IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) REACHING SOULS INTERNATIONAL, INC., *et al.*, *Plaintiffs,* v. (4) KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants*.	Case No. 5:13-cv-01092-D

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs have a sincere and unchallenged religious objection to participating in Defendants' abortifacient distribution scheme. If they persist in their religious exercise, Plaintiffs face massive penalties. Under *Hobby Lobby*, Defendants' impositions amount to a substantial burden under RFRA that Defendants may not impose unless they satisfy strict scrutiny.

Defendants rightly concede that they cannot satisfy strict scrutiny in light of *Hobby Lobby*. Dkt. 50, Defs' Br. 21. They further admit that they "lack authority" to impose their requirements on administrators of plans like the one at issue here. *Id.* at 2, 17-18. And they admit that they have exempted other religious organizations with the exact same religious objection to participating in the scheme. *Id.* at 11-13. The only court to consider Defendants' justification for this arbitrary rule has called it "speculative," "unsubstantiated," and "unpersuasive." *Zubik v. Sebelius*, No. 13-cv-1459, 2013 WL 6118696, at *29 (W.D. Pa. Nov. 21, 2013).

Defendants' concessions, combined with controlling law, doom their case. Defendants cannot avoid this result by seeking refuge in the law of standing because they continue to insist that Plaintiffs sign their self-certification form. Plaintiffs cannot sign the form because their religious beliefs prevent them from being complicit in Defendants' scheme, and because, beginning January 1, GuideStone's third party administrator Highmark intends to rely on any self-certification forms it receives to offer abortifacient coverage to girls as young as ten. Ormont Decl. (Ex. 1) ¶¶ 4-5.

For all these reasons, Defendants' Motion should be denied.

LCvR 56.1(c) RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Preliminary Statement. The factual claims set forth in the Defendants' Statement of Material Facts ("Defendants' Statement") largely consist of legal conclusions. This is improper, as the statement is supposed to contain "facts" not legal conclusions. *See* W.D. Okla. LCvR 56.1(b) (requiring statement of "facts"). Sections of the Federal Code and the Federal Register speak for themselves.

To the extent Defendants' Statement concerns actual facts, those facts are largely based on either (a) hearsay statements from the Defendants' own documents or (b) hearsay statements from third parties (including the IOM Report). This approach is improper. The court cannot rely on Defendants' inadmissible hearsay assertions for the truth of the matter asserted, either at trial, Fed. R. Evid. 802, or on summary judgment. *See Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (noting that, even when contained in affidavits, "courts should disregard inadmissible hearsay statements . . . as those statements could not be presented at trial in any form."); *see also Beck v. Mays Home Health, Inc.*, No. 10-cv-566-D, 2012 WL 1066151, *1 n.2 (W.D. Okla. Mar. 29, 2012) (DeGiusti, J.) (same).

Furthermore, any reliance on the purported administrative record before discovery begins would be improper for a second reason: Plaintiffs have not yet had the opportunity to conduct discovery to determine whether the proffered administrative record is complete and accurate. As set forth in Plaintiffs' Rule 56(d) Motion, serious questions have been raised about the lack of knowledge on the part of the witness who certified that

record to this court. Pre-discovery summary judgment in reliance on the proffered record is premature.

Subject to and including the objections set forth above, Plaintiffs' further responses to particular statements are set forth below:

1. Disputed and unsupported. The only related statement in these pages is a single survey "indicat[ing] that less than half of women are up to date with recommended preventive care screenings and services (Robertson and Collins, 2011)." AR 318. The Robertson and Collins survey, however, did not consider contraceptive coverage to be "preventive care," instead asking women "whether they had received a set of recommended preventive screening tests: blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50-64)." Robertson & Collins, *Findings from the Commonwealth Fund Biennial Health Insurance Survey of 2010* 8-9 (The Commonwealth Fund 2011) (Ex. 2-A). The only study in the cited IOM pages pertaining to contraception concerns whether changes in cost structure for certain contraceptives can cause "a change in the mix of contraceptive methods prescribed and purchased." AR 407, 1359.

2. Disputed and unsupported. See Response No. 1.

3. Disputed and unsupported. Undisputed that the cited statute exists. The statute speaks for itself, and nothing in the citation provided indicates what the statute "seeks to" do, or its efficacy, reasonableness, or general applicability in pursuing its alleged goals.

4. This is a legal conclusion, rather than a statement of fact. The cited statute, which is only partially quoted, speaks for itself.

5. Disputed and unsupported. The IOM Report includes a statement of its charge from HHS and that statement does not include any discussion of coverage issues. AR 300. Rather, the HHS charge simply deals with assessing preventive health guidelines, and expressly excludes factors such as cost-effectiveness and community-based solutions. AR 300-01 ("The cost-effectiveness of screenings or services could not be a factor for the committee to consider in its analyses leading to its recommendations."). IOM also acknowledged that it did *not* "conduct a USPSTF-style systematic review for any single preventable health condition or determinant of well-being." AR 294. Indeed, IOM expressly recommended to HHS that it should "establish a commission to recommend coverage of new preventive services for women to be covered under the ACA" and that commission should "[d]esign and implement a coverage decision making methodology to consider evidence review bodies (and other clinical guideline bodies) and coverage factors (e.g. cost, cost-effectiveness, legal, ethical)." AR 311.

Furthermore, Plaintiffs dispute: (1) the propriety of HHS abdicating its authority for creating preventive care guidelines by adopting IOM's recommendations wholesale even though those recommendations did not account for coverage-related issues like cost effectiveness; (2) the impartiality of the IOM committee that was formulated to recommend guidelines; (3) the methods the IOM committee employed; and (4) the merits of IOM's recommendations. Specifically, HHS outsourced deliberations to the IOM, which in turn created a "Committee on Preventive Services for Women" that invited presentations from several "pro-choice" groups, such as Planned Parenthood and the Guttmacher Institute (named for a former president of Planned Parenthood), without

inviting presentations from groups with religious objections to forced participation in the distribution of contraceptives, sterilization, and abortion-inducing drugs. AR 516-19.

In addition, the dissent reports that the IOM committee was tasked to act on an "unacceptably short time frame" in which to conduct meaningful scientific review, and that the IOM committee should not have made recommendations simply to keep pace with "the ACA-mandated rapidity with which the committee was confronted." AR 529-530. "[T]he committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* Ultimately, "the committee erred [in] their zeal to recommend something despite the time constraints and a far from perfect methodology" and "failed to demonstrate [transparency and strict objectivity] in the Report." AR 530-31 (deeming evidence evaluation process a "fatal flaw" in the report).

6. Undisputed that the quoted text appears in the IOM Report, but disputed that IOM's review was "extensive" and "science-based." Plaintiffs incorporate their response to Paragraph 5 *supra*. The report did not recommend that "HRSA guidelines include" anything, but rather recommended the drugs, devices, procedures, and related advice "for consideration as a preventive service for women." AR 308.

7. Undisputed but incomplete. FDA-approved contraceptive methods also include, *inter alia*, sterilization. AR 402-03. Emergency contraceptives (specifically: ella, Plan B and certain IUDs) can induce abortion, *see* Paragraph 37, *infra*.

8. Disputed and unsupported. The cited pages of the IOM Report do not discuss coverage of contraception without cost-sharing at all, much less that such coverage is "necessary to increase access to such services" or avoid bad outcomes. AR 400-01; *see also* AR 1290 ("The scarcity of studies on [negative health effects of unintended pregnancy] is surprising, given that the prevention of unintended pregnancy has been a major rationale for the funding and provision of family planning"); AR 1291 ("The scarcity of studies on the effects of unintended pregnancy on the physical and mental health of men and women . . . must be noted.").

9. Undisputed. This was done, however, via press release, *see* Press Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012) (Ex. 2-B), and website announcement, *see* AR 283-84, and without following notice and comment rulemaking.

10. This statement is a characterization of the law, not a statement of fact. The regulation speaks for itself. Undisputed that the 2011 final rule contained the four prongs described.

11. This is a disputed proposition of law. Undisputed that HRSA's webpage and the C.F.R. contain provisions addressing this topic. Disputed that Defendants have employed a proper definition of "religious employer," in that Plaintiffs *are* religious employers and should be treated as such under the law. *See, e.g.*, Plaintiffs' Statement of Additional Facts ¶¶ 1-8.

12. Undisputed.

13. Undisputed that the government undertook new rulemaking, but disputed that the rulemaking "accommodated" non-grandfathered non-profit religious organizations'

religious objections to forced participation in the government's scheme. *See* Plaintiffs' Statement of Additional Facts ¶¶ 13-15, 20-21 (noting that Plaintiffs cannot comply with new rule).

14. Undisputed, but see Response 13.

15. Disputed, unsupported, and argumentative. The "significance" of the "accommodation" and the "importan[ce]" of the government's policy goals are not facts, and Defendants' self-serving characterizations of their own documents are not admissible evidence establishing "facts." LCvR 56.1(b). Undisputed that the accommodation only helps "certain" religious non-profits. As evidenced by Defendants' opposition to Plaintiffs' request for even preliminary relief, the government continues to insist that Plaintiffs perform acts that violate their religious beliefs. *See* Plaintiffs' Statement of Additional Facts ¶¶ 13-15, 20-21 (noting that Plaintiffs cannot comply with new rule).

16. Disputed and unsupported. Defendants have claimed that, at least as relevant to this case, 78 Fed. Reg. 39,870 (July 2, 2013), AR at 1-31 (the "Mandate" or "Final Rules") is not enforceable against Plaintiffs' third party administrators (or "TPAs") and does not provide access to contraceptive coverage. Defs' Br. 2, 17-18. Consequently, it facially does not advance the government's claimed interests. Plaintiffs do not dispute, however, that the goal of the regulations, and the reason for Defendants' insistence on Plaintiffs' immediate compliance with the system, is promoting use of and facilitating access to contraceptives. *Id.* at 1-2, 10-11.

17. This is a disputed proposition of law, and is unsupported. As set forth in Plaintiffs' Complaint and supporting declarations, the regulations require Plaintiffs to take

numerous steps to contract, arrange, pay for, or refer for the relevant coverage. *See, e.g.*, Head Decl., Dkt. 7-1 ¶¶ 20-25, 45; Wells Decl., Dkt. 7-2 ¶¶ 7-10, 20; Armstrong Decl., Dkt. 7-3 ¶¶ 8-11, 22; *see also* Dkt. 1, Compl. ¶¶ 111-170.

18. This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

19. This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

20. This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

21. This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

22. This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

23. This is a legal conclusion, not a statement of fact. The regulation speaks for itself. Disputed and unsupported. *See* Paragraph 17.

24. This is a legal conclusion, not a statement of fact. Disputed and unsupported. *See* Paragraph 17. The regulation speaks for itself, and imposes additional requirements on Plaintiffs including, *inter alia*, a prohibition on asking or instructing a TPA not to provide payments for the objected-to services in connection with Plaintiffs' plan. *See* 26 C.F.R. § 54.9815-2713A (Plaintiffs "must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"). In addition, the self certification form requires Plaintiffs to authorize TPAs to provide such payments, and to inform TPAs of their obligation to provide such payments under federal law. *See* Self-Certification Form (Ex. 2-C). Plaintiffs are forbidden by their religion from taking these actions. *See* Plaintiffs' Statement of Additional Facts at ¶¶ 13-21.

25. This is a characterization of the law, not a statement of fact. The regulation speaks for itself, and on its face contains no exemption for "self-insured church plan[s]." Instead, the

regulation expressly requires that "if a third party administrator receives a copy of the [self] certification . . . the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715–2713A(b)(2); 26 C.F.R. § 54.9815–2713A(b)(2). "A third party administrator that receives a copy of the self-certification . . . *must* provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39870, 39880 (July 2, 2013) (emphasis added).

26. This is a characterization of the law, not a statement of fact. The regulation speaks for itself. The statement is also incomplete, in that Defendants' Statement 28 claims there is an unspoken carve-out for self-insured church plans, but Statement 27 contains no similar statement addressing whether Defendants believe that TPAs of self-insured church plans will be reimbursed under the regulation.

27. This is a characterization of the law, not a statement of fact. The regulation speaks for itself. The regulation contains no such exception on its face, and was issued under both ERISA and the Internal Revenue Code.

28. This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

29. Disputed and unsupported. The assertion is inadmissible speculation. The cited materials contain no evidence (admissible or otherwise) for the government's speculation about the likely religious beliefs of people who work for different religious institutions. Nor have Defendants offered any reason to believe that they are legally permitted to engage in speculation about the religious beliefs of those who associate with particular religious institutions, or to discriminate among such institutions based on government

predictions or preferences about what religious beliefs citizens and organizations may hold. Further, they have admitted in parallel litigation that they have no basis for their speculation. Ex. 2-D, Deposition Transcript of Gary M. Cohen, Defendants' Rule 30(b)(6) Designee, Director of the Center for Consumer Information and Insurance Oversight in the Centers for Medicare and Medicaid Services, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Nov. 21, 2013), Dkt. 51-1 at 34:9-24 (admitting there is "no evidence" for Defendants' speculation that employees of religious organizations like Plaintiffs "are more likely not to object to the use of contraceptives.") (Ex. 2-D). That court found Defendants' reasoning "speculative," "unsubstantiated," and "unpersuasive." *Zubik*, 2013 WL 6118696, at *29.

30. See Response 29.

31. Disputed and unsupported. Undisputed that the rules contain the cited language, but the language is contradicted by the text of the rule, which provides that eligible organizations are prohibited from engaging in particular speech about their opposition to contraception. *See* 29 C.F.R. § 2590.715-2713A ("must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements").

32. This is a legal conclusion, not a statement of fact. Disputed and unsupported. The words chosen in the statement—"improper attempt to interfere" and "threatening"—do not appear in the regulatory provision, which is in fact far broader. *See* 29 C.F.R. § 2590.715-2713A ("must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"). Defendants cannot edit the regulation via litigation.

33. This is a legal conclusion, not a statement of fact. The statutory language continues and speaks for itself.

34. This is a legal conclusion, not a statement of fact. The statutory language continues and speaks for itself.

35. This is a legal conclusion, not a statement of fact. The statutory language speaks for itself. This statement is also speculative.

36. This is a legal conclusion, not a statement of fact. The statutory language continues and speaks for itself.

37. This is a legal conclusion, not a statement of fact. Disputed and unsupported. Defendants cannot rely on their own hearsay assertions to prove the facts in the statement. Plaintiffs believe that the intentional termination of pregnancy is an abortion and that all human life must be protected from the time of conception. *See* Plaintiffs' Statement of Additional Facts ¶¶2, 6, 8-9. By Defendants' own admission, the Mandate requires coverage of several FDA-approved drugs and devices that act in part by "inhibiting implantation." *See* Brief for Appellees at 9 n.6, *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 12-6294 (10th Cir. filed Mar. 15, 2013) (Doc. No. 90). The FDA's Birth Control Guide likewise acknowledges that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. FDA Birth Control Guide (Ex. 2-E) at 11-12.

38. Undisputed, but incomplete. The list also includes other "emergency contraceptives" that can cause abortions. *See* Paragraph 37, *supra*.

39. Undisputed that Defendants have made statements deeming these drugs to be contraceptives, rather than abortifacients, based on their view that pregnancy begins at implantation rather than conception. Defendants' own hearsay statements are not admissible facts. In any case, other provisions of federal law acknowledge that human life begins at conception. *See, e.g.*, 10 C.F.R. § 20.1003 ("Embryo/fetus means the developing human organism from conception until the time of birth."); 7 C.F.R. § 247.9 ("For a pregnant woman, the State agency must count each embryo or fetus in utero as a household member in determining if the household meets the income eligibility standards."). Plaintiffs understand human life to begin at conception rather than implantation, and understand drugs and devices that kill human life after conception to be abortifacient. *See* Plaintiffs' Statement of Additional Facts ¶¶ 2, 6, 8-9. Furthermore, while Defendants have made statements deeming these drugs "safe and effective," their hearsay assertions are not admissible to prove that fact. *See* Fed. R. Evid. 802.

40. Undisputed that Defendants issued a memorandum, found on Defendant HHS's website, with the quoted language. The cited memorandum, however, says nothing about whether this language is "in light of this conclusion by the FDA" or has anything to do with whether emergency contraceptives can cause abortions.

41. Disputed and unsupported. Defendants' self-serving snippets of individual Representatives' statements does not provide evidentiary support for the underlying factual statement. "What motivate[d] one legislator to make a speech about a statute [in 2002] is not necessarily what motivate[d] scores of others to enact it" in 2013. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Moreover, Defendants' quoted statements of

Representative Weldon were in connection with the then-proposed Abortion Non-Discrimination Act of 2002 (H.R. 4691, 107th Cong. 2002)), which was never adopted. *See* www.govtrak.us/congress/bills/107/hr4691 (last visited Nov. 21, 2013).

STATEMENT OF ADDITIONAL FACTS[1]

1. GuideStone Financial Services of the Southern Baptist Convention ("GuideStone") was established in 1918 by the Southern Baptist Convention. Dkt. 7-1 ¶ 4. Today, GuideStone operates a self-insured, ERISA-exempt "church plan" that provides health benefits to current and former employees of organizations associated with the Convention. *Id.* ¶ 5, 9. The GuideStone Plan is one of the largest church health care plans in the country, providing benefits to over 78,000 people. *Id.* ¶ 4.

2. As an arm of the Southern Baptist Convention, GuideStone shares the Convention's belief that "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." *Id.* ¶ 16-17 (quoting the Baptist Faith and Message 2000).

3. Consistent with those beliefs, the GuideStone Plan does not pay or reimburse for expenses associated with "elective termination of a pregnancy by any method," including contraceptive methods that may cause early abortions. *Id.* ¶ 18.

4. As many as 187 GuideStone Plan employers, with over 5,144 full-time employees, may be considered "eligible organizations" that are not exempt from the Mandate. *Id.* ¶

[1] Plaintiffs submit these facts to oppose Defendants' motions to dismiss and for summary judgment and to support Plaintiffs' motion for a preliminary injunction (Dkt. 7). Plaintiffs are not required to submit admissible evidence in support of their motion, because at the preliminary injunction stage, the Federal Rules of Evidence do not apply. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

31. Most of these employers are small non-profit organizations operating on limited budgets and devoted to religious ministries. *Id.* ¶ 32. Two GuideStone Plan employers, Reaching Souls International, Inc. ("Reaching Souls") and Truett-McConnell College, Inc. ("Truett-McConnell"), are plaintiffs in this lawsuit. Dkt. 7-2 ¶ 17; Dkt. 7-3 ¶ 19.

5. Reaching Souls is an Oklahoma not-for-profit corporation founded in 1986 by a Southern Baptist pastor. Dkt. 7-2 ¶ 3. Today, Reaching Souls trains pastors and cares for orphans on three continents. *Id.* Reaching Souls requires all of its employees to share its Christian faith. *Id.* at ¶ 4.

6. Reaching Souls' beliefs are consistent with the Southern Baptist Convention's teachings about the sanctity of all human life, and Reaching Souls has adopted the GuideStone Plan to provide health benefits for its 10 full time employees in a manner that is consistent with its commitment to the sanctity of human life and the well-being of its employees. *Id.* ¶¶ 5-6, 13.

7. Truett-McConnell is a private, Christian, coeducational liberal arts college that has adopted the Southern Baptist Convention's Baptist Faith and Message 2000 as its own statement of faith. Dkt. 7-3 ¶¶ 3-5. The Baptist Faith and Message 2000 is included in the employee handbook, and all full-time faculty must sign the Baptist Faith and Message 2000 as part of their employment agreement. *Id* ¶ 5.

8. Truett-McConnell has adopted the GuideStone Plan to provide health benefits for its 78 full time employees in a manner that is consistent with its commitment to the sanctity of human life from conception to natural death and to the well-being of its employees. *Id.* ¶¶ 5-7, 14.

9. The Mandate includes drugs and devices that may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. Ex. 2-E (FDA Birth Control Guide) at 11-12.

10. All Plaintiffs—GuideStone, Reaching Souls, and Truett-McConnell—believe it would be sinful for them to intentionally trigger the provision of drugs and devices that may destroy a newly-conceived human life and thus cause an abortion. Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22.

11. Plaintiffs believe that obeying the Mandate's requirement to participate in the provision of abortion-causing drugs would harm their public witness of and advocacy for protecting human life from conception to natural death, and would risk leading others astray. Dkt. 7-1 ¶¶ 20-21; Dkt. 7-2 ¶ 10; Dkt. 7-3 ¶ 11.

12. Plaintiffs are also guided by their beliefs to provide for the health and welfare of their employees by providing them with adequate health benefits. Dkt. 7-1 ¶ 38; Dkt. 7-2 ¶ 6-7; Dkt. 7-3 ¶¶ 6-8.

13. Plaintiffs are prohibited by their religion from participating in the government's scheme to distribute, encourage, facilitate, and/or reduce the cost of drugs and devices that may cause abortions. Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22; *see also* Dkt. 7-1 ¶¶ 17; Dkt. 7-2 ¶¶ 4-5; Dkt. 7-3 ¶¶ 4-5 (setting forth underlying religious beliefs).

14. Plaintiffs are prohibited by their religion from signing, submitting, or facilitating the transfer of the government-required certification at issue in this case. Dkt. 7-1 ¶ 24; Dkt.

7-2 ¶ 10; Dkt. 7-3 ¶ 11; *see also* Head Supp. Decl. (Ex. 3) ¶¶ 8-12; Wells Supp. Decl. (Ex. 4) ¶¶ 10, 14; Armstrong Supp. Decl. (Ex. 5) ¶¶ 10, 15.

15. Plaintiffs' religious beliefs about their obligation not to participate in the government's scheme have not changed in light of the government's recent statements that it cannot use ERISA to force TPAs to act on the certifications for non-ERISA plans. Ex. 3 ¶¶ 8-9; Ex. 4 ¶¶ 10, 14; Ex. 5 ¶¶ 10, 15.

16. On the back of the self-certification form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." Ex. 2-C (Self-Certification Form).

17. Signing the self-certification form and providing it to a TPA violates Plaintiffs' religious beliefs by making them complicit in the government's scheme to provide abortifacients. Ex. 3 ¶¶ 7-10; Ex. 4 ¶¶ 7-9; Ex. 5 ¶¶ 7-9.

18. Defendants' regulations prohibit Reaching Souls and Truett-McConnell from "seek[ing] to influence the third party administrator's decision to make . . . arrangements" to provide abortifacient coverage. 26 C.F.R. § 54.9815-2713A.

19. One of GuideStone's third party administrators, Highmark, Inc. ("Highmark") has already informed GuideStone that it intends to offer contraceptive and abortifacient coverage to the qualified employees and beneficiaries of all GuideStone Plan employers

from whom it receives the self-certification form, including girls as young as 10. Ex. 1 ¶¶ 4-5. Highmark's position is a matter of immediate and deep concern to GuideStone. *Id.*

20. Plaintiffs also continue to object to signing and delivering the self-certification form because Defendants have stated that they "continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans." Def. Br. 2. But as already explained, Plaintiffs cannot provide such services or authorize someone else to do so; they must avoid participating in any system involving the provision of such services. Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22. It makes no difference whether those authorizations lead to payments that take place now or next year. Ex. 3 ¶¶ 8-9; Ex. 4 ¶¶ 10, 14; Ex. 5 ¶¶ 10, 15.

21. To restate: Plaintiffs object to (1) signing a self-certification form that on its face authorizes a TPA to deliver abortifacients to their employees *now*; (2) delivering that form to a TPA that could rely on it as an authorization to deliver these abortifacients to their employees, now or in the future; (3) agreeing to refrain from asking that TPA not to deliver abortifacients to Plaintiffs' employees; (4) creating a new relationship between plan beneficiaries and a third party administrators for the sole purpose of providing abortifacients; or (5) otherwise participating in Defendants' scheme to provide abortifacients to its employees. Ex. 3 ¶ 8; Ex. 4 ¶ 14; Ex. 5 ¶ 15.

22. If Plaintiffs fail to sign and submit the government-required certification at issue in this case, they face large penalties. For example, Truett-McConnell, which has approximately 78 full time employees, will incur penalties of approximately $2,810,500

per year unless it gives up its religious exercises and complies with the Mandate. Dkt. 7-3 ¶ 14**.**

23. Reaching Souls has approximately 10 full time employees and would face penalties of approximately $365,000 per year. Dkt. 7-2 ¶ 13.

24. Class members collectively face estimated penalties of $187,756,000 per year, while GuideStone faces losses of $39,088,325 in medical plan contributions if the class members are effectively forbidden from participating in the GuideStone Plan because of the Mandate. Dkt. 7-1 ¶¶ 35, 43.

25. Defendants estimated that in 2013, plans covering an estimated 87 million people would be "grandfathered." HealthCare.gov Grandfathering Factsheet (Ex. 2-F) at 5-7.

26. Defendants estimate that the Affordable Care Act "exempts all firms that have fewer than 50 employees – 96 percent of all firms in the United States or 5.8 million out of 6 million total firms – from any employer responsibility requirements." WhiteHouse.Gov, The Affordable Care Act Increases Choice and Saving Money for Small Business (Ex. 2-G) at 2.

27. Defendant Sebelius said at a fundraiser in October 2011—shortly after the Mandate had been announced but before any of the exemptions had been announced—that "we are in a war" over emergency contraception. William McGurn, Op-Ed., *The Church of Kathleen Sebelius*, Wall St. J., Dec. 13, 2011.

28. On April 8, 2013, the Church Alliance, an organization composed of the chief executives of thirty-eight church benefit boards, covering two branches of Judaism, Catholic schools and institutions, and mainline and evangelical Protestant denominations,

including GuideStone, submitted a 20-page comment letter on the NPRM, detailing how the expanded definition of "religious employer" excluded bona fide religious organizations, and how the proposed accommodation for "eligible organizations" was unworkable, particularly for self-insured church plans like GuideStone. AR 025526-45, Church Alliance, Comments on Notice of Proposed Rulemaking (Apr. 8, 2013).

29. Defendant Sebelius announced the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the many substantive objections to the Final Rule. In that presentation, Sebelius stated:

> We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities *will be providing coverage* to their employees starting August 1st . . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese *will be included* in the benefit package.[2]

ARGUMENT

I. All Plaintiffs Have Standing.

Article III standing requires (1) an injury in fact (2) fairly traceable to Defendants' actions, and (3) likely redressable by a favorable decision. *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013). Defendants argue that they can force Plaintiffs to participate in their regulatory scheme, while Plaintiffs lack standing to seek this Court's

[2] The Forum at Harvard Sch. of Publ Health, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services* (April 8, 2013), *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (starting at 51:20-52:00).

protection, because Defendants "lack regulatory authority" to enforce part of the Mandate "at this time." Defs' Br. 2, 17-18.

This argument fails for three reasons. First, Plaintiffs have standing because the Mandate forces them to take action against their will to avoid massive penalties. *Cressman*, 719 F.3d at 1145. To avoid massive penalties, they must provide either objectionable coverage that violates their religious beliefs or a self-certification which instructs their TPA to provide payments for abortion-inducing drugs and devices that also violate Plaintiffs' religious beliefs. *See* 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A; Ex. 2-C (Self-Certification Form).[3] At least one of GuideStone's TPAs has stated an intention to provide these payments upon receipt of a self-certification. Ex. 1 ¶¶ 4-5 & Ex. 1-A. Plaintiffs cannot sign or submit the self-certifications to their TPAs because such action would make them participate in Defendants' scheme. Indeed the forms expressly instruct the recipient to obey the regulations that require TPAs to provide or arrange for contraceptives services. *See* Ex. 2-C (Self-Certification Form). Moreover, it incorporates these instructions into Plaintiffs' health plan. *Id*. Furthermore, Defendants' gag rule prohibits the class members from "directly or indirectly" asking their TPA *not* to provide payments for the products at issue. 26 C.F.R. § 54.9815–2713A(b)(1)(iii).

Plaintiffs believe that taking these acts would violate their religious beliefs. But Defendants intend to enforce their rules, which places enormous pressure on Plaintiffs to

[3] Plaintiffs cannot avoid this dilemma by discontinuing coverage. That would still violate their religious beliefs, Dkt. 7-1 ¶¶ 38, 40; Dkt. 7-2 ¶¶ 6, 14; Dkt. 7-3 ¶¶ 6, 16, and subject Plaintiffs with 50 or more full-time employees to other penalties. *See* 26 U.S.C. § 4980H.

violate their religious beliefs and compromise their religious missions. Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22; Ex. 3 ¶¶ 8-9; Ex. 4 ¶¶ 10, 14; Ex. 5 ¶¶ 10, 15.

Plaintiffs must take these actions before January 1st or be penalized, so Plaintiffs are confronted with a concrete, imminent violation of a legally protected interest that is directly traceable to the Defendants' Mandate that can be avoided by a favorable decision in this action. *See Cressman*, 719 F.3d at 1144.

Second, even aside from the actionable burden on Plaintiffs' exercise of religion from such requirements, Plaintiffs have standing based on the simple fact that compliance with the rules will require an expenditure of time and money. The government has conceded that "the total annual burden for preparing and providing the information in the self-certification" is approximately $41 and 50 minutes for "each eligible organization." *See* 78 Fed. Reg. 39890. *See also* Ex. 2-C (Self-Certification Form). This burden of time and expense establishes standing. *See, e.g., Sprint Comm's Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (an interest of "only a dollar or two" could establish standing); *Cressman*, 719 F.3d at 1142, 1145 (license plate renewal fee of $16.50 was an "actual, concrete monetary injury" for standing purposes); *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1183 (10th Cir. 2010) (requirement to comply with permitting process establishes injury in fact); *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1389 (10th Cir.1980) ("Certainly the cost of obeying the regulations constitutes injury.").

Third, Defendants' new ERISA-based litigation position does not change the regulations, which on their face apply to *all* TPAs, with no exception for church plan

TPAs. The regulations—issued both by the Department of Labor under ERISA *and* by the Treasury Department under the Internal Revenue Code—provide that "if a third party administrator receives a copy of the [self] certification . . . the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715–2713A(b)(2); 26 C.F.R. § 54.9815–2713A(b)(2); *see also* 78 Fed. Reg. 39879, 39880 (July 2, 2013) (TPA who receives a self-certification "must provide or arrange" payments). The "obligations and burdens imposed by [law] speak for themselves, and no additional evidence is necessary to establish standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1235 (10th Cir. 2004).[4]

II. Defendants' Motion Must Be Denied.

A. The Mandate violates RFRA.

Plaintiffs' faith forbids them from participating in the government's scheme to subsidize and promote the use of abortifacients. Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22. Plaintiffs cannot provide these services themselves and cannot authorize someone else to provide them. *Id.* Plaintiffs' religious beliefs require them to avoid participating in any system that could involve the provision of such services. *Id*. This religious obligation to avoid participating in Defendants' scheme remains unchanged despite Defendants' new claim that part of the system is not yet fully operational with respect to Plaintiffs. Ex. 3 ¶¶ 8-9; Ex. 4 ¶¶ 10, 14; Ex. 5 ¶¶ 10, 15.

[4] *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) ("When the suit is one challenging the legality of government action," there is "ordinarily little question" that a plaintiff who is the object of the law has standing).

Hobby Lobby provides the required framework for RFRA analysis. First, a court must "identify the religious belief" at issue.[5] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013). Second, it must "determine whether this belief is sincere." *Id*. Third, it must determine "whether the government places substantial pressure on the religious believer." *Id*. Finally, if there is substantial pressure, Defendants' action will be upheld only if Defendants carry the burden of satisfying strict scrutiny. *Id*. at 1143.

Defendants effectively concede virtually every prong of this test. Defendants do not dispute the existence, religiosity, or sincerity of Plaintiffs' religious beliefs. And Defendants admit that *Hobby Lobby* already rejected their strict scrutiny argument. Def. Br. at 21.

Thus, the only part of the *Hobby Lobby* analysis that remains is whether the Mandate "places substantial pressure" on Plaintiffs to violate their beliefs. 723 F.3d at 1140. If Plaintiffs continue their religious exercises, they face the same penalties that constituted "substantial pressure" in *Hobby Lobby*. *Compare* Dkt. 7-1 ¶¶ 35, 43; Dkt. 7-3 ¶ 14; Dkt. 7-2 ¶ 13; *with* 723 F.3d at 1140; *see also Gilardi v. U.S. Dep't of Health & Human Srvs.*, No. 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013) (the Mandate burdens objectors by "pressur[ing] [them] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties"); *Zubik*, 2013 WL 6118696, at

[5] The Supreme Court has granted certiorari in *Hobby Lobby*, 82 U.S.L.W. 3139 (Nov. 26, 2013), but it remains binding precedent in this Circuit. *See, e.g., Jock v. Sterling Jewelers, Inc*., 677 F. Supp. 2d 661, 666 (S.D.N.Y. 2009) ("[A]lthough the Supreme Court has since granted certiorari, the Second Circuit's decision in *Stolt–Nielsen* remains binding at this time.").

*25 (concluding that the accommodation "substantially burdens" the religious beliefs of non-profits by "asking Plaintiffs for documentation for what Plaintiffs sincerely believe is an immoral purpose.").

Defendants cannot avoid this conclusion by arguing that Plaintiffs really *should* be comfortable signing the self-certification form in light of Defendants' new litigation position. The questions of moral complicity in this case are religious, not legal, and Defendants have no authority to dictate when and whether Plaintiffs' involvement in the scheme is "too attenuated" to implicate their religion. *Hobby Lobby*, 723 F.3d at 1153-54. As *Hobby Lobby* instructed:

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

Id.; *Gilardi*, 2013 WL 5854246, at *6 ("[I]t is not for courts to decide [what] severs [a religious objector's] moral responsibility") (internal citation omitted); *Korte v. Sebelius*, No. 12-3841, 2013 WL 5960692, at *24 (7th Cir. Nov. 8, 2013) (rejecting Defendants' "'attenuation' argument" because it asks whether "th[e] [Mandated] coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," a question which "[n]o civil authority can decide"); *Zubik*, 2013 WL 6118696, at *14 ("Completion of the self-certification form would be akin to cooperating with/facilitating 'an evil' and would place the Diocese 'in a position

of providing scandal' because 'it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching.'").

B. The Mandate violates the Administrative Procedures Act.

1. The Final Rules are "not in accordance with law" because they purport to bind ERISA-exempt church plan TPAs.

"The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A)—which means, of course, any law, and not merely those laws that the agency itself is charged with administering." *FCC v. NextWave Pers. Commc'ns Inc*., 537 U.S. 293, 300 (2003); *Hydro Res., Inc. v. E.P.A.*, 608 F.3d at 1145. The Final Rules are "not in accordance with" RFRA, the First Amendment, the ACA, or the Weldon Amendment, and they should be set aside on that basis. But they are also "not in accordance with law" because, as Defendants admit, they conflict with federal laws exempting church benefit plans from ERISA. *See* Defs' Br. 2, 17-18.

The Final Rules purport to bind all TPAs, including those affiliated with church plans. As amended, 26 C.F.R. § 54.9815–2713A flatly states that "if a [TPA] receives a copy of the self-certification . . . and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan" then "the [TPA] *shall provide or arrange payments* for contraceptive services[.]" (emphasis added); *see* 78 Fed. Reg. 39892-93 (promulgating regulation). Nothing on the face of this amended regulation indicates that it does *not* apply to TPAs of non-ERISA church plans.

Defendants now admit that they "lack authority" to regulate the TPAs of non-ERISA church plans in this way. Defs' Br. 2, 17-18. But Defendants' position conflicts with the express requirements of the regulation, 26 C.F.R. § 54.9815–2713A, and "[a]fter-the-fact rationalization by counsel" cannot save their rule. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1584 (10th Cir. 1994). Given Defendants' binding admission, their invalid regulation should be set aside as contrary to law. *NextWave*, 537 U.S. at 300; *Hydro Res.*, 608 F.3d at 1145.

2. The Final Rules are "arbitrary and capricious" because they force Reaching Souls and Truett-McConnell to comply with an unenforceable accommodation scheme.

Defendants' admission that the Final Rules do not bind non-ERISA church plan TPAs make continued enforcement of the self-certification requirement against Reaching Souls and Truett-McConnell arbitrary and capricious. An "agency must cogently explain why it has exercised its discretion in a given manner," and "articulate . . . a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983); *Olenhouse*, 42 F.3d at 1584. Defendants offer no explanation for their insistence that Reaching Souls and Truett-McConnell comply with step one of the Mandate despite Defendants' inability to enforce step two. Where, as here, an agency's explanation is "nonexistent," its actions are *necessarily* arbitrary and capricious. *Motor Vehicle Mfrs.*, 463 U.S. at 42-44.

a. It is arbitrary and capricious to require Reaching Souls and Truett-McConnell to comply with the allegedly meaningless accommodation scheme.

The Mandate states that Defendants created the accommodation to "protect[] certain nonprofit religious organizations with religious objections to contraceptive coverage." 78 Fed. Reg. 39873. "The purpose of the self-certification" is to "afford the third party administrator notice of obligations" under the Final Regulations, and to "designat[e] . . . the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. 39879. Defendants now say that a self-certification executed by Reaching Souls and Truett-McConnell would serve neither of these purposes, because "at this time" Defendants lack authority to impose obligations on TPAs of non-ERISA church plans like the GuideStone Plan. Defs' Br. 2, 17-18. But they continue to assert that Reaching Souls and Truett-McConnell must comply with the accommodation by (1) executing the self-certification form; (2) "provid[ing] each third party administrator that will process claims for any contraceptive services . . . with a copy of the self-certification," and (3) refraining from seeking to "interfere with" or "influence" the TPA's decision to provide such services. *See id.*; *see also* 26 C.F.R. § 54.9815-2713A(a), (b) (stating the accommodation requirements).

Defendants give no reason for continuing to require Reaching Souls and Truett-McConnell to execute and deliver self-certification forms that allegedly will not serve the purposes for which they were created, apart from the bald assertion that their regulations

require it. *See* Defs' Br. 7, 17-18. Defendants' failure to explain is fatal to their rule. *Motor Vehicle Mfrs.*, 463 U.S. at 42-44.

b. It is arbitrary and capricious not to exempt Reaching Souls and Truett-McConnell from the contraceptive mandate altogether.

The Final Rule is also arbitrary and capricious because Defendants' decision to impose the Mandate on organizations like Reaching Souls and Truett-McConnell is not supported by substantial evidence in the record. *Olenhouse*, 42 F.3d at 1584 ("[T]he 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record," and "will be set aside as arbitrary if it is unsupported by 'substantial evidence.'").

Defendants do not dispute that Plaintiffs only object to a small subset of the contraceptives covered by the Mandate—the four methods capable of being used as "emergency contraceptives" that may destroy a fertilized egg and thus end a newly-conceived human life. Dkt. 1, Compl. ¶ 184; *see* Dkt. 7-1 ¶¶ 19, 22-25; Dkt. 7-2 ¶¶ 9, 19-20; Dkt. 7-3 ¶¶ 10, 21-22. But although it discussed the use of contraceptives in general, the IOM Report mentioned emergency contraceptives only in passing.[6] Neither the Final Rules nor the HRSA Guidelines identified any evidence to support Defendants' decision to penalize religious organizations that, like Plaintiffs, are willing to cover sixteen out of twenty FDA-approved contraceptive methods. *Compare Hobby Lobby*, 723 F.3d at 1146

[6] *See* IOM Report at AR 403 (noting that "[a] wide array of safe and highly effective FDAapproved methods of contraception is available, including . . . emergency contraception" and that "[s]ome methods, such as . . . emergency contraceptives, are available without a prescription").

(Tymkovich, J., concurring) (noting that "the government's interest is largely realized" when an organization is willing to cover "sixteen of the twenty contraceptive methods")

Defendants likewise lack substantial evidence to support their decision to distinguish between "religious employers" and "eligible organizations." *See* 78 Fed. Reg. 39874. Defendants claimed in the Mandate that the limits they have imposed on the religious employer exemption are justified because objecting "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." *Id*. Defendants' reasoning is "speculative," "unsubstantiated," and "unpersuasive." *Zubik*, 2013 WL 6118696, at *29.

As the Defendants' 30(b)(6) witness in a parallel case has now admitted under oath, Defendants have *no evidence* that this assumption is correct. *See* Plaintiffs' Response to Defendants' Statement, *supra*, at ¶ 29. In fact, the evidence before the agencies was to the contrary: during the rulemaking process, commenters pointed out that many non-exempt religious organizations hire employees that share their religious beliefs,[7] and that it would

[7] CCCU NPRM Comments at 4-5 (Apr. 8, 2013), AR CMS-2012-0031-82670-A1 ("The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, **because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution.** . . . Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme.").

impose a significant burden on church benefit plans in particular to erect a dividing wall between religious organizations that share the same faith.[8]

Thus, Defendants now acknowledge that their decision to exempt some religious organizations and "accommodate" others was based on a rationale that is wholly unsupported by the evidence before the agency. This is a quintessential abuse of discretion. *Olenhouse*, 42 F.3d at 1584.

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

"Under the APA, legislative rules can be issued only following notice and comment procedures." *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222 (10th Cir. 2009); *see* 5 U.S.C. § 553(b)–(c) (stating procedural requirements). Congress gave HHS' sub-agency, HRSA, the authority to enact "comprehensive guidelines" for women's preventive health. *See* 42 U.S.C. § 300gg-13 (a)(4); 45 C.F.R. § 147.130 (a)(iv). Those guidelines are now binding on Reaching Souls and Truett-McConnell, who must either adopt a health benefit plan that complies with HRSA's guidelines and HHS' exceptions, or face massive penalties. *See* 26 U.S.C. § 4980D, 4980H. This is a paradigmatic delegation of rulemaking authority,[9] but instead of following the requirements of the

[8] *See*, *e.g.*, Church Alliance NPRM Comments (Apr. 8, 2013), AR 025526-45; *see also Zubik*, 2013 WL 6118696, at *29-30.

[9] Defendants claim (at 33-34) that they were not required to comply with notice-and-comment rulemaking when promulgating the HRSA Guidelines. They are mistaken. "[W]hen Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation." *Mission Grp. Kansas, Inc. v. Riley*, 146 F.3d 775, 781-85 (10th Cir. 1998) (internal quotations omitted). Therefore, legislative rules like the

APA, HRSA simply adopted the recommendations of a nongovernmental body—IOM—in a press release. *See* Ex. 2-B. HHS incorporated HRSA's guidelines by reference in an interim final rule promulgated the *same day*. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. But the interim final rule neither published HRSA's recommendations in the Federal Register nor explained HRSA's reasons for adopting the IOM's Report's recommendations without change. This left many questions unanswered: to take one example, Defendants did not explain why they adopted the IOM Report's recommendations as coverage requirements even though the IOM explicitly declined to consider many factors important for the formulation of coverage requirements, such as cost-effectiveness. Def's Br. 33-34; *see also* Plaintiffs' Response to Defendants' Statement, *supra*, at ¶¶ 5-8. Nor did the interim final rule explain why HRSA made emergency contraceptives, which were mentioned in the IOM Report only in passing, part of its mandatory guidelines. *See supra* at 28. Under the APA, this was an abuse of discretion.

HRSA Guidelines must be promulgated in compliance with the APA notice and comment procedures. *Id.* at 782 (when an agency adopts a new rule, it "may not give it binding effect in the absence of compliance with APA notice and comment procedures[.]").

Defendants' own practices belie its claim that it was not required to follow APA procedures here. The same statute that instructed HRSA to develop guidelines for women's preventive services also required HRSA to develop "comprehensive guidelines" for children's preventive care. 42 U.S.C. § 300gg- 13(a)(3). Relying on 42 U.S.C. § 300gg–92 and the "good cause" exception to the APA, Defendants published guidelines governing children's preventive services in the Federal Register as interim final rules, with a request for comments. *See* 75 Fed. Reg. 41,726, 41,740 *et seq.* (July 19, 2010) (requesting comments by Sept. 17, 2010).

Plaintiffs were prejudiced by this failure in at least two ways. First, they were harmed by HHS' failure to offer them the opportunity for public notice and comment, as required by the APA. *See* 5 U.S.C. § 553. Second, they were harmed because the evidence considered by the IOM was decidedly one-sided. IOM's invited presenters included a number of proponents of mandatory contraceptive coverage and of government-funded abortion. AR 516-19. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters. *Id.*; Dkt. 1, Compl. ¶¶ 68-69; *see also United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (stating that the APA requires public comments in part to "ensure fair treatment for persons to be affected by regulation"). Moreover, as the IOM Report dissent observed, the drafting committee suffered from an "unacceptably short time frame," "lacked transparency and was largely subject to the preferences of the committee's composition," which "tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." IOM Report at 231-32 (AR at 529-530). Under such circumstances, prejudice is clear. *Nat'l Ski*, 910 F. Supp. 2d at 1279-80.[10]

[10] Plaintiffs' Weldon Amendment/ACA claim survives as well. Plaintiffs have prudential standing because, as conscientious objectors to abortion, they are plainly within the "zone of interests" protected by both laws. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). Defendants' interpretation of the term "abortion" is not entitled to deference because Congress empowered the "issuer of a qualified health plan," not HHS, to interpret "abortion" under 42 U.S.C. § 18023 (b)(1)(A)(ii), and they have no special expertise in interpreting appropriations laws like the Weldon Amendment. *See Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991).

C. The Mandate violates the Free Exercise Clause.

Defendants claim that the forced compliance with the Mandate cannot violate the Free Exercise Clause because it is "neutral and generally applicable." Defs' Br. 21. It is neither.

The Mandate is not neutral because it expressly discriminates among religious objectors, creating a three-tiered system in which some are exempt (churches and "integrated auxiliaries"), some must comply with the "accommodation" and gag rule at issue here (non-exempt religious non-profits), and some receive no protection at all (religious believers who earn profits, *but see Hobby Lobby*, 723 F.3d 1114). Defendants openly admit that this facial discrimination among religious believers who have the same beliefs, and seek to engage in the same religious conduct, is based on the *government's* views of which religious exercises will or will not be compatible with the government-predicted religious beliefs of an organization's employees. Defs' Br. 13.

This open discrimination among religious institutions fails even "the minimum requirement of neutrality" which requires that a law *not* discriminate on its face. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) ("[T]he First

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In support of their interpretation, Defendants cite a 2002 statement by Rep. Weldon—but that comment, made about an un-enacted bill eight years before the FDA approved *ella* in 2010, likewise sheds little light on the meaning of a law Congress passed in 2011. Relying on the "ordinary meaning" found in medical dictionaries, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), it is clear that emergency contraceptives may qualify as "abortion." *See Stedman's Medical Dictionary* 4 (28th ed. 2006) (defining "abortion" as the "[e]xpulsion from the uterus of an embryo or fetus [before] viability."); *id.* at 1438 (defining "pregnancy" as "[t]he state of a female after conception and until the termination of the gestation").

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.'") (quoting *Lukumi*, 508 U.S. at 534).

Defendants cannot justify this discrimination among religious organizations merely by claiming its "purpose" is "something other than the disapproval of a particular religion, or of religion in general." Defs' Br. 21-22. The Tenth Circuit has already expressly rejected this argument, rejecting the distinction between discrimination among religions and discrimination among religious institutions as "a puzzling and wholly artificial distinction." *Weaver*, 534 F.3d at 1259-60 ("[T]he constitutional requirement is of government *neutrality*, through the application of "generally applicable law[s]," not just of governmental avoidance of bigotry.").[11]

Nor is the Mandate generally applicable. The Mandate favors secular over religious values by granting broad exemptions for grandfathered and small-employer plans for secular reasons, while denying religious exemptions for non-church religious organizations. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("*F.O.P.*") ("[I]t is clear from [*Smith* and *Lukumi*]" that government cannot decide

[11] Defendants cite *Lukumi* to argue that the Free Exercise Clause is not invoked because the Mandate does not target "*only*" religious conduct—secular institutions are also subject to it. Defs' Br. 22-23. But this oversimplification would excuse all but the most blatant attacks on religion. Indeed, *Lukumi* itself warned against this extreme reading, noting that the "explicit[ ] target[ing]" in *Lukumi* made it "an easy [case]" and "that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion)." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., concurring); *see also id*. at 564 (Souter, J., concurring) ("[T]his is far from a representative free-exercise case.").

"that secular motivations are more important than religious motivations."). These secular-value exemptions are quite large and severely undermine the government's claimed interest. *See 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. As noted above, this exempted population includes those working for private employers with grandfathered plans, for employers with fewer than fifty employees, and, under a proposed rule, for colleges and universities run by religious institutions."); *Zubik*, 2013 WL 6118696, at *29 ("If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases."). Defendants nowhere explain *why* they can accept secular reasons for exemptions covering millions of people, but to refuse the modest religious exemption sought here.

Instead, Defendants cite Tenth Circuit cases to argue that "the existence of 'express exemptions for objectively defined categories of [entities],' . . . does not negate a law's general applicability." Defs' Br. 23. But the cases cited do not advance the proposition claimed. In *Swanson v. Guthrie Independent School District*, the purpose of the school's policy was to ensure state funding by prohibiting part-time attendance except for fifth year seniors and special-education students, which was based on the number of full-time students, plus fifth-year seniors and special-education students. 135 F.3d 694, 697, 701

(10th Cir. 1998). Thus, the "exceptions" were not really exceptions at all and did not destroy neutrality and general applicability.

Similarly, in *Grace United Methodist Church v. City of Cheyenne*, the court found no free exercise violation where a city board denied a variance for a church to run a daycare center in a residential zone. 451 F.3d 643, 647-48 (10th Cir. 2006). The court held that the zoning code was not "discriminatorily applied" merely because it permitted case-by-case exceptions for "churches, schools, and other similar uses." *Id.* at 654; *see also id*. at 650 & n.1. It was uncontroverted that the board "did not have the 'authority or discretion' to permit anyone to operate a daycare center in a residential zone." *Id*. at 653. The denial was "mandatory," not "discretionary." *Id*. at 654. Nor was there "evidence that secular daycare centers ha[d] been permitted to operate . . . , while religious organizations like the Church ha[d] been denied such an exception." *Id*. Thus, the court emphasized that "this [was] not a controversy in which the City made a 'value judgment in favor of secular motivations, but not religious motivations'" *Id*. (quoting and distinguishing *F.O.P.*, 170 F.3d at 365).

In *Axson-Flynn v. Johnson*, a university student alleged a Free Exercise violation after being pressured to withdraw from the drama department for refusing to use certain curse words. 356 F.3d 1277, 1280 (10th Cir. 2004). The university claimed that its "strict adherence to offensive script requirement was a 'neutral rule of general applicability.'" *Id*. at 1294. The court disagreed since the student had shown that the policy was "discriminatorily applied." *Id*. at 1294, 1298-99 (Jewish student "received permission to

avoid doing an improvisational exercise on Yom Kippur"; university "sometimes granted [student] herself an exemption").

Here, the facts are analogous to those in *F.O.P.* and *Axson-Flynn*, not to those in *Swanson* or *Grace United*. The Mandate's "religious employers" exemption is wholly discretionary. 45 C.F.R. § 147.131(a) (agency "may" establish exemption). Defendants have already revised the exemption once, simply in response to public comment. *See* 78 Fed. Reg. 39873-74. Perhaps the best illustration of the exemption's discretionary nature is that it has been enacted only via footnote on an HHS website. *See* AR 283-84.[12] Furthermore, the exemption explicitly discriminates among religious organizations, protecting only institutional churches and their integrated auxiliaries, while otherwise identical non-integrated organizations are excluded. *Cf. Axson Flynn*, 356 F.3d at 1293, 1298-99; *see also Zubik*, 2013 WL 6118696, at *29-30. And it favors secular motivations for grandfathered and small-employer exemptions, while eschewing exemptions for non-church religious organizations. *Cf. F.O.P.*, 170 F.3d at 365. Expressly adding these discriminatory exemptions to the law underscores, not ameliorates, their invidiousness. *Lukumi*, 508 U.S. at 542 ("categories of selection are of paramount concern"); *F.O.P.*, 170 F.3d at 365 ("concern is only further implicated when the government does not

[12] These facts also refute that the "unbridled discretion" claim (Count XI) may be dismissed. Defs' Br. 25 & n.9. The creation in a website footnote of a religious employers exemption, revised at agency whim, and extending only to institutional churches, is a perfect example of unbridled discretion. *See, e.g.*, AR 283-84. 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) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)).

merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption").[13]

D. The Establishment Clause claims cannot be resolved in Defendants' favor.

As with their Free Exercise arguments, Defendants' Establishment Clause arguments hinge on the discredited notion that the government may prefer some religious institutions over others, so long as the discrimination is based on their internal structure and assumed religiosity, rather than denomination. Defs' Br. 25-28. But the Tenth Circuit has directly rejected that argument. In *Weaver*, the university challenged state regulations that provided scholarships for students to attend any college, secular or religious, unless the state deemed it "pervasively sectarian." 534 F.3d at 1250. Just like Defendants here, the state argued there was no Establishment Clause violation because the law only discriminated based on "types of institutions," not "types of religions." *Id*. at 1259. The court deemed this a "wholly artificial distinction," holding that "when the state passes laws that facially regulate religious issues, it must treat … religious institutions without discrimination or preference." *Id*. at 1257, 1259; *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").

[13] The government's claim that "nearly every court" to consider a free exercise challenge "has rejected it," Defs' Br. 22 & n.7, is misleading. The vast majority of courts addressing challenges have, like the Tenth Circuit, held the Mandate unlawful under RFRA and so have not reached the free exercise claim. *See* www.becketfund.org/hhsinformationcentral/ (in merits rulings, 3 out of 3 non-profit plaintiffs and 32 out of 38 for-profit plaintiffs have prevailed).

Moreover, the Mandate *does* discriminate among religious denominations: it favors those that consist primarily of "houses of worship," "integrated auxiliaries," or "religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavors non-hierarchal churches like the Southern Baptist Convention, whose faith encourages the creation of financially and institutionally autonomous religious organizations. *See* Dkt. 7-1 ¶¶ 11-13; *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1288 (8th Cir. 1985). The law cannot prefer denominations that exercise religion mainly through "houses of worship[]," 78 Fed. Reg. 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F. 3d at 1259.[14]

Defendants' reliance on *Gillette v. United States*, Br. 25-26, further illustrates why their position is wrong. 401 U.S. 437 (1971). *Gillette* granted military conscientious-objector status based on the *nature of the conscientious objection*. *Id.* at 442 n.5 (granting exemption to those who object to "war in any form," not to those who object to only "a particular war"). The religious exemption was therefore available to all sincere objectors—regardless of their faith—who asserted the same objection and sought to engage in the same practice. *Id.* at 450-51. This equal treatment of objectors is precisely

[14] Under the Fifth Amendment, since Plaintiffs have shown the Mandate infringes on their fundamental right to religion, the Mandate's religious classifications are also subject to "strict scrutiny." *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002); *see also Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998). Not that the classifications can survive even rational basis review: Defendants discriminate between essentially identical religious organizations based solely on unfounded speculation about the likely religious beliefs of religious institutions' employees. *See* Plaintiffs' Response to Defendants' Statement, *supra*, ¶ 29. Such discriminatory assessment of religiosity is flatly illegal. *Weaver*, 534 F.3d at 1259 (banning "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations"). Thus, Counts VII and VIII remain viable.

what the Mandate lacks, because it discriminates among institutions that engage in the exact same activity, and have the exact same religious objections.

E. The Mandate violates Plaintiffs' Free Speech rights.

The Mandate forces Reaching Souls, Truett-McConnell and other class members to request and authorize others to provide their employees with abortion-inducing drugs. *See, e.g.*, 26 C.F.R. § 54.9815-2713A(a)(4); *see also* Ex. 2-C (Self-Certification Form). Defendants insist that they can do this because it is "plainly incidental to the . . . regulation of conduct." Defs' Br. 29-30 (quoting *Rumsfeld v. FAIR Inc.*, 547 U.S. 47, 62 (2006)). But *FAIR* concerned a law that regulated what affected parties "must *do* . . . not what they may or may not *say*." 547 U.S. at 60 (emphases original). Here, the forced speech *is* the essential act that Defendants require. Such a "direct regulation of speech . . . plainly violate[s] the First Amendment." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

So Defendants switch tacks, arguing that Reaching Souls and Truett-McConnell cannot contest being required to sign a form that, Defendants allege, is unenforceable. Defs' Br. 17-18. But Defendants get things backward: *they* must show why they may massively penalize Reaching Souls and Truett-McConnell for declining to speak. If Defendants are "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the[m]," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000), they certainly cannot compel speech *for no purpose at all*.

The Mandate also muzzles Reaching Souls and Truett-McConnell from asking the TPAs not to be involved in the distribution of objectionable drugs and services. *See, e.g.*, 26 C.F.R. § 54.9815–2713A(b)(1)(iii). Defendants respond that the muzzle does no harm since Reaching Souls and Truett-McConnell may tell everyone *but* the TPAs of their opposition to participating in the Mandate, and that the TPAs will not provide the objectionable drugs anyway. But Plaintiffs reasonably believe that one or more of GuideStone's TPAs will obey Defendants' forms and regulations, rather than their briefs. Ex. 1 ¶¶ 4-5. Moreover, a ban on "speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("Effective speech has . . . a speaker and an audience. A restriction on either . . . is a restriction on speech."). Further, Defendants confuse Plaintiffs' religious liberty claims with their speech claims: the speech harm is not in the provision of the drugs, but in censorship itself. Defendants are censoring Reaching Souls and Truett-McConnell from talking with GuideStone's TPA Highmark, which currently plans to treat certification as a trigger. Ex. 1 ¶¶ 4-5. Defendants' rules burden *both* Plaintiffs' free exercise *and* their free speech.

F. The Mandate violates Plaintiffs' right to expressive association.

Against Plaintiffs' expressive association claim, Defendants make a one-paragraph argument that the *only* possible infringement on expressive association is forced acceptance of unwanted members. Defs' Br. 31-32. But unconstitutional burdens on expressive association "take many forms," just "one of which" is a "regulation that forces the group to accept members it does not desire." *Boy Scouts of America v. Dale*, 530 U.S.

640, 648 (2000); *see, e.g., In re Motor Fuel Temper. Sales Practice Litig.*, 641 F.3d 470, 479-81 (10th Cir. 2011) (associational rights can be infringed by, *inter alia*, expenditure caps, reporting requirements, and disclosure of internal communications). The appropriate inquiry is whether an association is expressive and, if so, whether the challenged law "impair[s] [the Plaintiffs'] expression." *Dale*, 530 U.S. at 648, 653. Courts must "give deference to" the Plaintiffs' views on both. *Id.*

Plaintiffs have a distinctive religious message that they share through their associations, and the Mandate impairs their message. Both Reaching Souls and Truett-McConnell are built around and exist to share their religious beliefs. Dkt. 7-2 ¶¶ 3-4 (Reaching Souls employees must affirm and share the same core religious beliefs as Reaching Souls); *see also* Dkt. 7-3 ¶ 5 (same requirement for Truett-McConnell faculty and trustees). These beliefs include the Scriptural command to respect the sanctity of human life, which requires Plaintiffs to treat unborn people with respect and to speak on their behalf. Dkt. 7-2 ¶¶ 4-5; Dkt. 7-3 ¶¶ 4-5. Reaching Souls and Truett-McConnell expressly require their employees or faculty to profess Christian faith and live consistently with that faith. Dkt. 7-2 ¶ 4 (Reaching Souls); Dkt. 7-3 ¶ 5 (Truett-McConnell). Reaching Souls and Truett-McConnell have these requirements in part to express their commitment to living and sharing specific Christian principles, including the sanctity of human life. Dkt. 7-2 ¶¶ 5, 10; Dkt. 7-3 ¶¶ 4-5, 11. Part of the reason that both Reaching Souls and Truett-McConnell chose to associate with the GuideStone Plan was to "provide health benefits for [their] employees in compliance with [their] commitment to . . . the sanctity of human life." Dkt. 7-2 ¶¶ 6, 11; Dkt. 7-3 ¶¶ 7, 11.

The Mandate impairs Reaching Souls' and Truett-McConnell's expressive associations with their employees and with GuideStone by forcing participation in the government's scheme. That participation forces Reaching Souls and Truett-McConnell to directly contradict the religious message which they intend to send via their associations with their employees and GuideStone, thereby "intru[ding] into the internal structure or affairs of" those associations. *Dale*, 530 U.S. at 648; *accord Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989) ("[I]nterfering with the internal workings of [an association]" can "infringe upon" the "right to associate … to promote a[] ... viewpoint"); Dkt. 7-2 ¶¶ 3-7, 10; Dkt. 7-3 ¶ 11.

The Mandate similarly burdens GuideStone, which uses its association with Reaching Souls, Truett-McConnell and other class members to share and express their religious beliefs respecting human life and dignity. *See*, *e.g.*, Dkt. 7-1 ¶¶ 14, 16-21, 26-28. GuideStone is committed to operating consistently with its Southern Baptist faith; indeed, failing to do so would destroy its ability to associate with ministries that, like the class members, want health services that are compliant with Southern Baptist beliefs. *Id.* ¶¶ 21, 26-28. Thus, the Mandate imperils GuideStone's *raison d'être*. The Mandate likewise burdens each of the class members' association with GuideStone. *Id*.

G. Defendants' motion for summary judgment is premature.

Defendants' motion to dismiss is actually just a motion for summary judgment because the Court must consider materials outside the pleadings in order to resolve it. *See* Fed. R. Civ. P. 12(d); *SEC v. Wolfson*, 539 F.3d 1249, 1265 (10th Cir. 2008); *Holy Land Found. for Relief and Dev't v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (district court

abused discretion by considering administrative record without converting Rule 12(b) motion to Rule 56 motion). Defendants' *de facto* summary judgment motion is premature as set forth in Plaintiffs' Rule 56(d) motion, which is incorporated herein.

III. Plaintiffs are entitled to an injunction.

A. Plaintiffs have a substantial likelihood of success on the merits and face a substantial threat of irreparable harm.

For the same reasons set forth in Section II above and discussed in Plaintiffs' Motion for a Preliminary Injunction, the Court should also find that Plaintiffs have demonstrated a substantial likelihood of success on the merits. They have therefore also established irreparable harm, because the Tenth Circuit has "explicitly held—by analogy to First Amendment cases—that establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby*, 723 F.3d at 1146.

B. A preliminary injunction will not harm Defendants or the public.

Defendants claim that an injunction protecting the Plaintiffs "would injure the government and the public." Def. Br. 39-40. This makes no sense in light of Defendants' admission that they cannot enforce their scheme against TPAs.[15]

[15] Defendants' argument that Plaintiffs must be coerced into this scheme because "Congress found it to be in the public interest to direct an agency to develop and enforce," *id.* at 39-40, is also incorrect: Congress did not mandate contraceptive coverage, Defendants did; Congress instructed the government to respect religious freedom in RFRA; and Congress left church plans like the one at issue here outside of ERISA. 29 U.S.C. § 1003(b)(2). In any case, Defendants have voluntarily provided widespread temporary relief from many of the requirements Congress did create—but not from Defendants' own contraceptive scheme. *See* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this court deny Defendants' motion to dismiss or, in the alternative, for summary judgment, and grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 27th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the Court's ECF filing system on counsel for Defendants on November 27, 2013.

/s/ Jared D. Giddens
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