IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-02105-REB-MJW

COLORADO CHRISTIAN UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary, U.S. Dep't of Health and Human Services, *et al.*,

Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Plaintiff Colorado Christian University (CCU) moves for summary judgment on Counts I, II, V, and IX of its Complaint. The common question is whether Defendants (collectively, HHS) can coerce conscientious objectors to aid and abet what they believe to be the taking of innocent life, by forcing them to arrange for their employees to have free access to abortion-causing drugs and devices. HHS concedes that religious organizations' refusal to do this is motivated by sincere religious belief and constitutes an exercise of religion. Hence its full exemption for institutional churches and its attempt to "accommodate" other religious organizations by shifting the *costs* of the objected-to coverage to insurers and third-party administrators. But shifting costs does not remove moral complicity. The "accommodation" still coerces CCU to maintain and trigger the mechanism allowing plan participants to access abortion-inducing drugs and devices. This, CCU cannot do in keeping with its conscience.

CCU's conscientious objection is protected by the Religious Freedom Restoration Act (RFRA) (Count I), the Free Exercise Clause (Count II), the Establishment Clause (Count V), and the Free Speech Clause (Count IX). Against any of these protections of constitutional rights, HHS can coerce CCU's participation only if it has a compelling interest of the highest order. As the *en banc* Tenth Circuit has already held, the mandate does not meet this strict standard. Summary judgment is thus warranted.

STATEMENT OF UNDISPUTED FACTS

I. The Contraception Mandate

A. Promulgation of the mandate and the "religious employer" exemption

Signed into law in March 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 1119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, ACA) instituted significant changes to our nation's health care and health insurance systems. Among other things, the ACA mandates that any "group health plan" or "health insurance issuer" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). The ACA did not specify what "preventive care" would include, but left that up to the Health Resources and Services Administration (HRSA), a division of Defendant HHS. 42 U.S.C. § 300gg-13(a)(4).

On July 19, 2010, HHS published an interim final rule under the ACA (First Interim Final Rule), confirming that HRSA would publish guidelines defining "preventive care." 75 Fed. Reg. 41726-01, 41728 (July 19, 2010); 45 C.F.R. § 147.130(a)(1)(iv). HRSA issued its guidelines on August 1, 2011, providing that "preventive care" would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization

procedures, and patient education and counseling for all women with reproductive capacity." HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), Baxter Decl. (Ex. B) ¶ 2, B-1. FDA-approved contraceptive methods include "emergency contraception" such as Plan B (the "morning-after" pill) and Ella (the "week-after" pill). FDA Birth Control Guide (August 2012), Ex. B ¶ 3, B-2 at 16-17. The FDA's Birth Control Guide notes that these drugs, as certain intrauterine devices (IUDs), may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. *Id*.

The same day HRSA issued guidelines, HHS promulgated an amended interim final rule (Second Interim Final Rule), adding a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621-01 (published Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). Specifically, HRSA was granted "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623; 45 C.F.R. § 147.130(a)(1)(iv)(A). A "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "serves primarily persons who share [its] religious tenets"; and (4) "is a nonprofit organization as described" in section 6033(a) of the Internal Revenue Code. 76 Fed. Reg. at 46626; 45 C.F.R. § 147.130(a)(1)(iv)(B). The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and to the "exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

B. The Safe Harbor

The Second Interim Final Rule's narrow exemption for religious employers provoked hundreds of thousands of public comments. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

In response, HHS Secretary Kathleen Sebelius announced that certain non-exempt religious objectors would be granted an "additional year" before the mandate was enforced to allow them "more time and flexibility to adapt to this new rule." Jan. 20, 2012 Statement, Ex. B ¶ 4, B-3. Subsequently, on February 10, 2012, HHS issued a "Temporary Enforcement Safe Harbor," advising it would not enforce the mandate for one additional year against certain non-exempt organizations with religious objections. HHS, *Guidance on the Temporary Enforcement Safe Harbor* (updated June 28, 2013), Ex. B ¶ 5, B-4 at 3. Under the safe harbor, the mandate would not apply until an organization's first plan year after August 1, 2013. *Id*. The safe harbor did not expand the religious employer exemption; the same day the safe harbor was issued, HHS confirmed the exemption as "a final rule without change." 77 Fed. Reg. 8725, 8730 (published Feb. 15, 2012).

C. The Advance Notice of Proposed Rulemaking

The controversy not subsiding, on March 16, 2012, HHS announced an "Advance Notice of Proposed Rulemaking" (ANPRM), stating its intention to finalize an "accommodation" by the end of the safe harbor. 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012). The ANPRM did not announce any intention to expand the exemption. *Id.* Rather, it proposed that objecting employers' "health insurance issuers" could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id.* HHS noted "approximately 200,000 comments" submitted in response to the ANPRM, 78 Fed. Reg. 8456, 8459 (published Feb. 6, 2013).

D. The Notice of Proposed Rulemaking

On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM), proposing two major changes to the then-existing regulations. 78 Fed. Reg. 8456. First, it proposed revising the religious employer exemption by eliminating the requirements that religious employers have the purpose of inculcating religious values and primarily employ and serve persons of their own faith. *Id.* at 8458-59. Second, it proposed to "accommodate" non-exempt religious organizations like CCU by requiring them to force their insurers and third party administrators to provide "separate . . . coverage" for the free contraception and abortifacients. 78 Fed. Reg. 8463. "[O]ver 400,000 comments" were submitted in response to the NPRM. 78 Fed. Reg. 39870, 39871 (July 2, 2013).

E. The Mandate's Final Form

On June 28, 2013, HHS issued a final rule (the Mandate). Under the Mandate, the "religious employer" exemption remains limited to institutional churches "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. at 39874(a); 45 C.F.R. § 147.131(a). The Mandate also creates a separate "accommodation" for any non-exempt religious organization that (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). The final rule extends the safe harbor through the end of 2013. 78 Fed. Reg. at 39889. Thus, an eligible organization must execute its self-certification "prior to the beginning of the first plan year" which begins on or after January 1, 2014, and deliver it to its insurer or third party administrator. *Id.* at 39875.

Delivering the self-certification would trigger the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 29 C.F.R. § 2590.715–2713A. If a third party administrator is unwilling to provide the services, the objecting religious organization is required to find one that is willing. 78 Fed. Reg. at 39880; ("[T]here is no [legal] obligation for a third party administrator to enter into or remain in a contract with the eligible organization,").

Once a third party administrator consents, the religious organization—via its self-certification—must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." *Id.* at 39879. The self-certification must notify the third party administrator of its "obligations set forth in these final regulations." *Id.* at 39879; *see also* 29 C.F.R. § 2590.715–2713A.

Employers who provide "grandfathered" health care plans are exempt from the Mandate. 42 U.S.C. § 18011 (2010). In 2010, the government predicted that 87 million people would remain on grandfathered plans in 2013. Ex. B ¶ 6, B-5 at 4. Employers with fewer than fifty employees also may avoid the mandate. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Nearly 34 million individuals are employed by firms with fewer than fifty employees. Ex. B ¶ 7, B-6 at 2.

II. CCU and the Mandate's Impact

CCU is a small, "Christ-centered" liberal arts university committed to offering a complete education that develops students intellectually, professionally, and spiritually. Armstrong Decl. (Ex. A) ¶¶ 4-5. It does not affiliate with any specific denomination, but

unites with the broad, historic evangelical faith. Ex. A ¶ 6. Consistent with its religious mission, CCU strives to manifest its beliefs in all aspects of its operations. Ex. A ¶¶ 7-9. All CCU employees profess a Statement of Faith, and all students commit to a Lifestyle Covenant. Ex. A ¶¶ 10-11. As part of its commitment to Christian education, CCU promotes both the spiritual and physical well-being of its employees and students, including by providing generous health insurance. Ex. A ¶ 12. Its employee plan currently covers 673 individuals. Ex. A ¶ 27. The student plan currently covers 74 individuals. Ex. A ¶ 28.

CCU believes and teaches that each human being bears the image of God, and that all human life is sacred from the moment of conception. Ex. A ¶ 13. One of CCU's Strategic Objectives is to promote the sanctity of life. Ex. A ¶¶ 14-15. Accordingly, its insured student health plan excludes coverage for abortions and all contraceptives. Ex. A ¶ 19. Its self-insured employee health plan excludes coverage for all abortions and emergency contraceptives like Plan B, Ella, and certain IUDs. Ex. A ¶¶ 20, 35. CCU believes the ability of these drugs and devices to prevent an embryo from implanting in the uterus ends an innocent human life. Ex. A ¶¶ 21, 36. It would be a violation of CCU's religious beliefs concerning the sanctity of life, and a betrayal of its employees', students', and donors' trust, to deliberately arrange for insurance coverage that facilitates access to abortion-inducing drugs and devices or related educational and counseling. Ex. A ¶¶ 16-18, 22, 36-37.

CCU does not qualify for the religious employer exception, because it is not a church, a church's integrated auxiliary, or a convention or association of churches. Ex. A ¶ 41; *see also* 26 U.S.C. § 6033(a). To qualify for the "accommodation," CCU would

need to execute its self-certification prior to July 1, 2014, Ex. A ¶¶ 38-39, and designate its third-party administrator as an "ERISA administrator" that will pay for the objected-to services, Ex. A ¶ 30; 29 C.F.R. § 2590.715-2713A(b). Expressly designating a third party administrator as "an ERISA section 3(16) plan administrator" and notifying the administrator of its "obligations set forth in the[] final regulations" would make CCU morally complicit in providing the objected-to drugs and services. Ex. A ¶ 23; 78 Fed. Reg. at 39879. In other words, CCU's self-certification would set in motion a chain of events resulting in its employees receiving free abortifacients through the insurance plans that CCU provides and pays for. Ex. A ¶ 24; 78 Fed. Reg. at 39875-77. Acting as a conduit for these products violates CCU's Christian faith. Ex. A ¶ 25. From CCU's perspective, finding and requiring a third party to provide free access to abortifacient services is no different than directly providing that access itself—CCU cannot simply outsource its conscience. Ex. A ¶ 26.

If CCU maintains its healthcare plans without participating in HHS's accommodation, it faces fines of over $27 million annually. Ex. A ¶¶ 27-28; 26 U.S.C. 4980D(b)(1). If it simply dropped its healthcare plans, it would face fines of more than $1.3 million annually, Ex. A ¶ 29, and would be placed at a severe competitive disadvantage in its efforts to recruit and retain employees and students. Ex. A ¶¶ 30-33.

ARGUMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, there can be no dispute that the Mandate substantially burdens CCU's sincere religious exercise. And it is clear under Tenth Circuit precedent

that HHS lacks a compelling interest that could justify forcing CCU to violate its conscience. Similarly, there can be no genuine dispute that the Mandate discriminates among religious organizations and compels CCU to speak against its will.

I. The Mandate violates RFRA.

In *Hobby Lobby Stores, Inc. v. Sebelius*—another lawsuit challenging the Mandate—the Tenth Circuit established the framework for analyzing RFRA claims. 723 F.3d 1114, 1140 (10th Cir. June 27, 2013) (*en banc*). First, a court must "identify the religious belief" at issue. *Id*. Second, it must "determine whether this belief is sincere." *Id*. Third, the court must determine "whether the government places substantial pressure on the religious believer." *Id*. Finally, if there is substantial pressure, the government action will be upheld only if it satisfies strict scrutiny—*i.e.*, the court concludes that forcing the religious believer to violate its conscience is "'the least restrictive means of advancing a compelling interest.'" *Id*. at 1143 (citation omitted); 42 U.S.C. § 2000bb-1.

Under this rubric, the *Hobby Lobby* court concluded that the Mandate violated RFRA, because it substantially pressured the plaintiffs to violate their sincere religious beliefs against facilitating access to abortion-inducing drugs and devices, without satisfying strict scrutiny. 723 F.3d at 1140-44. The facts at issue here are essentially identical to those in *Hobby Lobby*, and the same ruling should follow.

A. CCU's religious beliefs forbid it from participating in HHS's scheme.

CCU's religious beliefs are identical to the religious beliefs asserted in *Hobby Lobby*. There, the Tenth Circuit noted that "one aspect" of the plaintiffs' religious faith was "a belief that human life begins when sperm fertilizes an egg." *Id*. at 1122. Thus, the plaintiffs believed it was "immoral for them to facilitate any act that causes the death of a

human embryo." *Id*. The court later noted the plaintiffs' broad "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting' the devices and drugs" at issue. *Id*. at 1140 (citation omitted).

CCU likewise believes that "human life is sacred from the moment of conception," Ex. A ¶ 13, and that "prevent[ing] an embryo from implanting in the uterus ends an innocent human life." Ex. A ¶¶ 21, 36. Thus, CCU cannot in any way arrange for or facilitate access to what it considers to be an abortion. Ex. A ¶¶ 16-18, 22, 36-37. Yet the Mandate requires CCU to provide an employee health plan that will facilitate access. It must maintain the plan; it must expressly designate its third-party administrator as an ERISA "plan administrator and claims administrator" that will pay for the abortifacients; it must specifically notify the administrator of this obligation; and it must find a new administrator if the current one refuses to participate. 78 Fed. Reg. at 39879; 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1)(ii), (c)(1). CCU's religious beliefs forbid such complicity. Ex. A ¶¶ 22-26, 36-37, 43-44.

B. CCU's religious beliefs are sincere.

In *Hobby Lobby*, HHS did not contest the plaintiffs' sincerity. 723 F.3d at 1140. Thus, the court saw "no reason to question it either." *Id*. Nevertheless, the court noted the common nature of the plaintiffs' beliefs: "The assertion that life begins at conception is familiar in modern religious discourse . . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar." *Id*. at 1140 n.15. There is nothing to suggest that CCU's adherence to these same beliefs is anything but sincere.

To explain CCU's beliefs another way, if the accommodation were in furtherance of a crime rather than facilitating access to abortifacients, CCU would be subject to liability

for conspiracy and accomplice liability under, for example, 18 U.S.C. § 371 (conspirator liable for "any act to effect the object of the conspiracy") or 21 U.S.C. § 846 (liability for "[a]ny person who attempts or conspires to commit any offense"). CCU's understanding of moral culpability is entitled to at least as much deference as that of culpability in federal criminal law. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) (impact on religious exercise is "measured . . . from the [plaintiff's] perspective, not from the government's") (quotations omitted).

C. The Mandate substantially pressures CCU to abandon its beliefs.

Government action substantially burdens a religious belief when it "requires participation in an activity prohibited by a sincerely held religious belief" or "'places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138 (quoting *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010)). The Mandate does both.

First, the Mandate expressly requires CCU to participate directly in the government's scheme by either providing abortifacients itself or designating its third party administrator as "an ERISA . . . claims administrator solely for the purpose of providing" payments. 78 Fed. Reg. at 39879. CCU must specifically notify the administrator of these obligations. 78 Fed. Reg. at 39879. And if the third party administrator objects, CCU must find a new one. *Id*. at 39880 ("no obligation for a third party administrator to

enter into or remain in a contract . . . ."). This alone suffices to show a substantial burden. *See Hobby Lobby*, 723 F.3d at 1151-52 (Hartz, J., concurring).

The accommodation also places substantial pressure on CCU to abandon its religious convictions. If CCU refuses to designate a third party administrator or insurer and continues offering insurance without the objectionable drugs and devices, it will face fines of $100 per day per plan participant. 26 U.S.C. § 4980D(b)(1). With 747 covered individuals, that comes to nearly $75,000 per day, or over $27 million per year. Ex. A ¶¶ 27-28. And if CCU simply dropped its employee health plan, it would be fined $2000 per employee, or approximately $1.3 million annually. 26 U.S.C. § 4980H(c)(1); Ex. A ¶ 29. Dropping its insurance plan would also place CCU at a severe competitive disadvantage in its efforts to recruit and retain employees and students. Ex. A ¶¶ 30-33.

In *Hobby Lobby*, the Tenth Circuit held that "this dilemma created by the statute" met the "threshold showing regarding a substantial burden." 723 F.3d at 1141. Being forced to "compromise [its] religious beliefs, pay [over $27] million more in taxes every year," or "pay roughly [$1.5] million more in annual taxes and drop health-insurance benefits for all employees" is "precisely the sort of Hobson's choice" that "establishe[s] a substantial burden as a matter of law." *Id*. at 1141.

D. The Mandate cannot survive strict scrutiny.

Finally, the *Hobby Lobby* court also considered the government's asserted interests in promoting "public health" and "gender equality" and concluded they failed to satisfy strict scrutiny. *Id*. at 1143. First, the court noted that these asserted government interests were too "broadly formulated" to justify denying "specific exemptions to particular religious claimants." *Id*. (quoting *Gonzales v. O Centro Espirita Beneficente do*

Vegetal, 546 U.S. 418, 431 (2006)). Second, the court held that these interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people," including persons working "for private employers with grandfathered plans," and "for employers with fewer than fifty employees." *Id*. "'[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id*. (citations omitted). The *Hobby Lobby* court's conclusion compels the same result here.

II. The Mandate violates the Free Exercise Clause.

Laws impacting religious exercise that are not neutral or generally applicable also face strict scrutiny under the Free Exercise Clause. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

A. The Mandate is not generally applicable.

A regulation fails general applicability when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) (*FOP*). For example, the slaughter ordinances in *Lukumi* ostensibly protected public health and prevented animal cruelty. 508 U.S. at 543. But because hunting, pest control, and euthanasia were exempted, the ordinances were not generally applicable. *Id.* at 543-44. Similarly, the regulation in *FOP* prohibited police officers from growing beards, unless they had a medical justification. *FOP*, 170 F.3d at 366. The policy was unconstitutional as applied to Muslim officers, because it made a "value judgment in favor of secular motivations, but not religious motivations," thereby failing general applicability. *Id*.

Here, the Mandate goes far beyond the exemption schemes in *Lukumi* and *FOP*, because it allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes. Most notably, over 87 million Americans are covered under "grandfathered" plans that are indefinitely excused, not only from complying with the Mandate, but from covering *any* of the mandated preventive services. Ex. B ¶ 6, B-5 at 4; 26 U.S.C. § 18011(a)(2). Additionally, 34 million more Americans are employed by small businesses, which also may avoid the Mandate. Ex. B ¶ 7, B-6 at 2; 26 U.S.C. § 4980H (c)(2). While these secular exemptions severely undermine the Mandate's interest in increasing insurance coverage for the whole range of women's preventive services, CCU gets no exemption even from the narrow slice of the Mandate to which it objects for religious reasons. This is exactly the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *FOP*, 170 F.3d at 366.

B. The Mandate is not neutral.

The Mandate fails the requirement of neutrality for three reasons: (1) it produces differential treatment among religions; (2) it accomplishes a "religious gerrymander"; and (3) it favors secular over religious values.

1. The Mandate produces differential treatment among religions.

One way to prove a law is not neutral is to show it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. In *Lukumi*, the Court said that prohibiting killing animals for one religious purpose (sacrifice) while exempting other religious killings (kosher slaughter) created "differential treatment of two religions," which could be "an independent constitutional violation." *Id*. Similarly, in *Larson v. Valente*, 456 U.S. 228,

246 n.23 (1982), the Court struck down registration and reporting requirements that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency." *Cf. O Centro*, 546 U.S. at 432-37 (requiring exemption under RFRA for one religion where exemption was granted for another).

Here, the Mandate establishes three tiers of religious objectors: favored "religious employers" (who are exempt), less-favored non-profit religious objectors (who are forced to facilitate access to abortion-causing drugs), and disfavored for-profit religious objectors (who are forced to facilitate and pay for access). *See* 78 Fed. Reg. at 39874-75; *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face."). The government cannot rank in different tiers the rights of people with identical religious objections. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.") (quotations omitted); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).

2. The Mandate accomplishes a religious gerrymander.

Another way to prove that a law is not neutral is to show that "the effect of [the] law" is to accomplish a "religious gerrymander." *Lukumi*, 508 U.S. at 535. In *Lukumi*, the Court found that a "pattern of exemptions," *id*. at 537, was impermissibly used to narrow the law's prohibitions specifically "to target petitioners and their religious practices." *Id*. at 535. A similar pattern is manifest here. HHS has repeatedly recognized the sincerity

of religious organizations' objections to facilitating access to abortion-causing drugs and devices. *See, e.g.*, January 20, 2012 Statement of Defendant Secretary Sebelius, Ex. B ¶ 4, B-3 (recognizing the "important concerns some have raised about religious liberty" and the need to "respect[ ] religious freedom"); *see also Hobby Lobby*, 723 F.3d at 1140 (noting government did not dispute religious sincerity of objections). Nevertheless, the "religious employers" exemption protects only institutional churches, their "integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39871. Yet other religious organizations—like CCU—are excluded from the exemption, even though they share the same religious objections.

This facial evidence of targeting is bolstered in that the government's proffered justification for discriminating lacks legitimacy. HHS claims that objecting "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. But the same can be said for CCU. All CCU employees profess a Statement of Faith, which establishes "the essential framework" of Christian beliefs "within which members of the University both unite in shared beliefs and explore differences." Ex. A ¶¶ 10-11. Thus, CCU employees presumably are just as likely to adhere to the teachings CCU itself embraces. The inconsistency in HHS's treatment of similarly situated employers underscores the Mandate's targeting effect. *See Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599,

609 (5th Cir. 2008) (neutrality requires that government policy be "actually based on the justifications it purports, and not something more nefarious").

3. The Mandate favors secular over religious reasons for noncompliance.

Finally, the Mandate also fails neutrality by honoring certain secular reasons for failure to comply, while rejecting CCU's religious reasons. *See supra* Argument I.D. The net effect is that policies covering tens of millions of Americans are exempt for secular reasons, while CCU must drop its insurance and pay fines for its religious objection. *See Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (it is "clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

Because the Mandate cannot qualify as a neutral or generally applicable law, HHS must satisfy strict scrutiny. It cannot do so. *See supra* Argument I.D.

III. The Mandate violates the Establishment Clause

The Mandate's "explicit and deliberate distinctions between different religious organizations" also violate the Establishment Clause. *See Larson*, 456 U.S. at 247 n.23; *Weaver*, 534 F.3d at 1259 (quoting *Larson*) (The "neutral treatment of religions" is "[t]he clearest command of the Establishment Clause"). The government exempts favored religious organizations only if they are an institutional church or have structural, doctrinal, and financial affiliation—as defined by the government—with an institutional church. By structuring the exemption in this way, the Mandate engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1257 (McConnell, J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). This is forbidden by the Establishment Clause.

Larson invalidated a Minnesota law that imposed anti-fraud disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. The law thus exempted established, self-supported churches, while targeting churches that relied on outside donations. *Id.* at 247 n.23; *see also Weaver*, 534 F.3d at 1259 (explaining that the law in *Larson* "discriminated against religions . . . that depend heavily on soliciting donations from the general public"). This was an "explicit and deliberate distinction[] between different religious organizations," one that failed strict scrutiny and violated the Establishment Clause. *Larson*, 456 U.S. at 247 n.23, 255.

Like the exemption struck down by *Larson*, the Mandate's "religious employer" exemption impermissibly distinguishes religious organizations based on internal religious characteristics. An organization is exempt if it qualifies as an "integrated auxiliary" of a church—meaning that it has a particular church "affiliation" and is "internally supported." As detailed in Treasury Regulations, these requirements measure the quality of an organization's ties to a church as well as its funding sources. 26 C.F.R. § 1.6033-2(h)(2) and (3) ("affiliation"); *id*. § 1.6033-2(h)(4) ("internal support"). If it fails to meet these requirements, a religious organization cannot qualify for the exemption and must instead take part in the government's scheme to facilitate employee access to free abortion-causing drugs and devices.

As previously noted, the government has candidly explained that it structured the Mandate exemption this way because "[h]ouses of worship and their integrated auxiliaries . . . are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people

to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874 (emphases added). But distinguishing religious organizations based on internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*." *Weaver*, 534 F.3d at 1259. And, again, strict scrutiny is not met.

IV. The Mandate violates the Free Speech Clause.

Finally, the Mandate also violates CCU's free speech rights. The First Amendment protects CCU's rights to be free both from government efforts to compel its speech, and government efforts to compel its silence. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.") (emphasis added). The Mandate violates the First Amendment in both respects.

First, the proposed accommodation requires CCU to make statements that will trigger payments for the use of abortifacients. In particular, CCU would have to make certifications about its religious objections to its third party administrator "in a form and manner specified by the Secretary." 29 C.F.R. § 2590.715-2713A(a)(4), (b)(1)(ii), (c)(1); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2). As set forth above in Argument I.A, CCU is forbidden by its religion from engaging in such speech.

Second, the Mandate expressly prohibits CCU from engaging in speech with a particular viewpoint: it is barred from talking to its insurance issuer and encouraging it not to provide abortion-inducing drugs. 29 C.F.R. § 2590.715-2713A(b)(1)(iii) ("must not, directly or indirectly, seek to influence the third party administrator's decision").

None of this is remotely permissible under the First Amendment. The government cannot force CCU to make statements about its religious beliefs to third parties. Nor can

it forbid CCU from trying to convince others to exercise their own lawful right to choose not to pay for abortion-inducing drugs. Where, as here, the government has compelled speech, dictated its content, and forbade speakers from conveying particular messages, strict scrutiny again applies. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 624, 642 (1994).

CONCLUSION

CCU respectfully requests that the Court grant it a summary judgment under its RFRA, Free Exercise, Establishment, and Free Speech claims.

Dated: September 30, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, the foregoing *Motion for Partial Summary Judgment and Memorandum in Support* was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ Eric S. Baxter
Eric S. Baxter