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 REPLY IN SUPPORT OF ITS SEPTEMBER 30TH MOTION FOR PARTIAL SUMMARY JUDGMENT [DKT. 27] AND OPPOSITION TO DEFENDANT'S NOVEMBER 4TH MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT [DKT. 40]

This case is about complicity. CCU asserts that acting as the crucial conduit in the government's scheme for distributing abortifacients makes it complicit in abortion against its religious beliefs. The government's main response is to challenge CCU's moral conclusions, arguing that there can be no substantial burden on CCU's religious exercise because, in the government's view, CCU is required to do "virtually nothing." But this is to place the government in the role of arbiter of scriptural interpretation—a role it may not play. It is not for the government to decide whether CCU is morally complicit by acting as a government-appointed gatekeeper to abortifacients, any more than it is the government's role to decide who a church's ministers should be, whether food qualifies as kosher or halal, or whether making tank turrets makes one morally complicit in war.

At bottom, the government's response fundamentally confuses the government-imposed *burden* with CCU's religious *exercise*. The burden is the penalty—here,

massive fines—imposed by the government for failing to comply with its regulations. CCU's religious exercise is ensuring that it is not—by its own determination—complicit in immoral activity when it attempts to comply with government regulations. The government's claim that the connection is "too attenuated" is beside the point, because it is a moral assessment for CCU, not an objective determination for the court.

The government's responses to CCU's other summary judgment claims are equally unavailing: The Mandate is still not generally applicable to every American, nor is it neutral in its application, rendering it infirm under the Free Exercise Clause. It discriminates among religions in violation of the Establishment Clause under *Larson v. Valente*. And the Mandate violates freedom of speech both by compelling speech where CCU does not wish to speak and compelling silence where CCU does wish to speak.

The government's request for dismissal or summary judgment on CCU's other claims must fail because those claims either favor CCU as a matter of law or are premature without discovery. For these reasons, the Court should reject the government's arguments and grant summary judgment and injunctive relief to CCU.

ARGUMENT

CCU's motion seeks summary judgment on its RFRA (Count I), Free Exercise (Count II), Establishment Clause (Count V) and Free Speech (Count IX) claims. The government has failed to show a genuine issue of material fact with respect to any of these, and CCU is thus entitled to summary judgment on each. The government's cross-motion seeks judgment on all counts. But even on many of those, CCU is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(f) (authorizing courts to grant

summary judgment *sua sponte* to non-movant). Moreover, summary judgment cannot be granted to HHS on any of them because—as set forth in the accompanying Rule 56(d) motion—summary judgment for the government is premature without giving CCU the opportunity for discovery. For these reasons, as set forth more fully below, summary judgment should be granted in CCU's favor, while the government's motion should be denied entirely.

A. The Mandate violates RFRA (Count I).

The federal government violates RFRA whenever it "substantially burden[s]" a person's sincere "exercise of religion" without showing that the burden is justified by a "compelling government interest" and is "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a)-(b); *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). Defendants (collectively, HHS) concede that, in this lawsuit, only the "substantial burden" element remains at issue. HHS has not contested that "[i]t would be a violation of CCU's religious beliefs concerning the sanctity of life" for CCU "to deliberately . . . facilitate[] access to abortion-inducing drugs and devices or related education and counseling." Armstrong Decl. ¶ 22. Thus, it is undisputed that CCU's religious beliefs forbid it from maintaining a healthcare plan that would trigger access to abortifacients and from designating a third party to provide abortifacients on its behalf. *Id*. ¶¶ 23-26. Because CCU's sincere religious beliefs are unchallenged, they must be accepted as true. *Marcus v. McCollum*, 394 F.3d 813, 823-24 (10th Cir. 2004) (at summary judgment stage, court must accept undisputed facts as true); *see also Hobby Lobby*, 723 F.3d at

1140 ("The government does not dispute the corporations' sincerity, and we see no reason to question it either."); *Zubik v. Sebelius*, No. 2:13-cv-01459-AJS [Dkt. 75], *slip op.* at 5 n.5 (W.D. Pa. Nov. 21, 2013) (attached to Second Baxter Decl. as Ex. C-1) (accepting plaintiffs' sincerity where HHS "does not challenge" it). In addition, HHS concedes that "this Court is bound" by *Hobby Lobby's* ruling that HHS lacks a compelling government interest that could justify trampling CCU's religious beliefs. Defs' Opp. 14. Thus, the only issue remaining under RFRA is whether the Mandate "substantially burdens" CCU's religious exercise.

Hobby Lobby is also dispositive on that issue. There, the court held that the government imposes a substantial burden if it "'places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief.'" 723 F.3d at 1138 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). The Tenth Circuit agreed that forcing Hobby Lobby to compromise its beliefs or pay millions of dollars in fines was easily sufficient to satisfy this standard. *Id*. at 1140-41 ("[I]t is difficult to characterize the pressure as anything but substantial."); *see also id*. at 1147, 1150-51 (Hartz, J., concurring) (characterizing substantial burden analysis as "simple," because "[t]he law . . . compels the corporations to act contrary to their religious beliefs.").

If CCU continues its religious exercise, by refusing to participate in the government's scheme for distributing abortifacients, it faces the same penalties that constituted "substantial pressure" in *Hobby Lobby*. *Compare* Armstrong Decl. ¶¶ 27-33, 44-48, *with* 723 F.3d at 1140-41; *see also Gilardi v. U.S. Dep't of Health & Human Srvs.*, ---F.3d---,

2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013) (the Mandate burdens objectors by "pressur[ing] [them] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties"); *Zubik*, *slip op.* at 49 (accommodation "substantially burdens" religious beliefs by "asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose").

HHS's efforts to avoid *Hobby Lobby* are unavailing. First, HHS argues that *Hobby Lobby* is irrelevant because it involved a for-profit corporation that was "not eligible for the accommodations." Defs' Opp. 9. HHS contends that the Tenth Circuit thus did not have opportunity to consider whether the "accommodations"—which HHS claims "relieve [CCU] of any obligation to contract, arrange, pay, or refer for contraceptive coverage"—"impose a substantial burden." *Id*. But this argument muddles both the facts and the meaning of substantial burden. At most, the accommodation relieves CCU of the obligation *to pay* for coverage for abortifacients. But CCU still must maintain a healthcare plan through which the abortifacients will be made available, specifically designate another entity to pay for and process the coverage, and provide its employees' names to trigger that coverage. 26 C.F.R. § 54.9815-2713A(b). Thus, CCU is still obligated to "contract," "arrange for," and "refer" for the coverage. *Cf. Zubik*, *slip op.* at 49 (agreeing that "enabl[ing] Plaintiffs to avoid directly paying" did not "absolve or exonerate them from the moral turpitude created by the 'accommodation'"). The threat of fines against CCU if it refuses to provide these services despite its *undisputed* religious beliefs constitutes a substantial burden.

HHS's dismissive remarks that the Mandate does "not require plaintiff to modify its behavior in any meaningful way" and that CCU is required "to do next to nothing" and is "free to continue . . . to voice its disapproval of contraception," Defs' Opp. 9, wrongly "trivialize[]" CCU's "sincerely-held beliefs." *Zubik*, *slip op.* at 59. It is, again, *undisputed* that CCU's exercise of religion includes avoiding any deliberate participation in a scheme that facilitates access to products and services that, in its view, could terminate an innocent human life. Armstrong Decl. ¶¶ 13-15, 19-26. RFRA's protection of this "*exercise* of religion," 42 U.S.C. § 2000bb-2 (emphasis added), cannot be cabined merely to allowing CCU to *express* its religious opposition to abortifacients while at the same time subjecting it to government coercion to facilitate access to them. *Zubik*, *slip op.* at 28 ("Completion of the self-certification form . . . would place the Diocese 'in a position of providing scandal' because 'it makes it appear as though [it] is cooperating with an objectionable practice that goes against [Church] teaching.'"); *cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement, even for recipients of government funds, because grantees could express contrary beliefs "only at the price of evident hypocrisy"). If it were true, as HHS claims, that the Mandate and accommodation require "'no action or forbearance on [CCU's] part,'" Defs' Opp. 10 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)), then HHS should have no problem granting CCU a full exemption and letting the Mandate and accommodation do their work. But clearly, HHS understands that—even under the accommodation—CCU remains the critical player in the government's scheme to guarantee free employee access to abortifacients.

It should not be difficult for the government to agree that CCU cannot escape moral culpability simply by hiding its participation behind the coerced involvement of a third party. Its own criminal codes recognize conspirator liability for persons playing any part, direct or indirect, to "effect the object of [a] conspiracy." 18 U.S.C. § 371. Similarly, CCU's moral code prohibits it from assisting or causing others to do what it cannot directly do itself. Armstrong Decl. ¶¶ 23-26. As noted in *Hobby Lobby*, "[m]oral culpability for enabling a third party's supposedly immoral act" is a familiar concept in religious discourse. 723 F.3d at 1140 n.15. The relevant question is "not whether the reasonable observer [or HHS] would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." *Id*. at 1142; *see also Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 715 (1981) ("it is not for [the courts] to say" when a plaintiff's conduct is "sufficiently insulated" from moral complicity).

HHS is also misguided in arguing that, under the accommodation, CCU is only required to do what it has "done or would have to do voluntarily anyway even absent these regulations." Defs' Opp. 12. Factually, that is incorrect. Absent the regulations, CCU is not required to designate, and has never designated, its third party administrator as an ERISA plan administrator with obligations to provide morally offensive coverage benefits directly to employees. And without CCU's designation, the third party administrator would have no obligation to comply. 78 Fed. Reg. 39870, 39880 (published July 2, 2013) ("[T]here is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these

responsibilities."). CCU's designation would thus be directly causative of eased access to abortion-inducing drugs and devices.

In addition, the accommodation changes the significance of actions CCU has taken in the past—for example, providing the names and contact information of its employees to the third party administrator. This can be

> liken[ed] . . . by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

Zubik, *slip op.* at 49. CCU simply cannot continue to maintain a plan and provide administrative support for that plan where doing so now—as a result of the government's regulations—would facilitate access to abortion.

It is simply not true, however, that CCU "would also prevent *anyone else* from providing such coverage to its employees and students." Defs' Opp. 10. CCU seeks only to control its own religious conduct. It has no legal objection to HHS providing whatever services HHS wants to provide, as long as CCU is not coerced to participate in the process against its religious beliefs.

The D.C. Circuit's decision in *Kaemmerling*—on which HHS relies almost exclusively (not once citing *Hobby Lobby's* substantive analysis)—is irrelevant. In that case, a prisoner alleged that "submitting to DNA 'sampling, collection and storage'" was "repugnant to his strongly held religious beliefs about the proper use of 'the building blocks of life.'" 553 F.3d at 674. He made "abundantly clear," however, that he did not object to the government's *gathering* from him "any particular DNA carrier—such as

blood, saliva, skin, or hair—but rather . . . to the government collecting his DNA information" from any sample it had already gathered. *Id*. at 678. Because "[t]he extraction and storage of DNA information" were "entirely activities of the FBI" and happened only after the prisoner had given his "fluid or tissue sample (*to which he d[id] not object*)," he had no claim under RFRA. *Id*. at 679 (emphasis added). Although the government's activities may have "offend[ed] Kaemmerling's religious beliefs," they did not "pressure *him* to modify *his own* behavior in any way that would violate his beliefs." *Id*. (emphasis added). Here, in contrast, CCU is not concerned with what HHS or CCU's third party administrator may choose to do on their own; rather, it objects to the government interfering with its health insurance plans, over which it maintains control, and for which it thus retains moral responsibility.[1] Unlike in *Kaemmerling*, the regulations at issue here wrongly coerce CCU to changes *its own* behavior to facilitate something it deems morally wrong.

Finally, HHS's argument that any burden on CCU "is indirect and too attenuated" because CCU's employees make "[t]he ultimate decision of whether to use contraception," Defs' Opp 14, is directly contrary to binding precedent. *Thomas*, 450

[1] In *Living Water Church of God v. Charter Twp. Of Meridian*, the court found no substantial burden where zoning regulations allowed a church to expand, just not as much as the church wanted, because the limitation on expansion did not pressure the church "to violate its religious beliefs" or "effectively bar" the exercise of religion. 258 Fed. App'x 729, 739 (6th Cir. 2007). Here, in contrast, CCU is being directly pressured to engage in conduct against its beliefs. In both *Garner v. Kennedy*, 713 F.3d 237, 241, 244 (5th Cir. 2013) (challenging prison's "no beard" policy), and *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (challenging denial of zoning permit where church had no viable alternative), the courts found for plaintiffs on the issue of substantial burden. HHS's reliance on these cases, Defs' Opp. 13, is thus unfounded.

U.S. at 715 (holding that only the plaintiff, not the government, could decide where to draw the line that "sufficiently insulated" him from complicity in immoral conduct). The question of moral complicity in this case is religious, not legal, and HHS has no authority to dictate when and whether CCU's involvement in the scheme is "too attenuated" to implicate its religion. As stated in *Hobby Lobby*:

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.

Hobby Lobby, 723 F.3d at 1153-54 (Gorsuch, J., concurring); *Gilardi*, 2013 WL 5854246, at *6 ("[I]t is not for courts to decide [what] severs [a religious objector's] moral responsibility.") (citation omitted); *Korte v. Sebelius*, --- F.3d ---, 2013 WL 5960692, at *24 (7th Cir. 2013) (rejecting Defendants' "'attenuation' argument" because it asks whether "th[e] [Mandated] coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," a question which "[n]o civil authority can decide").

B. The Mandate violates the Free Exercise Clause (Count II).

HHS claims that forced compliance with the Mandate cannot violate the Free Exercise Clause because the Mandate is "neutral and generally applicable." Defs' Opp. 14-15. It is neither.

The Mandate is not neutral because it expressly discriminates among religious objectors, creating a three-tiered system where some are exempt (churches and "integrated auxiliaries"), some must comply with the "accommodation" and gag rule

(non-exempt religious non-profits), and some receive no protection at all (religious believers who earn profits, *but see Hobby Lobby*, 723 F.3d 1114). HHS openly admits that this facial discrimination among religious organizations with essentially identical beliefs and engaged in identical religious exercise, is based on the *government's* view of whether that religious exercise is compatible with the *government*'s estimation of the religious beliefs of the organizations' employees. Defs' Opp. 17 n.6 (acknowledging that discrimination is based on "general characteristics of houses of worship as compared to those of other non-profit religious organizations").[2]

This open discrimination among religious institutions fails even "the minimum requirement of neutrality" which requires that a law *not* discriminate on its face. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("[T]he First Amendment prohibits not only laws with 'the object' of suppressing a religious practice, but also '[o]fficial action that targets religious conduct for distinctive treatment.'").

HHS cannot justify this discrimination among organizations merely by claiming that the Mandate's "purpose [is] something other than the disapproval of a particular religion, or of religion in general." Defs' Opp. 15. The Tenth Circuit has already rejected any suggestion that free exercise is violated only by laws that discriminate "between types of religion," as opposed to "types of institutions." *Weaver*, 534 F.3d at 1258 (finding this

[2] HHS has no evidence to substantiate that houses of worship are more likely than other religious organizations to hire employees that share their beliefs. Second Baxter Decl., Ex. C-2 (HHS admitting in parallel litigation there is"no evidence" to support the distinction). It certainly is not true here, where all employees sign a Statement of Faith. Armstrong Decl. ¶ 10.

distinction "puzzling and wholly artificial"). A law that—like the Mandate—targets only certain manifestations of religious conduct (outside of a church) is just as nefarious as laws attacking all religious conduct or certain denominations. "[T]he constitutional requirement is of government *neutrality,* through the application of "generally applicable law[s]," not just of governmental avoidance of bigotry." *Id.* at 1259-60.[3]

Nor is the Mandate generally applicable. The Mandate favors secular over religious values by granting broad exemptions for grandfathered and small-employer plans for secular reasons, while denying religious exemptions for non-church religious organizations. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("[I]t is clear from [*Smith* and *Lukumi*]" that government cannot decide "that secular motivations are more important than religious motivations."). These secular-value exemptions are huge and severely undermine the government's claimed interest. *Hobby Lobby*, 723 F.3d at 1143 ("[T]he interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people."). HHS nowhere explains *why* it can accept these secular reasons for exempting millions of people, yet refuse the modest religious exemption sought here.

[3] Defendants cite *Lukumi* to argue that the Free Exercise Clause is not invoked because the Mandate does not target "*only*" religious conduct—secular institutions are also subject to it. Defs' Opp. 15. But this oversimplification would excuse all but the most blatant attacks on religion. Indeed, *Lukumi* itself warned against this extreme reading, noting that the "explicit[ ] target[ing]" in *Lukumi* made it "an easy [case]" and "that the First Amendment's protection of religion *extends beyond* those rare occasions on which the government explicitly targets religion (or a particular religion)." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., concurring) (emphasis added); *see also id*. at 564 (Souter, J., concurring) ("[T]his is far from a representative free-exercise case.").

Instead, HHS cites Tenth Circuit cases to argue that "the existence of 'express exemptions for objectively defined categories of [entities],' . . . does not negate a law's general applicability." Defs' Opp. 16. But the cases cited do not advance the proposition claimed. In *Swanson v. Guthrie Independent School District*, school policy prohibited part-time attendance, with an exception for "fifth-year seniors and special-education students." 135 F.3d 694, 698 (10th Cir. 1998). The plaintiff, who for religious reasons was mostly homeschooled, claimed a free exercise violation after the school refused to admit her for single classes. *Id*. at 696. But the purpose of the school's policy was to ensure state funding, which was based on the number of full-time students, plus fifth-year seniors and special-education students. *Id*. at 697, 701. Thus, the "exceptions" were not really exceptions at all and did not destroy neutrality and general applicability.

Similarly, in *Grace United Methodist Church v. City of Cheyenne*, the court found no free exercise violation where a city board denied a variance for a church to run a daycare center in a residential zone. 451 F.3d 643, 647-48 (10th Cir. 2006). The court held that the zoning code was not "discriminatorily applied" merely because it permitted case-by-case exceptions for "churches, schools, and other similar uses." *Id*. at 654; *see also id*. at 650 & n.1. It was uncontroverted that the board "did not have the 'authority or discretion' to permit anyone to operate a daycare center in a residential zone." *Id*. at 653. The denial was "mandatory," not "discretionary." *Id*. at 654. Nor was there "evidence that secular daycare centers ha[d] been permitted to operate . . . , while religious organizations like the Church ha[d] been denied such an exception." *Id*. Thus, the court emphasized that "this [was] not a controversy in which the City made a 'value

judgment in favor of secular motivations, but not religious motivations'" *Id*. (quoting and distinguishing *Fraternal Order of Police*, 170 F.3d at 365).

In *Axson-Flynn*, a university student alleged a Free Exercise violation after being pressured to withdraw from the drama department for refusing to use curse words. 356 F.3d 1277, 1280 (10th Cir. 2004). The university claimed that its "strict adherence to offensive script requirement was a 'neutral rule of general applicability.'" *Id*. at 1294. The court disagreed because the policy was "discriminatorily applied." *Id*. at 1294, 1298-99 (Jewish student "received permission to avoid doing an improvisational exercise on Yom Kippur" and university "sometimes granted [student] herself an exemption").

Here, the facts are analogous to those in *Fraternal Order of Police* and *Axson-Flynn*, not to those in *Swanson* or *Grace United*. The Mandate's "religious employers" exemption is wholly discretionary. 45 C.F.R. § 147.131(a) (agency "may" establish exemption). Defendants have already revised the exemption once, simply in response to public comment. *See* 78 Fed. Reg. 39870-01, 39873-74 (July 2, 2013). And perhaps the best illustration of its discretionary nature is that it has been enacted only via footnote on an HHS website. *See* Verified Compl. [Dkt. 1] ¶¶ 65, 99; *see also* First Baxter Decl. [Dkt. 27-2], Ex. B-1 (http://www.hrsa.gov/womensguidelines).[4]

[4] These facts also refute HHS's argument that the "unbridled discretion" claim (Count XI) may be dismissed. Defs' Opp. 18 & n.8. The creation in a website footnote of a religious employers exemption, revised at agency whim, and extending only to institutional churches is a perfect example of unbridled discretion. *See also* First Baxter Decl. [Dkt. 27-2], Ex. B-3 (further demonstrating HHS's unbridled discretion). The "determination of who may" exercise First Amendment rights may not be "left to the unbridled discretion of a government official." *Summum v. City of Ogden*, 297 F.3d 995, 1007 (10th Cir. 2002) (citation omitted).

Furthermore, the exemption explicitly discriminates among religious organizations, protecting only institutional churches and their integrated auxiliaries, while otherwise identical non-integrated organizations are excluded. *Cf. Axson Flynn*, 356 F.3d at 1293, 1298-99; *see also*, *Zubik*, *slip op.* at 50-53. And it favors secular motivations for grandfathered and small-employer exemptions, while eschewing exemptions for non-church religious organizations. *Cf. Fraternal Order of Police*, 170 F.3d at 365. Expressly adding these discriminatory exemptions to the law underscores, not ameliorates, their invidiousness. *Lukumi*, 508 U.S. at 542 ("categories of selection are of paramount concern"); *Fraternal Order of Police*, 170 F.3d at 365 ("concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption").[5]

C. The Mandate violates the Establishment Clause (Counts IV and V).

As with its Free Exercise arguments, HHS's Establishment Clause arguments hinge on the discredited notion that the government may prefer some religious institutions over others, so long as the discrimination is based on their internal structure and assumed religiosity, rather than their denomination. Defs' Opp. at 18-19. But the Tenth Circuit has directly rejected that argument. In *Weaver*, the university challenged state regulations that provided scholarships for students to attend any college, secular or religious, unless the state deemed the school "*pervasively* sectarian." 534 F.3d at 1250

[5] The government's claim that "nearly every court" to consider a free exercise challenge "has rejected it," Defs' Opp. 15 & n.5, is misleading. The vast majority of courts addressing challenges have held the Mandate unlawful under RFRA and so have not reached the free exercise claim.

(emphasis added). Like HHS here, the state in *Weaver* argued there was no Establishment Clause violation because the law discriminated based on "types of institutions," not "types of religions." *Id*. at 1259. The court deemed this an "artificial distinction," holding that "when the state passes laws that facially regulate religious issues, it must treat . . . religious institutions without discrimination or preference." *Id*. at 1257, 1259; *see also Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982) (rejecting that a law's "disparate impact among *religious organizations* is constitutionally permissible when such distinctions result from application of secular criteria").

Moreover, the Mandate *does* discriminate among religious denominations by favoring those that are vertically structured with all of their ministries as "integrated auxiliaries," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavoring those that are more horizontally structured, with ministries operating independently of any institutional church. The law cannot prefer denominations that exercise religion mainly through "houses of worship[]," 78 Fed. Reg. 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F. 3d at 1259.[6]

[6] Under the Fifth Amendment, since Plaintiffs have shown the Mandate infringes on their fundamental right to religion, the Mandate's religious classifications are also subject to "strict scrutiny." *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002); *see also Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998). Not that the classifications can survive even rational basis review: Defendants discriminate between essentially identical religious organizations based solely on unfounded speculation about the likely religious beliefs of religious institutions' employees. Defs' Opp. 17 n.6. Even rational basis review requires some evidence. *See* Second Baxter Decl., Ex. C-2 (HHS admitting "no evidence" in parallel case). But such discriminatory assessment of religiosity is illegal in any instance. *Weaver*, 534 F.3d at 1259 (banning "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations"). Thus, Counts VII and VIII remain viable and HHS's motion for summary judgment on those counts should be denied.

HHS's reliance on *Gillette v. United States*, Defs' Opp. 12, further illustrates why its arguments are wrong. *Gillette* granted military conscientious-objector status based on the *nature of the conscientious objection*. 401 U.S. 437, 442 n.5 (1971) (granting exemption to those who object to "war in any form," not to those who object to only "a particular war"). The religious exemption was therefore available to all sincere objectors—regardless of their faith—who asserted the same objection and sought to engage in the same practice. *Id.* at 450-51. This equal treatment of objectors is precisely what the Mandate lacks, because it discriminates among institutions that engage in the exact same activity, and have the exact same religious objections.

D. The Mandate violates the Free Speech Clause (Count IX).

The Mandate forces CCU to speak to request and authorize others to provide its employees with abortion-inducing drugs. 26 C.F.R. § 54.9815-2713A(a)-(b). HHS insists that it can do this because the speech is "plainly incidental to the . . . regulation of conduct." Defs' Opp. 22 (quoting *Rumsfeld v. FAIR Inc.*, 547 U.S. 47, 62 (2006)). But *FAIR* concerned a law that regulated what affected parties "must *do* . . . not what they may or may not *say.*" *FAIR*, 547 U.S. at 60 (emphases original). Here, the forced speech *is* the essential act that HHS requires. Such a "direct regulation of speech . . . plainly violate[s] the First Amendment." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

The Mandate also muzzles CCU from asking its third party administrator not to participate in the distribution of objectionable drugs and services. *See*, *e.g.*, 26 C.F.R. § 54.9815–2713A(b)(1)(iii). HHS responds that the muzzle does no harm since CCU

may tell everyone *but* the third party administrator of its opposition to participating in the Mandate. But a ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech."). Further, HHS confuses CCU's religious liberty claims with its speech claims: the speech harm is not in the provision of the drugs, but in censorship itself.

E. The Mandate violates the right to expressive association (Counts VI and X).

HHS also makes a brief argument against CCU's expressive association claim. Defs' Opp. 23-24. It argues that the *only* possible infringement on expressive association is forced acceptance of unwanted members. However, unconstitutional burdens on expressive association "take many forms," just "one of which" is a "regulation that forces the group to accept members it does not desire." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *see also*, *e.g.*, *In re Motor Fuel Temper. Sales Practice Litig.*, 641 F.3d 470, 479-81 (10th Cir. 2011) (associational rights can be infringed by, *inter alia*, expenditure caps, reporting requirements, and disclosure of internal communications). The appropriate inquiry is whether an association is expressive and, if so, whether the challenged law "impair[s] [the plaintiffs'] expression." *Dale*, 530 U.S. at 648, 653. Courts must "give deference to" the plaintiffs' views on both. *Id.*

CCU deliberately aims to create an expressive community built around religious principles. Armstrong Decl. ¶¶ 4-9. It expressly requires all employees to profess Christian faith and exhibit a lifestyle consistent with that faith. *Id*. ¶ 10. CCU has these

requirements in part for expressive purposes: to create and to model a religious educational community constructed around shared Christian principles. *Id*. ¶ 4 ("[CCU's] purpose is to cultivate knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the integration of exemplary academics, spiritual formation, and engagement with the world."). Similarly, CCU's students commit to a Lifestyle Covenant and other practices that help CCU further its mission in promoting the sanctity of life. *Id*. ¶¶ 11, 13-16. Even CCU's donor's give "with an understanding of its mission and with the assurance that CCU will continue to follow and transmit reliable Christian teachings on faith and morals." *Id*. ¶ 17.

The Mandate impairs these expressive associations by forcing participation in the government's scheme. That participation conflicts with CCU's religious witness and thus with its associations built around that witness, "intru[ding] into the internal structure or affairs of" those associations. *Dale*, 530 U.S. at 648; *accord Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989) ("[I]nterfering with the internal workings of [an association]" can "infringe upon" the "right to associate . . . to promote a[] . . . viewpoint.").

F. The Mandate violates the Administrative Procedures Act (Counts XI-XV).

1. HHS violated the APA by promulgating the HRSA Guidelines without notice, comment, or publication in the Federal Register.

"The APA requires agencies to adhere to three steps when they promulgate rules: (1) give notice of the proposed rulemaking in the Federal Register; (2) afford interested persons an opportunity to participate through submission of written data, views, or arguments; and (3) explain the rule ultimately adopted." *Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1279-80 (D. Colo. 2012) (citing 5 U.S.C.

§ 553(b)–(c)). Congress gave HHS's sub-agency, HRSA, the authority to enact "comprehensive guidelines" for women's preventive health. *See* 42 U.S.C. § 300gg-13 (a)(4); 45 C.F.R. § 147.130 (a)(iv). Those guidelines are now binding on CCU, which must either adopt an insurance plan that complies with HRSA's guidelines or face massive penalties. *See* 26 U.S.C. § 4980D, 4980H. This is a paradigmatic delegation of rulemaking authority,[7] but instead of following the requirements of the APA, HRSA simply adopted the recommendations of a nongovernmental body—IOM—in a press release. *See* First Baxter Decl. [Dkt. 27-2], Ex. B-1 (http://www.hrsa.gov/womensguidelines/). HRSA then incorporated those recommendations without change into a fully binding Interim Final Rule that HHS promulgated the *same day*. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. HHS did not explain why it adopted the IOM Report's recommendations even though the IOM explicitly declined to consider many factors important for the formulation of coverage requirements, such as cost-effectiveness. Under the APA, this was an abuse of discretion.

CCU was prejudiced by this failure in at least two ways. First, it was harmed by HHS's failure to offer it the opportunity for public notice and comment, as required by the APA. *See Nat'l Ski Areas Ass'n, Inc.*, 910 F. Supp. 2d at 1279-80. Second, it was

[7] "[W]hen Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation." *Mission Grp. Kansas, Inc. v. Riley*, 146 F.3d 775, 781-85 (10th Cir. 1998) (internal quotations omitted). Therefore, legislative rules like the HRSA Guidelines must be promulgated in compliance with the APA notice and comment procedures. *Id.* at 782 (holding that, when an agency adopts a new rule, it "may not give it binding effect in the absence of compliance with APA notice and comment procedures").

harmed because the evidence considered by the IOM was decidedly one-sided. IOM's invited presenters included a number of proponents of mandatory contraceptive coverage and of government-funded abortion. Verified Compl. ¶¶ 54-55. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters. AR 516-19; *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (stating that the APA requires public comments in part to "ensure fair treatment for persons to be affected by regulation"). Moreover, as the IOM Report dissent observed, the drafting committee suffered from an "unacceptably short time frame," "lacked transparency and was largely subject to the preferences of the committee's composition," which "tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." IOM Report at 231-32 (AR at 529-530). Under such circumstances, prejudice is clear. *Nat'l Ski Areas Ass'n, Inc.*, 910 F. Supp. 2d at 1279-80.

2. The Mandate and its exemptions are arbitrary and capricious.

A rule is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Texas v. E.P.A.*, 690 F.3d 670, 677 (5th Cir. 2012), *cert. granted*, Oct. 15, 2013. The Final Rule fails both prongs of this test.

First, HHS showed that it "entirely failed to consider an important aspect of the problem," *Texas v. E.P.A.*, 690 F.3d at 690, when Defendant Secretary Sebelius announced the content of the Final Rule the same day that the comment period closed,

without taking the time to review—let alone consider—the many substantive objections to the Final Rule. *See* The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services*, *infra* n.8 (see 51:30-52:00). "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011). Here, "over 400,000 comments" were submitted in response to HHS's NPRM, and many of them pointed to serious difficulties created by HHS's proposal to treat religious organizations differently based on their tax status. 78 Fed. Reg. 39870, 39871 (published July 2, 2013); *see, e.g.*, Church Alliance NPRM Comments (April 8, 2013), *available at* http://church-alliance.org/initiatives/comment-letters, AR CMS 2012-0031-80021-A1. Yet on April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius announced at Harvard University that "religious entities will be providing coverage to their employees starting August 1st."[8] The Final Rule followed Defendant Secretary Sebelius' announced rule, and her comments demonstrate that the outcome of the rulemaking was determined in advance.

Second, the Final Rule is arbitrary and capricious because HHS "offered an explanation for its decision" to limit the religious employer exemption to churches and church-like institutions "that runs counter to the evidence before the agency." *Texas v.*

[8] The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services*, 51:30-52:00 (April 8, 2013) *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (last visited November 26, 2013).

E.P.A., 690 F.3d at 677. HHS claims that the limits it has imposed on the religious employer exemption are justified because 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. 39874. But that is not true, and HHS knew it. As the Council for Christian Colleges and Universities (CCCU) stated in its comments to the NPRM:

> The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, *because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution.* Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.

CCCU NPRM Comments at 5 (Apr. 8, 2013), AR CMS-2012-0031-82670-A1 (emphasis in original). This is not an insignificant issue: CCCU represents 119 religious colleges and universities—nearly 15% of the 900 religiously-affiliated institutions of higher education in the United States. CCCU, Profile of U.S. Post-Secondary Education, *available at* https://www.cccu.org/about. And the same can be said for CCU, which is a member of CCCU. *See* CCCU, Members and Affiliates, https://www.cccu.org/members_and_affiliates. As noted above, CCU requires its employees to profess Christian faith and live accordingly, for the specific purpose of creating and modeling a religious educational community constructed around shared Christian principles. *See* Armstrong Decl. ¶¶ 4-10. HHS's Final Rule is arbitrary and capricious because its

explanation for limiting the religious employer exemption to churches and church-like institutions "runs counter to the evidence" that was before it. *Texas*, 690 F.3d at 690.

3. The Mandate violates governing law.

CCU's Weldon Amendment/ACA claim survives as well. CCU has prudential standing because, as a conscientious objector to abortion, it is plainly within the "zone of interests" protected by both laws. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). HHS's argument—that the IOM Report and a press release define "abortion" more narrowly than CCU—also fails. Defs' Opp. 28. HHS's interpretation is not entitled to deference because Congress empowered the "issuer of a qualified health plan," not HHS, to interpret "abortion" under the relevant section of the ACA, and HHS has no special expertise in interpreting appropriations laws like the Weldon Amendment. *See* 42 U.S.C. § 18023 (b)(1)(A)(ii). HHS also cites a 2002 statement by Rep. Weldon, Defs' Opp. 30 n.14, but that comment, made about a different law eight years before the FDA approved *ella* in 2010, likewise sheds little light on the meaning of a law Congress passed in 2011. Relying on the "ordinary meaning" found in medical dictionaries, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), it is clear that emergency contraceptives qualify as "abortion." *See Stedman's Medical Dictionary* 4 (28th ed. 2006) (defining "abortion" as the "[e]xpulsion from the uterus of an embryo or fetus [before] viability.")

G. Defendants' motion for summary judgment is premature.

Finally, HHS's motion is actually just a motion for summary judgment because the Court must consider materials outside the pleadings to resolve it. *See* Fed. R. Civ. P.

12(d); *SEC v. Wolfson*, 539 F.3d 1249, 1265 (10th Cir. 2008); *Holy Land Found. for Relief and Dev't v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (district court abused discretion by considering administrative record without converting Rule 12(b) motion to Rule 56 motion). HHS tacitly admits as much by failing to distinguish between arguments based on the Rule 12(b)(6) standard and ones based on the Rule 56 standard. And, as set forth more fully in CCU's Rule 56(d) motion, which is incorporated herein, HHS's *de facto* summary judgment motion is premature.

CONCLUSION

For all these reasons, CCU respectfully requests this court to grant its motion for summary judgment and deny HHS's motion to dismiss or, in the alternative, for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2013, the foregoing document was served on all counsel of record via the Court's electronic case filing (ECF) system.

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