contend that the Mandate survives strict scrutiny. *Supra* note 7.

In any event, there is no merit to the Government's claim that the "accommodation" is the least restrictive means to provide the mandated coverage. As this Court held in *Gilardi*, the Government need not use Plaintiffs' health plans as the vehicle to provide such coverage; it could instead use any number of "viable alternatives," *Gilardi*, 733 F.3d at 1222 (citing *Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Services*, 724 F.3d 377, 414 (3d Cir. 2013) (Jordan, J., dissenting)), including:

> (1) offer[ing] tax deductions or credits for the purchase of contraceptive services; (2) expand[ing] eligibility for already existing federal programs that provide free contraception; (3) allow[ing] citizens who pay to use contraceptives to submit receipts to the government for reimbursement; or (4) provid[ing] incentives for pharmaceutical companies that manufacture contraceptives to provide such products . . . free of charge.

Braunfeld was "saved" only by a "strong state interest in providing one uniform day of rest for all workers." *Id.* at 408; *Braunfeld*, 366 U.S. at 607-09. No such interest is present here.

Conestoga, 724 F.3d at 414 (Jordan, J., dissenting). All of these alternatives are "less restrictive," because unlike the "accommodation," none of them would require Plaintiffs to act in violation of their religious beliefs. Once again, there is good reason the Government conceded this point below: *Gilardi* squarely rejected the argument the Government now boldly seeks to revive.

III. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE

The Government does not dispute that under *Smith*, strict scrutiny applies to laws burdening religious exercise that are not neutral and generally applicable. As Plaintiffs have explained, the Mandate "is not neutral and generally applicable because the Government has exempted millions of individuals for secular and [some] religious reasons, but it refuses to extend a similar religious exemption to Plaintiffs." Pls.' Br. at 49-50. The Government's attempts to minimize these exemptions ignore this Court's holding in *Gilardi* that "small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers are exempt either from the mandate itself or from the entire scheme of the Affordable Care Act." 733 F.3d at 1222. Together, these exemptions "voluntarily allow[] millions upon millions of people" "to be covered by insurance plans that do not [provide] free contraceptives." *Id.* at 1223 (citation omitted).

There is no plausible justification for granting these exemptions while denying Plaintiffs a religious exemption. Once the Government admits that some

exemptions can be granted, it may not "refuse to extend [such exemptions] to cases of 'religious hardship' without compelling reason." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (citation omitted). The Government tries three different arguments to resist this conclusion, but all fail.

First, the Government contends that the existence of "categorical exemptions" does not trigger strict scrutiny as long as the same exemption criteria "apply to all employers." Gov't Br. at 48. But "[f]acial neutrality is not determinative." *Lukumi*, 408 U.S. at 534. Instead, courts must "meticulously" examine supposedly neutral exemptions to ensure the Government has not engaged in a "religious gerrymander[]" that devalues religious concerns. *Id.* That is exactly the case here. For example, grandfathered plans are exempt from the Mandate due to *secular* hardship (*i.e.*, alleged administrative costs). But there is no comparable exemption to relieve the *religious* hardship imposed on entities like Plaintiffs. This type of scheme, which grants "a categorical exemption for individuals with a secular objection but not for individuals with a religious objection," plainly triggers *Lukumi*'s concern about devaluing religion. *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

Second, the Government mischaracterizes *Lee* as "finding that social security tax requirements were generally applicable although there were categorical exemptions." Gov't Br. at 48. *Lee* did not consider whether the law at

issue was "generally applicable," because that question was irrelevant under pre-*Smith* doctrine. And because *Lee* held that the challenged law satisfied strict scrutiny, even if *Smith* had been the law at the time, any holding in *Lee* as to general applicability would have been dicta.

Finally, the Government suggests *Lukumi* does not apply unless the law "specifically target[s] the religious exercise of members of a single church." Gov't Br. at 48. But the Government should not be rewarded for discriminating wholesale against non-exempt religious objectors. The relevant point is that the Government's exemption "devalues religious reasons" for an exemption "by judging them to be of lesser import than nonreligious reasons," with the consequence that "religious practice" in general is "singled out for discriminatory treatment." *Lukumi*, 508 U.S. at 537-38.

IV. THE MANDATE VIOLATES PLAINTIFFS' FREEDOM OF SPEECH

A. The Mandate Imposes a Gag Order That Violates the First Amendment

As the *RCAW* court recognized, the Mandate violates Plaintiffs' right to free speech by prohibiting them from "directly or indirectly, seek[ing] to influence the[ir TPA's] decision" to procure contraceptive coverage. 26 C.F.R. § 54.9815–2713A. This sweeping gag rule "imposes a content-based limit on [Plaintiffs] that directly burdens, chills, and inhibits their free speech." (*RCAW* Ct. at 72-73 (JA520-21).)

The Government's primary response is that the regulation "makes no reference to speech" and "is not properly interpreted to prohibit protected speech." Gov't Br. at 33. On the Government's reading, the prohibition "is meant only to prevent a self-certifying organization from using its economic power to coerce a TPA into not fulfilling its legal obligation to provide contraceptive coverage." *Id*.

The Government's argument fails for two reasons. First, it simply mischaracterizes what the regulation says. By its plain terms, the gag rule prohibits any attempt to "directly or indirectly . . . *influence*" the decision to provide contraceptive coverage. 26 C.F.R. § 54.9815-2713A(b)(iii) (emphasis added). That broad prohibition is a naked, content-based speech restriction, which chills protected expression through its obvious overbreadth. The Government cannot enact such sweeping bans on speech and then cure the damage by promising to enforce a narrower interpretation it has not even published. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

Second, even if the gag rule could be interpreted as suggested by the Government without any chilling effect, it still would violate the First Amendment. Plaintiffs have a strong religious conviction that contraception, abortion, and sterilization are immoral, and by expressing that belief they routinely seek to "influence" their fellow citizens to act accordingly. Consequently, Plaintiffs may seek to encourage their TPAs to resist what they regard as a deeply unjust

regulatory mandate. Plaintiffs may also wish to inform their TPAs that if they provide the mandated coverage to Plaintiffs' students and employees, then Plaintiffs will terminate their contractual relationship. Under the Government's "narrow" reading of the gag rule, Plaintiffs could be punished for any of this speech.

The Government contends that it may punish Plaintiffs for engaging in such speech because the First Amendment does not provide any protection for (1) "threat[s] of reprisal or force or promise of benefit[s]" intended to "coerce employees in the exercise of their right to self-organization," Gov't Br. at 34 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), or (2) the "direct inducement of illegal conduct, *id*. (citing *United States v. Williams*, 553 U.S. 285, 298 (2008)). However, the cases relied on by the Government are inapposite. *Gissel* involved circumstances where one party was "economically dependent" on the other. 395 U.S. at 617. Here, TPAs are not obliged to contract with objecting employers, 78 Fed. Reg. 39,870 39,880 (July 2, 2013), and the Government has not shown they are so "economically dependent" on Plaintiffs as to be susceptible to coercion. And the Government's assertion that it has no legal authority to require certain Plaintiffs' TPA to provide their employees with the objectionable coverage, *supra* note 4, wholly undermines its claim that Plaintiffs would be "induc[ing] illegal conduct." If the Government is correct, then the gag rule prohibits Plaintiffs

from directing their TPAs to engage in conduct that the Government claims is not punishable—that is, from directing their TPAs not to provide Plaintiffs' employees with the objectionable coverage. In any event, the Government cannot justify censoring Plaintiffs' religiously-motivated speech without a compelling interest. *Gilardi*, 733 F.3d at 1221-22.

B. The Mandate Compels Speech in Violation of the First Amendment

To defend the requirement that Plaintiffs facilitate contraceptive "counseling," the Government claims the Mandate "do[es] not require that [the] counseling encourage any particular service." Gov't Br. at 50. This disavowal is incompatible not only with the description of contraceptive counseling in the IOM Report, but also with the Government's claims elsewhere that the required counseling serves the "compelling" interest of promoting the use of contraceptives. Indeed, the Government's stated *objective* for mandating the coverage is "to increase access to and utilization of these services." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010). Regardless, the Mandate violates Plaintiffs' freedom of speech even if the required "counseling" is limited to statements of fact regarding contraception. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995). The Government cannot cure that violation by allowing Plaintiffs subsequently to "express[] [their] opposition to the use of

contraceptives." Gov't Br. at 51; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15-16 (1986) (plurality op.).

The Government finds it "inexplicable" that forcing Plaintiffs to submit the self-certification would interfere with their right to speak on abortion and contraception at a time and place of their own choosing. Gov't Br. at 50. And yet the Government concedes in the very next breath that by submitting the self-certification, Plaintiffs will "explicitly proclaim their objection to contraception." *Id.* Contrary to the Government's assertion, forcing Plaintiffs to confess their views on contraception and abortion through a federally-approved form is incompatible with the First Amendment (particularly when the compelled act contradicts the very speech the government is forcing). *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2326 (2013).[10]

V. THE MANDATE VIOLATES THE ESTABLISHMENT CLAUSE AND INTERFERES WITH PLAINTIFFS' INTERNAL CHURCH GOVERNANCE

The Government maintains that the Mandate does not establish a favored category of religious organizations because "the challenged exemption does not

[10] Because the Mandate is forcing Priests for Life "to affirm in one breath that which [it] den[ies] in the next," *Hurley*, 515 U.S. at 575-76 (citation and quotations omitted), and compelling disclosure of its plan participants and beneficiaries *for an impermissible purpose*, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), the Government is making "group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message," *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 69 (2006), thereby also violating Priests for Life's right to expressive association.

grant any denominational preference or otherwise discriminate among religions." Gov't Br. at 54. For the same reasons this argument failed in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), it cannot prevail here.

By asserting the Mandate is constitutional because it "distinguishes not between types of religions, but between types of institutions," the Government's argument rests on a "puzzling and wholly artificial distinction." *Colo. Christian*, 534 F.3d at 1259. In the same way a law may not privilege "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," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), neither may a law prefer denominations that exercise religion principally through "churches, synagogues, mosques, and other houses of worship, and religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), while disfavoring a denomination whose faith "move[s] [its adherents] to engage in" broader religious ministries, *Colo. Christian*, 534 F. 3d at 1259. The Supreme Court has "consistently and firmly deprecated" such preferences. *Larson*, 456 U.S. at 246.[11]

[11] *Larson* rejected the argument the Government posits here, finding that the challenged statute was "not simply a facially neutral statute" that "happen[ed] to

Finally, Government offers no response to the argument that the Mandate interferes with Plaintiffs' internal church governance. Pls.' Br. at 62-64. As Plaintiffs explained, the Mandate violates the First Amendment by artificially dividing the Catholic Church and erecting arbitrary barriers that interfere with the Archdiocese's ability to extend benefits to its affiliates as it deems appropriate. *Id.*

VI. THE GOVERNMENT'S EMPLOYER-BY-EMPLOYER APPROACH CONTRADICTS THE PLAIN TEXT OF THE REGULATIONS

The Government concedes that "the contraceptive-coverage requirement" "applies to group health plans and not to employers themselves." Gov't Br. at 55. In light of that concession, the Government cannot sensibly maintain that the Mandate applies to some employers but not others who offer coverage under the *same* health plan. The language of the regulations is clear: "group health plan[s] established or maintained by . . . religious employer[s]" are exempt from "any

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have a 'disparate impact' upon different religious organizations," but rather made "explicit and deliberate distinctions *between different religious organizations*." 456 U.S. at 247 n.23 (emphasis added). The same is true here. The Government prefers and thus exempts from the Mandate one class of "religious employers," but refuses to extend this same exemption to another class of "religious employers," such as Priests for Life, based on the bare assertion that such organizations are "more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). Accordingly, the challenged regulations were "drafted with the explicit intention" of discriminating amongst religious organizations based on nothing more than unsupported stereotypes. 456 U.S. at 254. This discrimination violates both the Establishment Clause and the equal protection guarantee of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

requirement to cover contraceptive services." 45 C.F.R. § 147.131(a). Thus, the health plan "established [and] maintained" by the Archdiocese must be granted a full exemption from "any" requirement to provide contraceptive coverage.

The regulatory text contains no suggestion that "employers" rather than "plans" are exempt from the Mandate's requirements. Though the subsection title refers to "religious employers," here, the plan is maintained by a "religious employer"—the Archdiocese. And regardless, it is a "well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear." *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of the City of Newark*, 344 F.3d 335, 348 (3d Cir. 2003); *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 822 (D.C. Cir. 2001) (same).[12]

CONCLUSION

The district courts' judgments in the Government's favor should be reversed; those in favor of Plaintiffs should be affirmed.

[12] Similarly unpersuasive is the Government's claim that it "never suggested that the final regulations would take a plan by plan approach." Gov't Br. at 56. The ANPRM contained just such a "suggest[ion]." Pls.' Br. at 65-67.

Respectfully submitted, this the 11th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type volume limitations set out for principal briefs in Federal Rule of Appellate Procedure 32(a)(7)(B) as modified by this court's order of January 29, 2014. The brief, including headings, footnotes, and quotations, contains 7,998 words, as calculated by the Microsoft Word word count function.

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I hereby certify that, on April 11, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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