IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 1:13-cv-03263-MSK-KMT

FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS,
a Colorado non-profit corporation, et al.,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, CERTIFICATE OF COMPLIANCE RE: CONSULTATION and REQUEST FOR FORTHWITH CONSIDERATION

Pursuant to Fed. R. Civ. P. 65, Plaintiffs respectfully move the Court to enter a preliminary injunction order **on or before May 15, 2014** enjoining application of Defendants' contraceptive/abortifacient mandate ("Mandate") as to Plaintiffs.

Pursuant to D.C.COLO.LCiv.R 7.1(a), counsel for Plaintiffs has consulted and conferred with counsel for Defendants, to wit: Bradley P. Humphreys, Esq., prior to filing this motion. Defendants oppose the entry of the requested preliminary injunction order.

Plaintiffs request a preliminary injunction order against Defendants and their Mandate that requires Plaintiffs to contract, arrange, pay, or refer or facilitate, contrary to their sincerely held religious beliefs, contraceptives and abortifacient drugs and devices and related education and counseling as a part of Fellowship of Catholic University Students' ("FOCUS") employee health plan.

Because Plaintiffs, in violation of their sincerely held religious beliefs, will be required, absent injunctive relief, to include coverage of contraceptive/abortifacient drugs, devices, and services in FOCUS's health insurance plan that begins on July 1, 2014 or face massive fines and penalties for noncompliance, Plaintiffs need injunctive relief on or by May 15, 2014 so as arrange the details of that plan, including required employee notices, by the July 1, 2014 renewal date.

The factual and legal bases for Plaintiffs' request for a preliminary injunction order and Defendants' opposition thereto have been fully briefed by the parties in connection with Plaintiffs' Motion for Partial Summary Judgment (Docs. 12 and 12-1). In addition, Plaintiffs' request is supported by a memorandum brief filed contemporaneously herewith. A proposed order is also filed contemporaneously herewith.

Plaintiffs respectfully request oral argument on the motion.

Respectfully submitted this 11th day of March, 2014,

s/ Michael J. Norton
Michael J. Norton
ALLIANCE DEFENDING FREEDOM
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111
720-689-2410
(303) 694-0703 (facsimile)
mjnorton@alliancedefendingfreedom.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on the 11th day of March, 2014, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

bradley.p.humphreys@usdoj.gov

s/ Michael J. Norton
Michael J. Norton

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 1:13-cv-03263-MSK-KMT

FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS,
a Colorado non-profit corporation, et al.,

Plaintiffs,

v.

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

Defendants.

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiff Fellowship of Catholic University Students ("FOCUS") and the individual Plaintiffs Curtis A. Martin, Craig Miller, Brenda Cannella, and Cindy O'Boyle seek preliminary injunctive relief against the Patient Protection and Affordable Care Act's ("ACA") preventive services mandate and the accompanying series of federal regulations (the "Mandate"). These laws force Plaintiffs to violate their sincerely held religious beliefs and contract, arrange, pay, or refer or facilitate, contrary to their sincerely held religious beliefs, contraceptives and abortifacient drugs and devices and related education and counseling in FOCUS's employee health plan.

The facts are set forth in detail in Plaintiffs' original Verified Complaint (Doc. 1) filed on December 3, 2013, Plaintiffs' First Amended Verified Complaint (Doc. 10) filed on December 16, 2013, and Plaintiffs' Motion for Partial Summary Judgment (Doc. 12) filed January 15, 2014, each of which is incorporated herein by this reference. Plaintiffs' original Verified Complaint and First Amended Verified Complaint ("VC") are sworn affidavits and thus serve as evidence in support of Plaintiffs' motion for preliminary injunction.

Defendants' Mandate requires coverage of contraceptives/abortifacients and related services in employee health plans maintained by religious non-profit organizations, like FOCUS, for plans that commence on or after January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). For FOCUS, mandated coverage of these objectionable drugs, devices, and services will be required in FOCUS's next plan which commences on July 1, 2014. The Mandate requires religious organizations, including those that are self-insured like FOCUS, to violate their religious beliefs by contracting, arranging, paying, or referring or facilitating contraceptive/abortifacient coverage

or face massive fines of as much as $16 million and other penalties for non-compliance with the Mandate. VC, ¶ 13, 62-149.

Either the ACA itself or Defendants' regulations implementing the preventive services requirements of the ACA have resulted in massive exemptions to the Mandate, including for certain religious objectors, e.g., churches and "integrated auxiliaries," grandfathered plans, small businesses, and others. The net effect of these exemptions is that health insurance policies covering tens of millions of Americans are exempt, either for secular reasons or because the employer falls in the narrow religious exemption, while FOCUS does not and thus will be forced to either comply with the Mandate in violation of its religious beliefs or pay steep fines of as much as $16 million. VC, ¶¶ 1-2, 6-13.

FACTUAL BACKGROUND

A. Plaintiffs' Religious Beliefs.

In accord with nearly 2,000 years of consistent Catholic teaching, Plaintiffs believe, affirm, and teach that each and every human person is created in the image of God and that it is contrary to God's will to interfere with human conception with contraceptives or to destroy innocent human life by abortion or by the use of abortion-inducing drugs and devices. Thus, Plaintiffs hold that it is immoral to intentionally participate in, pay for, train others to engage in, enable or otherwise support or facilitate access to the objectionable drugs, devices, and related services. VC, ¶¶ 5, 18-22, 30-55.

B. Congress generally requires preventive services coverage in the ACA, but not contraceptives/abortifacients and not violations of conscience.

In March 2010, Congress passed the ACA. . VC, ¶¶ 62-63. The ACA requires health plans to abide by multiple rules benefitting patients, such as the requirement that plans cover

dependents until age 26. 42 U.S.C. § 18011(3)–(4). But the contraceptive/abortifacient coverage required by Defendants' Mandate and challenged here is not one of those statutory requirements. *Id.* at § 300gg-13(a)(4). VC, ¶ 65.

To define "preventive services for women," Defendant U.S. Department of Health and Human Services ("HHS") selected a private entity, the Institute of Medicine ("IOM") to define the drugs, devices and services that should comprise "preventive services." IOM did so and IOM's definition was adopted by HHS. *See* HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Jan. 10, 2014). The IOM definition, adopted as Defendants' Mandate, require that all FDA-approved contraceptives, sterilization procedures, and related counseling be included in the women's preventive services mandate. *See* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109–10 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 9, 2014); *see also* 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)); 77 Fed. Reg. 8,725 (Feb. 15, 2012). These IOM guidelines, the administrative adoption of these IOM guidelines by Defendants, and the attendant penalties enacted by Defendants for their violation, form "the Mandate" being challenged here. VC, ¶¶ 78-81.

The ACA empowered Defendants to enact "comprehensive" exemptions to the Mandate; but provided no guidance as to what should be included in or excluded from such exemptions. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Defendants decided to exempt only churches and their integrated auxiliaries from the Mandate. *See* 45 C.F.R. § 147.131 (2013); *see generally* 78 Fed. Reg. 39,870 (July 2, 2013). Defendants did so based on the rationale that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same

objection." 78 Fed. Reg. at 39,887. VC, ¶¶ 92-97. Defendants offered no evidence to support this speculation, and refused to extend an exemption to quintessential religious non-profits such as FOCUS even though FOCUS's employees' beliefs are congruent with the beliefs of FOCUS. VC, ¶¶ 13, 19-22, and 55.

Furthermore, Defendants decided not to impose Mandate penalties on the plan administrators of certain self-insured, non-profit entities that are exempt from ERISA because they are in a "church plan." *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691 (filed Jan. 3, 2014) (stating that church plans are "exempt from regulation" under ERISA). Defendants essentially arbitrarily "exempted" these entities even though these entities are neither churches nor integrated auxiliaries of churches. *See* 78 Fed. Reg. at 39,887.

However, Defendants have refused to exempt self-insured non-profit plans such as FOCUS's plan, even if they are identically situated to religious non-profit entities covered by non-ERISA "church plans"—simply because FOCUS's plan does not happen to qualify under that ERISA category. VC, ¶¶ 127-132.

C. Defendants force FOCUS to provide or contract for contraceptive/abortifacient coverage in its health plan.

To coerce non-profit, non-church, ERISA-governed plans such as FOCUS's plan to cover objectionable drugs, devices, and services, Defendants created what Defendants euphemistically call an "accommodation" (not an exemption, and not a withholding of penalties). *See generally* 78 Fed. Reg. 39,870. Under Defendants' "accommodation," Plaintiffs have four unacceptable options relating to FOCUS's health coverage insurance to its employees.

1. First unacceptable option.

FOCUS has the "option" of violating its sincerely held religious beliefs by taking specific

action to comply fully with the Mandate and include coverage of contraceptives/abortifacients in FOCUS's plan. 29 C.F.R. § 2590.715–2713 (referencing 45 C.F.R. 147.131(a)).

2. Second unacceptable option.

Plaintiffs have the "option" of signing the government's "certification" form and delivering it to its third party plan administrator ("TPA"). *See* EBSA Form 700 (Attached as Exhibit 1). This government form: (i) it expresses a religious objection to contraceptive/abortifacient coverage, *id.* at 1, and (ii) it declares "[t]he obligations of the third party administrator [to provide contraceptive/abortifacient payments] are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A. This certification is an instrument under which the plan is operated." EBSA Form at 2; *see also* 78 Fed. Reg. at 39,894–95; 29 C.F.R. § 2590.715–2713A.

If executed and delivered by FOCUS to its TPA, FOCUS amends its insurance plan and creates, assigns, contracts for, and arranges for legal "obligations" for its TPA. The executed government form thus If FOCUS executes and delivers the government form, it thereby creates legal obligations requiring its TPA to: (a) resign as FOCUS's TPA if the TPA objects to providing the required contraceptive/abortifacient coverage; (b) reimburse FOCUS's employees and plan beneficiaries for any contraceptive/abortifacient drugs, devices or services obtained by them; or (c) be subject to the Mandate's fines and penalties if the TPA declines to comply with the Mandate. 78 Fed. Reg. at 39,879–80, 39,894–95. None of these "obligations" may be legally required by the government of either FOCUS or its TPA unless FOCUS executes and delivers the government's form. *See* 78 Fed. Reg. at 39,879–80. The executed government form also enables FOCUS's TPA to obtain government payments for the TPA's costs of coverage of contraceptives/abortifacients. 78 Fed. Reg. at 39,879.

The executed government form thus constitutes an amendment to or part of FOCUS's own health insurance plan. *Roman Catholic Archbishop of Washington v. Sebelius,* 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (quoting the government's own concession that "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan").

As if this were not enough, the Mandate also chills FOCUS's speech by requiring that Plaintiffs "not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715–2713A. But for this prohibition, FOCUS would instruct its TPA not to provide contraceptive/abortifacient coverage to its employees.

3. Third unacceptable option.

Plaintiffs could continue to provide its employees with generous, non-abortifacient, health plan benefits as are now provided and that the employees want, but openly violate the Mandate by refusing to provide coverage of contraceptive/abortifacient drugs, devices, and services. That would trigger the Mandate's harsh penalties, including fines of up to $100 per day ($36,500 per year) per plan participant. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. In FOCUS's case, such fines could amount to $16 million per year – more than one-half of FOCUS's average annual budget.

4. Fourth unacceptable option.

Plaintiffs could cease providing its employees with health insurance altogether. To do so would violate Plaintiffs' religious conviction to promote and provide for the spiritual and physical well-being of FOCUS's employees and their families, and would make it far more

difficult, if not impossible, to hire and keep good employees. VC, ¶¶ 183-184.

D. Congress refrains from applying the Mandate to tens of millions of women.

Despite Defendants' refusal to exempt FOCUS from the Mandate, they and Congress decided that the preventive services requirement need not be applied to all employee health insurance plans. In addition to the exemptions listed above, the ACA withholds the Mandate from grandfathered plans (those that have made minimal changes since March 23, 2010). 42 U.S.C. § 18011; 76 Fed. Reg. at 46,623 & n.4. The government projects that these plans, even as they may reduce in number over time, will continue to exclude coverage for tens of millions of women. 75 Fed. Reg. 34,538, 34,540–53 & tbl. 3 (June 17, 2010). The ACA declares that these employers have a "right to maintain existing coverage" falling short of the Mandate, 42 U.S.C. § 18011, even if they make certain changes that raise employees' costs, *see generally* 75 Fed. Reg. 34,538. VC, ¶¶ 7, 193, 195-7, and 241.

The Mandate also does not reach members of certain Anabaptist congregations or participants in health sharing ministries. 26 U.S.C. § 5000A(d)(2)(A) & (B).

Virtually every week, it seems, there is yet another exemption created to the requirements of the ACA and the Mandate. For example, in recent days, the government has arbitrarily extended the time by which nonconforming health insurance plans must be brought into compliance. On March 6, 2014, Defendant Department of Health and Human Services announced that health insurance plans that were supposed to be canceled by Obamacare by 2014 may be sold through October 2016 in states that approve of the extension. This essentially extends some non-compliant non-grandfathered plans until 2017.

E. The Mandate forces plaintiffs to violate their beliefs or pay massive fines.

Defendants delayed the imposition of the Mandate on non-exempt non-profit groups until their first plan year that begins on or after January 1, 2014. HHS, *Guidance on the Temporary Enforcement Safe Harbor* (updated June 28, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited Jan. 10, 2014). For FOCUS, that makes it subject to the Mandate starting on and after July 1, 2014. VC ¶¶, 59, 61, 135, 138, 181, 289, 291.

This Court is Plaintiffs' only recourse from the Mandate's infringement of their religious freedom. Plaintiffs' health insurance plan does not qualify for the variety of secular or religious exemptions Defendants and federal law have arbitrarily chosen to provide from the Mandate. Plaintiffs are instead subject to the government's "accommodation" for objecting religious non-profits, forcing them to contract and arrange, pursuant to its contract with its TPA, for coverage of these objectionable contraceptive/abortifacient drugs, devices, and services. Defendants' "accommodation" therefore changes nothing for Plaintiffs.

Plaintiffs have no adequate remedy at law. The Mandate blatantly violates longstanding religious conscience protections found in federal statutes and the U.S. Constitution. Unless this Court orders preliminary injunctive relief to Plaintiffs before **May 15, 2014**, Plaintiffs will suffer irreparable harm. Relief is required by this date so as to enable Plaintiffs to implement any plan amendments and to provide necessary notices to covered employees before the July 1, 2014 start date of the new plan year.

ARGUMENT

Determination of the entry of a preliminary injunction turns on four factors: (1) the likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable

harm in the absence of preliminary relief; (3) whether the balance of equities tips in the movant's favor; and (4) whether the injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). Each factor favors the grant of injunctive relief to Plaintiffs.

A. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits.

1. The Mandate violates RFRA (First Claim for Relief).

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1 (2012). Such a burden is only permissible if the government proves that it: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id*.

The Tenth Circuit established the framework for analyzing RFRA claims in *Hobby Lobby*. The initial inquiry requires the court to (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013), cert. granted, No. 13-354, 2013 WL 5297798 (Nov. 26, 2013). If there is such substantial pressure, the government action will then be held to strict scrutiny. *Id.* at 1143; *see also* 42 U.S.C § 2000bb-1.

The Tenth Circuit concluded in *Hobby Lobby* that the Mandate violated RFRA because it substantially pressured the *Hobby Lobby* plaintiffs, including the individual named plaintiffs, to violate their sincere religious beliefs against facilitating access to abortifacient drugs and devices and because it could not satisfy strict scrutiny. *Id.* at 1140–44.

a. There should be no dispute about religious exercise or strict scrutiny.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). There should be no dispute that FOCUS, as a religious non-profit entity, and the individual Plaintiffs, as natural persons, are capable of exercising religious beliefs. Their objection to providing or facilitating coverage of contraceptive/abortifacient drugs, devices or services through FOCUS's health insurance plan, either straightforwardly or through the "accommodation," is an exercise of religion.

The government does not dispute the sincerity of Plaintiffs' religious beliefs nor does it dispute that religious non-profits like FOCUS may exercise religion. Moreover, in related cases in this Circuit, Defendants have "concede[d] that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test." *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-1092, 2013 WL 6804259, at *6 (W.D. Okla. Dec. 20, 2013).

b. The Mandate substantially burdens Plaintiffs' religious exercise.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). Here, though the government disagrees, the Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing them to do precisely what their religion forbids: facilitate access to contraceptive/abortifacient drugs, devices or services.

i. Most courts, including the Tenth Circuit, agree.

In the vast majority of non-profit organization challenges to this Mandate, the plaintiffs have received preliminary injunctive relief under RFRA.[1]

Hobby Lobby's finding that the Mandate substantially burdens religious exercise strongly suggests that the same outcome should result here. Plaintiffs challenge the same Mandate that was challenged in *Hobby Lobby*, and object to providing contraceptive/abortifacient drugs, devices, and services to its employees and their dependents. *Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). In *Hobby Lobby*, the Tenth Circuit held that "this dilemma created by the statute" met the "threshold

[1] *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691 (S. Ct. Dec. 31, 2013) (Sotomayor, J.) (temporary injunction for hundreds of non-profit religious groups); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (injunction pending appeal); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (injunction pending appeal); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting injunctive relief to the University of Dallas); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709-RC (E.D. Tex. Dec. 31, 2013); *Ave Maria Foundation* v. *Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order to religious non-profits because the regulations "likely substantially burden" their religious exercise); *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Servs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting injunctive relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *E. Texas Baptist Univ. v. Sebelius*, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013); *Grace Schools v. Sebelius*, No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Southern Nazarene University* v. *Sebelius*, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-0027 (W.D. Pa. Dec. 23, 2013); *Reaching Souls Int'l, Inc.* v. *Sebelius*, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus* v. *Sebelius*, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York* v. *Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik* v. *Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). *But see Univ. of Notre Dame* v. *Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20. 2013).

showing regarding a substantial burden." *Id.* at 1138, 1141. *See also Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (same); *Gilardi v. Sebelius*, 733 F.3d 1208, 1218 (D.C. Cir. 2013) (same); *Southern Nazarene Univ. v. Sebelius*, 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013) ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.").

The government admits that even under its "accommodation," coverage of the objectionable drugs, devices, and services will be provided through FOCUS's plan. *Archbishop of Washington*, 2013 WL 6729515 at *22 (quoting the government's concession that "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan"). Under that accommodation, because FOCUS is a self-insured entity, Plaintiffs are forced to legally obligate their TPA to provide the same coverage that FOCUS itself objects to providing. 78 Fed. Reg. at 39,879.

As a result, the Mandate is an example of a quintessential substantial burden: a command to violate one's religious beliefs. The Mandate expressly requires FOCUS (which acts through the individual Plaintiffs and others) to either cover contraceptive/abortifacient drugs, devices, and services in its plan, 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)), or designate its TPA as an ERISA "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services [and abortifacients] for participants and beneficiaries," EBSA Form at 2; 29 C.F.R. § 2590.715–2713A. FOCUS is thus required to create these obligations for its TPA by including the recitation of these obligations in FOCUS's certification form. *Id*. The coverage that the TPA must provide under those obligations will be

part of, or an amendment to, FOCUS's own plan. *Id.*; *see also Archbishop of Washington*, 2013 WL 6729515 at *22.

One exception is the decision of a Seventh Circuit panel in *University of Notre Dame v. Sebelius*, --F.3d---, 2014 WL 687134 (7th Cir. Feb. 21, 2014). In *Notre Dame*, Judge Posner incorrectly concluded that the TPA's obligations are the result of a designation "[b]y the government" not by the self-insured entity and that even if the self-insured entity did not file the government's form (or page 2 of it), the self-insured's employees would still be able to force the TPA to provide the objectionable drugs and devices. *Id. slip op.* at 15, 18.

Both assertions by the Seventh Circuit panel are false. Indeed, the government has not actually argued that these assertions are correct. Instead, the government's rules state that, unless FOCUS executes and delivers the government's form (which legally designates, on page 2 thereof, that the form is a plan "instrument," i.e., an amendment to the contract between the self-insured entity and its TPA), the TPA's obligations do not vest, the government has no way to enforce the TPA to perform the "obligations," and FOCUS has breached the Mandate. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(A) & (B). The legal need for FOCUS to be the designator of its TPA's "obligations" derives from ERISA 3(16)(A)(i) (*see* 29 U.S.C.A. § 1002(16)(A)(i)), which the government says (*see* 78 Fed. Reg. at 39,879) is the applicable provision. That section of ERISA requires a TPA's coverage obligations to be "specifically so designated by the terms of the instrument under which the plan is operated." *Id.* But the "instrument" is a contract between FOCUS and its TPA for the TPA to provide FOCUS's employees with insurance coverage, so FOCUS is the only one legally capable of executing such a designation and authorization. Certainly, the government cannot legally do so. Judge Posner simply erred on this point when he said the government was the designator. The government neither possesses nor claims to possess

the power or legal authority to designate a TPA to do anything under ERISA 3(16)(A)(i). Instead, the government asserts the naked power to force FOCUS to designate its TPA as FOCUS's assignee to provide coverage of the objectionable drugs, devices, and services. It can only exert leverage against FOCUS because it discriminatorily refuses to give it an exemption in the first place.

ii. Defendants then require Plaintiffs to keep their religious objections to themselves.

The government gags FOCUS from revoking its coerced designation of its TPA and bans it from declaring that the TPA shall *not* have or fulfill those obligations (as violating the "no influence" provision set forth in 29 CFR § 2590.715-2713A(b)(3)). FOCUS religiously objects to being the government's mouthpiece to promote these objectionable drugs, devices, and services and to being gagged from expressing its religious opposition to providing these objectionable items in FOCUS's health insurance plan in what amounts to a shell game by which Defendants require FOCUS to designate and assign, pursuant to its contract with its TPA, contraceptive/abortifacient coverage obligations to its TPA.

A law substantially burdens the exercise of religion in one of two ways. First it can compel one "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Put another way, a law is a substantial burden on religious exercise if it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Second, a substantial burden exists where a law places "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div*., 450 U.S. 707, 718 (1981); *see also Hobby Lobby*, 723 F.3d at 1141 (government action substantially burdens a religious belief when it "requires participation in an activity prohibited by a sincerely held religious belief," "prevents

participation in conduct motivated by a sincerely held religious belief," or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief") (internal citation and quotation marks omitted). The Mandate burdens Plaintiffs' religious exercise in both ways.

iii. The Mandate substantially burdens Plaintiffs' religious exercise.

The Mandate requires FOCUS, as a part of its self-funded plan, to instruct its TPA to provide coverage of contraceptive/abortifacient drugs, devices, and services without cost-sharing (or else FOCUS must do this itself, which in a self-insured situation amounts to the same thing). Either action violates FOCUS's religious beliefs (and they both amount to the same thing in a self-insured plan). Should FOCUS refuse to comply with the Mandate, it would be subject to potential fines of $100 per day per affected beneficiary ($36,500 per year), *see* 26 U.S.C. § 4980D, and ERISA lawsuits in which Defendant Department of Labor seeks to force FOCUS to provide the coverage. 29 U.S.C § 1132.

Being forced to "compromise their religious beliefs" and pay substantial fines "is precisely the sort of Hobson's choice" that "establishe[s] a substantial burden as a matter of law." *Hobby Lobby*, 723 F.3d at 1141. And penalizing people who refuse to violate their faith is a prototypical substantial burden. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable pressure upon [applicant] to forgo [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *see also Yoder*, 406 U.S. at 208, 218 (fine of *five dollars* for believers' refusal to violate their faith "not only severe, but inescapable"); *Abdulhaseed v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct

motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice – an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.").

The Mandate also substantially burdens FOCUS in its decision to provide high-quality and morally acceptable health coverage for its employees. FOCUS has religious beliefs in favor of caring for its employees, and one way it does so is through its insurance health plan. VC ¶ 61. It cannot drop its employee health insurance plan without violating its religious beliefs concerning the provision of health insurance coverage and thereby injuring its employees, including the individual Plaintiffs, by depriving them of that plan. To do so would also send its employees into an insurance market that is both expensive and morally treacherous, since the employees would be forced to violate their own pro-life religious beliefs because plans they could buy would most probably cover contraceptive/abortifacient drugs, devices, and services. Dropping the employee plan would also harm FOCUS's ability to attract and keep good employees. All of this amounts to significant pressure on FOCUS's religious exercise as well as the religious exercise of the individual Plaintiffs.

In *Hobby Lobby* and other cases, the government has argued that the burden under the Mandate is not substantial because the coverage is just a form of compensation and plaintiffs themselves are not being forced to use contraception or abortifacients. But that allegation misunderstands both the facts and the legal standard of substantial burden. Plaintiffs' religious objection is not only to the use of the objectionable drugs, devices, and services, but also to being required to actively participate in a scheme to provide its employees with such drugs, devices, and services. VC, ¶¶ 54-55. "Hobby Lobby and Mardel have drawn a line at providing coverage

for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable." *Hobby Lobby,* 723 F.3d at 1141; *see also Roman Catholic Archdiocese of New York v. Sebelius,* 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013) ("Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services"). The accommodation the government requires is to sign a form that is, "in effect, a permission slip." *Southern Nazarene,* 2013 WL 6804265, at *8.

As another court in the Tenth Circuit explained, the government's claim that Plaintiffs' objection to signing the form is "legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage" is "simply another variation of a proposition rejected by the Tenth Circuit in *Hobby Lobby*." *Reaching Souls Int'l,* 2013 WL 6804259, at *7. In RFRA, "substantial" is a measure of the government burden, not of the claimant's religious beliefs or theological culpability. RFRA asks for a "substantial burden," not a "substantial belief." 42 U.S.C. § 2000bb(b). The analysis asks "whether the government has applied substantial pressure." *Hobby Lobby,* 723 F.3d at 1137. It does not ask how substantial are the plaintiffs' moral concerns.

The Supreme Court has rejected the idea that the government can second-guess theological judgments of religious claimants. In *Thomas,* the Court rejected the idea that because Mr. Thomas was not opposed to manufacturing sheet metal, he was not burdened in the requirement to manufacture tank turrets possibly made from that sheet metal. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs." *Thomas,* 450 U.S. at 715–16. Similarly, the government has no business deciding that FOCUS may object to providing contraceptive/abortifacient drugs,

devices, and services coverage, but its conscience must accept the requirement to legally obligate its TPA to provide that same objectionable contraceptive/abortifacient drugs, devices, and services coverage as a part of FOCUS's own plan.

A. The Mandate violates the Free Exercise Clause (Second Claim for Relief).

The Mandate violates the Free Exercise Clause of the First Amendment because it is neither religiously neutral nor generally applicable, and as discussed above, it fails strict scrutiny. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

As discussed above, Plaintiffs exercise religion in their objection to the Mandate. *Smith* established that burdens on religiously-motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Both are missing here.

1. The Mandate is selective, not generally applicable.

Unlike in *Smith*, which involved an "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 884, the Mandate here falls far short of general applicability.

The ACA creates a vast system of categorical exemptions that frees thousands of employers and their employees from the Mandate's scope as recited in the Establishment Clause analysis, *infra*. Despite all of these exemptions and non-applications of the Mandate and its penalties, however, the government refuses to exempt objecting non-profits such as FOCUS.

Such "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Indeed, "categorical" exclusions

exacerbate concerns regarding the discriminatory potential of "'individualized exemptions.'" *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). Here, the government's exemptions for secular and religious reasons, in tandem with its arbitrary decision not to extend an exemption to Plaintiffs, demonstrate that the Mandate is selective, and not comprehensive, in nature. *See Lukumi*, 508 U.S. at 543 (noting a lack of general applicability when a regulation "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree").

This lack of general applicability justifies strict scrutiny of the Mandate under the Free Exercise Clause. *See id.* at 546. The government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Id.* at 537 (quotation omitted); *Smith*, 494 U.S. at 884 (quotation omitted). But that is precisely what the government seeks to do here. The First Amendment "protects religious observers against [such] unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation and alteration omitted); *see also Gillette v. United States*, 401 U.S. 437, 461 (1971) ("[T]he Free Exercise Clause no doubt has a reach of its own.").

2. The Mandate is not neutral towards religion.

The Mandate is not neutral because it distinguishes among religious objectors as well as between religious objectors and secular objectors. A neutral law "does not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *see also Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding that the city violated the Free Exercise Clause by enforcing an ordinance banning meetings in a park against Jehovah's Witnesses but exempting other religious groups). The "government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting." *Tenafly Eruv Ass'n v. Borough*

of Tenafly, 309 F.3d 144, 169 (3rd Cir. 2002). "The Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Id.* at 165.

Refusing to exempt Plaintiffs from the Mandate in the face of numerous exceptions "devalues [their] religious reasons" for objecting to assisting in the destruction of embryonic life. *Lukumi*, 508 U.S. at 537. Providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Order of Police*, 170 F.3d at 365; *see also Fowler*, 345 U.S. at 69 (noting the dangers inherent in "the state preferring some religious groups over this one"). Discrimination is inherent in the Mandate's departure from "our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette*, 401 U.S. at 453 (quotation omitted). The government has available to it a variety of ways to "accomplish its secular goals without even remotely or incidentally affecting religious freedom." *Braunfeld*, 366 U.S. at 608; s*ee Hobby Lobby*, 723 F.3d at 1144 (concluding that the Mandate fails the least restrictive means requirement); *Korte*, 735 F.3d at 686–87 (same, expanding on least restrictive means analysis); *Gilardi*, 733 F.3d at 1222–24 (same). Indeed, Congress authorized "comprehensive" religious exemptions, *see* 76 Fed. Reg. at 46,623, yet Defendants chose to exempt only churches, and to refrain from penalizing many non-profit non-churches' plans, while denying either to FOCUS.

By engaging in such arbitrary line drawing between religious people and organizations, and by offering secular exemptions that encompass tens of millions of women, the government has failed to pursue its proffered objectives "with respect to analogous non-religious conduct," as well as to identical conduct by other religious actors whom the government views with a more favorable eye. *Lukumi*, 508 U.S. at 546. The "risks" caused by existing exemptions from the

Mandate "are the same" as those posed by the exemption requested here. *See id.* at 544. The millions of women covered by grandfathered plans, employees of Anabpatists, and the hundreds of non-profit plans exempt from ERISA have no less of the government's alleged "need" for the Mandate's benefits than women covered by FOCUS's plan. Yet those plans are exempt, while FOCUS is required to cover objectionable contraceptive/abortifacient drugs, devices, and services in its plan.

The First Amendment prevents Plaintiffs from "being singled out for discriminatory treatment" by the government's refusal to grant them an exemption that would have no different effect than those already approved. *Lukumi*, 508 U.S. at 538. Defendants cannot give a nondiscriminatory reason why Plaintiffs' free exercise of religion must bear the weight of the Mandate when Defendants' own voluntary measures place thousands of other employers, both religious and nonreligious, and their employees outside of its scope. *Cf. id.* at 544. Because the Mandate hinders "much more religious conduct than is necessary in order to achieve the legitimate ends asserted in [its] defense," it is "not neutral." *Id.* at 542; *see also Blackhawk*, 381 F.3d at 209 (explaining that for a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice"). This lack of neutrality subjects the Mandate to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

Finally, it is noteworthy that under the Free Exercise Clause, Plaintiffs need not show that the Mandate imposes a "substantial" burden on their free exercise rights at all: strict scrutiny applies to a non-generally applicable or non-neutral law. *See Lukumi*, 508 U.S. at 546; *Blackhawk*, 381 F.3d at 209 (Alito, J.) (recognizing strict scrutiny applies once non-general applicability or non-neutrality is established); *accord Hartmann v. Stone*, 68 F.3d 973, 979 n.3 (6th Cir. 1995), and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994).

Because the violation of FOCUS's religious beliefs includes compelled speech and censorship, FOCUS's Free Exercise Clause claim also triggers strict scrutiny under the "hybrid-rights" theory recognized by the Tenth Circuit. The Tenth Circuit will "apply the hybrid-rights exception to [*Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)],"and thus require strict scrutiny, "where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim," even if the companion speech claim might not be "successful." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004).

B. The Mandate violates the Establishment Clause (Third Claim for Relief).

The Mandate also violates the Establishment Clause of the First Amendment. "A set of rules that "makes explicit and deliberate distinctions between different religious organizations" in order to burden some and not others violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) "By their 'very nature,' the distinctions [among religious organizations] 'engender a risk of politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* at 253 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970)). The Establishment Clause "guard[s] against" government distinctions "inviting undue fragmentation" among religious groups who "inevitably represent certain points of view . . . in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." *Id.* (quoting *Walz*, 397 U.S. at 695). Instead the government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (quoting New York Const., art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 75).

The government's exemptions, "accommodations," and non-enforcement choices create exactly the kind of discriminatory caste system of religious groups that the Establishment Clause prohibits.

1. Defendants' narrow religious exemption.

Despite the "comprehensive" discretion Congress provided by which Defendants were authorized to exempt all religious objectors, s*ee* 76 Fed. Reg. at 46,623; 45 C.F.R 147.131, the government decided that only churches and their integrated auxiliaries count as "religious employers" entitled to an "exemption" from the Mandate, 45 C.F.R. § 147.131. The government's unsupported rationale for denying this exemption to other objecting religious non-profits such as FOCUS was that only churches and their integrated auxiliaries have employees committed to the organization's beliefs on contraception. *See* 78 Fed. Reg. at 39,887. This rationale is demonstrably false in this case, as evidenced by the presence of the individuals Plaintiffs in this case and their oaths of fidelity to FOCUS and its religious beliefs.

2. FOCUS does not qualify as an "integrated auxiliary."

Defendants' narrow religious exemption includes not just churches but their "integrated auxiliaries." 45 C.F.R. § 147.131. Thus if a church runs a school and does not separately incorporate it, the school is likely exempt; but if a diocese has a separately incorporated religious school it is likely not exempt.

Though FOCUS operates under the auspices of the spiritual beliefs and hierarchy of the Catholic Church, it does not qualify of as an integrated auxiliary because it is not organized as an operation of a specific Catholic Church.

The rule which exempts only integrated auxiliaries and not other religious organizations like FOCUS is similar to one rejected by *Larson* as an unconstitutional basis to distinguish

between religious organizations. IRS rules define integrated auxiliaries, in part, based on the percentage of income received from a church. 26 CFR § 1.6033-2(h) ("[n]ormally receives more than 50 percent of its support from" outside sources). The Court declared in *Larson*, 456 U.S. at 249, that "we find no substantial support . . . in the record" for the government's rationale for distinguishing between religious organizations on that basis.

3. Defendants make theological judgments in their "accommodation."

The government subjects objecting, but non-exempt, religious organizations to a multi-tiered "accommodation" by which Defendants attempt to decide what will satisfy each organization's conscience. Under the rule, FOCUS is forced to either provide contraceptive/abortifacient coverage itself, 45 C.F.R. § 147.131, or (because it maintains a self-insured plan in a contract with its TPA) order its TPA to do so as a part of FOCUS's own plan, 78 Fed. Reg. at 39,894-95. Defendants improperly don the role of theological arbiters to determine and decide that this arrangement satisfactory to FOCUS's religious conscience.

Such a rule imposes conflicting and "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261. Another kind of non-exempt religious organization is treated differently. The government chose not to impose its penalties on the plan administrators of self-insured plans of non-profit religious entities that are "church plans" exempt from ERISA. *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691. In this respect, FOCUS's coerced government designation form triggers penalties on its TPA for not providing contraceptive/abortifacient coverage, merely because FOCUS does not happen to be enrolled in a self-insured plan that is a "church plan" exempt from ERISA. The government actually contradicts its rationale in making this distinction. When it refused to "exempt" both FOCUS and

"church plan" non-exempt religious groups, the government did so on the basis that all such groups' employees need to receive contraceptive/abortifacient drugs, devices or services coverage through the accommodation. *See* 78 Fed. Reg. at 39,887. But under the "church plan" loophole, the government withheld the principal penalty it chose to use to deliver that exact coverage. The government therefore undermined the premise that any such organization's employees need to receive the coverage.

4. Defendants reject idea that for-profit corporations can be exempt.

The government deemed religious people in for-profit corporations to not have any claim to religious conscience at all and therefore to be entitled to neither an exemption nor the accommodation. *See Hobby Lobby, passim*.

5. Defendants have arbitrarily exempted "grandfathered" plans.

Defendants chose to withhold the Mandate from tens of millions of women who are in grandfathered health plans. FOCUS's plan does not qualify for this grandfathered status. Instead FOCUS must comply with the Mandate and include contraceptive/abortifacient drugs, devices or services coverage in its own plan while Defendants have exempted tens of millions of women at thousands of employers from the Mandate.

6. Defendants have exempted "health sharing ministries."

Defendants have exempted "health sharing ministries" and their members from the Mandate, provided they have been in existence since December 31, 1999. 26 U.S.C. § 5000A(d)(2)(B). The choice of that date is arbitrary. It appears that the only ministries that meet this qualification are three Evangelical Protestant groups: Samaritan Ministries, Medi-Share, and Christian Healthcare Ministries. Catholic or other religious denominations that wish to establish health sharing ministries are prohibited from doing so. *Larson* found an

Establishment Clause violation in the context of a scheme that similar had the effect of denominational discrimination. 456 U.S. at 252–55.

7. Defendants have exempted Anabaptists.

The ACA exempts members of certain historic Anabaptist denominations from the ACA's individual mandate to obtain insurance the result of which is that such denominations need not deliver contraceptive/abortifacient drugs, devices, and services coverage to their members. These Anabaptist denominations oppose the acceptance of insurance and have been in existence at all times since December 31, 1950. *See* 26 U.S.C. § 5000A(d)(2)(A) (referencing 26 U.S.C. § 1402(g)(1)). This adds to the government's patchwork exemption scheme, which nevertheless refuses to offer an exemption from the Mandate to FOCUS.

8. Defendants' arbitrary exemptions amount to "religious gerrymandering."

Such "religious gerrymandering" of religious believers and organizations is unconstitutional. *Larson*, 456 U.S. at 255 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). In *Weaver*, the Tenth Circuit held unconstitutional a policy of discrimination among religions that is very similar to the Mandate. The policy in that case attempted to treat "pervasively sectarian" educational institutions differently than other religious institutions. *Id.* at 1250–51. The Mandate here likewise improperly discriminates among religious organizations. It treats them differently based on whether they are churches that have been exempted from the Mandate, religious non-profits that are subject to the Mandate's coercive "accommodation," or religious non-profits otherwise exempt from the Mandate.

The government explicitly refused to extend its church exemption to entities such as FOCUS based on the incorrect judgment that churches have a greater coincidence of beliefs with their employees. That judgment is of the same brand as a "pervasively sectarian" rule. The Tenth

Circuit called such line drawing "puzzling and wholly artificial," even when the government contended, as it does here, that it was merely "distinguish[ing] not between types of religions, but between types of institutions." *Id.* at 1259–60. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial demarcations of discrimination. *Id.* at 1260.

Under *Weaver*, therefore, discrimination because of different types of religious organizations and their religious exercise violates the Constitution. *Id*. at 1256, 1259. The Mandate picks and chooses between different kinds of religious people and practices, respecting some while coercing most others. The government has decided that covering or ordering coverage of abortifacient items does not infringe on Plaintiffs' religious beliefs, while at the same time it: exempted tens of millions of women in grandfathered plans; exempted churches even though religious ministries may have similar congruence between the beliefs of the organization and its employees (as is obviously the case here); exempted churches' integrated auxiliaries even if those entities engage in Christian ministry indistinct from other non-profits (as is obviously the case here); refrained from applying penalties to plan administrators of self-insured non-exempt religious groups in "church plans" even though the government presumably contends that their employees need the Mandate; refrained from applying the Mandate to health sharing ministries, but prohibited the founding of new health sharing ministries of the same or other denominations; and refrained from requiring the Mandate on certain religious denominations.

This segregation among religious groups is not only discriminatory, it is largely arbitrary and irrational. It violates the neutrality and non-entanglement requirements of the Establishment Clause and is therefore unconstitutional.

C. The Mandate violates the Free Speech Clause (Fourth Claim for Relief).

1. The Mandate impermissibly compels speech.

The Mandate also violates the First Amendment's protection of the Freedom of Speech by coercing Plaintiffs to engage in speech that is contrary to their religious beliefs.

The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Here, the Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable. It explicitly requires FOCUS, as a self-insured entity, not merely to express its religious objection to the Mandate by signing the government's form, but it also requires Plaintiffs to explicitly declare (by an individual Plaintiff's signature to the government's form) that "[t]he obligations of the third party administrator [to provide contraceptive/abortifacient drugs, devices, and services] are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A. This certification is an instrument under which the plan is operated." EBSA Form at 2; 29 C.F.R. § 2590.715–2713A.

The government explained that, by means of this speech, FOCUS creates legal obligations in its TPA, as FOCUS's agent, to provide the precise coverage within its own plan that FOCUS objects to arranging and contracting for. 78 Fed. Reg. at 39,879–80; *Archbishop of Washington*, 2013 WL 6729515 at *22. The government also explained that those legal obligations occur only if FOCUS itself speaks this message, i.e., it is necessarily FOCUS's own speech, or else it is not operative. 78 Fed. Reg. at 39,879–80. By this coerced speech, FOCUS is forced to arrange and contract for its TPA to provide the exact coverage that the government falsely declares FOCUS does not arrange and contract for.[2] This is speech that FOCUS objects to speaking, VC ¶ 214, 217. Thus, the designation requirement constitutes compelled speech in its purest form. It is a straightforward violation of the First Amendment.

2. The Mandate impermissibly censors speech.

Second, the Mandate also censors FOCUS's speech. After forcing FOCUS to speak words that contract and arrange for objectionable "obligations" on its plan administrator, the Mandate goes on to prohibit FOCUS (and one or more of the individual Plaintiffs acting for it) from speaking a contrary message to its plan administrator. The Mandate provides that "[t]he eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, *and must not, directly or indirectly, seek to influence the third*

[2] In other self-insured cases the government has described the required form as merely an expression of religious objection. As noted above, that description is false. The form also requires FOCUS to recite the above-quoted designation of "obligations" language, and that speech contains specific content and legal import well beyond a religious objection. If FOCUS does not recite this "obligations" language, the government will impose its full range of penalties. As discussed above, FOCUS also objects to the triggering context of its forced expression of objection in the form.

party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715–2713A (emphasis added).

This is a gag rule, prohibiting a Catholic organization from speaking its Catholic beliefs. It strikes at the heart of the freedom of speech enshrined in the First Amendment. It restricts FOCUS's speech based on its content, i.e., the content of speech that would try to "interfere" or "influence" someone against providing products and services (abortifacients, contraceptives, sterilization, and related services) to which FOCUS objects. But for this gag rule, FOCUS would instruct its TPA not to provide such objectionable drugs, devices, and services.

The Mandate is therefore a content-based restriction on speech that is presumptively unconstitutional. *Turner*, 512 U.S. at 641 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid" under the First Amendment).

The Mandate is also an unconstitutional prior restraint on speech. "The term prior restraint is used to describe administrative . . . orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal citations omitted). The Supreme Court has declared that "prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any system of prior restraints on expression comes to [the Supreme Court] bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971). The Defendants have issued an administrative regulation forbidding Plaintiffs from engaging in

speech to their TPA. This is "forbidding [of] communications . . . in advance." *Alexander*, 509 U.S. at 550.

3. The Mandate cannot survive strict scrutiny.

The government cannot meet its burden to satisfy strict scrutiny either for its compelled speech or for its censorship of speech. As discussed above, the government has conceded in similar cases that it fails the compelling interest test. *See Reaching Souls Int'l*, 2013 WL 6804259 at *6. The government has not shown any compelling interest to justify burdening FOCUS's speech. And violating FOCUS's freedom of speech is not the least restrictive means of pursuing any compelling interest. *See also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 799–801 (1988) (requiring government efforts in the alternative).

E. Plaintiffs Are Entitled to a Preliminary Injunction.

1. Plaintiffs will Suffer Irreparable Harm Absent an Injunction.

Plaintiffs seek to continue offering their employee insurance plan without providing coverage of contraceptives/abortifacients drugs, devices, and related services, and without being subject to the Mandate's harsh fines and penalties, lawsuits, and other liability. Without the requested injunction, Plaintiffs would be coerced, in violation of their religious rights under RFRA and the First Amendment, and thereby caused actual and imminent loss of their religious conscience rights and liberties. This is irreparable injury. *Hobby Lobby* ruled that irreparable injury is satisfied in the presence of the Mandate's violation of RFRA and noted that the same is true for constitutional violations. *Hobby Lobby*, 723 F.3d at 1146. Irreparable harm is therefore established here as well.

2. The Balance of Equities Strongly Favors Plaintiffs.

The balance of equities strongly favors Plaintiffs. FOCUS's plan already omits contraceptives/abortifacients and related services, and through a "safe harbor" for non-profits the government has already delayed the impact of the Mandate on FOCUS and other objecting religious non-profits well beyond the Mandate's application to other entities. The government will suffer minimal, if any, harm if the injunction is entered for the duration of this case. The government is already withholding application of the Mandate from tens of millions of women in grandfathered plans. It is also withholding enforcement of the Mandate from religious non-profit organizations indistinguishable from FOCUS except that their plans are not subject to ERISA or they are churches or integrated auxiliaries. And Defendants have conceded that in organizations likely to have employees that share their beliefs on contraceptives/abortifacients and related services (such as is the case with FOCUS), an exemption does not undermine the government's interests. Granting preliminary injunctive relief here will merely prevent Defendants from enforcing the Mandate against one objecting religious non-profit which employs only 450 people. Defendants cannot possibly show that applying the Mandate to one entity and so few employees, considering the massive exemptions it has created, would "substantially injure" Defendants' or any others' interests. Any minimal harm in not applying the Mandate against one additional entity, in light of Defendants' willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff'd* 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

Balanced against this non-injury to Defendants is the real and immediate threat to Plaintiffs' integrity with respect to their sincere religious beliefs. They face the imminent

prospect of being forced to cover or order coverage of contraceptives/abortifacients and related services in violation of their sincere religious beliefs, or suffering massive penalties that Defendants obstinately declare they intend to apply. *See Reaching Souls Int'l,* 2013 WL 6804259 at *8 (finding balance of equities in favor of non-profit challengers to the Mandate); *Southern Nazarene,* 2013 WL 6804265, at *10–*11 (same).

3. The Public Interest Would Be Served by a Preliminary Injunction.

The public interest is served by granting Plaintiffs' motion for preliminary injunction as fundamental rights protected by the Constitution are at stake. "Vindication of First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). The government's purported interest in "improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men . . . are countered, and indeed outweighed, by the public interest in the free exercise of religion." *Newland,* 881 F. Supp. at 1295 (internal citations omitted). Furthermore, any interest of Defendants in uniform application of the Mandate is "undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Id.*; *see also Reaching Souls Int'l,* 2013 WL 6804259 at *8 (finding public interest factor in favor of non-profit challengers to the Mandate); *Southern Nazarene,* 2013 WL 6804265, at *11 (same).

Conclusion

For the foregoing reasons, the Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

Plaintiffs respectfully request that their motion be set for oral argument so as to enable Plaintiffs to have a decision by no later than May 15, 2014.

Respectfully submitted this 11th day of March, 2014.

Attorneys for Plaintiffs

s/ Michael J. Norton
Michael J. Norton
ALLIANCE DEFENDING FREEDOM
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111
720) 689-2410
(303) 694-0703 (facsimile)
mjnorton@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on the 11th day of March, 2014, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

bradley.p.humphreys@usdoj.gov

s/ Michael J. Norton
Michael J. Norton