IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY, *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants.

Case No. 4:12-cv-03009

Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment and Preliminary Injunction

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INTRODUCTION AND SUMMARY OF ARGUMENT

The central question presented by this case is straightforward: Can the government force conscientious objectors to aid and abet what they believe to be the taking of innocent life?

No one disputes in this case that the Plaintiff Universities sincerely believe that they must not abet abortions. And no one disputes that the Mandate makes Plaintiffs, as employers, part of the mechanism by which employees or their dependents are able to obtain coverage for the drugs and devices Plaintiffs object to. The disagreement in this case concerns whether the Defendants' "accommodation" has solved the moral problem of complicity. It has not.

The government will argue that its "accommodation" puts enough moral distance between Plaintiffs and the provision of the objectionable drugs and devices to their employees. But this argument fails for several reasons. First, the government cannot tell Plaintiffs and others what they believe—Plaintiffs, not the government are the arbiters of whether a particular set of actions would be immoral in their own eyes. Second, the Plaintiffs are inescapably part of the mechanism for obtaining the drugs and devices. Without Plaintiffs' acting to trigger the accommodation mechanism, their employees and dependents would not receive the abortion-causing items. Third, the government cannot command Plaintiffs and other religious organizations to outsource their consciences to third party administrators or others; as the Supreme Court stated just last Term, government cannot force religious

groups to express their beliefs "only at the price of evident hypocrisy." *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013).

Indeed, the moral dilemma confronted by the Universities is not unlike the one faced by a person who is solicited to commit a crime, or invited to join a conspiracy or a fraud. There is a moment of decision where the person must decide whether to aid and abet the existing criminals and thus become a criminal herself, or whether to abstain. The law makes individuals culpable for their decisions to participate as accomplices or co-conspirators. Similarly, the moral law that ETBU and HBU follow would make them culpable for a decision to act as the government's accomplice or co-conspirator in committing what they believe to be the taking of innocent human life. The government should not be able to tell Plaintiffs not to use their own standard of culpability, especially when federal standards of culpability are so similar.[1]

Perhaps the worst part of this entire situation is that the government could have avoided this problem altogether. If, for example, Congress or the Defendant agencies had structured the law and regulations in a way that had the government

[1] Judge Gorsuch explained the problem well in *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d. ---, No. 12-6294, 2013 WL 3216103 (June 27, 2013) (*en banc*):

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The [plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.

Id. at *31 (Gorsuch, J., concurring).

or the private market deliver the objected-to drugs and devices instead of employers, as under Title X, 42 U.S.C. § 300 *et seq.*, then there would also have been no problem of moral complicity.

But because the government chose instead to make employers, including Plaintiffs, the means to its chosen end, the issue of conscientious objection is squarely presented.

That conscientious objection is protected under the Religious Freedom Restoration Act (RFRA), the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. The Mandate creates a substantial burden on Plaintiffs' religious exercise of refusing to assist in abortion, triggering strict scrutiny under RFRA. The Mandate is neither neutral nor generally applicable, triggering strict scrutiny under the Free Exercise Clause. The Mandate discriminates among religions to the detriment of Plaintiffs, triggering strict scrutiny under the Establishment Clause. And the Mandate compels Plaintiffs to speak when they don't want to speak and be silent when they don't want to be silent, triggering strict scrutiny under the Free Speech Clause.

As several Courts of Appeals have already held, the Mandate cannot be justified under strict scrutiny. The government invokes no compelling interest to justify it, the Mandate does not actually further the interests the government has identified, and it is not the means least restrictive of Plaintiffs' constitutional and RFRA rights.

Because there is no dispute of material fact regarding the foregoing claims, summary judgment should be entered for Plaintiffs on those claims. And because the Mandate will soon coerce Plaintiffs absent an order from this Court, a preliminary injunction should issue protecting Plaintiffs from the Mandate during the pendency of litigation in this Court and any subsequent appeal.

STATEMENT OF FACTS SUPPORTING SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

I. The HHS Mandate

A. Promulgation of the Mandate and the "Religious Employer" Exemption

Signed into law by President Obama in March of 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010) (collectively, "ACA") instituted a number of significant changes to our nation's health care and health insurance systems. Among other things, the ACA mandates that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain "preventive care and screening" services without "any cost sharing." 42 U.S.C. § 300gg-13(a). The ACA does not specify what "preventive care and screenings" include, but rather leaves that task to the Health Resources and Services Administration (HRSA), a division of Defendant Department of Health and Human Services (HHS).[2] 42 U.S.C. § 300gg-13(a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010).

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[2] Unless context indicates otherwise, all references to "HHS" or "Defendants" also include Defendants Department of Labor and Department of Treasury.

On July 19, 2010, HHS published an interim final rule under the Affordable Care Act, (First Interim Final Rule). 75 Fed. Reg. 41726 (2010). The First Interim Final Rule, enacted without prior notice of rulemaking or public comment, provided that at a later date HRSA would publish guidelines specifying what would constitute preventive care. 75 Fed. Reg. at 41759. The First Interim Final Rule explained that "cost sharing" refers to "out-of-pocket" expenses for plan participants and beneficiaries, 75 Fed. Reg. 41730, and acknowledged that those expenses would be "covered by group health plans and issuers" which would, in turn, result in "higher average premiums for all enrollees[,]" *id.*, and "an increase in premiums," *id.* at 41737. In other words, the prohibition on cost sharing was a way "to distribute the cost of preventive services more equitably across the broad insured population." *Id.*

On August 1, 2011, HRSA issued guidelines stating that preventive services would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), Ex. C-1. FDA-approved contraceptive methods include "emergency contraception" such as Plan B (commonly known as the "morning-after pill") and ulipristal (also known as "Ella" or the "week-after pill"). FDA Birth Control Guide (August 2012), Ex. C-2 at 9. The FDA birth control guide specifically notes that Plan

B and Ella (and certain intrauterine devices (IUDs)) may work by preventing "attachment (implantation)" of a fertilized egg in a woman's uterus. *Id.*

On the same day that HRSA issued these guidelines, HHS promulgated an amended interim final rule (Second Interim Final Rule) which reiterated the mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. The Second Interim Final Rule granted HRSA "*discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623 (emphasis added). A "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "primarily serves persons who share its religious tenets"; and (4) "is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46626. The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and the "exclusively religious activities of any religious order." 26 U.S.C. § 6033. Like the First Interim Final Rule, the Second Interim Final Rule went into effect immediately, without prior notice or comment. 76 Fed. Reg. 46621.

B. The Safe Harbor

Controversy ensued over the mandate and the religious employer exemption, and hundreds of thousands of public comments were filed in response to the mandate and the religious employer exemption. *See* 77 Fed. Reg. 8725, 8726 (Feb.

15, 2012).[3] In response, Secretary Sebelius announced in January 2012 that certain non-exempt religious objectors would be granted an "additional year" before the mandate was enforced against them, in order to "allow these organizations more time and flexibility to adapt to this new rule." January 20, 2012 Statement of HHS Secretary Kathleen Sebelius, Ex. C-3. Accordingly, on February 10, 2012, HHS issued a bulletin describing a "Temporary Enforcement Safe Harbor" from the mandate. Department of Health and Human Services, *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers* (updated June 28, 2013), Ex. C-4. The bulletin advised that Defendants would not enforce the mandate for one additional year against certain non-profit organizations who have religious objections to covering the mandated services but who did not qualify for the religious employer exemption. Ex. C-4 at 3. Under the safe harbor, the mandate would not apply until an organization's first insurance plan year that began after August 1, 2013 (as opposed to August 2012 under the Second Interim Final Rule). Ex. C-4 at 3. The safe harbor is available to non-profit organizations that self-certify that they have not offered the offending coverage "from February 10, 2012 onward" and that provide notice to plan participants. Ex. C-4 at 4. The safe harbor did not alter the religious employer exemption, however. On that same afternoon,

[3] Additionally, in 2011, religious organizations that did not qualify for the exemption began filing lawsuits challenging the interim final rules. *See, e.g.*, *Belmont Abbey College* v. *Sebelius*, No. 11-1989 (D.D.C. Nov. 10, 2011), *dismissed as moot*, Dkt. 41 (Aug. 19, 2013) (first lawsuit filed). To date, 30 lawsuits have been filed by nonprofit religious organizations and 37 lawsuits have been filed by business owners. Their status is kept reasonably updated by Plaintiffs' counsel at HHS Mandate Information Central, www.becketfund.org/hhsinformationcentral.

Defendants issued regulations adopting that exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (published Feb. 15, 2012).

C. The Advance Notice of Proposed Rulemaking

On March 16, 2012, Defendants Announced an "Advance Notice of Proposed Rulemaking" (ANPRM). 77 Fed. Reg. 16501, 16503 (published March 21, 2012). The ANPRM announced the Defendants' intention to finalize an accommodation by the end of the safe harbor period. 77 Fed. Reg. at 16503. The ANPRM did not announce any intention to alter the mandate. *Id.* In vague terms, the ANPRM proposed that "health insurance issuers" for objecting religious employers could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id.* For self-insured plans, the ANPRM suggested that third party plan administrators "assume this responsibility." *Id.* For the first time, the ANPRM suggested that the cost for the separate contraceptive coverage could not result in increased premiums for conscientious objectors. *Id.* at 16503 ("the Departments would require that, in this circumstance, there be no premium charge for the separate contraceptive coverage"). Defendants recognized "approximately 200,000 comments" submitted in response to the ANPRM, which for the most part objected to the scheme. 78 Fed. Reg. 8456, 8459 (published Feb. 6, 2013).

D. The Notice of Proposed Rulemaking

On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM). 78 Fed. Reg. 8456. The NPRM proposed two major changes to the then-existing regulations. 78 Fed. Reg. at 8458-59. First, it proposed revising the religious employer exemption by eliminating the requirements that religious employers have

the purpose of inculcating religious values and primarily employ and serve persons of their own faith. *Id.* It did not, however, "expand the universe of employer plans that would qualify for the exemption." *Id.* Second, it proposed to "accommodate" non-exempt religious organizations like the Plaintiffs by requiring those religious insurers to force their insurers and third party administrators to provide "separate . . . coverage" for the free contraceptive and abortifacient drugs and services. 78 Fed. Reg. 8463. "[O]ver 400,000 comments" were submitted in response to the NPRM. 78 Fed. Reg. 39870, 39871 (published July 2, 2013). On April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius answered questions about the contraceptive and abortifacient services requirement in a presentation at Harvard University.[4] In response to a question, she explained that "religious entities will be providing coverage to their employees starting August 1st." *Id.* at 51:30-52:00.

E. The Final Form of the Mandate

On June 28, 2013, Defendants issued a final rule (the "Mandate"). Under the Mandate, the "religious employer" exemption remains limited to institutional churches and religious orders "organized and operate[d]" as nonprofit entities "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39874(a). The Mandate creates a separate "accommodation" for certain non-exempt religious organizations. 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). An organization is eligible for the accommodation if it (1) "opposes providing

[4] The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services* (April 8, 2013) *available at* http://theforum.sph.harvard.edu/sites/default/files/downloads/audio/20130408_Sebelius_PODCAST.mp3 (last visited August 30, 2013).

coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). The final rule extends the current safe harbor through the end of 2013. 78 Fed. Reg. at 39889. An eligible organization would need to execute its self-certification "prior to the beginning of the first plan year" which begins on or after January 1, 2014, and deliver it to the organization's insurer, or, if the organization has a self-insured plan, to the plan's third party administrator. *Id.* at 39875. The delivery of the self-certification would trigger the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c). This obligation would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. 39876; see 45 C.F.R. § 147.131(c)(2)(i)(B). Insurers and third party administrators would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application materials distributed in connection with enrollment" in a group health plan. *Id.* at 39876; 45 C.F.R. § 147.131(d). The insurers and third party administrators are expected to provide the emergency contraceptives "in a manner consistent" with the provision of other covered services, 78 Fed. Reg. at 39876-77, and "may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization." *Id.* at 39896; 45 C.F.R. § 147.131(c)(2)(ii). The burden remains on the objecting religious organization to find a third party administrator who will agree to provide free access to the same contraceptive and abortifacient services the religious organization cannot provide directly. 78 Fed. Reg. at 39880 ("[T]here is no [legal] 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 state in the final rule that they "have evidence to support" that providing payments for contraceptive and abortifacient services will be "cost neutral for issuers." *Id.* at 39877. Nevertheless, even if the payments were, over time, to become cost neutral, it is undisputed that there will be up-front costs for making the payments. *Id.* at 39877-78 (addressing ways insurers can cover up-front costs). The final rule suggests that issuers may ignore this fact and "set the premium for an eligible organization's large group policy as if no payments for contraceptive services had been provided to plan participants." *Id.* at 39877. Another suggestion Defendants have provided is to "treat the cost of payments for contraceptive services . . . as an administrative cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." *Id.* at 39878.

The Mandate requires that, even if the third party administrator consents, the religious organization—via its self-certification—must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive

services for participants and beneficiaries." *Id.* at 39879. The self-certification must specifically notify the third party administrator of its "obligations set forth in the[ ] final regulations, and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39879.

Employers with fewer than fifty employees are exempt from the Mandate. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Nearly 34 million individuals are employed by firms with fewer than fifty employees. WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business*, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Aug. 30, 2013), Ex. C-5 at 3. Also exempt from the Mandate are employers who provide "grandfathered" health care plans. 42 U.S.C. § 18011. In 2010, the government predicted that 87 million people would remain on grandfathered plans in 2013. Ex. C-6 at 4.

II. East Texas Baptist University and Houston Baptist University

A. East Texas Baptist University

East Texas Baptist University (ETBU) is a Christian liberal arts university located in Marshall, Texas. Declaration of Samuel W. Oliver, Ex. A ¶ 4. Founded in 1912, ETBU is affiliated with the Baptist General Convention of Texas and is in cooperation with the national Southern Baptist Convention. Ex. A ¶¶ 4, 11. ETBU's motto is "A World of Opportunity in a Community of Faith." Ex. A ¶ 6. Its central purpose is to "prepare students to accept the obligations and opportunities to serve humanity and the Kingdom of God." Ex. A ¶ 5. Today, ETBU is a thriving academic

community, serving over 1,250 students in thirty undergraduate degree programs and four graduate degree programs. Ex. A ¶ 7.

In keeping with its Christian identity, ETBU employs "administrators, academic officers, faculty, and staff who have a personal relationship with Christ, who are familiar with truth as revealed in the Bible, who live out this truth in the presence of others, [and] who can create an environment where Christ is lived out in the life of the individual" in both "their initial and continuing employment[.]" Ex. A ¶ 13. ETBU is governed by a 36-member Board of Trustees, all of whom must be active members of Baptist churches. Ex. A ¶ 10.

ETBU holds and follows traditional Christian beliefs about the sanctity of life. Ex. A ¶ 16. ETBU believes that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. Ex. A ¶ 16-17. ETBU affirms that "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." Ex. A ¶ 18. ETBU believes and teaches that abortion ends a human life and is a sin. Ex. A ¶ 19.

Consequently, it is a violation of ETBU's teachings and religious beliefs to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services. Ex. A ¶ 20. Specifically, ETBU has a sincere religious objection to covering the emergency contraceptive drugs popularly known as Plan B, Ella, and certain abortifacient IUDs. Ex. A ¶ 21. ETBU believes that those drugs could prevent a

human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo. Ex. A ¶ 21. It is similarly a violation of ETBU's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third-party administrator and not by ETBU. Ex. A ¶ 24.

It is also part of ETBU's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. Ex. A ¶ 27. The overwhelming majority of ETBU's 227 full time employees and their families rely upon ETBU's health benefits. Ex. A ¶ 28. It is important to ETBU that its insurance plan is consistent with its religious beliefs. Ex. A ¶ 20. Consistent with these religious beliefs, ETBU's employee health insurance plans do not cover abortions or emergency contraception such as Plan B, Ella, or abortion-causing IUDs. Ex. A ¶ 20-21. ETBU cannot, in good conscience, participate in the Mandate. Ex. A ¶ 38. ETBU is self-insured, and while it was initially unclear whether its plan was grandfathered, its current plan is not grandfathered. Ex. A ¶ 33.

The mandate will take effect against ETBU on January 1, 2014. Ex. A ¶ 66. On that date, it will face an unconscionable choice: either violate the law, or violate its faith. Ex. A ¶ 66. If ETBU violates the law by ceasing to offer employee health insurance, it will face the prospect of fines of $2000 per employee per year, or roughly $454,000 per year, every year. Ex. A ¶ 67; 26 U.S.C. § 4980H. Although the

government has recently announced that it will postpone implementing the annual fine of $2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner* (July 2, 2013), Ex. C-7. Furthermore, if ETBU violates the law by offering insurance that fails to comply with the Mandate, it could also incur penalties of $100 per day "for each individual to whom such failure relates," or up to $8 million per year for ETBU's 227 full-time employees. Ex. A ¶ 69; 26 U.S.C. § 4980D; 29 U.S.C. § 1132. Terminating its health Plan would be a serious hardship for ETBU's faculty and staff. Ex. A ¶ 35. Terminating its health plan would result in serious competitive disadvantages for ETBU in recruiting and retaining faculty and staff. Ex. A ¶ 36. ETBU could also face regulatory action and lawsuits under ERISA. Ex. A ¶ 71.

ETBU has raised its objections to the Mandate with Congress. Ex. A ¶ 41. On February 16, 2012, ETBU's president testified before the House Committee on Oversight and Government Reform that ETBU objected to the Mandate. Ex. A ¶ 41. ETBU submitted public comments on the ANPRM and the NPRM objecting to the scheme they proposed. Ex. A ¶ 42-44.

B. **Houston Baptist University**

Houston Baptist University (HBU) is a Christian liberal arts university located in Houston, Texas. Declaration of Dr. Robert B. Sloan, Ex. B ¶ 4. Founded in 1960 by the Baptist General Convention of Texas, HBU is also connected with the national Southern Baptist Convention. Ex. B ¶¶ 4-5. HBU's mission is "to provide a

learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of [its] central confession, 'Jesus Christ is Lord.'" Ex. B ¶ 6. Today, HBU is a thriving academic community, serving over 2,800 students in 33 undergraduate degree programs and 15 graduate degree programs. Ex. B ¶ 7.

In keeping with its Christian identity, HBU's bylaws have required that "all those who become associated with [HBU] as a trustee, officer, member of the faculty or of the staff, and who perform work connected with the educational activities of the University, must believe in the divine inspiration of the Bible, both the Old Testament and New Testament, that man was directly created by God, the virgin birth of Jesus Christ, our Lord and Savior, as the Son of God, that He died for the sins of all men and thereafter arose from the grave, that by repentance and the acceptance of and belief in Him, by the grace of God, the individual is saved from eternal damnation and receives eternal life in the presence of God . . . ." Ex. B ¶ 8. HBU's mission as an academic community is not merely the transmission of information; its goal is to "express Christ's Lordship as a function of its academic mission." Ex. B ¶ 10.

HBU holds and follows traditional Christian beliefs about the sanctity of life. Ex. B ¶ 11-12. HBU believes that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. Ex. B ¶ 11. HBU affirms that "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." Ex. B

¶ 13. HBU believes and teaches that abortion ends a human life and is a sin. Ex. B ¶ 14. HBU expects all of its faculty to affirm and teach these beliefs. Ex. B ¶ 14. HBU's beliefs about the sanctity of life are also reflected in its Student Code of Conduct, which affirms that Houston Baptist "embraces a biblical position which honors the sanctity of life," and "cannot support actions which encourage or result in the termination of human life through suicide, euthanasia, or abortion-on-demand." Ex. B ¶ 15. As a result, when students face a crisis pregnancy, "the campus community is prepared to stand with both the father and mother of the unborn child" and is "committed to assisting the student(s) with" alternatives to abortion. Ex. B ¶ 15.

Consequently, it is a violation of HBU's teachings and religious beliefs to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services. Ex. B ¶ 16. Specifically, HBU has a sincere religious objection to covering the emergency contraceptive drugs popularly known as Plan B and Ella. Ex. B ¶ 19. HBU believes that those drugs could prevent a human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo. Ex. B ¶ 17. It is similarly a violation of HBU's beliefs to deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third-party administrator and not by HBU. Ex. B ¶ 20.

It is also a part of HBU's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. Ex. B ¶ 23. The overwhelming majority of HBU's 355 full time employees and their families rely upon HBU's health benefits. Ex. B ¶ 24. It is important to HBU that its insurance plan is consistent with its religious beliefs. Ex. B ¶ 22. Consistent with these religious beliefs, HBU's employee health insurance plans do not cover abortions or emergency contraception such as Plan B, Ella, or abortion-causing IUDs. Ex. B ¶ 22. HBU cannot, in good conscience, participate in the Mandate scheme. Ex. B ¶ 36.

HBU's health benefits plan (plan) is provided through GuideStone Financial Resources of the Southern Baptist Convention (GuideStone). Ex. B ¶ 25. GuideStone's mission is "to assist churches, denominational entities, and other evangelical ministry organizations by making available" a variety of retirement, investment, and insurance programs. Ex. B ¶ 26. GuideStone is a church health plan, which is a "self-funded, multiple employer health plan[] operated by not-for-profit church benefit boards" and given special status by the IRS. Ex. B ¶ 27. Although GuideStone provides preventive services—including most FDA-approved contraceptives—without cost sharing, GuideStone "does not provide coverage for abortions and abortion-causing drugs, as this violates [its] Biblical convictions on the sanctity of life." Ex. B ¶ 28. HBU's plan is not grandfathered. Ex. B ¶ 31.

The Mandate will take effect against HBU on January 1, 2014. Ex. B ¶ 66. On that date, it will face an unconscionable choice: either violate the law, or violate its

faith. Ex. B ¶ 66. If HBU violates the law by ceasing to offer employee health insurance, it will face the prospect of fines of $2000 per employee per year, or roughly $710,000 per year, every year. Ex. B ¶ 67; 26 U.S.C. § 4980H. Although the government has recently announced that it will postpone implementing the annual fine of $2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. Ex. B ¶ 68; Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner* (July 2, 2013), Ex. C-7. If HBU violates the law by offering insurance that fails to comply with the Mandate, it could also incur penalties of $100 per day "for each individual to whom such failure relates," or up to nearly $13 million annually. Ex. B ¶ 69. HBU could also face regulatory action and lawsuits under ERISA. Ex. B ¶ 71.

III. The Mandate's Impact on ETBU and HBU

Both ETBU and HBU will be subject to the Mandate on January 1, 2014. Ex. A ¶ 66; Ex. B ¶ 66. Although the Universities have no objection to including free coverage for non-abortifacient contraceptive services, their religious convictions forbid them from including free coverage for abortifacient services in their employee healthcare plans. Ex. A ¶ 75; Ex. B ¶ 75. The Plaintiffs cannot take advantage of the religious employer exemption. Ex. A ¶ 39; Ex. B ¶ 39. In order to comply with the Mandate under the "accommodation," the Plaintiffs would need to execute their self-certifications prior to January 1, 2014. Ex. A ¶ 47; Ex. B ¶ 45. The Mandate does not provide any guidance for "eligible organizations" that are insured through church health plans like GuideStone. Ex. B ¶ 46. GuideStone also has a religious

objection to providing abortion-causing drugs. Ex. B ¶ 28. Neither GuideStone nor ETBU's third party administrator has a legal obligation to cooperate in providing the Plaintiffs with the accommodation. Ex. A ¶ 50; Ex. B ¶ 52; 78 Fed. Reg. at 39880. The Plaintiffs' beliefs preclude them from soliciting, contracting with, or designating a third party to provide these drugs and services. Ex. A ¶ 53; Ex. B ¶ 50.

Expressly designating a third party administrator as "an ERISA section 3(16) plan administrator" and notifying the third party administrator of its "obligations set forth in the[] final regulations" would make the Plaintiffs morally complicit in providing the drugs and services. Ex. A ¶¶ 54-56; Ex. B ¶¶ 54-56; 78 Fed. Reg. 39879.

If they were to violate their beliefs and designate a new insurer or designate a third party administrator for the distinct purpose of facilitating access to free abortifacients, the Plaintiffs would have to identify their employees to that entity. Ex. A ¶ 58; Ex. B ¶ 58. Both Universities would have to coordinate with their designees regarding when they added or removed employees and beneficiaries from their healthcare plan and, as a result, from the contraceptive and abortifacient services payment scheme. Ex. A ¶ 60; Ex. B ¶ 60; 78 Fed. Reg. 39876. Both Universities would be required to coordinate notices with their designees. Ex. A ¶ 62; B ¶ 62; 78 Fed. Reg. 39876.

Thus, the burden remains on the Plaintiffs to find an insurer or third party administrator that will agree to provide free access to the abortifacient drugs and

devices that Plaintiffs object to. Ex. A ¶ 52; Ex. B ¶ 59. There is no way to ensure that the cost of administering the abortifacient services would not be passed down to the Plaintiffs through increased premiums or fees. Ex. A ¶ 65; Ex. B ¶ 65.

The Mandate burdens the Plaintiffs' employee recruitment and retention efforts by creating uncertainty as to whether they will be able to offer health benefits beyond 2013. Ex. A ¶ 72-73; Ex. B ¶ 72-73. The Mandate forces the Plaintiffs to choose between, on the one hand, violating their religious beliefs, and, on the other hand, incurring substantial fines and terminating their employee benefits. Ex. A ¶ 74; Ex. B ¶ 74.

The Plaintiffs must begin planning now for the 2014 insurance plan year. Ex. A ¶ 77; Ex. B ¶ 77. The Plaintiffs need immediate relief from the Mandate in order to arrange for and continue providing employee health insurance. Ex. A ¶ 81; Ex. B ¶ 81.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiffs filed an original complaint in this matter on October 9, 2012. Dkt. 1. On December 20, 2012, this Court held a status conference and stayed the case pending the promulgation of new regulations. Dkt. 25. Defendants issued the new regulations on June 28, 2013, 78 Fed. Reg. 39870-01 (published July 2, 2013), and this Court lifted the stay on August 1, 2013. Dkt. 57. Following a status conference on August 2, 2013, this Court ordered *inter alia* that Plaintiffs file their motion for partial summary judgment and preliminary injunction on August 30, 2013. Dkt. 60. On August 6, 2013, Plaintiffs filed their first amended complaint addressing the

new regulations. Dkt. 61. On August 30, 2013, the Court granted permissive intervention to Plaintiff-Intervenor Westminster Theological Seminary. Dkt. 68. Plaintiffs now timely file their motion for partial summary judgment and a preliminary injunction.

STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS OF REVIEW

I. Preliminary Injunction

Plaintiffs seek a preliminary injunction barring enforcement of the Mandate against them during the pendency of proceedings in this Court and any subsequent appeal.

To obtain a preliminary injunction, a plaintiff must establish: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). *See also Blanco v. Select Specialty Hosp. Houston, L.P.*, CIV.A. H-13-1591, 2013 WL 2408189 (S.D. Tex. May 31, 2013).

II. Summary Judgment

Plaintiffs request that summary judgment be entered in their favor on some of their claims brought under RFRA, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause.

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to a material fact exists when, after considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, a court determines that the evidence is such that a reasonable jury could return a verdict for the party opposing the motion. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007) (citations omitted). A court considering a motion for summary judgment must consider all facts and evidence in the light most favorable to the nonmoving party. *Id.* (citing *United Fire & Cas. Co. v. Hixson Bros., Inc.*, 453 F.3d 283, 285 (5th Cir.2006)).

ARGUMENT

I. Plaintiffs are entitled to summary judgment on their RFRA, Free Exercise, Establishment Clause, and Free Speech claims.

The Mandate violates federal constitutional and statutory law in four independent ways.[5] Most obviously, it is a flagrant violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et. seq.*. It also violates the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the U.S. Constitution. Each violation subjects the Mandate to strict scrutiny, a test it cannot possibly survive. Any one violation is sufficient to invalidate the Mandate and entitle the Plaintiffs to summary judgment.

[5] Plaintiffs have raised other claims in addition to these four, but do not currently seek a preliminary injunction or summary judgment on the basis of those other claims.

A. The Mandate violates the Religious Freedom Restoration Act.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (b).

RFRA thus restored strict scrutiny to religious exercise claims. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006); *see also* 42 U.S.C. § 2000bb (b)(1) (RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972))."[6] A plaintiff makes a prima facie case under RFRA by showing the government substantially burdens its sincere religious exercise. *O Centro*, 546 U.S. at 428. The burden then shifts to the government to show that "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).[7]

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[6] Although RFRA is unconstitutional as applied to States, it continues to apply "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). Some states have enacted their own individual RFRAs. The Fifth Circuit has previously applied Texas' RFRA. The analysis for that statute is the same as the federal RFRA. *See, e.g.*, *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009).

[7] These burdens are the same at the preliminary injunction stage as at trial. *O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

1. Plaintiffs' abstention from facilitating access to abortion-causing drugs and devices is sincere religious exercise.

RFRA broadly defines "religious exercise" to "include[ ] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

Plaintiffs have demonstrated their sincere commitment to the Christian faith, and specifically to Christian teachings on the sanctity of life. Ex. A ¶ 4-5, 10-15, 16-20; Ex. B ¶ 4-5, 8-10, 11-15. Plaintiffs cannot, in good conscience, support activities or products they believe to be immoral. Ex. A ¶ 20-26, 16-22. The Mandate requires Plaintiffs to actively participate in a scheme to provide their employees with drugs and devices that risk destroying human life. Their religious beliefs forbid them from participating in that scheme. Under the accommodation, Plaintiffs' self-certification sets in motion a chain of events that results in their employees receiving free abortifacients through the insurance plans that Plaintiffs provide and pay for. 78 Fed. Reg. at 39875-77. It violates Plaintiffs' Christian faith to act as a conduit for these drugs and devices. Ex. A ¶ 20-26; Ex. B ¶ 16-22. Plaintiffs have always sought to avoid facilitating access to abortifacients through their insurance plans, and the Mandate forces them to abandon this practice. Ex. A ¶ 26, 31; Ex. B ¶ 22, 29. Abstaining for religious reasons from facilitating evil easily qualifies as "religious exercise," just as much as refusing to manufacture items that will later be used for the destruction of human life in a war, *see Thomas v. Review Bd.,* 450 U.S. 707 (1981), abstaining from work on certain days, *see Sherbert*, 374 U.S. 398, or

providing alternative education for children, *see Yoder*, 406 U.S. 205. *See also* 42 U.S.C. § 2000bb (b)(1) (incorporating *Sherbert* and *Yoder* in RFRA).

2. The Mandate imposes a substantial burden of enormous fines on Plaintiffs' religious exercise of abstention.

Once the sincerity of the specific religious exercise at issue is determined, the Court must answer the question of whether the burden is substantial. This is an objective test. It does not matter what the belief is that is being violated, what matters is the objectively-measured burden imposed by the government upon the plaintiff.[8] In *Hobby Lobby v. Sebelius*, the *en banc* Tenth Circuit confirmed that the existence of a substantial burden does not turn on whether the government coercion "somehow depends on the independent actions of third parties." *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d ---, No. 12-6294, 2013 WL 3216103, at *17 (10th Cir. June 27, 2013) (*en banc*). In that case, the government argued that the burden on Hobby Lobby to comply with the same Mandate at issue here was too attenuated because it was the employees, not Hobby Lobby itself, that would have access to the problematic drugs and devices. The Tenth Circuit explained that the government's argument mistakenly transformed the objective substantial burden test into a subjective test. The government would have wrongly required a subjective review of the *Hobby Lobby* plaintiffs' belief that delved into "the theological merit of the belief

[8] One way to think about the burden analysis is whether the burden would be considered "substantial" when imposed on *any* activity, religious or not. For example, if the government imposed the burdens here—massive fines—on for-profit corporations engaged in political speech, those burdens would easily be considered "substantial." *Cf. Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 336-37 (2010) (describing unconstitutional restrictions on speech such as "imposing a burden by impounding proceeds on receipts or royalties").

in question." *Id.* Instead, the Tenth Circuit squarely held that the controlling consideration was the *intensity of the coercion* applied by the government to act contrary to those beliefs. *Id.; see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) ("The focus of the inquiry is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression, as measured . . . from the person's perspective, not from the government's.") (quotations omitted).

To explain Plaintiffs' quandary another way, if the accommodation were in furtherance of a crime rather than access to abortifacients, Plaintiffs would be subject to liability for conspiracy and accomplice liability under, for example, 18 U.S.C. § 371 (conspirator liable for "any act to effect the object of the conspiracy") or 21 U.S.C. § 846 (liability for "[a]ny person who attempts or conspires to commit any offense"). Plaintiffs' understanding of moral culpability should be given at least as much deference as that of culpability in federal criminal law. Of course the Court need not agree with Plaintiffs that abortion constitutes taking innocent human life in order to defer to their understanding of moral culpability. But Defendants cannot—without hypocrisy—claim that Plaintiffs' understanding of their own moral complicity is wrong when they frequently use a similar standard in conspiracy and accomplice liability prosecutions.

In the Fifth Circuit, a government action substantially burdens a religious belief "when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some

generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 793 (5th Cir. 2013) (citation omitted). The Mandate easily qualifies as a substantial burden under both prongs of that test. As to the first prong, the Mandate compels Plaintiffs to participate in a scheme that they believe is immoral. Ex. A ¶ 20-26; Ex. B ¶ 16-22. By paying for the insurance and communicating with an outside party through the self-certification, Plaintiffs facilitate the use of emergency contraceptives. *See* Ex. A ¶ 53, 57; Ex. B ¶ 47, 48, 50, 57. This violates their sincere religious belief. Since the Plaintiffs can continue to exercise their faith only by dropping their insurance and facing enormous penalties, 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1132(a), the Mandate most certainly "influences" them "to act in a way that violates [their] religious beliefs." *See Moussazadeh*, 703 F.3d at 793; *see also* Ex. A ¶ 66-73, 82-85; Ex. B ¶ 66-73, 82-84 (discussing the impact of penalties and potential loss of health benefits). As for the second prong, the Mandate forces the Plaintiffs to forgo the "non-trivial benefit," *Moussazadeh*, 703 F.3d at 793, of providing insurance to their employees that does not violate their conscience. Ex. A ¶ 72-73, 82-85; Ex. B ¶ 72-73, 82-84 (discussing the impact that the threat of losing health benefits has on the Universities' ability to hire and retain faculty). The imposition of fines for non-compliant insurance leaves Plaintiffs with a "Hobson's choice" between obeying their conscience and providing health insurance to their employees. *Hobby Lobby*, 2013 WL 3216103, at *21.

3. The Mandate cannot satisfy strict scrutiny.

The Mandate fails strict scrutiny for three separate reasons: (1) the government has neither identified an "interest of the highest order" nor has it acted as if its interests are compelling; (2) the Mandate will not further the government's purported interests; and (3) Defendants have multiple alternative means of pursuing their ends that are less restrictive of Plaintiffs' constitutional and civil rights than the Mandate. Any one of these reasons suffices to defeat Defendants' affirmative defense of strict scrutiny.

a. The government has identified no compelling interest.

Strict scrutiny requires "'the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Merced*, 577 F.3d at 592 (quoting *O Centro*, 546 U.S. at 430-31).

i. Providing Plaintiffs' employees access to the objectionable drugs and devices is not an "interest of the highest order."

In other lawsuits, the government has identified its compelling interests in imposing the Mandate as "public health" and "gender equality." *Hobby Lobby*, 2013 WL 3216103 at *23. Although these are important interests in the abstract, they do not meet the *O Centro* test because they are "'broadly formulated interests justifying the general applicability of government mandates.'" *Id.* (quoting *O Centro*, 546 U.S. at 431). *Cf. Betenbaugh*, 611 F.3d at 268 ("invocation of general interests, standing alone, is not enough"). The government has thus far in the litigation failed to bring forward information explaining why it has a compelling interest in

specifically ensuring insurance coverage of the mandated abortion-causing drugs and devices—Plan B, Ella, and certain IUDs—to ETBU and HBU employees, which is what it must do to meet the "to the person" standard articulated in *O Centro*. Since it is the government's burden to do so, the Mandate fails strict scrutiny as a threshold matter.

ii. Defendants' purported interest is not compelling because the government has issued numerous exemptions and because the objectionable drugs and devices are already widely available.

A purported government interest also will not qualify as compelling unless the government has consistently demonstrated that it has a critical need to pursue the interest. "'Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.'" *Merced*, 577 U.S. at 594 (quoting *Lukumi*, 508 U.S. at 546-47).

Here, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103 at *23. "[T]his exempted population includes those working for private employers with grandfathered plans, [and] for employers with fewer than fifty employees." *Id.* In addition, some religious organizations are exempt from the Mandate altogether. *See* 45 C.F.R. § 147.131 (religious exemptions); 26 U.S.C. § 5000A (d)(2)(A) & (B) (exempting "health care sharing ministr[ies]"). These massive exemptions cover upwards of 120 million

people.[9] That means that the Mandate fails strict scrutiny, because "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Hobby Lobby*, 2013 WL 3216103 at *23 (citations omitted).

b. The Mandate will not further the government's purported interest.

The Mandate also does not further Defendants' purported interest in expanding the availability of contraceptives (including abortifacient contraceptives) to citizens. For a strict scrutiny affirmative defense to be successful, there must be a causal link between the end in view and the means applied "to the person." *O Centro*, 546 U.S. at 430. In *O Centro*, for example, the Court recognized that in applying strict scrutiny courts "must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would *flow from* recognizing [the claimed exemption]." *Id.* at 431 (quoting *Yoder*, 406 U.S. at 221) (emphasis added). Moreover, the government had "to show with more particularity *how* its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*." *O Centro*, 546 U.S. at 431 (quoting *Yoder*, 406 U.S. at 236) (first emphasis added). Indeed, the government "cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests.'" *Betenbaugh*, 611 F.3d at 268 (quoting *Merced*, 577 F.3d at 592). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (in

[9] The government expects 87 million people to be on grandfathered plans. See Ex. C-7 at 4. And "small employers," employing nearly 34 million people, need not offer health insurance at all and can therefore avoid the Mandate. Ex. C-5 at 2.

applying *intermediate* scrutiny, courts must not conflate "two distinct concepts . . . whether there is a substantial government interest and whether the regulation furthers that interest").

Forcing ETBU and HBU to terminate their employee health insurance coverage—or face the threat of having to cease their operations altogether because they cannot sustain the crippling fines imposed—will not advance the government's claimed purpose of expanding contraceptive insurance coverage. *See* Ex. A ¶ 70; Ex. B ¶ 70. Indeed, by forcing Plaintiffs to drop coverage of their employees, *fewer* people will have insurance coverage for contraceptives, not more.

And it is no answer for the government to speculate that employees might obtain insurance on the exchanges it has yet to set up. Aside from the fact that the eventual functioning of an exchange in Texas is at this point at least an open question, there is little reason to think that *every* person covered under ETBU's and HBU's plans would seek coverage on the exchange rather than paying the relatively small penalty under the individual mandate. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595-96 (2012) ("for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more" so "[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance"). Thus, the means (the Mandate) chosen by the government to advance its purported end (expanding contraceptive coverage) does not just fail to advance that goal, but actually tends to defeat it.

c. Defendants have numerous alternative less restrictive means of furthering their purported interest.

Even were one to assume that Defendants had identified a compelling interest and that the Mandate advanced that interest, the Mandate still fails strict scrutiny because there are other readily-available means of expanding contraception coverage that are far less restrictive of Plaintiffs' constitutional and RFRA rights. *See, e.g., Merced*, 577 F.3d at 595 ("'If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'") (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Moreover, the government must put forward "specific evidence" explaining why there is no less restrictive means of applying it "to the person"—that is, specifically to ETBU and HBU. *Betenbaugh*, 611 F.3d at 268; *O Centro*, 546 U.S. at 430.

In nationwide litigation over the Mandate, the government has failed to "advance[ ] an argument that the contraception mandate is the least restrictive means of furthering" its general interest in ensuring contraceptive access. *Korte v. Sebelius*, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2012) (emphasis added); *accord Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception").

Indeed, Defendants have a host of readily available alternatives for expanding contraceptive access that would avoid any need to conscript religious objectors. Defendants could:

- Provide a tax credit to employees who purchase emergency contraceptives with their own funds.
- Directly provide the drugs at issue, or directly provide insurance coverage for them through the state and federal health exchanges.
- Empower willing actors—for instance, physicians, pharmaceutical companies, or various interest groups—to deliver the drugs and sponsor education about them.
- Use their own resources to inform the public that these drugs are available in a wide array of publicly-funded venues.

This array of alternatives is real. Plan B is available over the counter to anyone, from a leading online pharmacy for $50, and even in many college vending machines.[10] Ella can be purchased online for $40, with no need for a physician's visit.[11] Moreover, HHS planned to spend over $300 million in 2012 to provide

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[10] Teva Women's Health, Find Plan B One-Step in the Aisle and Pick It Up Yourself, http://planbonestep.com/pharmacylocator.aspx (last visited Aug. 30, 2013) ("just take it off the shelf, and pay for it at the cashier"); Drugstore.com, Plan B One Step Emergency Contraceptive, http://www.drugstore.com/plan-b-one-step-emergency-contraceptive/qxp387630?catid=183040 (last visited Aug. 30, 2013) (advertising Plan B for $49.99 with free shipping); James Eng, FDA OK with college's Plan B contraceptive vending machine, MSN News, Jan. 29, 2013, *available at* http://news.msn.com/us/fda-ok-with-colleges-plan-b-contraceptive-vending-machine?stay=1 (last visited Aug. 29, 2013) (reporting that "Plan B is available widely in colleges and universities throughout . . . the nation," and that a Pennsylvania college that dispenses Plan B from a vending machine for $25 is "far from the first to do this").

[11] KwikMed, ella Prescribed Online Legally, http://ella-kwikmed.com/ (last visited Aug. 29, 2013) (physicians licensed to prescribe online offering free medical consultation and free next day shipping for Ella); Watson Pharmacy, Understanding How Your Patients Can Get ella, http://www.ella-rx.com/wheredoigetella.asp (last visited Aug. 29, 2013) (noting "ella is also available at Planned Parenthood clinics").

contraceptives directly through Title X funding.[12] And the federal government, in partnership with state governments, has constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion for family planning in FY 2010.
- $228 million in FY 2010 for Title X program.
- $294 million in state spending for family planning in FY 2010.[13]

The government can employ such pre-existing sources to increase contraceptive access. *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting existence of "analogous programs" and concluding that government has "failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women").

B. The Mandate violates the Free Exercise Clause.

Laws which are not neutral or generally applicable face strict scrutiny under the Free Exercise Clause. *Lukumi*, 508 U.S. at 520. The Mandate is neither generally applicable nor neutral and cannot satisfy strict scrutiny.

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[12] *See* HHS Grant Announcement, 2012 Family Planning Services FOA, *available at* https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=12978 (click on Grant Announcement – View PDF Version) (last visited Aug. 29, 2013) (announcing that "[t]he President's Budget for . . . (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

[13] Guttmacher Inst., *Facts on Publicly Funded Contraceptive Services in the United States* (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Aug. 29, 2013) (citations omitted).

1. The Mandate is not generally applicable.

A regulation fails general applicability when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) (*FOP*). The animal slaughter ordinances in *Lukumi*, for example, ostensibly protected public health and prevented animal cruelty, but "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests." 508 U.S. at 543. Because the ordinances exempted many types of animal killing—such as hunting, fishing, pest eradication, and euthanasia—the ordinances were not generally applicable. *Id.* at 543-44.

To be sure, not every exemption dooms a regulation. The problem arises when government allows secular exemptions that undermine a regulation's interests but disallows religious exemptions, thus making a "value judgment in favor of secular motivations, but not religious motivations." *FOP,* 170 F.3d at 366. In *FOP*, a regulation prohibiting police officers from growing beards allowed one exemption for undercover officers and another for medical reasons. *Id.* Two Muslim officers sued because the regulation forbade beards for religious reasons. The Third Circuit found that, whereas the undercover-officer exemption "d[id] not undermine the Department's interest in uniformity [of appearance]," the medical exemption did. *Id.* The court therefore found the policy failed general applicability.

Here, the Mandate goes far beyond the exemption scheme in *FOP*. The Mandate allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes. Most notably, over 87 million Americans are covered under

"grandfathered" plans that are indefinitely excused, not only from complying with the Mandate, but from covering *any* of the mandated preventive services. Additionally, 34 million more Americans are employed by small businesses which may avoid the Mandate. Ex. C-5 at 2; *see* 26 U.S.C. § 4980H(c)(2). While these secular exemptions severely undermine the Mandate's interest in increasing insurance coverage for the whole range of women's preventive services, HBU and ETBU get no exemption even from the narrow slice of the Mandate to which they object for religious reasons. This is exactly the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *FOP*, 170 F.3d at 366.

2. The Mandate is not neutral.

In addition to failing the requirement of general applicability, the Mandate also fails the requirement of neutrality for three reasons: (1) it produces differential treatment among religions; (2) it accomplishes a "religious gerrymander"; and (3) it favors secular over religious values.

a. The Mandate produces differential treatment among religions.

One way to prove that a law is not neutral is to show that it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. In *Lukumi*, for example, the Court said that prohibiting killing animals for one religious purpose (sacrifice) while exempting other religious killings (kosher slaughter) created "differential treatment of two religions," which could constitute "an independent constitutional violation." *Id.* Similarly, in *Larson v. Valente*, 456 U.S. 228, 246 n.23

(1982), the Court struck down registration and reporting requirements that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency."[14] *Cf. O Centro*, 546 U.S. at 432-37 (requiring exemption under RFRA for one religion where exemption was granted for another).

Here, the Mandate establishes three tiers of religious objectors: favored "religious employers" (who are exempt), less-favored non-profit religious objectors (who are forced to facilitate access to abortion-causing drugs), and disfavored for-profit religious objectors (who are forced to facilitate and pay for access). *See* 78 Fed. Reg. at 39874-75; *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

The government cannot rank in different tiers the rights of people with identical religious objections. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.") (quotations omitted); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).

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[14] Although *Larson* was decided under the Establishment Clause, 456 U.S. at 230, it is significant for interpreting the neutrality requirement of both Religion Clauses. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) ("[W]hile the Establishment Clause frames much of our [religious discrimination] inquiry, the requirements of the Free Exercise Clause . . . proceed along similar lines."). For further discussion of *Larson* under the Establishment Clause, see *infra* Argument I.C.

b. The Mandate accomplishes a religious gerrymander.

Another way to prove that a law is not neutral is to show that "the effect of [the] law" is to accomplish a "religious gerrymander." *Lukumi*, 508 U.S. at 535. In *Lukumi*, the Court found that a "pattern of exemptions," *id.* at 537, was impermissibly used to narrow the law's prohibitions specifically "to target petitioners and their religious practices." *Id.* at 535. A similar pattern is manifest here.

Defendants have repeatedly recognized the sincerity of religious organizations' objections to facilitating access to abortion-causing drugs and devices. *See, e.g.*, January 20, 2012 Statement of Defendant Secretary Sebelius, Ex. C-3 (recognizing the "important concerns some have raised about religious liberty" and the need to "respect[ ] religious freedom"); *see also Hobby Lobby*, 2013 WL 3216103, at *20 (noting the government did not dispute religious sincerity of objections). Nevertheless, the "religious employers" exemption protects only institutional churches, their "integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39871. Yet other religious organizations—like HBU and ETBU—are excluded from the exemption, even though they share the same religious objections. On its face, the exemption is thus narrowed to specifically target all religious organizations except institutional churches.

This facial evidence of targeting is bolstered in that the government's proffered justification for discriminating lacks legitimacy. Defendants claim that objecting

"[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. But the same can be said for HBU and ETBU. Both limit employment to persons "who have a personal relationship with Christ, who are familiar with truth as revealed in the Bible, who live out this truth in the presence of others, [and] who can create an environment where Christ is lived out in the life of the individual." Ex. A ¶ 13 (ETBU); *see also* Ex. B ¶ 8 (HBU employees "must believe in the divine inspiration of the Bible, . . . that man was directly created by God, the virgin birth of Jesus Christ" and be willing "express Christ's Lordship as a function of [HBU's] academic mission"); *id.* ¶ 14 (HBU faculty are "expected to affirm and teach that human life exists from conception to natural death, that the dignity of life is a gift from God, and that as a result abortion, except in cases where it is necessary to save the physical life of the mother, is sin"). The inconsistency in Defendants' justifications underscores the Mandate's targeting effect. *See Mayfield v. Texas Dep't of Criminal Justice*, 529 F.3d 599, 609 (5th Cir. 2008) (neutrality requires that government policy be "actually based on the justifications it purports, and not something more nefarious").

c. The Mandate favors secular reasons for noncompliance over religious reasons.

Finally, the Mandate also fails neutrality by honoring certain secular reasons for failure to comply, while rejecting the University's religious reasons. *See supra*

Argument I.B.1 (cataloguing secular reasons that many employers may avoid Mandate). The net effect is that policies covering tens of millions of Americans are exempt for secular reasons, while HBU and ETBU must drop their insurance and pay fines for their religious inability to comply with the Mandate. *See Lukumi*, 508 U.S. at 535 (noting "the effect of a law in its real operation is strong evidence of its object"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

* * *

Because the Mandate cannot qualify as a neutral or generally applicable law, Defendants must satisfy strict scrutiny. They cannot do so. *See supra* Argument I.A.3.

C. The Mandate violates the Establishment Clause

The Mandate's "explicit and deliberate distinctions between different religious organizations" also violate the Establishment Clause. *See Larson*, 456 U.S. at 247 n.23; *see Croft v. Perry*, 624 F.3d 157, 165-66 (5th Cir. 2010) (quoting *Larson*) (a denominational preference would contravene the clearest command of the Establishment Clause"). The government exempts favored religious organizations only if they are an institutional church or have structural, doctrinal, and financial affiliation—as defined by the government—with an institutional church. By structuring the exemption in this way, the Mandate engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1257 (McConnell,

J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). This is forbidden by the Establishment Clause.

Larson invalidated a Minnesota law that imposed anti-fraud disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. The law thus exempted established, self-supported churches, while targeting churches that relied on outside donations. *Id.* at 247 n.23; *see also Weaver*, 534 F.3d at 1259 (explaining that the law in *Larson* "discriminated against religions . . . that depend heavily on soliciting donations from the general public"). This was an "explicit and deliberate distinction[] between different religious organizations," one that failed strict scrutiny and violated the Establishment Clause. *Id.* at 247 n.23, 255.

Like the exemption struck down by *Larson*, the Mandate's "religious employer" exemption impermissibly distinguishes religious organizations based on internal religious characteristics. An organization is exempt if it qualifies as an "integrated auxiliary" of a church—meaning that it has a particular church "affiliation" and is "internally supported."[15] As detailed in Treasury Regulations, these requirements measure the quality of an organization's ties to a church as well as its funding

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[15] *See* 45 C.F.R. § 147.131(a) (exempting as "religious employers" churches, their "integrated auxiliaries," and religious orders) (referring to 26 U.S.C. §§ 6033(a)(3)(A)(i) & (iii)); 26 C.F.R. § 1.6003-2(h)(1) (defining a non-profit organization as an exempt "integrated auxiliary" if "[a]ffiliated" with a church and "[i]nternally supported")). The Mandate co-opts tax code criteria that relieve certain tax exempt entities from filing an "annual information return," or "Form 990." *See* 26 C.F.R. § 1.6033-2(a)(1).

sources. *See* 26 C.F.R. § 1.6033-2(h)(2) and (3) ("affiliation"); *id.* § 1.6033-2(h)(4) ("internal support"). So, an organization is exempt depending on, for instance:

(1) whether it is "operated, supervised, or controlled by or in connection with . . . a church," *id.* § 1.6033-2(h)(2)(iii);

(2) whether its "enabling instrument . . . affirm[s] that [it] shares common religious doctrines, principles, disciplines, or practices with a church," *id.* § 1.6033-2(h)(3)(i);

(3) whether "[a] church . . . has the authority to appoint or remove . . . [its] officers or directors," *id.* § 1.6033-2(h)(3)(ii);

(4) whether, "[i]n the event of dissolution, [its] assets are required to be distributed to a church," *id.* § 1.6033-2(h)(3)(vi); and,

(5) whether it "[n]ormally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses," *id.* § 1.6033-2(4)(ii).

If it fails to meet these requirements, a religious organization cannot qualify for an exemption and must therefore participate in the government's scheme to facilitate employee access to free contraception, sterilization, and abortion-causing drugs and devices.

As previously noted, the government has candidly explained the assumptions that led it to structure the Mandate exemption this way:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). In other words, whether or not a religious organization is exempt turns on the government's estimate of whether its faith does, or does not, line up with the faith of its employees. This distinction is just as suspect

as the one invalidated in *Larson*. There, the Minnesota law's premise was that, if a church is not predominantly self-supporting, it poses a fraud risk and needs regulation. 456 U.S. at 249-51. Here, the Mandate's premise is that, if a religious organization is not closely affiliated with (and financially tied to) a church, its employees are "more likely" to disagree with it about the morality of contraception, and its insurance should therefore be made to facilitate access to the mandated contraceptive services. *Cf.* 78 Fed. Reg. at 39874 (estimating that the employees of "[h]ouses of worship and their integrated auxiliaries" are "less likely than other people to use contraceptive services even if such services were covered").

As explained by Judge McConnell in *Weaver*, the leading circuit case applying *Larson*, distinguishing religious organizations based on internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*." 534 F.3d at 1259. *Weaver* invalidated a Colorado state scholarship program's exclusion of "*pervasively* sectarian" schools, but not mere "sectarian" schools, as "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Id.* Judge McConnell's description of the program's constitutional infirmity applies equally well to the Mandate, which separates exempt from non-exempt organizations based on their "degree of religiosity" (i.e., their doctrinal, structural, and financial connection to an institutional church) and "the extent to which that

religiosity affects [their] operations" (i.e., whether employees are more or less likely to share an organization's beliefs about contraception). *Id.*[16]

The Mandate's impermissible distinction among religious organizations triggers strict scrutiny regardless of whether it "substantially burdens" Plaintiffs' religious exercise under the Free Exercise Clause or RFRA.[17] *See Larson*, 456 U.S. at 253-54 (explaining that the Establishment Clause is offended by "the *selective* legislative imposition of burdens and advantages upon particular denominations," whether or not those "burdens . . . would be intrinsically impermissible if they were imposed evenhandedly") (emphasis in original); *Weaver*, 534 F.3d at 1257 (observing that "neutral treatment of religions [is] '[t]he clearest command of the Establishment Clause'") (quoting *Larson*). And, for the reasons already discussed, the Mandate cannot be justified under strict scrutiny. *See supra* Argument I.A.3.

D. The Mandate violates the Free Speech Clause.

For similar reasons, the Mandate violates ETBU's and HBU's free speech rights under the First Amendment. The First Amendment protects Plaintiffs' rights to be free both from government efforts to compel their speech, and government efforts to compel their silence. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S.

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[16] The Mandate also violates the Establishment Clause for the reasons set forth *supra* in Arguments II.B.2(b) and (c)—it creates a religious gerrymander targeting the sincere religious beliefs of organizations that are not institutional churches and favors secular reasons for non-compliance over religious reasons. In both instances, the government is establishing a preference for institutional churches that are focused on inculcating faith over organizations that pursue their religious missions in other ways.

[17] Most Establishment Clause violations are not subject to an affirmative defense of strict scrutiny, but *Larson* claims are. *See Weaver*, 534 F.3d at 1266.

781, 796-97 (1988) ("[T]he First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.") (emphasis added); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citing *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The Mandate violates the First Amendment in both respects.

First, the Mandate's proposed accommodation purports to require ETBU and HBU to make statements that will trigger payments for the use of abortion-inducing drugs and devices. Ex. A ¶ 47, 54-56; Ex. B ¶ 45-49, 54-56. In particular, Plaintiffs would have to make certifications about their religious objections to their insurers and/or third party administrators "in a form and manner specified by the Secretary." 29 C.F.R. § 2590.715-2713A (a)(4), (b)(1)(ii), (c)(1). In HBU's case, it may have to ask another Baptist organization to violate its *own* conscience, creating an additional moral dilemma. Ex. B ¶ 47. Making these statements will trigger payments for the use of abortion-inducing drugs and devices. 29 C.F.R. § 2590.715-2713A (b)(2), (c)(2). As set forth above, ETBU and HBU cannot engage in the speech required by the Mandate because they are forbidden by their religion from doing so. Ex. A ¶ 53, 57; Ex. B ¶ 50, 57.

Second, the Mandate expressly prohibits ETBU and HBU from engaging in speech with a particular content and viewpoint: they are barred by federal law from talking to their third party administrators and encouraging them not to provide

abortion-inducing drugs. 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"). Ex. A ¶ 48.

None of this is remotely permissible under the First Amendment. The government cannot force ETBU and HBU to make statements about their religious beliefs to third parties. Nor can it forbid them from trying to convince others to exercise their own lawful right to choose not to pay for abortion-inducing drugs. Where, as here, the government has compelled speech, dictated its content, and forbade speakers from conveying particular messages, strict scrutiny applies. *See, e.g., Turner Broad. Sys. Inc. v. FCC* ("*Turner I*"), 512 U.S. 624, 642 (1994) (stating that "laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content").

The mechanism of the accommodation also triggers strict scrutiny because "[l]aws singling out a small number of speakers for onerous treatment are inherently suspect." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012). The number of speakers here—"eligible [religious] organizations"—is quite small, especially when taken in the context of the sheer number of organizations subject to the Mandate. Thus this targeted speech regulation triggers strict scrutiny.

The Mandate fails strict scrutiny for all the reasons set forth in Section I.A.

Nor can the government justify controlling ETBU's and HBU's speech as the price of obtaining the alleged benefit of the accommodation—even where the government is *paying* speakers, it cannot force them speak the government's preferred message. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy").

Finally, ETBU and HBU are not even able to avoid these coercive requirements about what they must say and what they must not say by foregoing the accommodation. That course of action would leave them subject to the original Mandate, meaning they would be forced by Defendants to pay directly for abortion-inducing drugs and devices, and for "patient education and counseling for all women with reproductive capacity" about these drugs and devices.[18] For the reasons set forth above, such a course would violate Plaintiffs' religious liberty. And forcing them to pay for speech counseling and educating people about how to use abortion-inducing drugs would separately violate ETBU's and HBU's speech rights. *See, e.g., Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 234-35 (1977) (finding that forced contributions for union political speech violate the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *United States* v. *United Foods Inc.*, 533 U.S. 405, 411 (2001) (finding that forced

[18] Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), Ex. C-1..

contributions for advertising related to unbranded mushrooms violates First Amendment).

For these reasons, the Mandate and proposed accommodation violate the Free Speech Clause of the First Amendment.

II. This Court should grant a preliminary injunction.

As previously discussed at the August 2 conference with the Court, Plaintiffs need speedy interim relief, at the latest before January 1, 2014, which marks the beginning of their respective plan years. Ex. A ¶¶ 66, 77; Ex. B ¶¶ 66, 77. Therefore, regardless of how the Court rules on the motion for partial summary judgment, Plaintiffs request the entry of a preliminary injunction to last during the pendency of litigation in this Court and until the resolution of any subsequent appeal. For the reasons stated below, Plaintiffs easily meet all four preliminary injunction factors. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (citation omitted).

A. Plaintiffs have a substantial likelihood of success on the merits.

For the same reasons set forth in Section I above, the Court should also find that Plaintiffs' burden has been met by demonstrating a substantial likelihood of success on the merits. Indeed, showing a substantial likelihood of success on the merits is by definition a lower standard than the standard governing whether the Court may grant summary judgment on the same claim. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) ("A plaintiff is not required to prove its entitlement to summary judgment in order to establish 'a substantial likelihood of success on the merits' for preliminary injunction purposes.")

B. Plaintiffs face a substantial threat of irreparable injury if the injunction is not issued.

It is settled law that a potential violation of Plaintiffs' rights under the First Amendment and RFRA threatens irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012), *appeal dismissed*, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (citation omitted). *See also Newland*, 881 F. Supp. 2d at 1294-95 (irreparable harm established under RFRA claim against Mandate); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 997-98 (E.D. Mich. 2012) (same). Here, coercing Plaintiffs to facilitate access to abortion-causing drugs in direct violation of their faith is the epitome of irreparable injury. Once they have been forced to violate their conscience by providing access to objectionable drugs and services, future remedies cannot change that violation.

The impending enforcement of the Mandate is also causing significant disruption to Plaintiffs' hiring and human-resources planning. Ex. A ¶¶ 77-85; Ex. B ¶¶ 72-86. Health plans do not take shape overnight, but instead require a number of analyses, negotiations, and decisions before Plaintiffs can offer a health benefits package to their employees. Ex. A ¶ 78; Ex. B ¶ 78. Employers like ETBU that are self-insured must negotiate with third-party administrators, and employers like HBU that are

insured under church health plans must negotiate with their church health plan provider. Ex. A ¶ 78; Ex. B ¶ 78. Under normal circumstances, Plaintiffs must begin the process of determining their health care package for a plan year several months before the plan year begins. Ex. A ¶ 79; Ex. B ¶ 79. The multiple levels of uncertainty surrounding the Mandate make this already lengthy process even more complex. In addition, if Plaintiffs choose to follow their religious conscience instead of complying with the Mandate, they will be subject to massive fines and penalties. Ex. A ¶¶ 66-70; Ex. B ¶¶ 66-70. Plaintiffs require time to budget for such additional expenses. Such jarring uncertainties adversely affect Plaintiffs' ability to hire and retain employees, and constitute irreparable injury difficult to evaluate in terms of money damages. Ex. A ¶¶ 72-73, 82-85; Ex. B ¶¶ 72-73, 82-84.

C. The threatened injury to Plaintiffs far outweighs any harm that might result.

There is no real dispute that, absent an injunction, Plaintiffs face grievous harm—namely, government compulsion to violate their religious beliefs or face crippling fines of up to $8 million and nearly $13 million per year. Ex. A ¶ 69; Ex. B ¶ 69. Nor has anyone questioned the reality and severity of the fines Plaintiffs face for exercising those sincerely held religious beliefs. In contrast, granting the injunction will merely prevent the government from enforcing one element of the mandate (the requirement to cover emergency contraceptives) against two employers during the pendency of this appeal.

In other words, an injunction will merely preserve the status quo. The Government has never mandated contraception before, and there is no urgent need

to enforce the Mandate immediately against Plaintiffs before its legality can be adjudicated. When the government has "alternative, constitutional ways of regulating . . . to achieve its goals," as it does here, compared to the denial of "First Amendment freedoms," the government cannot show that its interest outweighs constitutional freedoms. *See RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866, 875 (S.D. Tex. 2007). Both the ubiquity of contraception access and government subsidization thereof, and the fact that the government has exempted "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, make it impossible for the Government to claim that it will be harmed by a temporary delay in enforcement against Plaintiffs. Moreover, while a "preliminary injunction would forestall the government's ability to extend all twenty approved contraceptives" to Plaintiffs' employees, Plaintiffs "will continue to provide sixteen of the twenty contraceptive methods, so the government's interest is largely realized while coexisting with" Plaintiffs' "religious objections." *Hobby Lobby*, 2013 WL 3216103, at *26.

Any claim of harm by the Government is further undermined by the fact that it consented to or did not oppose preliminary injunctive relief in numerous other cases challenging the Mandate. *See, e.g.*, Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); Order, *Hall v. Sebelius*, No. 13-cv-00295 (D. Minn. Apr. 2, 2013) (Dkt. 11). The Government "cannot claim irreparable harm in this case while acquiescing to

preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). "If the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith Elec. Co., Inc. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013). In short, especially when balanced against the serious irreparable injury being inflicted on Plaintiffs, any harm the Defendants might claim from a preliminary injunction is *de minimis*.

D. An injunction will not disserve the public interest.

Finally, issuing a preliminary injunction will not disserve the public interest. In this matter, there are two statutory schemes in potential conflict with each other. While the ACA requires Plaintiffs to purchase abortion-causing drugs for any interested employees, RFRA would protect them in exercising their religion by not purchasing those same drugs. The public interest in enforcing long-standing First Amendment and religious freedom protections certainly outweighs the interest in immediate enforcement of a new law that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted." *Hobby Lobby Stores, Inc. et al. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. Nov. 19, 2012), *rev'd on other grounds*, 2013 WL 3216103 (10th Cir. June 27, 2013); *see also Newland*, 881 F. Supp. 2d at 1295 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010).

Congress decided that RFRA trumps in this battle between statutes when it enacted RFRA; the statute reads: "[f]ederal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). "Congress thus obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a constitutional right." *Hobby Lobby*, 2013 WL 3216103, at *26. Here, "Congress did not exempt the ACA from RFRA." *Id*. And of course the protection of Plaintiffs' *constitutional* rights is also very much in the public interest.

Furthermore, any government interest in uniform application of the mandate is again "undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans." *Newland*, 881 F. Supp. 2d at 1295.

In sum, all of the factors weigh heavily in favor of granting a preliminary injunction to stay application of the Mandate and avoiding grave harm to Plaintiffs' consciences and First Amendment liberties.

CONCLUSION

Plaintiffs respectfully request that the Court grant them summary judgment on their RFRA, Free Exercise, Establishment Clause, and Free Speech claims, and issue a preliminary injunction relieving them from the Mandate during the pendency of this litigation, including any appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2013, the foregoing memorandum was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ *Eric C. Rassbach*
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