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' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Fellowship of Catholic University Students ("FOCUS") and individual Plaintiffs Curtis A. Martin, Craig Miller, Brenda Cannella, and Cindy O'Boyle respectfully reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment (Doc. 18) (herein "Defendants" Opposition") as follows:

I. PROCEDURAL BACKGROUND

A. Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs' motion for partial summary judgment (Doc. 12) seeks judgment 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).

Regulations promulgated by the Defendants pursuant to the Patient Protection and Affordable Care Act ("PPACA") require many, but not all, employers, to provide insurance coverage of contraceptives, abortifacients, and related counseling and education to employees without cost to employees (herein the "Mandate"). *See* Plaintiffs' First Amended Complaint (Doc. 10) (herein "VC") and Plaintiffs' Motion for Partial Summary Judgment (Docs. 12 and 12-1), both of which are incorporated herein by reference.

Though there are a myriad of exemptions for religious and secular employers, *see*, e.g., VC, ¶¶ 6, 64, 89, 92-95, 164, FOCUS does not qualify for any of them. For example, though FOCUS is Catholic faith-based organization, FOCUS does not meet Defendants' "religious employer" exemption chiefly because FOCUS is not directly owned or controlled by the local Catholic Bishop. Nor does FOCUS's health insurance plan qualify for "grandfathered" status. *See* VC, ¶ 7. Nor does FOCUS qualify as a small business with less than 50 employees. *See* VC, ¶¶ 89, 193.

FOCUS's employee health insurance plan, managed and operated pursuant to a contract with an agent called Third Party Administrator ("TPA"), provides agreed-upon

benefits to its employees and covered dependents. Because of FOCUS's Catholic faith, it religiously objects to providing coverage of the drugs, devices, and services required by Defendants' Mandate. FOCUS's TPA, as an agent under contract with FOCUS, administers FOCUS's health insurance plan and, within plan limits on coverage benefits, periodically reimburses claims filed by FOCUS's employees. As FOCUS hires new employees, FOCUS arranges for these new employees to enroll in FOCUS's plan. Likewise, as employees leave FOCUS, its TPA is notified so that insurance coverage may be concluded in accord with FOCUS's contract with its TPA and employment arrangement with affected employees.

Defendants' Mandate requires FOCUS, sometime prior to the start of its next plan year on July 1, 2014, to sign a government form (*see* "EBSA FORM 700 – CERTIFICATION" (herein the "Form") attached as Exhibit A) which authorizes and directs FOCUS's TPA to cover the objectionable drugs, devices, and services. Once FOCUS signs and delivers the Form to its TPA, the Form constitutes an "amendment" to the contract for insurance coverage between FOCUS and its TPA, legally authorizes FOCUS's TPA to provide coverage of the objectionable drugs, devices, and services essentially as an amendment to FOCUS's insurance plan, and qualifies the TPA to be reimbursed by Defendants for the cost of the TPA's coverage of these objectionable drugs, devices, and services, plus a ten percent additional payment. 78 Fed. Reg. at 39,879-80.

Defendants' regulations specify that the purpose of the Form is to "designate" a TPA to provide payment for drugs, devices, and services to employees of a religiously

objecting nonprofit, 78 Fed. Reg. 39,879, so as to ensure that the religiously objecting nonprofit has provided its TPA with the "legal authority" to reimburse FOCUS's employees for the costs of the objectionable drugs, devices, and services and to receive the additional ten percent bonus from the government, 78 Fed. Reg. at 39,893. After the Form is executed by FOCUS and delivered to its TPA, Defendants' regulations provide that FOCUS's TPA thereupon "shall provide" reimbursements for the objectionable drugs, devices, and services, 26 C.R.C. § 54.9815-2713A(b)(2), and ensure that FOCUS's employees receive these objectionable drugs, devices, and services for "so long as they remain enrolled in the [employer's] plan." 78 Fed. Reg. at 39,893; see 45 C.F.R. § 147.131(c)(2)(i)(B); 26 C.F.R. § 54.9815.

Plaintiffs hold sincere religious beliefs, based on 2,000 years of authoritative teaching by the Catholic Church, which forbid them from the use of contraceptives, abortion-inducing drugs and devices, sterilization, and related education and counseling as required by Defendants' Mandate. See VC, ¶¶ 30-55. However, if FOCUS, a religious nonprofit with a $30 million annual budget, does not comply with Defendants' Mandate, FOCUS will face fines and penalties that could exceed $16 million per year.[1] *See* VC, ¶ 13.

B. <u>Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment.</u>

Defendants contend that they have "accommodated" objecting religious non-profits like FOCUS by requiring them to "merely" sign Defendants' Form. Defendants

[1] If FOCUS elected to drop health coverage altogether, it would be subject to an annual fine of $2,000 per full-time employee, *see* 26 U.S.C. § 4980H(a), (c)(1), and/or face ruinous practical consequences due to its inability to offer crucial and generous healthcare benefits to its employees. *See* VC, ¶¶ 56-57, 61, and 182.

contend that their Mandate "require[s] nothing of the individual plaintiffs . . . and thus cannot impose a substantial burden on their religious exercise." *See* Defendants' Opposition at 2, 11.

Defendants contend that really all FOCUS "seeks [is] to avoid paying for, administering, or otherwise providing contraceptive coverage itself, [and] also seeks to prevent the women who work for the organization from obtaining such coverage, even if through other parties." *See* Defendants' Opposition at 2-3. Defendants add that the Mandate is "narrowly tailored" and does not require objecting religious nonprofits "to provid[e] contraceptive coverage to contract, pay, arrange, or refer for that coverage." *See* Defendants' Opposition at 6-7.

Thus, Defendants assert that FOCUS cannot prevail on either its RFRA claim or its constitutional claims and, since the Mandate does "not require anything of the individual plaintiffs," the individual Plaintiffs lack standing and should be dismissed from the action. *See* Defendants' Opposition at 3-4, 8ff.

As is described in Plaintiffs' First Amended Complaint (Doc. 10), motion for partial summary judgment (Docs. 12 and 12-1), and herein, these assertions are false. FOCUS, on the basis of its sincere religious beliefs, objects to executing the Form because the Form amounts to an amendment to its insurance benefits contract with its TPA and requires FOCUS to act as the crucial conduit in triggering Defendants' Mandate and the distribution to FOCUS's employees, through FOCUS's health insurance plan, of objectionable drugs, devices and services. Accepting this so-called "accommodation"

would make FOCUS a party to and complicit in promoting the use and distribution of objectionable drugs, devices and services to which the Plaintiffs religiously object.

The individual Plaintiffs support and share FOCUS's religious liberty rights and religious beliefs. One or more of the individual Plaintiffs would be required to execute the government's Form, administer the Defendants' Mandate in concert with FOCUS's TPA, and participate in what they and the members of their family regard as Defendants' sinful and immoral scheme.

Thus, the Mandate substantially burdens the religious beliefs of both FOCUS and the individual Plaintiffs; does not further a compelling government interest; and, even assuming there is such a compelling government interest, the Mandate is not narrowly tailored and furthered by the least restrictive means.

C. Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. 19), filed contemporaneously with Defendants' Opposition, contains multiple references to a voluminous 187,805 page appendix filed by Defendants on February 20, 2014. *See* Docs. 24 and 24-1.

At Magistrate Judge Kathleen M. Tafoya's March 5, 2013, Scheduling Conference, counsel for the parties agreed and the Judge Tafoya ordered that this Court's consideration of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and the discovery it necessitated would be stayed pending further order of Court so that Plaintiffs' motion for partial summary judgment, as responded to by

Defendants, could proceed to decision on the basis of legal arguments framed in those pleadings. *See* Doc. 30.

Therefore, Plaintiffs need not, at this time, respond to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. Plaintiffs reserve the right to do so at a future time as may be ordered by the Court. Counsel for the parties are in the process of preparing a stipulation to this effect. To the extent this matter is not resolved, Plaintiffs reserve the right to respond to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

II. ARGUMENT

A. Defendants' Mandate Violates RFRA (First Claim for Relief).

The federal government violates RFRA whenever it substantially burdens 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*, 723 F.3d at 1125-26.

1. Plaintiffs' Religious Beliefs are Sincere.

Defendants do not contest the existence, religiosity, or sincerity of Plaintiffs' religious beliefs or that Plaintiffs exercises religion when they object to their role in Defendants' Mandate. Likewise, Defendants do not dispute the sincerity of the religious beliefs of the individual Plaintiffs. Thus, it is undisputed that both FOCUS and the individual Plaintiffs object to FOCUS acting as the crucial conduit in Defendants' scheme for distributing objectionable drugs, devices and services as this makes them complicit in promoting contraception and abortion in violation of their sincere religious

beliefs. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013), cert. granted, No. 13-354, 2013 WL 5297798 (Nov. 26, 2013) ("The government does not dispute the corporations' sincerity, and we see no reason to question it either."). *See also* VC, ¶¶ 3-5, 18-22, 30-55.

Regardless of whether Defendants "sincerely" believe that Plaintiffs' execution of the government's Form is morally meaningful, the relevant legal question is whether FOCUS or the individual Plaintiffs do. There is no dispute that Plaintiffs believe they cannot execute and deliver the government's Form without violating their religious beliefs.

2. <u>The Mandate Substantially Burdens Plaintiffs' Religious Beliefs.</u>

The federal government imposes a substantial burden on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138 (*citing Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2020)).

The Tenth Circuit determined that forcing Hobby Lobby to compromise its beliefs or pay millions of dollars in fines easily satisfied 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 FOCUS acts in accordance with its sincere religious beliefs and refuses to participate in Defendants' scheme for distributing objectionable drugs, devices and services, it faces the penalties that constituted "substantial pressure" in Hobby Lobby. *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"); *Zubic v. Sebelius*, No. 2:13-cv-01459-AJS [Dkt. 75], *slip op.* (W.D. Pa. Nov. 21, 2013) (Defendants' "accommodation" "substantially burdens" religious beliefs by "asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose").

Defendants' effort to avoid *Hobby Lobby* should be deemed unavailing. Defendants argue that *Hobby Lobby* cannot control here because it involved for-profit corporations, which, unlike FOCUS, are not eligible for the accommodations. Defendants contend that the Tenth Circuit thus did not have the "occasion to consider whether the regulation's accommodations, which relieve eligible non-profit religious organizations like FOCUS of any obligation to contract, arrange, pay, or refer for contraceptive coverage, impose a substantial burden on religious exercise." *See* Defendants' Opposition at 11, 15-16.

Defendants' argument muddies both the facts and the meaning of substantial burden. While Defendants contend their "accommodation" relieves FOCUS of the obligation to itself pay for coverage of objectionable drugs, devices and services, FOCUS still must maintain a health insurance plan through which, pursuant to a contract with its

TPA, these objectionable drugs, devices, and services are made available to FOCUS's employees and, in the process, provide the names of its employees and covered dependents and other confidential information to trigger this coverage. 26 C.F.R. § 54.9815-2713A(b). *See Zubik, supra,* (granting preliminary injunction and agreeing that "enabl[ing] Plaintiffs to avoid directly paying" did not "absolve or exonerate them from the moral turpitude created by the 'accommodation'").

The government's Form is FOCUS's authorization to its TPA to provide objectionable drugs, devices and services pursuant to its contract with its TPA. Signing and submitting the government's Form to its TPA is the act that FOCUS and the individual Plaintiffs believe their religion forbids them from performing. This, coupled with the threat of fines to FOCUS if it refuses to comply with the Mandate despite its undisputed religious beliefs constitutes a substantial burden. *See*, e.g., VC, ¶ 13.

Defendants' dismissive assertion that the Mandate does not require plaintiffs to modify their behavior in any meaningful way and that FOCUS need do next to nothing and is free to continue to refuse to contract, arrange, pay, or refer for contraceptive coverage and is free to voice its disapproval of contraception, and to encourage its employees to refrain from using contraceptive series is dissembling or false.

One need only review Defendants' Form to see how dissembling is Defendants' contention that FOCUS need do next to nothing and is really not involved in the provision of objectionable drugs, devices, and services. The government's Form requires FOCUS to state, on page 1, that it "objects to providing coverage" of contraceptives,

abortifacients, and related services. However, critical and legally operative language appears on page 2 of the government's Form, reproduced below:

> The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.
>
> Notice to Third Party Administrators of Self-Insured Health Plans
>
> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

The language on page 2 directs the TPA to specific provisions of the Mandate that: (a) require that the TPA "shall provide" payments for objectionable drugs, devices and services, (b) instructs the TPA that these Mandate regulations set forth the TPA's "obligation," and (c) constitutes an amendment of the contract ("instrument") to the contract between FOCUS and its TPA by which "the plan is operated."

These "obligations" – both for the religiously objecting employer who must execute the Form and the TPA who thereupon legally authorized to provide coverage of the objectionable drugs, devices and services – are replicated in two sections of the Code of Federal Regulations, giving enforcement authority both to the Defendant Department

of Treasury via the Internal Revenue Code (*see* 26 C.R.F. 54.89815-2713A) and to the Defendant Department of Labor via its ERISA enforcement authority (*see* 29 C.F.R. 2590.715-2713A). The Form explicitly forces FOCUS, notwithstanding the religious objections both of FOCUS itself and of the individual Plaintiffs, to designate, by plan amendment, its TPA to provide coverage of objectionable drugs, devices, and services and requires the TPA to provide coverage of these objectionable drugs, devices, and services for so long as a FOCUS employee remains enrolled in the plan.

Defendants seem to believe that Plaintiffs cannot be morally culpable for violating their religious beliefs if they execute Defendants' Form and thereupon instruct a third party to provide coverage of objectionable drugs, devices and services to FOCUS's employees and covered dependents. The language on page 2 of Defendants' Form cannot be minimized, however, by Defendants' incantation that FOCUS has no obligation to contract, arrange, pay, or refer for contraceptive coverage.

The specific designation language of Defendants' Form literally amounts to contracting, arranging, and/or referring for contraceptive coverage and it does so by intentional design.

Defendants admitted in their final rule in 2013 that this "designation" language was necessary because, unless a self-insured entity (such as FOCUS) executed Defendants' Form and transmitted it to its TPA, Defendants were legally powerless to require the TPA to provide the objectionable coverage. This is because neither the PPACA nor ERISA give Defendants any authority whatsoever to independently direct TPAs to provide this objectionable coverage without the employer's specific designation

with, as page 2 of the government's Form specifies, "obligations . . . set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A." See 29 U.S.C. § 1002(16)(A)(i); 29 CFR 2510.3-16(a) (a TPA can become a "plan administrator" only if it is "specifically designated by the terms of the instrument under which the plan is operated"). *See also* 78 Fed. Reg. at 39,879. Thus, execution and delivery of the government's Form is the *sine qua non* of Defendants' scheme because otherwise the TPA cannot be required to make these objectionable drugs, devices and services available to FOCUS's employees and covered dependents. *Zubik v. Sebelius*, No. 2:13-cv-01459-AJS (W.D. Pa. Nov. 21, 2013) (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.'"); *see also 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').[2]

Defendants assert that, under Defendants' "accommodation," Plaintiffs' execution of the Form is essentially what FOCUS "has done or would have to do voluntarily anyway even absent these regulations in order to ensure that it is not responsible for contracting, arranging, paying, or referring for contraceptive coverage." *See* Defendants' Opposition at 13. That is false as, absent the Mandate and execution of the government's

[2] Defendants also ignore federal criminal conspiracy laws which recognize conspirator liability for persons playing any part, direct or indirect, to "effect the object of [a] conspiracy." *See*, e.g., 18 U.S.C. § 371.

Form, FOCUS would not be required to designate (and has never designated) its TPA as an ERISA plan administrator with obligations to provide morally offensive coverage of drugs, devices, and services to its employees and their covered dependents. And, without FOCUS's designation and the execution of the government's Form, its TPA would have no obligation to comply. 78 Fed. Reg. 39,870, 39,880 (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.").

Defendants' "accommodation" effectively changes the significance of actions FOCUS has taken in the past as, for example, in providing the names and contact information of its employees and their covered dependents to its TPA. As the court said in *Zubik*:

> 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. FOCUS cannot continue to maintain its health insurance plan and provide administrative support to its TPA for that plan where doing so in compliance with the Mandate, even with Defendants' "accommodation," would facilitate access to morally objectionable drugs, devices and services.

Additionally, the Mandate commands objecting non-exempt religious organizations like FOCUS to "not, directly or indirectly seek to influence the third party administrator's decision" whether to provide coverage of contraceptive and abortifacient services. *See* 26 C.F.R. 54.9815-2713A(b)(iii). This means, as Defendants acknowledge,

that FOCUS could not seek to discourage its TPA from using Defendants' Form to distribute objectionable drugs, devices and services.

The D.C. Circuit Court's *Kaemmerling* decision on which Defendants almost exclusively rely (as opposed to the Tenth Circuit Court's *Hobby Lobby* decision which Defendants almost virtually ignore) is inapposite. *See* Defendants' Opposition at 15-16. *Kaemmerling*, in a RFRA challenge, did not object to the government's gathering from him of "any particular DNA carrier – such as blood, saliva, skin, or hair – bur rather . . . to the government collecting his DNA information from any sample it had already gathered." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). The court ruled that, 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.* at 679.[3]

Here, in contrast, FOCUS is not concerned with what FOCUS's employees may do on their own; rather, it objects to Defendants interfering with FOCUS's health insurance plan over which, even though administered pursuant to a contract with its TPA, FOCUS maintains control, including the moral responsibility to assure plan coverage

[3] In *Living Water Church of God v. Charter Twp. Of Meridian*, 258 Fed. App'x 729, 739 (6th Cir. 2007), 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. Here, in contrast, FOCUS is being directly pressured to engage in conduct against its beliefs. Also, 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. Thus, Defendants' reliance on these three cases (See Defendants' Opposition at 15) is unfounded.

corresponds with FOCUS's sincerely held religious beliefs and those of its employees such as the individual Plaintiffs.

FOCUS seeks to control only its own religious conduct. It has no legal objection to Defendants providing whatever services Defendants want to provide to anyone, so long as FOCUS is not coerced by Defendants to utilize FOCUS's health insurance plan and its TPA agent against its religious beliefs to do so.

Defendants argue next that "[t]he challenged regulations . . . do not impose a substantial burden on plaintiffs' religious exercise because any burden is indirect and too attenuated to be substantial." *See* Defendants' Opposition at 16. The precedent is to the contrary. *See Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (holding that only the plaintiff, not the government, could decide where to draw the line that "sufficiently insulated" him from complicity in immoral conduct).

That Defendants consider religious nonprofits such as FOCUS necessary to their scheme to guarantee free access to objectionable drugs, devices and services by the execution of Defendants' Form led the U.S. Supreme Court to grant an injunction to the Little Sisters of the Poor. *Little Sisters of the Poor v. Sebelius*, No. 13A691, 571 U.S. – (January 24, 2014). The Supreme Court, essentially calling Defendants' "bluff" that all an objecting religious nonprofit need do was take the "de minimis" step of executing the government's Form to express its religious objections to its TPA and thereafter would not be "directly" involved in decisions relating to coverage of these objectionable drugs, devices, and services, entered an injunction in which the Court said:

> If the employer applicants [Little Sisters of the Poor] inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents [Defendants here] are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the Form prescribed by the Government and need not send copies to third-party administrators.

Id.

That is all Plaintiffs request here - a simple order, in the form of a permanent injunction to the same effect. However, Defendants want more than FOCUS's religious objection; Defendants insist that Plaintiffs execute their Form because Defendants know that, without the executed Form, FOCUS's TPA cannot be legally compelled by Defendants to cover the objectionable drugs, devices, and services.

These government actions satisfy RFRA's substantial burden prong. Under RFRA, such a substantial burden on FOCUS's religious exercise triggers strict scrutiny, the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This Court, as Defendants must concede, is bound by the Tenth Circuit's ruling in Hobby Lobby that the Mandate cannot satisfy strict scrutiny under RFRA.

D. <u>The Mandate Does Not Further a Compelling Government Interest.</u>

Plaintiffs have fully addressed this prong in their First Amended Verified Complaint, *see* VC, ¶¶ 7-10, 102-106, and their Motion for Partial Summary Judgment, ¶ III.A.2.a at 13 ff. As the Mandate does not satisfy a compelling government interest, the

Mandate fails strict scrutiny as a matter of law. If the Court determines that the Mandate does not satisfy a compelling government interest, the analysis ends and the Plaintiffs prevail.

E. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

Assuming the Court does determine that the Mandate satisfies a compelling government interest, the Court must then determine whether the Mandate, as implemented, is the least restrictive means of furthering Defendants' interest. Clearly, it is not.

Defendants argue that, should FOCUS be exempted from the Mandate, "the government itself would not realistically be able to provide contraceptive coverage to FOCUS's employees directly." *See* Defendants' Opposition at 12.

This argument really relates to the "least restrictive means" issue. That is because, assuming the Mandate satisfies a compelling government interest, one way of implementing the Mandate would be to compel FOCUS, in violation of its religious beliefs, to provide coverage of these objectionable drugs, devices, and services. But that way of implementation of the Mandate, which substantially burdens Plaintiffs' religious beliefs, would not further whatever the government's interests may be in the least restrictive means.

There are clearly less restrictive means available to the government. Plaintiffs, in their First Amended Verified Complaint and motion for partial summary judgment, identify the virtually unlimited alternative methods available to Defendants to further

whatever interests Defendants contend they have in making these objectionable drugs, devices and services available to FOCUS's employees. *See*, e.g., VC, ¶¶ 188-198. As Defendants point out, "RFRA is a shield, not a sword, . . . and accordingly it does not prevent the government from providing alternative means of achieving important statutory objectives. . ." *See* Defendants' Opposition at 12.

Next, Defendants argue that FOCUS "would also prevent anyone else from providing such coverage to FOCUS's employees and their covered dependents." *See* Defendants' Opposition at 12. That is, of course, false. Plaintiffs have no legal objection to Defendants utilizing any one of the virtually unlimited options it has available to it to provide coverage of these drugs, devices, and services to whomever Defendants so desire.

Thus, the Mandate does indeed violate both RFRA and, as briefly described below, cannot survive strict scrutiny under the First Amendment Free Exercise and Establishment Clauses either.

B. Defendants' Mandate Violates the Free Exercise Clause (Second Claim for Relief).

Defendants contend that forced compliance with the Mandate does not violate the Free Exercise Clause[4] because the Mandate is "neutral and generally applicable." Strict scrutiny applies to any burden placed on religious exercise by a law that is neither neutral

[4] Defendants' contention that "nearly every court" to consider a Free Exercise challenge "has rejected it" is misleading as the vast majority of courts addressing challenges have held the Mandate unlawful under RFRA and thus have not reached the Free Exercise or other constitutional claims.

nor generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1933).

1. <u>The Mandate is Not Neutral.</u>

The Mandate is not neutral because it expressly discriminates among religious objectors. It has created at least three tiers of religious objectors which tiers are based on unfounded guesswork about the likely religious characteristics of different religious organizations. As a result, some are wholly exempt from the Mandate (e.g., churches and "integrated auxiliaries"), some must comply with the "accommodation" and gag rule (e.g., non-exempt religious nonprofits like FOCUS), and some receive no protection at all (e.g., religious believers who earn profits).[5] The net effect is that policies covering tens of millions of Americans are exempt for both secular and religious reasons, while FOCUS, an objecting religious nonprofit, will be forced to pay steep fines as the cost of 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.").

Such open discrimination fails even "the minimum requirement of neutrality" which requires that a law not discriminate on its face. *Lukumi*, 508 U.S. at 533; *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.'").

[5] The Tenth Circuit obviously does not agree with this last contention. *See Hobby Lobby*, 723 F.3d 1114.

Defendants 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." *See* Defendants' Opposition at 17. 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 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 1259-1260.[6]

2. <u>The Mandate is not generally applicable.</u>

Nor is the Mandate generally applicable. It not only discriminates among religious objectors and penalizes the Plaintiffs for their religious conduct, it allows extensive secular exemptions from its provisions. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (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); *see also Blackhawk v. Pennsylvania*, 381 F.3d 202,

[6] Defendants cite *Lukumi* to argue that the Free Exercise Clause is not invoked because the Mandate targets not "only conduct motivated by religious belief" but secular conduct as well. Such a distorted proposition would, if accepted, excuse all but the most blatant attacks on religion. *Lukumi* warned against just such an 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 ("[T]his is far from a representative free-exercise case.").

209 (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.").

The number of secular exemptions from the Mandate is huge, completely putting the lie to Defendants' 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."). Defendants have already revised the Mandate's religious nonprofit exemption once, purportedly in response to public comments objecting to the initial exemption. *See* 78 Fed. Reg. 39,870-01, 39873-74 (July 2, 2013) and even then the exemption was implemented via a footnote on an HHS website. See *http://www.hrsa.gov/womensguidelines*.[7]

Defendants do not even attempt to justify why they can accept these secular and discriminatorily religious reasons for exempting tens of millions of people and yet refuse to provide FOCUS an exemption for is mere 450 employees. It is clear that Defendants may easily revise the Mandate yet again and grant FOCUS its requested exemption.

C. Defendants' Mandate Violates the Establishment Clause (Third Claim for Relief).

Defendants' claim that "[e]very court to have considered an Establishment Clause challenge to . . . these regulations . . . has rejected it" (*see* Defendants' Opposition at 20)

[7] The creation in a website footnote of a religious employers' exemption is a perfect example of 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). *See also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280 (10th Cir. 2004) (university drama department policy requiring one student to use curse words when a Jewish student had been excused from performance obligation on Yom Kippur a Free Exercise violation).

is misleading. In the first place, the vast majority of courts addressing challenges to Defendants' Mandate have entered relief in favor of the plaintiffs pursuant to RFRA, thus not even reaching the constitutional claims.[8]

More importantly, the Tenth Circuit has rejected Defendants' argument that somehow a religious nonprofit's "structure and purpose" determines whether the government may prefer some religious institutions over others. In *Weaver*, which involved a challenge to Colorado regulations that provided scholarships for students to attend any secular or religious college unless the state deemed the school to be "pervasively sectarian," the state argued that there was no Establishment Clause violation because the law discriminated based on "types of institutions," not "types of religions."*Weaver*, 534 F.3d at 1250, 1259. The court called this an "artificial distinction" and held 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 actually does discriminate among religious denominations by favoring those that are vertically structured with the result that all of their ministries are deemed exempt "integrated auxiliaries," 78 Fed. Re. 8,456, 8,461 (Feb. 6, 2013), and by disfavoring those religious denominations that are more horizontally structured with

[8] See *www.becketfund.org/hhsinformatiioncentral/* (last visited February 21, 2014) which relates that, in 45 nonprofit lawsuits which have been filed, 19 injunctions have been granted, 1 injunction has been denied.

ministries operating independently of their institutional church sponsor – organizational circumstances not unlike that of FOCUS. A law cannot prefer denominations that exercise religion mainly through "houses of worship[]," 78 Fed. Reg. 8,461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F.3d at 1259. Equal treatment of objectors is precisely what the Mandate lacks. It discriminates among institutions that engage in the exact same or substantially the same activity and have the exact same religious objections. The Mandate therefore violates the constitutional guarantee against government establishment of one religious view over another.

D. Defendants' Mandate Violates the Rights to Free Speech and Expressive Association (Fourth and Sixth Claims for Relief).

The Mandate violates the First Amendment's Free Speech Clause because it compels Plaintiffs to engage in government-required speech against their will and prohibits them from engaging in speech they wish to make.[9]

The Mandate forces Plaintiffs to speak by executing the government's Form that authorizes another, its TPA, to provide FOCUS's employees and covered dependents with objectionable drugs, devices and services as an amendment to FOCUS's health insurance plan. 26 C.F.R. § 54.9815-2713(a)-(b). The Mandate explicitly requires FOCUS to communicate to its TPA that it is "[t]he obligation of the third party administrator [to provide the contraceptive services] . . . set forth in 26 CFR. 54.9815-

[9] Defendants, as before, claim that "every court to review a free speech challenge like plaintiffs' . . . has rejected it." *See* Defendants' Opposition at 24. This is misleading as the vast majority of courts addressing challenges to Defendants' Mandate have held the Mandate unlawful under RFRA and thus have not reached constitutional claims.

2713A, 29 CFR. 2510.3-16, and 29 CFR 2590.715-2713A. This certification is an instrument under which the plan is operated."

By this coerced speech, FOCUS arranges and contracts for its TPA to provide the exact coverage to which FOCUS objects.

After forcing FOCUS to speak words that contract and arrange for objectionable "obligations" by its TPA, the Mandate censors FOCUS's speech by requiring that "[t]he eligible organization [i.e., FOCUS] must not, directly or indirectly, seek to interfere with a third party's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party's decision to make any such arrangements." 78 Fed. Reg. at 39,895; 26 C.F.R. § 54.9815-2713A(b)((1)(iii). This gag rule, say Defendants, does no harm to FOCUS's free speech rights since FOCUS may speak its views to everyone but its TPA. "Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999).

As to FOCUS's right to expressive association, FOCUS deliberately aims to create an expressive community built around 2,000-year-old Catholic Church principles and traditions. It expressly requires its employees to profess their "oath of fidelity" to these principles. *See* VC, ¶¶ 19-22 and exhibits A-D attached thereto. FOCUS's purpose is to create a community of college students from around the nation who develop "a growing relationship with Jesus Christ and His Church [and] inspire[] and equip[] them for a lifetime of Christ-centered evangelization, discipleship and friendship in which they lead others to do the same." *See* VC, ¶ 30-31. Defendants' Mandate impairs FOCUS's

expressive association by forcing its participation in a scheme that conflicts with Plaintiffs' religious witness and thus with its associations built around that witness, thereby "intru[ding] into the internal structure or affairs of" those associations. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *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.").

E. Defendants' Mandate Violates the Due Process and Equal Protection Guarantees of the Fifth Amendment (Fifth Claim for Relief).

Plaintiffs have fully addressed these issues in their First Amended Verified Complaint. *See* VC, ¶¶ 266-277. *See also* Plaintiffs' Motion for Partial Summary Judgment at 26-29.

Section 2713 of the PPACA is quintessentially a law so "standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The statute practically invites discriminatory and unconstitutional enforcement—which is exactly what Defendants have done in this case

F. The Individual Plaintiffs Have Standing.

Contrary to Defendants' assertion that the individual Plaintiffs lack standing, the individual Plaintiffs, all employees of FOCUS, hold and live the same religious beliefs as FOCUS. Thus, Defendants' assertion that the Mandate "require[s] nothing of the individual plaintiffs . . . and thus cannot impose a substantial burden on their religious exercise is simply wrong. *See* Defendants' Opposition at 11.

These individual Plaintiffs, as do other FOCUS employees, support FOCUS's religious liberty rights, do not want to have any part in authorizing, managing, or participating in Defendants' immoral health insurance scheme, and do not want, either for themselves or for their wives or daughters, to expose their family members to Defendants' immoral health insurance scheme by participating in a plan which requires FOCUS to designate its TPA to make promises of payments to these employees for objectionable drugs, devices, and services.

In these ways, the individual Plaintiffs are clearly exercising their religion. They do not forfeit their religious liberty rights because they work for or manage a religious nonprofit organization.

The individual Plaintiffs also object to losing their health insurance coverage currently provided by FOCUS as they may be forced to do should FOCUS determine to discontinue health insurance altogether to avoid violating its religious beliefs. The individual Plaintiffs object to being forced, in that event, to having to buy for themselves and their families health insurance from another source that (because of the Mandate challenged here and other provisions of Obamacare) would inevitably require them to buy coverage of objectionable contraceptives, abortifacients, sterilization, and related education and counseling.

Moreover, at least one of the individual Plaintiffs, Curtis A. Martin, president and chief executive officer of FOCUS, will be obliged to execute Defendants' Form. In the alternative, Plaintiff Martin, as president and chief executive officer of FOCUS, would be the responsible corporate officer required to instruct another of FOCUS's employees,

including one of the other individual Plaintiffs, to execute Defendants' Form and to assure compliance with the Mandate via its TPA. Not only does Plaintiff Martin object to doing so but so also do the other individual Plaintiffs.

A plurality of judges in *Hobby Lobby*, 723 F.3d at 1126 n.4, 1154, 1156, 1179, rejected the government's similar argument that the founders, executives, and directors of Hobby Lobby lacked standing to seek relief from the Mandate imposed upon the corporation that they led. Their injury derived from the moral compromise of their leadership just as much as it derived from the damage to the corporation their owned and operated. The judges said:

> [I]t is beyond question that the Greens have Article III standing to pursue their claims individually. This is so not simply because the company shares of which they are the beneficial owners would decline in value if the mandate's penalties for non-compliance were enforced, though that alone would satisfy Article III. (citations omitted). It is also because **the mandate infringes the Greens' religious liberties by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong. This sort of governmental pressure to compromise an article of religious faith is surely sufficient to convey Article III standing to the Greens, as it was for the plaintiffs in *Thomas* and *Lee* and in so many other religious liberty cases.** Certainly our sister circuits have had no trouble finding Article III standing in similar cases where, say, individual pharmacists sought to contest regulations requiring their employers to dispense some of the same drugs or devices challenged here, *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121 (9th Cir. 2009) . . .

Id., 723 F.3d at 1154 (Gorsuch, J., concurring, joined by Kelly, J, Tymkovich, J) (emphasis added).

The Seventh Circuit reached the same conclusion:

> It is axiomatic that organizational associations, including corporations, act through agency. . . As owners, officers, and directors, the Kortes and

> Grotes set all company policy and manage the day-to-day operations of their businesses. Complying with the mandate requires them to purchase the required contraception coverage (or self-insure for these services), albeit as agents of their companies and using corporate funds. But this conflicts with their religious commitments as they understand the requirements of their faith . . .

Korte v. Sebelius, 735 F.3d 654, 668 (7th Cir. 2013).

To argue that the individual Plaintiffs have no rights when they act or refuse to act as officers or managers of FOCUS is a formalistic shell game. For Defendants to represent that there is no injury that provides the individual Plaintiffs with standing when it imposes on them the Hobson's choice of promoting contraceptives, abortifacients, and related services and by abandoning their faith or potentially losing their jobs betrays a level of callousness that is characteristic of the most hostile trends towards religious persecution in our history.

Thus, the individual Defendants have standing to challenge the Mandate as the Mandate substantially burdens the religious beliefs of these individual Plaintiffs as well and fails for the same reasons it fails as to FOCUS.

V. CONCLUSION

For the foregoing reasons, FOCUS respectfully requests that the Court (a) grant FOCUS's motion for partial summary judgment and enter a permanent injunction in FOCUS's favor, (b) deny Defendants' motion to dismiss or, in the alternative, for summary judgment, and (c) for such other and further relief as the Court deems just and proper.

Respectfully submitted this 10th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on the 10th day of March, 2014, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

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s/ Michael J. Norton
Michael J. Norton