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

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

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

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Fellowship of Catholic University Students ("FOCUS"), Curtis A. Martin, Craig Miller, Brenda Cannella, and Cindy O'Boyle, by and through their undersigned attorneys, respectfully move the Court, pursuant to FED.R.CIV.P. 56(a) and D.C.COLO.LCivR 56.1, for partial summary judgment in favor of Plaintiffs and against all Defendants on Plaintiffs' claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* (2012) (First Claim for Relief), the Free Exercise Clause of the First Amendment to the U.S. Constitution (Second Claim for Relief), the Establishment Clause of the First Amendment to the U.S. Constitution (Third Claim for Relief), the Free Speech Clause of the First Amendment to the U.S. Constitution (Fourth Claim for Relief), the Freedom of Expressive Association guarantees of the First Amendment to the U.S. Constitution (Sixth Claim for Relief), and the Due Process and Equal Protection guarantees of the Fifth Amendment to the U.S. Constitution (Fifth Claim for Relief).

Counsel for Plaintiffs has discussed this motion and the relief requested herein with counsel for the Defendants. Defendants are opposed to both.

I. INTRODUCTION

In their Verified Complaint (Doc. 10), Plaintiffs seek declaratory and injunctive relief for Defendants' violations of, *inter alia*, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA") and the First Amendment to the United States Constitution (Free Exercise Clause, Establishment Clause, and Free Speech Clause) caused by Defendants' actions in implementing the Patient Protection and Affordable Care Act (Pub. L. 111-148, March 23, 2010, 124 Stat. 1029) and the Health Care and Education Reconciliation Act (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively herein, the "ACA") in ways that force Plaintiffs to violate their deeply held religious beliefs.

The ACA requires group health plans to cover certain preventive-health services without cost sharing, i.e., without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. *See* 42 U.S.C. 300gg-13. The preventive-services provision is enforceable pursuant to the enforcement mechanisms of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1185d. It is also enforceable through imposition of tax penalties on the employer that sponsors the plan. 26 U.S.C. 4980D; *see* 26 U.S.C. 9815(a)(1), 9834. States may enforce the ACA's insurance provisions, including the preventive-services coverage provision. 42 U.S.C. 300gg-22(a)(1). Also, if the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the ACA's insurance provisions, the Secretary may conduct such enforcement herself and may impose civil penalties. 42 U.S.C. 300gg-22(a)(1); *see* 42 U.S.C. 300gg-22(b)(1)(A); 42 U.S.C. 300gg-22(b)(2).

In June 2013, HHS issued final regulations purporting to accommodate religious employers. These regulations exempted certain religious employers, but not FOCUS, from the requirement of insurance coverage of contraceptives and abortifacients in most employers' health care plans, including FOCUS's health care plan. *See* 45 C.F.R. § 147.131. In order to be eligible for this so-called accommodation, an employer must "oppose providing coverage for some or all of any contraceptive services required to be covered under [the Mandate] on account of religious objection," must operate as a non-profit entity, and must hold itself out as a religious organization. *Id*. at (b). However, in the case of a self-insured plan such as that maintained by FOCUS, the Third Party Administrator ("TPA") must provide the requested covered services without-cost-sharing. *Id*. at (c). If the TPA declines to provide such coverage, FOCUS is mandated to locate and contract with a TPA who will agree to provide such coverage. 78 Fed. Reg. at 39,880.

There are thus only two ways by which FOCUS may "comply" with the Mandate. First, FOCUS could provide the required coverage. Because FOCUS holds traditional Catholic religious beliefs about contraception, sterilization, and abortion, FOCUS cannot comply with the Mandate in this manner.

The second way FOCUS could "comply" with the Mandate is by signing a certification form – EBSA FORM 700 – CERTIFICATION, attached hereto as Exhibit A, authorizes and directs FOCUS's TPA to provide the required coverage, and then deliver the form to the third party, which would qualify the third party for reimbursement payments from the federal government (along with a ten percent additional payment for margin and costs). This form is part of the government's purported "accommodation" to religious nonprofits like FOCUS to make it seem that the religious nonprofit is not actually responsible for the decision to make

objectionable drugs and devices available to its employees and plan beneficiaries. 78 Fed. Reg. at 39879-80. According to Defendants' regulations, the purpose of the form is to "designate" a third party to provide payments for contraceptive services, 78 Fed. Reg. at 39879, to ensure that there is a party with "legal authority" to provide those payments, 78 Fed. Reg. at 39880, and to ensure that employees of employers with religious objections receive these objectionable drugs and devices "so long as they remain enrolled in the plan." 78 Fed. Reg. at 39893; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A.

When the form is delivered to a TPA, Defendants' regulations dictate that the TPA "shall provide" payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(2). The notice section of the form (see Exhibit A) (a) directs the TPA to portions of the CFR that say the TPA "shall provide" payments for contraceptive services, (b) instructs the TPA that these code sections set forth the TPA's "obligations," and (c) purports to make the form "an instrument under which the plan is operated."

Defendants' so-called "accommodation" to religious nonprofits does not offer religious liberty protections to FOCUS. Indeed, if FOCUS follows its religious convictions and declines to participate in Defendants' scheme, FOCUS will face, among other injuries, enormous fines that could exceed $16,000,000 annually. It also forces the individual plaintiff employees of FOCUS, CURTIS A. MARTIN, CRAIG MILLER, BRENDA CANNELLA, and CINDY O'BOYLE, each of whom, in the Verified Complaint, objected to coverage by FOCUS of these morally objectionable drugs and devices, to participate in a health insurance plan that causes them to receive promised payment coverage of morally and religiously objectionable abortifacient, contraceptive and sterilization items for themselves and their families. Verified Complaint, ¶ 13.

FOCUS's religious beliefs preclude it from providing the required certification form. Thus, the issue, which has been decided against Defendants in the Tenth Circuit with respect to for profit entities – *see Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013)[1] - is whether Defendants can coerce a conscientious religious objector like FOCUS to facilitate access to contraceptives and abortion-inducing drugs and devices and related education and counseling in violation of the Plaintiffs' sincerely held religious beliefs.[2]

Plaintiffs believe that it is sinful and immoral to provide or facilitate coverage of contraceptives and abortifacients in their health care plan. The so-called "accommodation" requires that the objectionable contraceptives and abortifacients be made available to those covered under FOCUS's employee health insurance plan. FOCUS is required to serve as a conduit for or facilitator of such coverage. Such a requirement is a substantial burden under RFRA.

Without the relief requested in this motion for partial summary judgment, FOCUS will be forced to either (a) incur significant government penalties and fines for continuing its religious exercise of neither providing these objectionable drugs and devices nor submitting and accepting forms to authorize others to do so, or (b) cease that religious exercise.

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[1] The Hobby Lobby plaintiffs were for-profit, secular corporations. Here, FOCUS is a religious nonprofit corporation which is required, in its health insurance plan year beginning on July 1, 2014, to comply with Defendants' mandate by making arrangements with its TPA to provide contraceptives and abortion-inducing drugs and devices and other services to plan participants and beneficiaries at no cost. Thus, the rationale of the Tenth Circuit's ruling in the *Hobby Lobby* case involving for profit corporations applies with even greater force to FOCUS, a religious nonprofit corporation.

[2] Certiorari has also been granted by the U. S. Supreme Court in another religious for profit case, i.e., *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.,* 724 F.3d 377 (3d Cir. 2013), *cert. granted,* 134 S.Ct. 678 (2013).

As there is no known material fact in dispute in this case, judgment should enter in favor of Plaintiffs on their RFRA claim and their First and Fifth Amendment claims as a matter of law. Plaintiffs are also entitled to a permanent injunction in their favor and to their attorney's fees and costs.

II. UNDISPUTED FACTS

None of the facts alleged in Plaintiffs' First Amended Verified Complaint (Doc. 10) ("Verified Complaint"), which Verified Complaint is incorporated herein by this reference, are in dispute.

III. CLAIMS UPON WHICH JUDGMENT IS SOUGHT

A. Plaintiffs are entitled to summary judgment on their First Claim for Relief that the Mandate violates the Religious Freedom Restoration Act ("RFRA").

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

The Tenth Circuit established the framework for analyzing RFRA claims in *Hobby Lobby*. The initial inquiry requires the court to (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby,* 723 F.3d at 1140. If there is such substantial pressure, the government action will then be held to strict scrutiny. *Id.* at 1143; *see also* 42 U.S.C § 2000bb-1. The *Hobby Lobby* court concluded that the

Mandate violated RFRA because it substantially pressured the Hobby Lobby plaintiffs to violate their sincere religious beliefs against facilitating access to certain contraceptive drugs and devices and could not satisfy strict scrutiny. *Id.* at 1140-44.

Here, Plaintiffs' religious beliefs are sincere. "Plaintiffs' religious objection is not only to the use of the objectionable drugs and devices but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of New York v. Sebelius,* No. 1:12-cv-2542, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013). The accommodation the government requires is to sign a form that is, "in effect, a permission slip." *Southern Nazarene Univ. v. Sebelius,* No. 13-cv-1015-F, 2013 WL 6804265, at *8 (W.D. Okla. Dec. 23, 2013).

As another court in the Tenth Circuit explained, the government's claim that Plaintiffs' objection to signing the form is "legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage" is "simply another variation of a proposition rejected by the Tenth Circuit in *Hobby Lobby*." *Reaching Souls Int'l, Inc. v. Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013).

Plaintiffs believe that completing the self-certification form is forbidden complicity with the government's scheme. Accordingly, as one court held, "regardless of the effect on plaintiffs' third party administrator, the regulations still require plaintiffs to take actions they believe are contrary to their religion." *Roman Catholic Archdiocese of New York,* 2013 WL 6579764, at *7; *E. Texas Baptist Univ. v. Sebelius,* No. 4:12-cv-3009, 2013 WL 6838893, at *20 (N.D. Tex. Dec. 27, 2013) ("The plaintiffs have demonstrated that the mandate and accommodation will compel them to engage in an affirmative act and that they find this act – their own act – to be religiously offensive. That act is completing and providing to their insurer or TPA the self-certification forms.").

The vast majority of courts to consider this issue have found that threatening nonprofit religious organizations with substantial fines unless they give up their objection to participating in the Mandate – either by providing objectionable drugs and devices or by signing authorization forms – imposes a substantial burden on religion and triggers strict scrutiny.[3]

FOCUS's Verified Complaint challenges the very same Mandate that was challenged in *Hobby Lobby*. The facts in this case are virtually identical to those in *Hobby Lobby* but for the

[3] *See Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31,2 013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Servs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *Reaching Souls Int'l, Inc.* v. *Sebelius*, No. 5:13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Southern Nazarene Univ.* v. *Sebelius*, No. 5:13-cv-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013); *Grace Sch'ls v. Sebelius*, No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-0027 (W.D. Pa. Dec. 23, 2013); *Legatus* v. *Sebelius*, No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of N. Y.* v. *Sebelius*, No. 1:12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *see also Ave Maria Found.* v. *Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order to religious non-profits because the regulations "likely substantially burden" their religious exercise); *compare Roman Catholic Archbishop of Wash. v. Sebelius*, No. 1:13-cv-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (finding substantial burden with respect to a self-insured non-exempt religious non-profit but concluding that religious non-profits in a church plan lacked standing). *But see Michigan Catholic Conference v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), emergency motion for injunction filed Dec. 29, 2013, No. 13-2723 (6th Cir.); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-cv-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), emergency motion for injunction filed Dec. 27, 2013, No. 13-6640 (6th Cir.); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20. 2013), emergency motion for injunction failed Dec. 27, 2013, No. 13-6640 (6th Cir.); *Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), emergency motion for injunction denied and expedited briefing schedule set, Doc. 11, No. 13-3853 (7th Cir. Dec. 30, 2013); *Priests for Life v. U.S Dep't of Health & Human Servs.*, No. 1:13-cv-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), emergency motion for injunction filed Dec. 20, 2013, No. 13-5368 (D.C. Cir.); *Gilardi v. U.S. Dep't of Health & Human Servs*., 733 F.3d 1208 (D.C. Cir. 2013) (same); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (same); *but see Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted* 134 S. Ct. 678 (2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013).

fact that FOCUS is a non-exempt religious nonprofit organization, whereas the Hobby Lobby plaintiffs were for profit corporations.

FOCUS presents a clear and straight forward RFRA claim and, as a result, has an overwhelming likelihood of prevailing on this claim. There is no legal or factual basis for a different ruling in this case than that rendered in *Hobby Lobby*. The Court should enter summary judgment in favor of Plaintiffs and against all Defendants on Plaintiffs' RFRA claim for relief.

1. The Mandate substantially burdens Plaintiffs' religious exercise.

The government does not dispute the existence, religiosity, or sincerity of Plaintiffs' religious beliefs. Accordingly, RFRA's substantial burden test involves a straightforward, two–part inquiry: a court must (1) identify the religious exercise at issue, and (2) determine whether the government has placed substantial pressure, i.e., a substantial burden, on the plaintiff to abstain from that religious exercise. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) ("prima facie case under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise").

A law substantially burdens the exercise of religion when it compels persons "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). A substantial burden also exists where a law places "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Hobby Lobby*, 723 F.3d at 1138.

For purposes of this Court's analysis, what matters is whether the Government is coercing entities to take action that violates their sincere religious beliefs. *Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.").

In *Hobby Lobby*, the Tenth Circuit held that "this dilemma created by the statute" met the "threshold showing regarding a substantial burden." 723 F.3d at 1138, 1141 (government action substantially burdens a religious belief when it "requires participation in an activity prohibited by a sincerely held religious belief," "prevents participation in conduct motivated by a sincerely held religious belief," or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief") (internal citation and quotation marks omitted).

Fining people who refuse to violate their faith is a prototypical substantial burden. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable pressure upon [applicant] to forgo [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *see also Wisconsin v. Yoder,* 406 U.S. 205, 208, 218 (1972) (fine of *five dollars* for believers' refusal to violate their faith "not only severe, but inescapable"); *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice – an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."). *See also Hobby Lobby*, 723 F.3d at 1141 (being forced to "compromise their religious beliefs" and pay substantial fines "is precisely the sort of Hobson's choice" that "establishe[s] a substantial burden as a matter of law.").

The Mandate expressly requires FOCUS to designate its TPA as an ERISA "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services [and abortifacients] for participants and beneficiaries." 78 Fed. Reg. at

39,879. FOCUS is required to create these obligations in its third party plan administrator by including the recitation of these obligations in FOCUS's certification form. *Id*. at 39,894-95. The coverage that the TPA provides under those obligations will be part of FOCUS's own plan. *Id.* at 39,879; *see also Roman Catholic Archbishop of Washington v. Sebelius*, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (quoting the government's own concession that "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan"). The TPA is then reminded that it may cease to contract with FOCUS entirely because of these new obligations; however, if the TPA objects to providing payments for contraceptive services and abortifacients for participants and beneficiaries, FOCUS is obligated to find a new TPA who will comply with the Mandate. 78 Fed. Reg. at 39,880.

Thus, pursuant to the Mandate, FOCUS, as a part of its self-insurance plan, will, on and after July 1, 2014, be required to instruct its TPA to provide preventive care and screening to its employees and plan beneficiaries, including the coverage of all FDA-approved contraceptives, abortifacients, and related education and counseling, without cost-sharing. 45 C.F.R. § 147.130.[4]

Should FOCUS refuse to comply with the Mandate, it would be subject to potential fines of $100 per day per affected beneficiary, i.e., as much as $16 million annually. *See* 26 U.S.C. §

[4] Notably, in related cases the government has argued that no substantial burden exists because the self-insured entity must merely recite its religious objection which it is already glad to declare publicly. This is false as a matter of fact: FOCUS must also recite and create the "obligations" of its third party plan administrator. The government's own form therefore proves that FOCUS must do more than cite a religious objection, it must also specifically create third-party obligations, Moreover, even the portion of the form that expresses FOCUS's religious objections is not a "mere" expression of objections, because the form only exists in order to trigger the objectionable coverage in FOCUS's own plan. As the district court stated in *Persico*, 2013 WL 61186906, at *25, the religious objection portion of the form is analogous 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" that renders the second expression objectionable despite being facially similar to the first

4980D(b). If FOCUS, in the alternative, elects to cease providing employee health insurance altogether, it will be subject to an annual fine of $2,000 per full time employee after the first thirty employees, i.e., approximately $840,000. *See* 26 U.S.C. §§ 4980H(a), (c)(1).

Such fines clearly constitute pressure that amounts to a substantial burden under RFRA—far surpassing, for example, the $5 fine that was a "substantial burden" in *Yoder*. In the face of such similar substantial pressure, the Tenth Circuit concluded in *Hobby Lobby* that a secular for-profit business organization which challenged the Mandate was likely to succeed on the merits of its RFRA claim and that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [the Hobby Lobby Plaintiffs] enable access to contraceptives that [they] deem morally problematic." *See also Korte v. Sebelius*, Nos. 12-3841, 13-1077, 2013 WL 5960692, at *23 (7th Cir. Nov. 8, 2013); *Gilardi v. Sebelius* No. 13-6059, 2013 WL 5854246, at *8 (D.C. Cir. Nov. 1, 2013); *Southern Nazarene*, 2013 WL 6804265, at *9 ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.").

The pressure on FOCUS is at least equal. Under RFRA, such a substantial burden on Plaintiffs' religious exercise triggers strict scrutiny, the "most demanding test known to constitutional law," *City of Boerne v Flores*, 521 U.S. 507, 534 (1997), which the Mandate cannot possibly survive.

In related cases, these Defendants have "concede[d] that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test." *Reaching Souls Int'l*, 2013 WL 6804259, at *6. That party admission similarly controls this case.

2. The Mandate cannot survive strict scrutiny

a. The Mandate does not further a compelling government interest.

Because the Mandate substantially burdens Plaintiffs' religious exercise, the government must justify the Mandate under strict scrutiny. 42 U.S.C. § 2000bb-1(b). It cannot do so here.

Under RFRA, the government must that applying the Mandate to these Plaintiffs furthers a compelling interest. *O Centro*, 546 U.S. at 430-31 (the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened."). To be compelling, the interest cannot be "broadly formulated" or "sweeping," but must be shown to apply particularly to the Plaintiffs. *Id.* at 431 (citing *Wisconsin v. Yoder*, 406 U.S. at 236). *See also Hobby Lobby*, 723 F.3d at 1143 (The government's interests in public health and gender equality are "insufficient under *O Centro* because they are broadly formulated interests justifying the general applicability of government mandates.") (internal citations omitted). Rather, the government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *O Centro*, 546 U.S. at 431. The government must "specifically identify an 'actual problem' in need of solving" and demonstrate that coercing conscientious objectors to provide contraceptives and abortifacients in violation of their religious beliefs is "actually necessary to the solution." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted). The government cannot meet this burden.

In *Hobby Lobby*, the Tenth Circuit considered the government's asserted interests in promoting "public health" and "gender equality" and concluded that those interests failed to satisfy strict scrutiny. *Hobby Lobby*, 723 F.3d 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 Cento 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 exempt religious non-profits, "private employers with grandfathered plans," and "employers with fewer than fifty employees." *Id*. A further factor militating against the compelling nature of the Mandate is the safe-harbor provision crafted for religious nonprofits such as FOCUS. "[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*. (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547(1993)).

As the Tenth Circuit found in *Hobby Lobby*, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." 723 F.3d at 1143. In *O Centro* "the Supreme Court found that the government failed to make a showing that a ban on the use of a hallucinogenic substance" used by a Native American tribe for religious purposes was justified by a compelling state interest because the government granted "hundreds of thousands" of exemptions to members of the Native American Church. *Geneva Coll. v. Sebelius*, No. 12-00207, 2013 WL 3071481, at *10 (W.D. Pa. June 18, 2013) (citing *O Centro*, 546 U.S. at 433-34). "[S]uch broad exemptions weighed heavily against the finding of a compelling government interest." *Id.*

The Mandate does not satisfy a compelling government interest; therefore the Mandate fails strict scrutiny as a matter of law.

b. The Mandate is not the least restrictive means of furthering the government's allegedly compelling interests.

Under RFRA, the government must also show that the regulation is narrowly tailored and "is the least restrictive means of furthering [a] compelling governmental interest." *United States v. Playboy Ent'mt. Grp., Inc.*, 529 U.S. 803, 813 (2000) (if a less restrictive alternative would serve the government's purpose, "the legislature *must* use that alternative." (emphasis added)); 42 U.S. § 2000bb-1(b). Under that test, "[a] statute or regulation is the least restrictive means if no alternative forms of regulation would [accomplish the compelling interest] without infringing [upon religious exercise] rights." *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (internal citations omitted). The government cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ .of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal) (internal quotation marks and citation omitted). The government must specifically "identify an 'actual problem' in need of solving" and that curtailing religious liberty is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2739 (citations omitted).

The government has numerous alternatives available to it which are less restrictive than the Mandate and would not improperly violate Plaintiffs' religious liberty rights. The government could: (i) expand federal Medicare, Medicaid or other federal programs to provide these drugs and devices at federal taxpayer expense; (ii) authorize tax credits to employees who elect to buy these drugs and devices with their own funds; (iii) directly fund and distribute these drugs and devices in a new federal program or fund and distribute these drugs and devices through state health insurance exchanges or federally facilitated exchanges; or (iv) enable and

subsidize manufacturers or other distributors of these drugs and devices to distribute these objectionable drugs and devices to those who wish to obtain them, all at federal expense. Indeed, the government has "many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Korte v. Sebelius,* 735 F.3d 654, 686 (7th Cir. 2013). *See also,* e.g., *Newland v. Sebelius,* 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting programs like Title X and the government's lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd* no. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

Each of the foregoing alternatives, and no doubt many more that can be thought of, are less restrictive than is the Mandate. Importantly, the government already pays for or subsidizes contraceptives and Plan B drugs distributed through various government funded family planning programs such as Title X and Title XIX-Medicaid, thereby demonstrating that this is already a feasible alternative in lieu of burdening Plaintiffs' religious exercise rights. These alternatives would not require Plaintiffs to facilitate coverage for contraceptives and abortifacients in violation of their religious beliefs, and would effectively further the government's asserted compelling interests.

The Mandate violates RFRA both because it does not further a compelling government interest and because there are less restrictive alternatives available to the government. Thus, Plaintiffs are entitled to judgment as a matter of law, and summary judgment is proper on Plaintiffs' RFRA claim.

B. Plaintiffs are entitled to summary judgment on their Second Claim for Relief that the Mandate violates the First Amendment's Free Exercise Clause.

Defendants' Mandate, as applied to FOCUS, improperly burdens its religious exercise, because it forces FOCUS to violate its religious beliefs. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. As is discussed in more detail above, the Mandate is neither neutral nor generally applicable, and therefore is subject to strict scrutiny. *Id*. at 546. As previously discussed, the Mandate cannot satisfy strict scrutiny and therefore must fail.

1. The Mandate is not generally applicable.

The Mandate is neither neutral nor generally applicable, as it discriminates among religious objectors, penalizes the Plaintiffs for their religious conduct, and allows extensive exemptions from its provisions. The Mandate is therefore in violation of the Free Exercise Clause of the First Amendment.

When a regulation "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection," the regulation fails general applicability. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004). A law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated." *Blackhawk*, 381 F.3d at 209. For example, in *Lukumi*, the city ordinances against animal slaughter, which prohibited a church from engaging in animal sacrifice, protected public health and prevented animal cruelty. 508 U.S. at 543. However, because hunting, pest control, and euthanasia were exempted, the ordinances were not generally applicable. *Id*. at 543-44.

The Mandate is not generally applicable because the government has chosen to exempt a vast amount of Americans from the requirements of the Mandate. The government has allowed numerous employers and plans to avoid the Mandate, including exemptions for small businesses, grandfathered health plans, certain non-profit religious employers, as well as a safe-harbor provision for other non-profit entities which object to the requirements of the Mandate.

A law that provides exemptions for secular reasons, such as the Mandate, must contain exemptions for religious reasons. The Third Circuit used strict scrutiny to invalidate a law which prohibited beards worn by police officers—the law contained an exemption for medical reasons, but no such exemption for religious reasons. *Fraternal Order of Police*, 170 F.3d 359. The Court "conclude[d] that the Department's decision to provide medical exemptions [was] sufficiently suggestive of discriminatory intent" so as to trigger strict scrutiny. *Id*. at 365. Similarly, the Third Circuit invalidated a law prohibiting possession of wild animals without a permit which contained myriad exemptions, but none for religious reasons. *Blackhawk*, 381 F.3d 202. There, the court found that the challenged provisions of the law were substantially underinclusive with respect to its asserted goals, and the government "thus fail[ed] the requirement of general applicability." *Id*. at 211.

2. The Mandate is not neutral.

The Mandate is not neutral because it distinguishes among religious objectors (namely, for-profit or not-for-profit), as well as between secular and religious objectors, resulting in differential treatment among religions. A neutral law "does not target religiously motivated conduct either on its face or as applied in practice." *Id.* at 209; *see also Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding that the city violated the Free Exercise Clause by enforcing an ordinance banning meetings in a park against Jehovah's Witnesses but exempting other religious

groups). Furthermore, the "government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 169 (3rd Cir. 2002). "The Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Id.* at 165. Here, the government has provided several secular motivations for exemptions, but has crafted only limited religious exemptions to the Mandate's requirements, despite the fact that there is widespread religious belief in opposition to the requirements of the Mandate. This is impermissible under the Free Exercise Clause's mandate of neutrality toward religion.

Furthermore, the Mandate constitutes an impermissible "religious gerrymander." If "the effect of [the] law" is to accomplish a "religious gerrymander," it is not neutral. *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. Defendants have repeatedly recognized the sincerity of religious organizations' objections to facilitating access to contraceptive drugs and devices. *See*, e.g., January 20, 2012 Statement of Defendant Secretary Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last accessed Dec. 9, 2013) (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 employer" 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 39,871. Yet, other religious organizations, such as FOCUS,

are excluded from the exemption, though they share the same religious objections of exempt entities.

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. The same can be said for FOCUS. The primary purpose of FOCUS is to "[i]nvit[e] college students into a growing relationship with Jesus Christ and His Church [and i]nspiring and equipping them for a lifetime of Christ-centered evangelization, discipleship, and friendship in which they lead others to do the same." Verified Complaint, ¶ 31. 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").

Finally, the Mandate is also not neutral because it honors certain secular reasons for failure to comply, while rejecting FOCUS' religious reasons. The net effect is that policies covering tens of millions of Americans are exempt for secular reasons, while FOCUS will be forced to pay steep 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.").

The Mandate is neither a neutral nor generally applicable law, and therefore must satisfy strict scrutiny. The government cannot do so.

3. The Mandate cannot survive strict scrutiny.

Once it has been determined that a law is either not neutral or not generally applicable, strict scrutiny applies to *any* burden placed on religious exercise. Actions not neutral or not generally applicable must undergo "the most rigorous of scrutiny" and "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi,* 508 U.S. at 546. Further, there is "no substantial burden requirement when government discriminates against religious conduct." *Tenafly,* 309 F.3d at 170 (citing *Lukumi*, 508 U.S. at 531-47). "Evaluating the extent of a burden on religious practice is . . . impermissible . . . because it entails a forbidden inquiry into religious doctrine." *Id*. at 170.

The inquiry under the Free Exercise Clause is essentially the same as the inquiry under RFRA set forth above, requiring laws which burden religion be narrowly tailored to serve a compelling government interest. *Lukumi*, 508 U.S. at 546. In *Tenafly*, the Third Circuit considered a challenge to a city ordinance which prohibited hanging anything on utility poles, where the city would not permit Orthodox Jewish residents to construct an eruv[5] on utility poles, but permitted permanent house numbers and temporary signs to be posted on the poles. In finding no compelling interest, the Court stated that because the city "ha[d] tolerated [other permanent postings on utility poles], it hardly ha[d] a compelling interest in refusing to allow the inconspicuous [eruv] on the ground that [it was] permanent." *Id.* at 172. Similarly, because the government has permitted a myriad of exemptions from the Mandate, it has no ground to claim that imposing a burden on the religious beliefs of Plaintiffs furthers a compelling interest in public health or gender equality.

[5] A religious object of significance to Orthodox Jews.

Because of the widespread exemptions to the requirement that employers provide contraception coverage and related education and counseling without cost-sharing through their health plan, the Mandate is not narrowly tailored to serve a compelling interest. The Mandate must therefore fail strict scrutiny, and judgment as a matter of law is warranted. Defendants have violated Plaintiffs' guarantee to the free exercise of religion of the First Amendment. Summary judgment is therefore proper.

C. Plaintiffs are entitled to summary judgment on their Third Claim for Relief that the Mandate violates the First Amendment's Establishment Clause.

The Mandate also violates the Establishment Clause of the First Amendment. The "religious employer" exemption sets forth the Governments notion of what is "religious enough" to qualify for an exemption from the Mandate. The government cannot, under the Constitution, create a caste system of different religious organizations, belief-levels, and "accommodations" when it imposes a burden. Instead, "when we are presented with a [law] granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Furthermore, the Government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). While the government may want the analysis to end where no specific reference is made to denomination in the statute, apparent facial neutrality cannot overcome making "deliberate distinctions between different religious organizations." *Valente*, 456 U.S. at 246 n.23.

The government used its unfettered discretion to pick and choose what criteria qualify a group as sufficiently "religious" for an exemption, and it imposed its constricted theological view on all Americans. The government then went on to create an "accommodation" for yet

another level of religious organizations, such as Plaintiffs. The government crafted these regulations on their own theological judgment, determining that the sham "accommodation" would somehow quell the religious objections to the Mandate. These actions involve "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

In *Weaver* the Tenth Circuit held unconstitutional a discrimination - among religions policy - that is very similar to the Mandate. The discrimination among religions in that case was treating "pervasively sectarian" education institutions differently than other religious institutions. *Id.* at 1250–51. The Mandate here likewise draws its line around "religious employers" based on whether they are churches, or whether they are religious nonprofits, or whether they are nonprofits deserving of a non-enforcement safe-harbor, or whether they are just religious families in business. The Tenth Circuit rejected as "puzzling and wholly artificial" the government's argument that their law "distinguishes not between types of religions, but between types of institutions." *Id.* at 1259–60. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial discrimination. *Id.* at 1260.

Under *Weaver*, discrimination because of different types of religious practice violates the Constitution. *Id*. at 1256, 1259. The Mandate picks and chooses between different kinds of religious people and practices, so as to respect some and coerce others. The government is explicitly deciding that facilitating coverage of contraceptive drugs and devices does not substantially burden the tenets of Plaintiffs' religion. This is precisely the type of non-neutrality and entangling that the Establishment Clause prohibits. Plaintiffs are therefore entitled to summary judgment on their Establishment Clause claim.

D. Plaintiffs are entitled to summary judgment on their Fourth Claim for Relief that the Mandate violates the First Amendment's Free Speech Clause.

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

Here, the Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable.

First, the Mandate explicitly requires FOCUS, as a self-insured entity, not merely to express its religious objection but also to explicitly declare that "[t]he obligation of the third party administrator [to provide contraceptive services] are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A. This certification is an instrument under which the plan is operated." See attached Exhibit A, *available at: http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificatoinform.pdf;* 78 Fed. Reg. 39,870, 39,894-95 (July2, 2013). The government explained that by means of this speech,

FOCUS creates legal obligations in its plan administrator to provide the precise coverage that FOCUS objects to arranging and contracting for, within its own plan. *Id.* at 39,879-80. The government also explained that those legal obligations occur only if FOCUS itself speaks this message – it is necessarily FOCUS's own speech, or else it is not operative. *Id.* By this coerced speech, FOCUS would arrange and contract for its plan administrator to provide the exact coverage that the government falsely declares FOCUS does not arrange and contract for. This designation requirement is coerced speech in its purest form, and it is speech that FOCUS objects to speaking.[6] It is a straightforward violation of the First Amendment.

Second, the Mandate not only coerces FOCUS's speech, but it censors FOCUS's speech. After forcing FOCUS to speak words that contract and arrange for objectionable "obligations" on its plan administrator, the Mandate goes on to prohibit FOCUS from speaking a contrary message to its plan administrator: "The eligible organization must not, directly or indirectly, seek to interfere with a TPA's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the TPA's decision to make any such arrangements." 78 Fed. Reg. at 39,895. This is a gag rule, prohibiting a Catholic organization from speaking its Catholic beliefs. It strikes at the heart of the freedom of speech rights enshrined in our First Amendment. It restricts FOCUS's speech based on its content; the content of speech that would try to "interfere" or "influence" someone against providing a service (abortifacient, contraceptive, and sterilization

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

coverage and related education) to which FOCUS objects. It is therefore a content-based restriction on speech that is presumptively unconstitutional. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (noting that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys"); *Ysura v. Pocatello Educ. Ass'n,* 555 U.S. 353, 358 (2009), quoting *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 188 (2007); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992).

The government cannot meet its burden to satisfy strict scrutiny either for its compelled speech or its censorship of speech. As discussed above, the government has conceded in similar cases it fails the compelling interest test. *See Reaching Souls Int'l,* 2013 WL 680425, at *6. The government has not shown any compelling interest to justify burdening FOCUS's speech. And violating FOCUS's freed of speech is not the least restrictive means of pursuing any compelling interest there may be. *See also Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 799-801 (1988) (requiring government efforts in the alternative).

E. Plaintiffs are entitled to summary judgment on their Fifth Claim for Relief that the Mandate violates the Fifth Amendment guarantee of due process and equal protection.

1. <u>The ACA violates Due Process.</u>

The ACA violates the Plaintiffs' rights under the Due Process Clause of the Fifth Amendment because it creates a standardless blank check for Defendants to discriminatorily enforce the "religious" exemption. Section 2713 of the ACA gives HHS the authority to determine which groups are sufficiently "religious" to qualify for an exemption, and which groups are not. This sort of unbridled discretion is forbidden by the Due Process Clause.

A law that is so "standardless that it authorizes or encourages seriously discriminatory enforcement" does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304. The ACA provision underlying the Mandate authorizes Defendants to exempt religious employers, directing the agencies to determine the scope of the exemption. Public Health Service Act § 2713 (codified at 42 U.S.C. § 300gg-13); *see also* 76 Fed. Reg. at 46623. This statutory authority is unfettered, as HHS is tasked with determining the entire scope of the religious exemption, without any statutory guidance, and has the authority to determine the "level of religiosity" required to satisfy an exemption.

Furthermore, there is absolutely no limit on HHS deciding whether or not contraception, abortifacients, related education and counseling, and other services are preventive in the first place—the statute itself does not define what qualifies as "preventive service." Section 2713 of the ACA contains no standards regarding these decisions, and offers absolutely no guidance as to who counts as "religious" for purposes of the exemption and what kind of accommodation such objectors could receive, despite the fact that such an exemption implicates constitutional rights.

Section 2713 is therefore a quintessential law so "standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. The statute practically invites discriminatory and unconstitutional enforcement—which is exactly what Defendants have done in this case. Plaintiffs are therefore entitled to summary judgment on their Due Process Clause claim.

2. The Mandate is a violation of the guarantee to Equal Protection.

Equal protection, applied to the federal government by virtue of the Fifth Amendment, requires that government actors such as Defendants treat equally all persons similarly situated. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 429 (1985). The Mandate's narrow "religious employer" exemption exempts certain religious organizations that object, based on their sincerely held religious beliefs, to providing contraceptive coverage, but refuses to exempt other religious objectors such as FOCUS. This results in impermissible differential treatment under similarly situated groups. The Mandate must therefore fail as a violation of the Equal Protection Clause.

The Government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Weaver*, 534 F.3d at 1257. The narrow religious employer exemption applies only to institutional churches, their integrated auxiliaries, "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39,871. FOCUS, while not meeting the formal requirements for the exemption, is a religious institution, and objects, on the basis of strongly held religious beliefs, to facilitating access to contraception and related education and counseling. The only difference between FOCUS and the groups exempted is a simple distinction in the tax code, but the religious beliefs remain consistent among similar exempt organizations.

The Mandate discriminates among religious groups, subjecting similarly situated groups to differential treatment based on a fundamental right and is therefore subject to strict scrutiny. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). "[S]tatutes involving discrimination on the basis of religion, including interdenominal discrimination, are subject to heightened scrutiny…" *Weaver*, 534 F.3d at 1266. As previously discussed, Defendants cannot meet this burden.

Defendants cannot establish a compelling interest in health and gender equality because the massive exemptions to the Mandate undermine any purported interest on part of the government. The Mandate therefore violates the Equal Protection Clause as a matter of law.

F. Plaintiffs are entitled to summary judgment on their Sixth Claim for Relief that the Mandate violates the First Amendment guarantee to expressive association.

The Mandate compels Plaintiffs to facilitate expression and activities that Plaintiffs believe and teach are inconsistent with their religious beliefs, expression, and practices. The Mandate therefore violates the Plaintiffs' First Amendment right of expressive association.

The Supreme Court has observed that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boys Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Freedom of association is "an indispensable means of preserving other individual liberties" such as the exercise of religion and speech. *Roberts*, 468 U.S. at 618. "Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association." *Dale*, 530 U.S. at 648 (internal citations omitted).

A threshold question to determine whether or not the freedom of expressive association is abridged is to ascertain whether the forced association would "significantly affect the [plaintiffs'] ability to advocate public or private viewpoints." *Id*. at 650. FOCUS, its employees, and the individual plaintiffs associate with FOCUS for an expressive purpose, to live and promote their common religious beliefs, which include the belief that the use of contraceptives and abortifacients is a grave sin. The Mandate forces Plaintiffs to support and associate with a viewpoint against which they have strong religious objections by requiring coverage for

contraceptive drugs and devices and related education and counseling. This would make it incredibly difficult for Plaintiffs to advocate against the use of contraceptives, while also facilitating access to those exact drugs and devices, without cost. These contradictory actions affect in a "significant way the [plaintiffs'] ability to carry out their various purposes." *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

The freedom of expressive association can only be "overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648. This is the strict scrutiny test. As discussed previously, the Government cannot meet this demanding standard because they have neither a compelling government interest nor is the Mandate narrowly tailored to be least restrictive on First Amendment freedoms.

Requiring Plaintiffs to associate with an ideology that they find objectionable on religious grounds and would hamper their ability to advocate their views regarding the sanctity of human life is plainly a violation of Plaintiffs' freedom of expressive association. Indeed, the "[f]reedom of association . . . plainly presupposes a freedom *not to associate*." *Id.* at 648 (internal citations omitted) (emphasis added). Plaintiffs are therefore entitled to summary judgment on their expressive association claim.

IV. CONCLUSION

Plaintiffs' claims for relief are clear and unambiguous. There are no material facts in dispute. Speedy resolution of this case by summary judgment is warranted. Plaintiffs are entitled to a permanent injunction in their favor and to their attorney's fees and costs pursuant to 42 U.S.C. § 1988(b) and/or 5 U.S.C. § 504.

Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment as follows:

1. Judgment declaring the Mandate and its application to FOCUS and the individual Plaintiffs to be an unconstitutional violation of their rights protected by RFRA (First Claim for Relief) and/or the First Amendment to the U.S. Constitution, to wit: the Free Exercise Clause (Second Claim for Relief), the Establishment Clause (Third Claim for Relief), the Free Speech Clause (Fourth Claim for Relief), Freedom of Expressive Association (Sixth Claim for Relief), and/or Due Process and Equal Protection as guaranteed by the Fifth Amendment (Fifth Claim for Relief) and therefore that the Mandate is invalid and inapplicable to Plaintiffs;

2. A permanent injunction in favor of FOCUS and the individual Plaintiffs prohibiting Defendants from applying or enforcing the Mandate to Plaintiffs in any way that substantially burdens Plaintiffs' religious beliefs of Plaintiffs in violation of RFRA and/or the First Amendment or Fifth Amendment to the U.S. Constitution, and prohibiting Defendants from continuing to illegally discriminate against Plaintiffs by requiring them to provide health insurance coverage for contraceptives, abortion-inducing drugs and devices and related education and counseling; and

3. The award to Plaintiffs of their court costs and reasonable attorney's fees as provided either 42 U.S.C. § 1988(b) or 5 U.S.C. § 504. Upon request of the Court or at an appropriate time, an affidavit of attorney's fees and costs will be presented to the Court.

Respectfully submitted this 15th day of January, 2014.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on the 15th day of January, 2014, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

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