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 RULE 56(D) MOTION

In Plaintiff's Rule 56(d) Motion (the "Motion") (Dkt. 46), it explains that to grant summary judgment in favor of Defendants, this Court would have to resolve factual issues that Plaintiff has not yet had a chance to pursue in discovery. Contrary to Defendants' arguments, the Court should grant Plaintiff's Motion because: (1) judicial review should not be limited to the administrative record; (2) discovery is necessary regarding the issue of intentional discrimination; and (3) discovery is needed regarding the certification of the administrative record filed by Defendants.

ARGUMENT

1. Defendants' Motion to Dismiss Should be Converted Into a Motion for Summary Judgment

As an initial matter, Defendants argue that that "the Court should reject [P]laintiff's [Motion] because it ignores the obvious fact that [D]efendants have *moved to dismiss all of [P]laintiff's claims.*" Dkt. 53 at 2 (emphasis in original). However, where a court must rely on material from outside the pleadings, the court must convert a motion to dismiss

into a motion for summary judgment. *See Alloway v. Jordan*, 69 Fed. Appx. 431, 433 (10th Cir. 2003) (because district court considered material outside the pleadings that went to the merits, Rule 12 motion should have been considered under Rule 56); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (district court abused discretion by considering Department of Treasury administrative record without converting Rule 12(b) motion to Rule 56 motion).[1] Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, Dkt. 40, fails to distinguish between Defendants' arguments that require review of the administrative record and those that do not. Neither Plaintiff nor the Court is required to parse Defendants' filings to determine: (1) which claims they are seeking to dismiss; and (2) on which claims they are seeking summary judgment. Because Defendants have failed to distinguish their arguments that require review of the administrative record and those that do not, Defendants' motion to dismiss should be converted into a motion for summary judgment.

Moreover, Defendants do not explain how the Court could consider the administrative record without converting the motion wholly into one for summary judgment. Rather, Defendants simply state that "even if the Court determines that it must consider the administrative record," none of Plaintiff's claims could possibly require discovery. Dkt. 53 at 3. But saying it does not make it so. And in fact, Plaintiff requires discovery on multiple issues.

2. Review is Not Limited to the Administrative Record

Defendants argue that discovery is not warranted at all in this case because they

[1] *See Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) ("Failure to convert to a summary judgment motion and to comply with Rule 56 when the court considers matters outside the plaintiff's complaint is reversible error."); *SEC v. Wolfson*, 539 F.3d 1249, 1264 (10th Cir. 2008).

have submitted what they claim to be the entire administrative record. Dkt. 53 at 3. However, the cases cited by Defendants are inapposite.

First, Defendants rely on administrative law cases only, none of which holds that courts must exclude evidence from outside the administrative record in deciding as-applied constitutional and statutory challenges to government actions—even when brought in conjunction with APA challenges. Contrary to Defendants' claims, this Court is not limited to the administrative record in deciding constitutional and RFRA claims. *See, e.g., Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (administrative adjudication abuse-of-discretion "standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts.").

In fact, several courts—including the Tenth Circuit—have held that in reviewing a constitutional claim the court should make an "independent examination" of the facts. *See, e.g., U.S. v. Friday*, 525 F.3d 938, 949-50 (10th Cir. 2008) (holding in RFRA case that court of appeals had independent review of allegations of government "bias" and "callous indifference" to rights); *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009); *Porter v. Califano*, 592 F.2d 770, 781, n.15 (5th Cir. 1979) (noting that independent judicial judgment is especially appropriate in the First Amendment area because courts, not agencies, are the expert on the First Amendment). As a result, courts have permitted plaintiffs to submit evidence that was not part of the administrative record. *See Nat'l Med. Enters. Inc.*, 826 F. Supp. at 565 n. 11 (allowing plaintiffs to submit an additional declaration not in the record); *see also Rydeen*, 748 F. Supp. at 906 (allowing plaintiffs to submit two additional affidavits not in the administrative record). Indeed, in a similar case addressing the Mandate, the court

considered *all* materials submitted by the parties because "plaintiffs bring constitutional challenges to the Mandate . . . ." *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 CIV. 2542 BMC, 2013 WL 6579764, at *6 n.5 (E.D.N.Y. Dec. 16, 2013).

Second, the cases cited by Defendants do not stand for the proposition that evidence outside of the administrative record is prohibited for Plaintiff's constitutional claims. *See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). Though APA claims are frequently best addressed through the administrative record, none of these cases prohibit review outside the administrative record, especially not with respect to non-APA claims.

3. Discovery is Needed on the Issue of Intentional Discrimination

In support of their position that discovery is not needed in this case, Defendants contend that allegations of intentional discrimination "are not relevant to any of [P]laintiff's claims." Dkt. 53 at 4. This contention is wrong with respect to each of Plaintiff's claims that turn (in part) on intentional discrimination.

(a) Free Exercise Clause

Defendants contend (1) that a "law does not violate the Free Exercise Clause if it is neutral and generally applicable;" and (2) that courts are not permitted to inquire "into the subjective motives of legislators or administrators." Dkt. 53 at 4-5. However, the intent of lawmakers and regulators is *one* way to prove evidence of a law's "object." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see also Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (noting that "[p]roof of hostility or discriminatory motivation" is not necessary, but "may be sufficient to prove that a challenged governmental action is not neutral"). Even if neutral on its

face, a law may still run afoul of the Free Exercise Clause if it "targets religious conduct for distinctive treatment." *Id.* at 534 ("We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative."). As explained by the Supreme Court, the Free Exercise Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy*, 476 U.S. 693, 703 (1986). *See also Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.").

Courts may find "guidance" in Equal Protection jurisprudence, which, among other things, requires consideration of direct and circumstantial evidence regarding the objects of those who enacted the law in question. *See, e.g., Lukumi*, 508 U.S. at 540 (Kennedy, J. joined by Stevens, J.); *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (free exercise violation where "the object of [the law] was to burden practices because of their religious motivation"); *Olsen* v. *Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed"). Here, Plaintiff is entitled to discovery regarding the objects of those who enacted the Mandate.

The *Grossbaum* case that Defendants cite in support of their argument actually supports Plaintiff's position, rather than supporting a mandatory prohibition:

> [T]he relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth., 100 F.3d 1287, 1294 (7th Cir. 1996). Where, as here, Plaintiff has pointed to evidence of targeting and animus, Dkt. 46 at 4-6, Plaintiff should be allowed to investigate further "to give full effect" to its claims of discrimination.[2]

(b) Establishment Clause

Defendants assert that the Court should only look to "the text of the regulations" to determine whether the Establishment Clause is violated. Dkt. 53 at 6-7. However, regarding discriminatory intent, the 10th Circuit has stated:

> To be sure, where governmental bodies discriminate out of 'animus' against particular religions, such decisions are plainly unconstitutional. But the constitutional requirement is of government *neutrality*, through the application of 'generally applicable law[s],' not just of governmental avoidance of bigotry.

Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1260 (10th Cir. 2008) (emphasis in original) (quoting *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990)). "As Justice Harlan noted in the [ ] context of the Establishment Clause, '[n]eutrality in its application requires an equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Here, as in equal protection cases, the Court may consider "direct and circumstantial evidence" regarding the objects of those who enacted the law in question. *See id.*

Defendants' citation to *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005), Dkt. 53 at 6, is misguided. The passage of *McCreary* cited by Defendants dealt with the question of whether hidden legislator motives would suffice to make out a claim under the purpose prong of the well-known *Lemon* test, which applies to laws affording

[2] *See also* Dkt. 1 at 30-31 (Defendant Sebelius announcing that "we are in a war" over emergency contraception).

uniform benefit to all religions. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *see also Larson v. Valente*, 456 U.S. 228, 252 (1982) (instructing that *Lemon* applies to "laws affording uniform benefit to *all* religions, and not to provisions ... that discriminate among religions.") (emphasis in original) (citations omitted). In the case at hand, however, the Court should apply a different Establishment Clause test, *i.e.* the *Larson* test, which governs discrimination *among* religions. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1126-27 (10th Cir. 2012) (distinguishing between the two lines of precedent); *cf. Croft v. Perry*, 624 F.3d 157, 165-66 (5th Cir. 2010) (separately analyzing plaintiffs' *Lemon* and *Larson* claims).

Moreover, *McCreary* critiqued the effort to discover the "veiled psyche" of individual lawmakers. 545 U.S. at 863. Individual lawmakers' private opinions are not as relevant to an illegal Establishment Clause purpose because they are part of a larger body, and determining the subjective opinion of that body is a task fraught with difficulty. However, if the Defendant County Board had lifted the veil and publicly stated that the purpose of the display was to advance Christianity, the Court would likely have found that relevant to an Establishment Clause violation. For the same reason, as head of Defendant HHS, Defendant Sebelius has made public discriminatory remarks that are relevant as a basis for finding intentional discrimination.

(c) Free Speech

"[T]he scope of protection for speech generally depends on whether the restriction is imposed because of the content of the speech." *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641-42 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). In cases where plaintiffs alleged that government defendants were motivated by a discriminatory animus because of plaintiffs' religious affiliation,

multiple courts have agreed that the plaintiffs were able to adequately plead that a particular governmental ordinance impermissibly restricted protected expressive conduct. *See, e.g., Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 625 (S.D.N.Y. 2013) (denying motion to dismiss Free Speech claim, because plaintiffs had alleged that "Defendants were motivated by a discriminatory animus against Plaintiffs because of Plaintiffs' affiliation with the Orthodox/Hasidic community"); *Chabad Lubavitch v. Borough of Litchfield, Conn.*, 796 F. Supp. 2d 333, 345 (D. Conn. 2011) (denying motion to dismiss Free Speech claim, because plaintiff had alleged that defendants "acted with the intent to interfere with [plaintiff's] religious speech and expressive association") (emphasis in original); *cf. Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir. 2006) (affirming dismissal of Free Speech and Free Association claims, where "no evidence was presented indicating that the ordinance was passed for the purpose of curtailing or controlling the content of expression"). Plaintiff is therefore entitled to pursue discovery regarding intentional discrimination in connection with its Free Speech claim.

(d) Equal Protection and Administrative Procedures Act

Defendants fail to substantively respond to the arguments set forth in Plaintiff's Motion regarding discovery to support Plaintiff's Equal Protection and the APA claims. *See* Dkt. 46 at 4 n.1. Thus, the Court should accept Plaintiff's arguments.

4. Discovery is Needed Regarding Ms. Braxton's Knowledge of the Certification of the Administrative Record in this Case

When an agency presents a certified copy of the complete administrative record, the court assumes the agency properly designated the record absent evidence to the contrary. *City of Dallas v. Hall*, No. 3:07-CV-0060-P, 2007 WL 3257188, at *8 (N.D. Tex. Oct. 29, 2007). Despite this assumption, however, a party is allowed to conduct

discovery where there is a reasonable basis to believe that materials considered by the agency are not in the record. *Id.*

Parallel litigation in the Western District of Pennsylvania recently revealed that the administrative record submitted in many and perhaps all of the Mandate-related cases, including this one, appears to have been certified by someone who has no knowledge of its contents, how the information was compiled, whether the information was complete, or why certain information was excluded from the record, among other failings. *See* Dkt. 46-31, ¶ 17 and Ex. D-1 (Transcript of Deposition of Shawn L. Braxton); *see also Persico v. Sebelius*, Civ. No. 1:13-00303 (W.D. Pa.), Dkt. 50 (Plaintiff's Joint Motion to Strike the Certification of Ms. Shawn Braxton Concerning the Administrative Record, filed Nov. 11, 2013).

Since Ms. Braxton also certified the "administrative record" in this case, Dkt. 20-2, Plaintiff intends to take discovery concerning Ms. Braxton's knowledge of the certification of the administrative record in this case and move to strike Ms. Braxton's certification in this case on the same basis. In the interim, it seems clear that the administrative record cannot be relied upon for any purpose since there is no assurance that it is complete. The purpose of certifying the record is to verify that the record is indeed complete, rather than a random compilation of documents that may or may not have been before the agency at the time of the decision. It would be illogical to conclude that the record here, certified by an individual with no knowledge of the record's contents whatsoever, is complete because of that certification. This is especially true in light of the fact that parallel litigation has discovered the record is incomplete and inadequate. For instance, in October, a Congressional subpoena unearthed emails between IRS and the White House discussing the scope of the religious employer exemption. *See* Patrick Howley, *White House, IRS exchanged confidential taxpayer*

info, The Daily Caller, Oct. 9, 2013, *available at* http://dailycaller.com/2013/10/09/white-house-irs-exchanged-confidential-taxpayer-info/#!. In those emails, senior officials appear to discuss specific religious non-profit entities or taxpayers to determine whether they will be exempt under specific tests for "religious employers." *Id.* Even though the emails show Defendants' officials considering the scope of the Mandate, these emails are not in the Administrative Record produced here. Additionally, a deposition of HHS 30(b)(6) designee Gary Cohen, the Director of the Center for Consumer Information and Insurance Oversight in the Centers for Medicare and Medicaid Services, taken by plaintiffs in parallel litigation in New York, uncovered facts that have been omitted from and/or undermine documents in the Administrative Record. *See Persico v. Sebelius*, Civ. No. 1:13-00303 (W.D. Pa.), Dkt. 36 at 5 (Plaintiffs' Joint Response to Defendants' Motion for Protection Order). Based on the above, a reasonable basis exists to believe that the Administrative Record is not complete and, on that basis alone, Plaintiff is entitled to discovery.

Dated: January 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2014, the foregoing *Plaintiff's Reply in Support of Rule 56(d) Motion* was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ Eric S. Baxter
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