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

EAST TEXAS BAPTIST UNIVERSITY, and
HOUSTON BAPTIST UNIVERSITY,

Plaintiffs,

and

WESTMINSTER THEOLOGICAL SEMINARY,

Plaintiff-Intervenor,

v.

KATHLEEN SEBELIUS, *et al.*

Defendants.

Civil No. 12-3009

Plaintiff Universities' Combined Opposition to Defendants' Motion to Dismiss or for Summary Judgment and Reply in Support of Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about complicity. The Universities say that acting as a crucial conduit in the government's mechanism for distributing abortifacients makes them complicit in abortion in a way condemned by their Baptist religious beliefs. The Universities do not object to non-abortifacient contraceptives and have in fact chosen to cover those for many years. Nor do the Universities seek to stop their employees from obtaining abortifacients on their own. What the Universities do seek is to be left out of the process.

The government's main response is to challenge the Universities' moral conclusions, arguing that there can be no substantial burden on the Universities' religious exercise because they are, in the government's view, required to do "virtually nothing." But this is to place the government in the role of arbiter of scriptural interpretation—a role it may not possess. It is not for the government to decide whether the Universities are morally complicit by acting as government-appointed gatekeepers to abortifacients, any more than it is the government's role to decide who a church's ministers should be, who the members of a Hindu temple should be, whether food qualifies as kosher or halal, or whether making tank turrets makes one morally complicit in war.

At bottom, the government's response fundamentally confuses the government-imposed *burden* with the Universities' religious *exercise*. The burden is the penalty imposed by the government for failing to act in accordance with its regulations. That burden can be measured objectively, and here it constitutes, among other

things, massive fines. The Universities' religious exercise is ensuring that they are not—by their own lights—complicit in immoral activity when they attempt to comply with government regulations. The government's claim that the connection is too attenuated is beside the point, because it is a moral assessment, not an objective one.

Ironically, at the same time that the government says that the "accommodation" mechanism requires the Universities to do "virtually nothing" it claims compelling interests in forcing them to do something. This is unconvincing, since the government only recently discovered its supposedly compelling interest of providing all American employees with abortifacients, and even now pursues this interest very unevenly. Moreover, the government has a number of less religion-restrictive alternatives open to it that it has chosen not to utilize in pursuing its interests. The government does not come close to meeting the high standard for RFRA strict scrutiny set in *O Centro*, nor that case's requirement that compelling interests under RFRA be measured "to the person." The government's strict scrutiny affirmative defense therefore fails.

The government's response to the Universities' other summary judgment claims are equally unavailing:

The Mandate is still not generally applicable to every American, nor is it neutral in its application, rendering it infirm under the Free Exercise Clause.

The Mandate discriminates among religions under *Larson v. Valente*.

And the Mandate violates freedom of speech by both compelling speech that the Universities do not want to say and compelling the Universities to silence a message that they want to share.

The government's request for dismissal or summary judgment on the Universities' nine other claims must fail because there has been no discovery and thus, summary judgment would be premature. However, as detailed below, each of the Defendants' somewhat terse and haphazard summary judgment arguments also fails on the merits.

* * *

The reality underlying this case is that Defendants are stuck with the limited means Congress chose (employer-based coverage) to promote the Defendant agencies' end (encouraging use of abortifacient drugs). But neither that means nor that end can satisfy strict scrutiny under RFRA or the Constitution. Defendants' most recent fig leaf—the "accommodation"—cannot change that underlying reality because Defendants are still using the Universities and their insurance programs to achieve their regulatory goal and the Universities are still morally complicit. The Court should therefore reject Defendants' arguments and grant summary judgment and injunctive relief to the Universities.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiffs East Texas Baptist University and Houston Baptist University ("the Universities") incorporate by reference the statement of facts in their original memorandum, Dkt. 70 ("Mem.") at 13-30, and supplement it here.

HBU's health benefits plan ("Plan") is provided through GuideStone Financial Resources of the Southern Baptist Convention. ("GuideStone"). Ex. D ¶ 2, Dkt. 70-2 ("Ex. B") at ¶ 25. GuideStone is not an insurer, but a not-for-profit church benefits board, and it operates a self-funded, multiple employer health plan. Ex. D ¶¶ 3, 6; Ex. B ¶ 27. GuideStone's Plan operates as a single self-funded health plan with different health benefit programs available for its participating organizations. Ex. D. ¶ 8. HBU is a "plan participant" in GuideStone's Plan. *Id.* The terms of the GuideStone Plan and its various health benefit programs are set by GuideStone, and the Plan itself is funded by both GuideStone and plan participants like HBU. Ex. D ¶ 9. GuideStone has contracted with Highmark Blue Cross Blue Shield ("Highmark") to administer some of the health benefit programs offered by its Plan, but HBU does not have any role in contracting with Highmark. Ex. D ¶ 10. HBU makes an average yearly payment of $1.5 million to GuideStone in order to participate in GuideStone's Plan. Ex. D ¶¶ 11-12.

SUPPLEMENTAL STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

ETBU and HBU incorporate by reference their statement of the nature and stage of the proceeding in their original memorandum, Mem. 30-31, and supplement it here.

On August 30, 2013, pursuant to this Court's order, Dkt. 60, Plaintiffs East Texas Baptist University and Houston Baptist University ("the Universities") filed a motion for partial summary judgment and preliminary injunction. Dkt. 69. Plaintiffs requested summary judgment on Counts I, II, III, IV, V, VII and IX of their first amended complaint, which included claims based on RFRA, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. On September 20, 2013, Defendants responded with a motion to dismiss or, in the alternative, for summary judgment on all sixteen counts of Plaintiffs' amended complaint. Dkt. 78. On October 1, the Defendants filed a motion to stay the case pending appropriation of funding for the Department of Justice. Dkt. 86. This Court granted the stay and ordered that all subsequent filing deadlines be tolled based on the number of days the stay remained in place. Dkt. 89. On October 17, 2013, the stay was automatically lifted when the government shutdown ended. The Universities now timely file their combined reply in support of their motion for a preliminary injunction and partial summary judgment on some of their claims and opposition to Defendants' motion to dismiss or for summary judgment on all counts of the amended complaint.

STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS OF REVIEW

I. Preliminary Injunction

The Universities 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) (citation omitted).

II. Summary Judgment

The Universities 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.*

III. Motion to Dismiss

On a motion to dismiss, the court accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (citations omitted).

ARGUMENT

I. Defendants have not created a material fact issue on the Universities' RFRA, Free Exercise, discrimination-among-religions, and compelled speech claims (Counts I, II, III, IV, V, VII and IX).

A. The Mandate violates RFRA.

In their opening brief, the Universities met their summary judgment burden under RFRA with respect to the substantial burdens imposed by Defendants on the Universities' sincere religious exercise. In its response, the government fails to create a material fact issue either with respect to the Universities' case or the government's affirmative defense of strict scrutiny.

1. The Mandate substantially burdens the Universities' religious exercise.

As the Universities explained in their opening memorandum, the Universities' religious exercise at issue in this case is their compliance with their Baptist faith's prohibition on complicity in abortion, specifically by facilitating the obtaining of abortifacients. Mem. 25.[1] The Universities demonstrated in their opening brief that this exercise is sincere and religious. Mem. 25-26. They also demonstrated that the objective burdens the government will impose on them for engaging in this exercise are massive fines and a prohibition on providing health benefits to their employees. Mem. 28. And the Universities further demonstrated that these burdens are objectively substantial. Mem. 27-28. Plaintiffs have thus been both "(1) influence[d] . . . to act in a way that violates [their] religious beliefs" and "(2) forced . . . to choose

[1] Page citations in this memorandum to docketed briefs from this case refer to the Plaintiffs' and Defendants' page numbers at the bottom of each page, not to the ECF numbers.

between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following [their] religious beliefs." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 793 (5th Cir. 2013); Mem. 27-28.

In their response, Defendants do not challenge the sincerity or religiosity of the Universities' religious exercise. Nor do they contest the fact that they will impose burdens on the Universities when the Universities do not comply with the Mandate. Nor do Defendants challenge the Universities' argument that these burdens—massive fines and an inability to provide health benefits to their employees—constitute substantial burdens under any objective measure.

Defendants instead attempt to conflate the burden with the exercise.[2] Defendants' Memorandum, Dkt. 79 ("Opp.") at 12. The government claims that the burden on the Universities' religious beliefs is *de minimis* because it requires "virtually nothing" or "next to nothing" of the Universities. Opp. 12, 13. It also claims that the burden is too "attenuated" to be substantial. Opp. 19. But these arguments are misdirected. They go to the *religious* question of whether the Universities are morally compromised by carrying out the government's accommodation scheme and not to the objective—and judicially ascertainable—

[2] Defendants also baldly mischaracterize—without citation to the Universities' opening memorandum—the Universities' explanation of the substantial burden test. Opp. 17 ("Plaintiffs would limit the Court's inquiry to two prongs: first, whether plaintiffs' religious objection to the challenged regulations are sincere, and second, whether the regulations apply significant pressure to plaintiffs to comply.") This is wishful thinking on Defendants' part. As set out in Plaintiffs' briefing, to meet their burden RFRA plaintiffs must show (1) a specific religious practice; (2) that is sincere; (3) and religious; and (4) an objective government-imposed burden on that practice; (5) that is substantial. *See* Mem. 24; *infra* Section I(A)(1)(a).

questions of what burden the government has imposed on that exercise, and whether that burden is substantial. Applying the proper, objective standard shows the Mandate and the accommodation to be a straightforward violation of RFRA.

a. The Universities' religious exercise is abstaining from facilitating access to abortion-causing drugs and devices, as required by their Baptist faith.

As shown in the Universities' opening memorandum, Mem. 25-26, the "specific religious practice" at issue in this case is the Universities' abstention from facilitating access to abortion-causing drugs and devices. *Merced v. Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (citation omitted). The Universities will not be able to carry out this religious practice because the Mandate and the accommodation require the Universities to engage in several new actions and omissions that make them morally complicit in abortion:

(1) They must provide their employees with insurance that brings with it the guarantee of a free stream of payments for abortifacient drugs and devices. Mem. 25; 78 Fed. Reg. 39870-01, 78 Fed. Reg. 39875-77; 45 C.F.R. § 147.131. This is "arranging" for the abortifacient drugs and devices to be provided to their employees. Opp. 14.

(2) They must fill out the self-certification form prescribed by the government. Mem. 10, 25; 78 Fed. Reg. 39875. This is also "arranging" for the abortifacients to be provided to their employees, because without the self-certification, the employees have no way to obtain the abortifacients.

(3) They must then notify their third-party administrator that they have so self-certified, triggering the obligation of the third-party administrator to provide the objectionable drugs and devices for free. Mem. 10. This is "referring" for the abortifacient drugs and devices. Opp. 14.

(4) They must refrain from telling the third-party administrator *not* to provide abortifacient drugs and devices. 78 Fed. Reg. 39879-80; Dkt. 70-1, ("Ex. A") ¶ 48.

Each of these are new actions and omissions that the Universities would not have engaged in but for the Mandate and the "accommodation" mechanism. And each violates their Baptist faith.

Defendants' main argument in response is that the Mandate and the accommodation require "virtually nothing" or "next to nothing" of the Universities, or is too "attenuated." Opp. 12, 13, 19, 29. But even in Defendants' non-Baptist moral calculus "next to nothing" or "virtually nothing" is actually something. And from the Baptist point of view, that something constitutes a sin.[3]

Indeed, the alternative to doing "virtually nothing" is for ETBU and HBU to provide no insurance at all, in which case their employees will *not* have access to free abortifacients, as there will be no insurer or third-party administrator to provide them. The ability to obtain cost-free abortifacients follows the original

[3] Indeed, Defendants' argument makes little sense if one thinks about other forms of religious exercise. "Virtually halal" or "virtually kosher" would not suffice for Muslim or Jewish prisoner plaintiffs, because "virtually" in that instance means "not." And helping to make tank turrets was not so "attenuated" a form of complicity that the Jehovah's Witness Thomas could not win his case. *See Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981).

provision of employee health benefits. Indeed, employees will probably have to use the same insurance card to obtain the abortifacient drugs and devices, since the insurers and third-party administrators are not to issue new insurance policies to carry out the accommodation. 78 Fed. Reg. 39874. But for the Universities' doing "virtually nothing," the abortifacients would not be available. It is that but-for role that makes the Universities—from the Baptist perspective—morally complicit.

Defendants' "virtually nothing" response "mistakes or rewrites [the Universities'] sincerely held religious convictions." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. June 27, 2013) (*en banc*) (cert. petition filed Sep. 19, 2013) (Gorsuch, J., concurring). In fact, it is the Universities' own "involvement in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg that their religious faith holds impermissible." *Id.* "Whether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of faith we must respect." *Id.* at 1154. *See also id.* at 1142 (lead opinion) ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.").

Perhaps in an effort to avoid answering that question, Defendants studiously avoid stating what the "specific religious exercise" at issue in this case is. *Merced*, 577 F.3d at 591 ("The relevant inquiry is not whether governmental regulations substantially burden a person's religious free exercise broadly defined, but whether the regulations substantially burden a specific religious practice."). And when they

do come closer to defining that exercise, they get it wrong: "plaintiffs' complaint appears to be that the regulations require plaintiffs to indirectly facilitate conduct on the part of their employees that they find objectionable (*i.e.*, the use of certain contraceptives)." Opp. 19-20. But the Universities are concerned about their own direct actions—"involvement in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg"—the facilitation is something *the Universities* are doing, not their employees; there is nothing "indirect" about it. *Hobby Lobby*, 723 F.3d at 1153 (Gorsuch, J., concurring).

The government also asserts that all the Universities have to do is something that they say Plaintiffs will do anyway, so the Universities are therefore not required to "modify [their] religious behavior." Opp. 13. This misstates what the Mandate actually requires the Universities to do. The Universities do not currently have to obtain insurance that brings with it a tag-along right to obtain free abortifacient drugs and devices. Nor must they fill out the government-prescribed self-certification form with the purpose of helping others obtain abortifacients. Nor need they notify their contracted third-party administrators that they have so self-certified so that the third-party administrators then have an obligation to pay for abortifacients. Nor must they refrain from telling their third-party administrators not to provide the drugs and devices. In fact, they have not engaged in any of these activities up until now. But starting January 1, they will have to do all of those things or suffer government-imposed penalties.

The government's argument that the Universities currently self-certify is particularly specious, as is its argument that they already notify their third-party administrator that they have a conscientious objection to providing abortifacients. ETBU does not have to tell its third-party administrator that it has a conscientious objection; it tells it what goes on the list (*i.e.* the formulary) and what stays off of the list; it doesn't have to give any reasons, much less do so with the purpose of facilitating access to abortifacients. HBU does not ever communicate with its third-party administrator, but only with its church plan, GuideStone. Ex. D ¶ 11. Under the Mandate and accommodation, it will have to specifically reach out to an entity it has never communicated with before for the sole purpose of facilitating abortions for its employees. *Id.*

b. The objective government-imposed burdens on that religious exercise are massive fines and a prohibition on providing employee health benefits.

As shown in the Universities' opening memorandum, the burdens on the Universities are massive fines and a prohibition on providing health benefits to employees. Mem. 15, 19, 28. The government makes no real effort to counter this conclusion, perhaps because it is difficult to argue that millions of dollars in fines do not constitute a substantial burden on any activity. Instead, as noted above, they have chosen to treat the question of complicity—a religious question going to the Universities' beliefs about moral complicity—as part of the burden analysis. Opp. 13 (stating Universities would be "not responsible for" helping others obtain

abortifacients). As noted *supra*, this argument fails because what the Universities are "responsible for" is a religious question, not a question of burden.

It is important to note that the nature of the government-imposed burdens is an *objective* inquiry. Mem. 26 & n.8 (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 336-37 (2010)). The question of the nature of the burden does not turn on the internal state of mind or religious beliefs of the plaintiff, but instead requires assessing whether the burden would be substantial if imposed on *any* activity, religious or not. *See Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) ("Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent.") (emphases added); *see also Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 n.12 (9th Cir. 2008) (en banc) (the "undue burden" in *Yoder* "was the penalty of criminal sanctions" and in *Sherbert v. Verner*, 374 U.S. 398 (1963), was the "money from unemployment benefits"). It is under this objective test that the burdens are identified, not Defendants' subjective "responsible for" test.

c. Those burdens are substantial.

By any objective measure these specifically identified burdens—massive fines and a prohibition on providing health benefits to employees—are substantial.

The Supreme Court and the Fifth Circuit have identified a number of government-imposed burdens as "substantial": an outright prohibition or

compulsion, *United States v. Lee*, 455 U.S. 252, 256 (1982) ("compulsory participation in the social security system" was burden); *Merced*, 577 F.3d at 590 ("*ban* of conduct" constitutes substantial burden) (emphasis original); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 333 (5th Cir. 2009), *affirmed*, 131 S.Ct. 1651 (2011) (denying access to chapel created fact issue regarding substantial burden); a five-dollar criminal fine, *Yoder*, 406 U.S. at 208); and loss of employment benefits, *Sherbert*, 374 U.S. at 404; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987), *reaffirmed in Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872, 883 (1990). *Cf. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2823 (2011) (matching funds mechanism was "substantial burden" on "exercise" of "First Amendment rights"); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 740 (2008) (campaign expenditure cap "substantial burden on the exercise of . . . First Amendment right").

The courts have also identified other government-imposed burdens that are not substantial, such as having to go through a permitting process, *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (having to submit a complete planned unit development permit application was not a substantial burden) or temporarily losing access to a prison dayroom, *DeMoss v. Crain*, 636 F.3d 145, 153 (5th Cir. 2011) (having to go outside dayroom to engage in religious exercise was not a substantial burden).

Here, the millions of dollars in punitive fines and the termination of all health coverage for employees are far weightier burdens than the loss of employment

benefits in *Sherbert* or *Hobbie*, or the five-dollar fine, albeit a misdemeanor, in *Yoder*. Courts reaching this issue have held as much. *Hobby Lobby*, 723 F.3d at 1140; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125 (D.D.C. 2012), appeal dismissed, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

Defendants' only (partial) response is to argue that the Universities would read "substantial" out of the statute altogether by allowing RFRA plaintiffs to make out a case simply by identifying a religious exercise. Opp. 18. This again misunderstands both the RFRA standard as applied by the courts and the difference between the burden and the exercise. First the examining court identifies the exercise Plaintiff seeks to engage in. *Merced*, 577 F.3d at 591. Then the court identifies the objective, not subjective, burdens imposed by the government on the exercise, if any. *Yoder*, 406 U.S. 205, 218. Then the court evaluates those to determine whether they are substantial or not. And courts have not hesitated to hold that burdens are not substantial when they would not coerce someone to modify her behavior. *See*, *e.g.*, *DeMoss*, 636 F.3d at 153. That procedure is hardly the burden-only standard Defendants claim.

d. Defendants' additional substantial burden arguments fail.

Defendants add a grab bag of arguments to buttress their position on substantial burden, most of which are warnings about the purportedly dire consequences of applying RFRA as written to their regulations. Each of these arguments fails.

1. Defendants object to the Universities' reliance on *Hobby Lobby*, 723 F.3d 1114, Opp. 12 n.9, and the supermajority of other for-profit cases that have gone in

plaintiffs' favor,[4] but these cases are directly on point. The substantial burden analysis in this case is exactly the same as in *Hobby Lobby*. The Universities offer the *same* religious objection to a slightly more complicated coverage scheme; the specific religious practice at issue—facilitating access to abortifacients—is identical.[5] In *Hobby Lobby*, as here, the plaintiffs objected to providing health insurance coverage for objectionable drugs, and in *Hobby Lobby*, as here, the plaintiffs were faced with a "Hobson's choice" to either "compromise their religious beliefs" or pay crippling fines. *Hobby Lobby*, 723 F.3d at 1141. The only distinction is the particular morally objectionable mechanism the government has imposed.

2. Next Defendants claim that a more analogous case to the Universities' situation is *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). Opp. 14-15. In that case, a prisoner objected, not to the government cutting his hair or drawing his blood, but to the storage of his DNA in a database. 553 F.3d at 678. That situation is the opposite of the Mandate. The Universities have no religious objection to what the government or their employees do with their own resources once they belong to them (such as taxes or salaries), but they object to the government interfering with the health insurance plans, over which they retain control and which are part of the

[4] See www.becketfund.org/hhsinformationcentral.

[5] *Hobby Lobby* is the only circuit-level decision thus far to consider whether the Mandate poses a substantial burden on religious plaintiffs. *See Conestoga Wood Specialities Corp. v. Sec'y of HHS*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013), *cert. petition filed* Sept. 19, 2013 (holding that corporate form barred plaintiffs from raising RFRA claim); *Autocam Corp. v. Sebelius*, 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013), *cert. petition filed*, Oct. 17, 2013 (same). There are many district court cases, which are split in favor of plaintiffs and the government, some of which have been appealed.

relationship between the employer and the employee. *A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010) (Higginbotham, J.)—which Defendants fail to mention—is much more on point. In *Betenbaugh*, the plaintiff objected to having his hair cut, or worn up. *Id.* at 262-63. In *Kaemmerling*, the plaintiff objected to what the government planned to do with his hair after it was cut. 553 F.3d at 249. The Universities object to the government commandeering their insurance policies to provide drugs to which they object, but they otherwise remain in control of the plans, and are thus morally responsible for the results of those plans, unlike in *Kaemmerling*.

3. Defendants also say that the Universities' objective is to "prevent *anyone else* from providing" objectionable drugs and devices to their employees. Opp. 14 (emphasis original). But that is simply false. The government can choose to provide these drugs directly to the Universities' employees, but the Universities seek protection from being forced to facilitate the government's scheme to do so. Employees remain free to obtain whatever drugs they wish.

4. Defendants also make a "Chicken Little" argument about the effects of accommodating the Universities, saying that applying RFRA would require a wholesale revamp of the ACA. But RFRA does not require the Court or anyone else to redraft the ACA, any more than the leading RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), required Congress or the Drug Enforcement Agency to redraft the Controlled Substances Act, 84 Stat. 1242, as amended, 21 U.S.C. § 801 *et seq*. What RFRA does require is that

Defendants not impose these particular burdens on the Universities based on the regulations they have promulgated under the ACA. There is no need to strike down the law in whole or in part; all that is required is an order prohibiting Defendants from enforcing parts of the ACA against the Universities. Since the government could itself issue an order tomorrow exempting Plaintiffs from the Mandate, this argument is especially unconvincing.

This objection is telling in a different way. Defendants seem to think an argument that "Congress made me do it" is sufficient for an agency to defeat a RFRA claim. Opp. 30 ("Even if defendants wanted to adopt one of plaintiffs' nonemployer-based alternatives, they would be constrained by the statute from doing so.") But every federal agency is bound by RFRA, regardless of whether the government imposition is defined by a statute passed by Congress or a regulation promulgated by an agency. Indeed, *O Centro* itself involved not a regulation but the Controlled Substances Act. *See O Centro*, 546 U.S. at 425. The DEA was simply enforcing the law as Congress wrote it, but it still had the burden of showing that "respondents' proposed less restrictive alternatives are less effective than [enforcing the Act]." *Id.* at 429 (alteration in original).

Here, there is even less excuse for Defendants to evade consideration of the Universities' proffered alternatives since the conflict is between a law (RFRA) and various regulations (the Mandate and accommodation). More importantly, the fact that Defendants believed their objection to be plausible indicates a fundamental misunderstanding of RFRA jurisprudence.

5. The government then argues that the burden on the Universities' religious beliefs is too "attenuated" to be substantial, Opp. 19-22, but this argument is a retread of the "virtually nothing" argument, and fails for the same reasons explained above.

The "attenuated" argument would, if credited, also result in the same governmental line-drawing approach that the Supreme Court has repeatedly held to be unconstitutional. *See*, *e.g.*, *Thomas*, 450 U.S. at 715 ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.") (finding substantial burden). The Universities

> have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable. This is especially so given that [the Universities] stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables someone else to behave in a manner he considered immoral. That is precisely the objection of [the Universities]. It is not the employees' health care decisions that burden the [Universities'] religious beliefs, but the government's demand that [the Universities] enable access to contraceptives that [the Universities] deem morally problematic.

Hobby Lobby, 723 F.3d at 1141.

The government attempts to distinguish *Thomas* in a footnote by arguing that while a "compulsion" may be indirect, it is the "burden" that is indirect in this case. Opp. 22 n.17. This argument finds no foundation in the text of *Thomas*, and Defendants cannot quote *Thomas* for their new-found distinction. More importantly, this argument again conflates burden with exercise. In *Thomas*, the exercise was not facilitating the conduct of war and the government-imposed burden was the denial of unemployment benefits; the indirect compulsion was the connection

between the two. *Thomas*, 450 U.S. at 717-8. Here, the government-imposed burden is not the prospect that a third party may engage in behavior as a consequence of the Universities' actions—the burden is the massive fines and inability to provide employee health benefits that the government will impose on the Universities' exercise. The compulsion here is thus more direct than in *Thomas*.[6]

6. Finally, Defendants compare the burden on the Universities' religious exercise to paying a salary to their employees. Opp. 22. As noted above, however, the Universities do not seek to control the actions of others; they seek only not to help others engage in abortion. Moreover, this particular argument was rejected in *Hobby Lobby*: "This argument ignores the fact that the government can justify a substantial burden on religious exercise by demonstrating a compelling interest, and uniform enforcement of labor laws such as the Fair Labor Standards Act, which governs the payment of wages, would give rise to such an interest." *Hobby Lobby*, 723 F.3d at 1141 n.16.

Moreover, the very fact that Defendants felt it necessary to provide an accommodation is a concession that providing insurance implicates organizations' consciences in a way that paying wages does not. 78 Fed. Reg. 39872

[6] Although they need not prove it, in the Universities' view, the moral complicity is "direct" as well. Just as a pacifist who shoots at the enemy is morally compromised whether he kills the enemy or not, the Universities will be in violation of their beliefs whether or not it can be proven that the death of an embryo actually results from their actions. Put another way, the Universities' objection to the Mandate does not depend on the strange notion that employees' personal health care decisions are attributable to the Universities, but that they themselves are helping others obtain the abortifacients. The moral problem is not vicarious liability, but accomplice liability, which exists even if the attempt to commit a moral wrong fails in its object.

(accommodation designed to "protect" certain nonprofit religious organizations with religious objections "from having to contract, arrange, pay, or refer" for "coverage"). And Congress also recognized the moral implications of providing health insurance: The Affordable Care Act prohibits health plans in state exchanges from using federal subsidies to fund most abortions, and also requires plans covering abortions to pay for them in a segregated account. 42 U.S.C. § 18023(b)(2).

2. The Mandate fails strict scrutiny.

The government has not met its burden of showing that the Mandate advances an "interest of the highest order" or that the Mandate is the "least restrictive means" of pursuing that interest. Mem. 30-31. *O Centro*, 546 U.S. at 429, 433.

As an initial matter, the government has not put forth evidence that "properly support[s]" its responses to the Universities' motion for partial summary judgment. Fed. R. Civ. P. 56(e). In fact, the government has submitted only one piece of evidence: the administrative record, which consists entirely of hearsay. Fed. R. Evid. 802. That hearsay would not be admissible to support any of Defendants' arguments on the non-APA claims in this lawsuit. *See Spring Street Partners-IV, L.P. v. Lam*, --- F.3d ----, 2013 WL 5012436 at *11 (5th Cir. Sep. 13, 2013) ("'A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.'") (quoting Fed. R. Civ. P. 56(c)(2)). In *O Centro*, the government failed to carry its burden of showing a compelling government interest by simply submitting the affidavits of government officials "attesting to the general importance" of their compelling interest. *O Centro*, 546

U.S. at 438. Here, the government does even worse. It has brought forward no sworn testimony at all. Thus, the government's evidence "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). Because it has not submitted any properly authenticated summary judgment evidence that could be admitted into evidence at trial, the government has not met its burden on opposition to summary judgment for its strict scrutiny affirmative defense. For that reason alone, its strict scrutiny defense fails.

However, even on the faulty record put forward by Defendants, their strict scrutiny defense fails.

a. The government has identified no compelling interest.

Rather than presenting evidence of the "consequences of granting an exemption" specifically to the Universities, *O Centro*, 546 U.S. at 438, the government instead invokes the broad interests of "promotion of public health," Opp. 23, and "assuring that women have equal access to health care services," Opp. 24.[7] Its invocation of these interests does not satisfy the RFRA strict scrutiny standard established in *O Centro*. Mem. 29; *Merced*, 577 F.3d at 592 (quoting *O Centro*, 546 U.S. at 430-31).

First, the government defines its interests in relation to the wrong group of people. The government complains that it should not have to explain its compelling interest as applied to the Universities and Westminster, but can instead invoke any entity "similarly situated" who it speculates would also be able to claim an exemption as a result of a judgment against it in this case. Opp. 25 n.20. This is the

[7] Although the government refers to "gender equality" in a subheading, Opp. 23, in the text of its argument it recasts this interest as "equal access to healthcare". *Id.*

same mistake that the government made in *O Centro*: "[u]nder the Government's view, there is no need to assess the particulars of the [plaintiff's] use or weigh the impact of an exemption for that specific use." 546 U.S. at 430 (rejecting argument). But *O Centro* held that the government's interest must be evaluated "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 (citation omitted).

In a very long footnote, Opp. 25 n.20, the government argues that the Supreme Court did not really mean what it said in *O Centro*, when it held that the proper scope of application was the "particular claimant." *Id.* (also citing pre-*O Centro* cases). Instead, according to the government, the Court was only rejecting "argument by analogy." *Id.* This is a gross misreading of *O Centro*. The Drug Enforcement Agency made *identical* arguments in *O Centro*, all of which were rejected. 546 U.S. at 430, 435-36. Moreover, the law the DEA sought to enforce did not concern just the plaintiff religious organization before the Court, but any use of banned hallucinogen. *O Centro*, 546 U.S. at 430 ("According to the Government, there would be no way to cabin religious exceptions once recognized"). Under the government's reading of *O Centro*, *O Centro* itself was wrongly decided.

Relying wholly on its creative re-reading of the *O Centro* standard, the government makes no effort to identify any compelling interest it has in providing access to contraceptive coverage specifically to the Universities' employees, nor does it explain how its claimed interest in promoting equal access to contraceptives is

furthered by specifically giving the Universities' female employees—who already have access to free non-abortifacient contraceptives and have pledged support for traditional Christian doctrine—access to abortifacients. Ex. A ¶ 13; Ex. B ¶¶ 14, 24. It thus has waived any argument that it has a compelling interest.[8]

Second, the government cannot show "that granting the requested religious accommodations would seriously compromise" its supposedly compelling interests, because it has pursued these interests very unevenly. *O Centro*, 546 U.S. at 421. For instance, the government only recently discovered both of these purported "interests of the highest order," having previously left decisions about abortifacient coverage entirely up to employers and employees. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

In addition, the government still does not pursue its interest with respect to millions of employees. As the Tenth Circuit explained in *Hobby Lobby*, "the interest here cannot be compelling because the contraceptive coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; Mem. 30-32 (describing exemption for grandfathered plans, employers with fewer than fifty employees, and religious exemptions).

The government cannot refute this point. Defendants say that "many" of the exemptions the Universities pointed to in their opening memorandum are not

[8] Oddly, after saying that the proper scope of inquiry is to the "category" rather than "to the person," Opp. 25 n.20, Defendants never attempt to explain their supposed interests even as applied to their preferred "category" of religious nonprofit schools. *Id.*

exemptions from the Mandate specifically. Opp. 26. But all of the exemptions allow other employers to avoid facilitating the preventive services coverage Defendants claim is so important that they must force the Universities to facilitate it. And even if a "majority" of plans are no longer grandfathered in 2013, that still leaves "48 percent of covered workers" in grandfathered health plans. Opp. 27. In fact, "[t]he government's best case scenario is that by the end of 2013, 51 percent of employer plans will have lost 'grandfathered' status. That still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate." *Beckwith Elec. Co., Inc. v. Sebelius*, --- F.Supp.2d ----, 2013 WL 3297498 at *17 (M.D.Fla., June 25, 2013) (citations omitted).

Finally, the government argues that it has a "rational" basis for its "religious employers" exemption because employees of "houses of worship and their integrated auxiliaries" are "more likely than other employers to employ people of the same faith." Opp. 28. As noted below, this interest in classifying organizations according to their religion can't even qualify as a legitimate government interest, much less a a "rational" one. *See* Section I.C *infra*. But the distinction also fails as applied to the Universities. All of the Universities' employees share their Christian beliefs. Ex. A ¶ 13, Ex. B ¶¶ 8, 14. Indeed, the prevalence of schism and religious disagreement in American religious life means that many houses of worship will have a greater diversity of religious opinion than do the Universities; yet the house of worship gets the exemption while the Universities do not. The government simply cannot show that an exemption for ETBU and HBU would undermine any compelling interest in

providing women with emergency contraceptives or would contribute to some contraceptive coverage crisis.

b. The Mandate does not actually further the government's claimed interests.

Defendants separately fail to satisfy strict scrutiny because they cannot show a causal link between the means they have chosen and the supposedly compelling interests they invoke. *See* 42 U.S.C. § 2000bb-1 (government's chosen means must be "in furtherance of" compelling interest); *Department of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Commission*, 727 F.3d 415, 433 (5th Cir. Aug. 21, 2013) (strict scrutiny defense rejected because government failed to "connect" the governmental interests invoked with the regulatory measures taken by the government).

The government cites Congressional statements in support of the Women's Health Amendment, which exempts "additional preventive [women's] care and screenings" not already stipulated in the Affordable Care Act from cost-sharing requirements.[9] Opp. 25; 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009); 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009). These sources mention contraception only as one item in a long list of women's preventive services. They do not mention emergency contraceptives at all. Nor does the IOM report argue that covering emergency contraceptives is essential for women's health. *See* IOM Rep. at 19, AR 317 (not mentioning emergency contraceptives). Nowhere does the IOM report link the cost of women's health care to emergency contraceptives, let alone

[9] 115 Cong. Rec. S11985-02 (Nov. 30, 2009).

provide evidence proving that linkage. In addition, since the IOM is not an appendage of Congress, its report reveals nothing about congressional intent to provide contraceptives. Thus there is no evidence that the means imposed by the government actually furthers the ends it has (wrongly) identified as compelling.

Moreover, as the Universities argued in their opening memorandum, Mem. 32, the result of imposition of the Mandate will not be to expand contraceptive coverage, but to reduce it. In response, Defendants claim without support that "[i]t cannot be, however, that a plaintiff's own deliberate steps to thwart the effects of a law undermine the government's interest in creating it." Opp. 23 n.18. But dropping coverage is exactly what Defendants were told would happen if they went forward with the accommodation, and they did it anyway. Willfully going forward with a plan they knew would not work ahead of time does not meet the furtherance requirement.

c. The Mandate is not the least restrictive means of advancing the government's claimed interests.

The government has numerous less restrictive means available to advance its interests, but it has chosen the onerous Mandate instead. In the Universities' opening memorandum, they detailed five different less restrictive options available to the government. Mem. 34. In response, the government puts forward no evidence to demonstrate why any would be unworkable. Instead, it claims that those alternatives would be "incompatible with the fundamental statutory scheme set forth in the ACA[.]" Opp. 30. But the ACA is not the only way of addressing the government's interest in the health and equality of women. Mem. 34. Congress

could have chosen many other ways to provide these drugs. But it is not the Universities' burden to explain *how* the government might administer those options. "[T]he government must show why the employees' burden creates a compelling interest that can only be met by requiring the [the Universities] to conform to a mandate." *Hobby Lobby*, 723 F.3d at 1144. As noted above, Section I(A)(1)(d)(4), Defendants' claimed lack of requisite statutory authority does not allow them to escape the reach of RFRA, particularly since they are trying to enforce regulations they themselves promulgated, when even agency action taken pursuant to Congressional statute must conform to RFRA. *See O Centro*, 546 U.S. at 432. Lastly, just as Defendants acted outside of their statutory authority in requiring third-party administrators to provide the drugs to which the Universities object, they could have enacted a similar such scheme that does not involve the Universities' health plans at all. *See* 78 Fed. Reg. 39880 ("The Departments note that there is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities.")

* * *

In sum, Defendants have not rebutted the Universities' case for partial summary judgment. The Universities have identified a sincere religious exercise, a government-imposed burden on that exercise, and that the burden is objectively substantial. Defendants cannot escape the conclusion that the penalties they plan to impose are substantial burdens, so they have redefined burden to include the

question of complicity—whether Plaintiffs are "responsible for" facilitating abortion. But this question is a religious one outside the purview of the courts.

Defendants have failed to make out their strict scrutiny defense. They have not identified a compelling interest, the means they have chosen do not further their stated interests, and they have not used the least restrictive means.

Plaintiffs are therefore entitled to summary judgment in their favor on the RFRA claim.

B. The Mandate violates the Free Exercise Clause.

Defendants have failed to refute the Universities' clear showing that the Mandate is *not* generally applicable and *not* neutral. They indisputably have exempted grandfathered, small employer, and institutional church plans, leaving millions of Americans without the supposedly crucial coverage. And this gerrymandering of exemptions ultimately serves to target any religious exercise that ventures outside the walls of a formal church and favors secular over religious values. Defendants try to brush these wrongs aside, citing *Lukumi* to argue that the Free Exercise clause is not violated so long as the challenged law does not target "*only*" religious conduct. *See* Opp. 32, 33. But this oversimplification would excuse anything but the most blatant attacks on free exercise. Indeed, the Supreme Court recognized this, observing that the "explicit[ ] target[ing]" in *Lukumi* made it "an easy [case]" and "that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment." *Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., concurring); *see also id.* 564 (Souter, J., concurring) ("[T]his is far

from a representative free-exercise case.") A law that—like the Mandate—targets only certain religious conduct (*i.e.*, outside a church) is just as nefarious as laws directly attacking all religious conduct or only certain religions. Whether viewed under general applicability, neutrality, or both—the Mandate is egregious in its own right and plainly violates the Free Exercise Clause.

1. The Mandate is not generally applicable.

Defendants do not, and cannot, dispute their own calculations that the Mandate exempts more than one-fourth of the U.S. population. Dkt. 70-3 ("Ex. C.") Ex. C-6 at 4 (predicting 87 million Americans on grandfathered plans by 2013); http://www.census.gov/popclock/ (317 million people in the U.S.) (last visited Oct. 17, 2013). Rather, they argue that general applicability does not require "absolute universality" and that objectively-defined categories of exemptions are acceptable, provided they don't "suggest disfavor of religion." Opp. 33-34. These arguments are misleading. In the first place, exempting more than 1/4 of the entire United States population can hardly be characterized as falling slightly short of "absolute universality." Moreover, the standard is not about how close the law comes to "universality." Where the government has in place any "system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason." *Smith*, 494 U.S. at 884. The underlying concern is "the prospect of the government's deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark (FOP)*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). Thus, where—as with the Mandate—the government does not "merely create a

mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection" the suggestion of discriminatory treatment (and intent as well—*see* Section II.B *infra*) is even greater. *Id.*; *see also Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.") (emphasis added). Because the Mandate "grandfathers" millions of Americans for secular reasons (namely, the government's promise that "you can keep your plan"), its refusal to grant exemptions for religious reasons "suggest[s] disfavor of religion" in a manner more than sufficient to trigger strict scrutiny. *O'Brien v. HHS*, 894 F. Supp. 2d 1149, 1162 (E.D. Mo. 2012); *see also Lukumi*, 508 U.S. at 543 (a law violates general applicability when it "fail[s] to prohibit nonreligious conduct that endangers [the law's stated] interests in a similar or greater degree" than the prohibited religious conduct); *see also Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 437 (W.D. Pa. 2013) ("The fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best.").

2. The Mandate is not neutral.

As for neutrality, Defendants again cannot dispute that the Mandate targets all religious organizations except a narrowly-defined subclass of institutional churches. Their only response is to state that this is an "unsupported assertion" and "mere rhetorical bluster." Opp. 35. But it is undisputable from the text of the Mandate that institutional churches are completely exempted, while all other religious organizations—despite having the same sincere beliefs—are still forced to

participate in the government's scheme for providing free access to abortion-inducing drugs and devices. *Compare* 45 C.F.R. § 147.131(a) (exempting institutional churches) *with* 45 C.F.R. § 147.131(b), (c) and 29 C.F.R. § 2590.715-2713A(a)-(c) (shifting costs but still requiring non-institutional religious organizations to participate). The Mandate thus explicitly creates "differential treatment" between institutional churches and all other religious organizations, violating the very "minimum requirement of neutrality . . . that a law not discriminate on its face." *Lukumi*, 508 U.S. at 536, 533.

The gerrymandered exemptions further confirm the Mandate's discriminatory effect. In creating the religious employers exemption and the religious "accommodation," Defendants have conceded there is a legitimate religious objection to participating in a scheme that creates free access to abortion-inducing drugs. *See also* Ex. C-3 (recognizing "important concerns some have raised about religious liberty"); *Hobby Lobby*, 723 F.3d at 1140 n.15 ("The assertion that life begins at conception is familiar in modern religious discourse . . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar."). Yet the Mandate's tiered system of exemptions was reluctantly granted only after prolonged public outcry and still protects only a subset of institutional churches. This, combined with the ready exemptions granted for grandfathered plans and small employers, is more than sufficiently suggestive of discriminatory treatment to trigger heightened scrutiny. *Accord Geneva Coll.*, 929 F. Supp. 2d at 437 (applying strict scrutiny because "[t]he process of implementing the objected to requirements

has been replete with examples of the government impermissibly exercising its discretion by exempting vast numbers of entities while refusing to extend the religious employer exemption"). The effort to marginalize religious exercise that takes place outside the confines of a formal church or within a less-than-hierarchical religious polity is no less nefarious than efforts to favor non-religion over religion, or one specific religion over another.

Defendants' continued reliance on the argument that institutional churches are more likely than other religious organizations to hire employees that share their religious beliefs, Opp. 34 n.22, only underscores the Mandate's discriminatory nature. Defendants have no evidence that religious charities or universities, for example, are less committed to their religious views and missions than institutional churches. Nor do they have evidence that employees of non-church religious organizations are less likely to share their employers' religious beliefs than employees of institutional churches. But even if the government did have such evidence, it cannot discriminate among religious institutions based upon its perception of their level of religiosity. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (McConnell, J.) (striking statute whose "function and purpose" was "to exclude some but not all religious institutions" based on whether they were "pervasively sectarian" rather than just "sectarian").

Finally, the Mandate also violates neutrality by favoring secular, over religious, values. Defendants dispute this by arguing that both religious and secular organizations can avail themselves of the grandfathering and small employer

exemptions. Opp. 33. But this was also true of the medical exemption from the rule against facial hair in *FOP*. Both religious and non-religious employers could grow a beard for medical reasons ("typically because of a skin condition"), *FOP*, 170 F.3d at 360. But strict scrutiny still applied because the rule "unconstitutionally devalued . . . religious reasons for wearing beards by judging them to be of lesser import than medical reasons." *Id.* at 365. Likewise, the Mandate favors secular reasons for granting exemptions (the political expediency behind the government's promise that "you can keep your plan"), while disfavoring religious reasons, even though the purposes of the statute would be equally compromised by both. Defendants cannot make such judgments without being subject to strict scrutiny.

C. The Mandate discriminates among religions.

As the Universities demonstrated in their opening memorandum, the Mandate's religious employer exemption violates the Establishment Clause by impermissibly differentiating organizations according to their internal religious characteristics. Mem. 41-45. Exempt organizations must be affiliated with institutional churches according to a carefully defined set of structural, doctrinal, and financial criteria. Mem. 41, 43. These criteria are meant to capture religious organizations whose employees, by the government's theological guesses, likely share the organization's faith. Mem. 43; 78 Fed. Reg. 39874. By contrast, organizations deemed not religious enough are denied the exemption. Calibrating the exemption in this manner contravenes "the clearest command of the Establishment Clause," *Larson v. Valente*, 456 U.S. 228, 247 (1982), by discriminating "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 1259.

The government's response, Opp. 35-38, misses the point. The exemption does not simply "apply to some employers but not others," Opp. 36, nor merely distinguish organizations "based on their structure and purpose," *id.* Rather, the exemption makes "explicit and deliberate distinctions between different religious organizations" based on their internal religious characteristics. *Larson*, 456 U.S. at 246 n.23. For instance, exempt organizations must share "common religious doctrines . . . with a church," their officers must be "appoint[ed] or remove[ed]" by a church, and their assets "are required to be distributed to a church" upon dissolution. *See* 26 C.F.R. § 1.6033-2; Mem. 43. Deploying such internal religious characteristics in granting or withholding the exemption squarely contravenes *Larson*. Mem. 43-44. Indeed, one of the exemption's factors looks to whether the organization "normally receives more than 50 percent of its support" from a combination of government sources, public solicitations, and sales—a qualification that closely parallels the criteria condemned in *Larson*. *See Larson*, 456 U.S. at 230 (law "impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers.")

The government suggests that *Larson* is narrowly limited to laws that openly name the preferred "denominations" or "sects" *See, e.g.,* Opp. 35. But this misreads *Larson*, which more broadly condemns distinctions between "religious

organizations." 456 U.S. at 246 n.23; *see Weaver*, 534 F.3d at 1259 (rejecting argument that the law "distinguishe[d] not between types of religions, but between types of institutions"). Indeed, one decision the government relies on, *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000), explains that, under *Larson*, "[t]o facially discriminate among religions, a law need not expressly distinguish between religions by . . . name." That is precisely the approach the exemption takes. It does not name the disfavored groups or denominations, but its detailed criteria explicitly favor those groups with defined structural, financial, and doctrinal ties to institutional churches. Moreover, leaving nothing to the imagination, the government explains *why* it makes such distinctions: it wishes to exempt only those organizations which, in its view, are sufficiently religious to influence their employees' religious views about contraception. Opp. 31.

The cases the government relies on cannot justify the exemption under *Larson*. The conscientious objector statute in *Gillette v. United States* "d[id] not discriminate on the basis of religious affiliation or religious belief," 401 U.S. 437, 450 (1971), whereas the Mandate's exemption expressly turns on the quality of an organization's religious "affiliation" with an institutional church. The social security exemption in *Droz v. Commissioner* was conditioned on the neutral criterion of whether the religious group had a substitute welfare system, 48 F.3d 1120, 1125 (9th Cir. 1995), whereas the Mandate's exemption is conditioned on the religious criteria of a group's structural, doctrinal, and financial ties to a church.

Furthermore, *Droz* expressly left open the question whether an exemption would contravene *Larson* if it were limited to organizations with "established tenets." *Id.* at 1124 n.5.

Defendants also object to the applicability of *Weaver*, arguing that *Weaver* dealt with "laws that facially regulate religious issues" as opposed to laws that grant religious exemptions, and that the government inquiry in *Weaver* was more intrusive in determining whether the school was religious. Opp. 37. These are distinctions without differences. *Weaver's* reasoning easily encompasses this situation. The Mandate "facially regulate[s] religious issues" by making distinctions between those religious entities that qualify for an exemption and those that do not. That *Weaver* involved denial of equal treatment under a government program and this one involves denial of an exemption is not much of a difference. Indeed, both laws privilege those entities the government has decided are "religious enough." Moreover, *Weaver* analogized the Colorado loan program to the religious exemptions at issue in *University of Great Falls v. NLRB,* 278 F.3d 1335 (D.C. Cir. 2002), a case involving a religious exemption. *Weaver*, 534 F.3d at 1264 (citing *Great Falls*, 278 F.3d at 1340). Second, Defendants' argument that IRS audits and other assessments are not intrusive belies common experience. Few religious organizations will welcome a visit from an IRS agent. Moreover, *Weaver* expressly noted that the intrusive inquiry was only *one* unconstitutional outcome of the law, the other being discrimination among religious entities. 534 F.3d at 1250.

Defendants fail to justify the Mandate's discrimination among different sets of religious beliefs; summary judgment should be granted on this claim.

D. The Mandate violates Free Speech by compelling speech.

Defendants' opposition fails to rebut the two glaring free speech problems with the Mandate: it compels the Universities to engage in speech they wish to avoid, and it forbids them from engaging in speech with a message they would like to convey. Mem. 45. Each problem is independently fatal.

1. Compelled Speech

The Final Rules compel the Universities' speech by forcing them to make certifications to their insurers and/or third party administrators about their religious beliefs. 29 C.F.R. § 2590.715-2713A(a)(4). For the reasons set forth in the Universities' opening memorandum, Mem. 45-49, the Universities are forbidden by their religion from making this certification because of the effects it will have of (1) triggering payments for the use of abortion-inducing drugs and devices, (2) designating a third-party administrator to provide the payments, and/or (3) foisting onto another Baptist organization the obligation to provide the payments in violation of its *own* religious beliefs.

As discussed above, Defendants nowhere challenge the sincerity or seriousness of the Universities' claims that they are forbidden from engaging in this required speech. Opp. 39-43. Instead, the government insists that it can coerce this speech (a) because the speech requirement is "plainly incidental to the . . . regulation of conduct," Opp. 39 (quoting *Rumsfeld v. FAIR Inc.*, 547 U.S. 47, 62 (2006)), and (b)

because other for-profit Mandate cases and state Mandate cases found no speech violation was involved in other mandates, Opp. 39-40.

Both arguments fail. The *FAIR* case concerned a regulation that the Court found "regulates conduct, not speech" and regulated what affected parties "must *do* . . . not what they may or may not *say*." *FAIR* , 547 U.S. at 60 (emphases original). But the exact opposite is true here, because the speech requirement stands alone, and is not incidental to a conduct regulation. *See*, *e.g.*, Opp. 12 (claiming the Mandate does not force Plaintiffs to "modify their behavior in any meaningful way.") In this case, the forced speech requirement simply is not "plainly incidental to" some other conduct plaintiffs must undertake; instead the forced speech is *the essential act* plaintiffs must engage in, in precise words and manner to be dictated by the government, in order to trigger the flow of the drugs and devices at issue.[10] This case is thus the opposite of *FAIR*.

Indeed, just last term, the Supreme Court held that it is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *FAIR*, 547 U.S. at 61). The Court went on to hold that "[w]ere it enacted as a direct regulation of speech, the

[10] Indeed, the government's claim here that the forced speech is "incidental" and not "meaningful," makes no sense in light of its claim to have a *compelling* interest in forcing the plaintiffs to make the forced statements. Although the government is wrong to claim its interest is compelling, its arguments demonstrate that the statements required here are hardly "incidental" or meaningless: they are the central cog in the government's scheme to promote and distribute the drugs and devices at issue. Plaintiffs merely seek to exercise their right not to be compelled to make the statements upon which the government has based that scheme.

[government requirement that private institutions adopt government speech as their own] would plainly violate the First Amendment." *Id.* Such a direct regulation of speech is what is currently before the Court.

Defendants' string-cite of other Mandate cases, Opp. 40, gets them no further. All of the cases cited either (a) concern the Mandate as applied to for-profit entities, or (b) concern parallel state mandates. While of course some analysis in such cases may be relevant, the compelled speech analysis is not because—as the government admits, Opp. 40, the compelled speech trigger to which the Universities are subject just issued this summer, 78 Fed. Reg. 39870-01 (July 2, 2013), and was not at issue in the cases they cite.

2. Compelled Silence

The Mandate also compels the Universities to remain silent and refrain from conveying a lawful viewpoint to certain audiences. In particular, the Universities are forbidden from "seek[ing] to influence the third-party administrator's decision to make . . . arrangements" to pay for the drugs and devices at issue. 29 C.F.R. § 2590.715-2713A; Ex. A ¶ 48. On its face, this is an obvious violation of the First Amendment, in that it prohibits speech with one particular viewpoint: discouraging participation in the government's scheme by third party administrators. Indeed, the Supreme Court has recently explained that the "most basic" principle of First Amendment law is that "[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Ashcroft v. ACLU,* 535 U.S. 564, 573 (2002)).

The government tries to avoid this "most basic" First Amendment violation by comparing such speech to a "threat of reprisal or force" which can be validly proscribed. Opp. 41. This argument misses the point completely. HBU and ETBU are not seeking the right to make threats, or otherwise commit crimes. They are seeking the right to be able to speak freely and lawfully with third party administrators about their religious preference that administrators do not involve HBU and ETBU in the distribution of these drugs and devices. Such speech is particularly important in light of the Mandate's plain language indicating that third party administrators are free to choose not to participate in the government's scheme. 78 Fed. Reg. 39880. Tellingly, other than disparaging such perfectly lawful speech as akin to a proscribable "threat of reprisal or force," the government musters no defense at all of its viewpoint-based restriction of plaintiffs' speech.

For these reasons, the Court should enter summary judgment that the Mandate violates Plaintiffs' free speech rights under the First Amendment. To be clear, this ruling would not mean that the government could never find a way to compel other parties to provide the drugs and devices in question for free; it would simply mean that the government's mechanism for doing so must not rely on forcing unwilling speakers to speak, or compelling willing speakers to be silent about government-dictated topics.

II. Both material fact issues and the prematurity of the motion preclude summary judgment for Defendants on the Universities' claims concerning intentional discrimination, government interference in internal affairs, Due Process, Equal Protection, expressive association, unbridled discretion, and APA violations (Counts III, VI, VIII, X, XI, XII, XIII, XIV, and XV).

Defendants' motion also fails. As an initial matter, Defendants' motion should be converted entirely into a motion for summary judgment. That converted motion for summary judgment is premature because there has been no discovery in this case. For that reason alone, Defendants' motion for summary judgment should be denied.

But even if summary judgment could be granted for Defendants without any opportunity to take discovery, Defendants are far from meeting their burden with respect to the claims that are not part of the Universities' motion for partial summary judgment. With respect to each of the remaining claims, there are genuine issues of material fact that preclude summary judgment for Defendants.

A. Defendants' motion for summary judgment is premature.

Defendants ostensibly move to dismiss, or in the alternative, for summary judgment. But Defendants' motion is actually just a motion for summary judgment because the Court must consider materials outside the pleadings (both the Administrative Record and the summary judgment evidence proffered by Plaintiffs) in order to resolve Plaintiffs' claims. *See Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 171-72 (5th Cir. 2012) (because court considered material outside the pleadings that went to the merits, Rule 12 motion should have been considered under Rule 56); *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (district court abused discretion by considering

Department of Treasury administrative record without converting Rule 12(b) motion to Rule 56 motion). Indeed, Defendants tacitly admit as much by failing to make any distinction between their arguments that are based on the motion to dismiss standard and their arguments based on the summary judgment standard. The Court is not required to sift through Defendants' motion in order to make such distinctions when Defendants have failed to do so.

Defendants' *de facto* summary judgment motion is fatally premature. As set forth in the Universities' concurrent Rule 56(d) motion for discovery, since no discovery has been taken in this case, the Court should deny Defendants' summary judgment motion and allow discovery on the claims remaining after the Court rules on the Universities' motion for partial summary judgment. "Rule 56([d]) allows for further discovery to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990)). "Such motions are broadly favored and should be liberally granted." *Id.* (citing *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991)). As detailed in the motion and supporting declaration, the remaining claims each have fact issues that would benefit from discovery and thus summary judgment would be premature.

B. Defendants intentionally discriminated against the Universities.

Several of the Universities' claims cannot be dismissed because they turn on a quintessential fact question: intentional discrimination. *Anderson v. Bessemer City*,

470 U.S. 564, 573 (1985) (identifying intentional discrimination as a question of fact). The following counts include an intentional discrimination theory precluding summary judgment, particularly before any discovery has been had:

Free Exercise. "Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (citing *Lukumi*, 508 U.S. at 533; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)).

Establishment Clause. Intentional governmental discrimination against a particular religious group violates the First Amendment's command of neutrality. *See* Section I.C. *supra*.

Free Speech. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); "[S]ingling out disfavored viewpoints for penalty" is forbidden viewpoint discrimination. *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 362 (2010).

Equal Protection. Intentional discrimination is often (but not always) an element of an Equal Protection claim. *See*, *e.g.*, *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (allegations of intentional discrimination in administering election rules required reversal of dismissal); *infra* Section II.D; *cf. Weaver*, 534 F.3d at 1260 ("The 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently.")

APA claims. If Plaintiffs establish intentional discrimination after fact discovery, they will have both "arbitrary and capricious" and "violates governing law" claims based on that intentional discrimination. *See*, *e.g.*, *E&T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) (noting that "purposeful discrimination" supports a claim of arbitrariness and capriciousness). And if it is shown that the Mandate violates the intent elements of the First Amendment, *see supra*, it will automatically be in violation of governing law.

Because there has been no fact discovery and intentional discrimination is a quintessential question of fact, the Universities' claims based on intentional discrimination cannot be subjected to summary judgment at this juncture.

But even without the benefit of any discovery there are enough data points to allow an inference of intentional discrimination that allows these claims to survive summary judgment. For example, Defendant Sebelius spoke at a NARAL Pro-Choice America fundraiser in October 2011—shortly after the Mandate had been announced but before any of the exemptions had been announced—that "we are in a war" over emergency contraception. *See, e.g.*, Robin Marty "Sebelius: 'We Are In A War'" *RH Reality Check* (Oct. 6, 2011), *available at* http://rhrealitycheck.org/article/2011/10/06/sebelius-0/ (last visited Oct. 17, 2013). Although she was appearing in her official capacity, she painted the conflict over abortion in starkly partisan terms, claiming that opposition to the contraceptive mandate was part of a Republican Party attack on women rather than an issue of religious conscience. Defendant Sebelius further demonstrated her prejudgment of

the issue when she announced the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the many substantive objections to the Final Rule. *See* The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services* (April 8, 2013) *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (last visited Oct. 17, 2013) (see 51:30-52:00).

C. The Mandate interferes in the internal affairs of religious institutions in violation of *Hosanna-Tabor*.

The Mandate also interferes in the internal affairs of the Universities as religious organizations, in violation of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012). Under *Hosanna-Tabor*, the government is absolutely forbidden from interfering with any "internal" decision "that affects the faith and mission of the church itself." *Id.* at 707. The Court contrasted these absolutely protected internal affairs with "outward physical acts" that fall under the rule of the *Smith*/*Lukumi* line of cases. *Id.*

Defendants have not moved to dismiss or for summary judgment on the Universities' *Hosanna-Tabor* internal affairs claim. Indeed, they do not even cite *Hosanna-Tabor* or use the term "internal affairs" with respect to a church. This may be because they are not aware of the significant change to First Amendment doctrine represented by *Hosanna-Tabor*, which recognized the internal affairs line of precedent as separate from the *Smith*/*Lukumi* rule. *See*, *e.g.*, Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 *Harv. J.L. & Pub. Pol'y* 821, 833-37 (Summer 2012) (describing major doctrinal changes resulting from Hosanna-Tabor).

Indeed, Professor McConnell stated that *Hosanna-Tabor* provided a different way of analyzing the Mandate, stating that it "constitutes a mandatory term in the contract between the religious organization and its employees, which looks 'internal,' and it certainly affects 'faith and mission.'" *Id.* at 835.

Whatever the reason for Defendants' silence, because they have failed to move to dismiss or for summary judgment on the *Hosanna-Tabor* claim, they have waived any argument concerning it.

D. The Mandate violates the Universities' Equal Protection and Due Process rights.

The same reasoning applies to Plaintiffs' claims under the Equal Protection Clause. Where the government violates the Free Exercise and Establishment Clauses, equal protection interests are implicated, too. *See Weaver*, 534 F.3d at 1258 ("So while the Establishment Clause frames much of our inquiry, the requirements of the Free Exercise Clause and Equal Protection Clause proceed along similar lines.").

Here, the Universities have established violations of the Free Exercise and Establishment Clauses, which subject the government's classifications to strict scrutiny under the Equal Protection Clause. "If a classification disadvantages a 'suspect class' or impinges upon a 'fundamental right,' the [law] is subject to strict scrutiny." *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) (internal citation omitted). Here, the government's classifications impinged on fundamental rights under the Free Exercise and Establishment Clauses. *See* Sections I.B. and I.C. above.

The government's classifications also improperly disadvantaged a suspect class. The government exempted houses of worship which teach the faithful, hold worship services, and serve the young. But it refused to exempt the Universities, which teach the faithful, hold worship services, and serve the young. *See* Mem. at 39-40 (describing improper classifications). It did so on an improper religious basis: its own unsupported speculation that

> [h]ouses 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. 39874 (emphases added).[11] This is an improper test of religiosity under the Establishment Clause, and a suspect classification under the Equal Protection Clause. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (religion a suspect classification); *see also Weaver*, 534 F.3d at 1250 (rejecting unequal government treatment of religious institutions deemed to be "pervasively" religious).

None of the government's cases are to the contrary. All are cases where there were no distinctions drawn on the basis of religion, or where the distinctions did not disadvantage the religious.[12] In *St. John's United Church of Christ v. City of*

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[11] The government also restricted the Universities' fundamental right to religious exercise when it interfered with the employment policies of religious schools and subjected religious exercise to heavy fines. *See, e.g., Hosanna-Tabor*, 132 S. Ct. at 706; *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[12] *See also Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (no infringement upon the fundamental right of Free Exercise); *Wirzburger v. Galvin*, 412 F.3d 271, 282-84 (1st Cir. 2005) (the government prohibited "both initiatives that would disfavor as

Chicago, the distinction was made not upon religious lines, but geographic ones—and "[g]eography . . . is not a suspect class for equal protection purposes." 502 F.3d 616, 638 (7th Cir. 2007). In *Droz*, the classification was made upon secular lines related to the purpose of the statute: only those religions which had their own social welfare programs, in addition to religious objections to the statute, were exempt. 48 F.3d at 1125.[13] There, unlike here, the government's lines were not premised upon the perceived degree of religiosity among the groups' employees, but the groups' willingness to opt out of Social Security benefits themselves and an objective practice of superseding the program by providing their own benefits to the elderly and infirm. *See id.* None of these cases involve a situation resembling this case or *Weaver*, where the government disadvantaged a group of religious institutions based upon their perceived religiosity.

Even were the Court to find no suspect classification, the Mandate must still have a rational basis for distinguishing between houses of worship and religious bodies such as the Universities. *City of New Orleans,* 427 U.S. at 303. As explained above, the government claims that houses of worship "are *more likely* than other employers to employ people of the same faith who share the same objection." But the Universities already require their employees to share the same faith, and in

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well as those that might benefit religion," and also protected Massachusetts' Free Exercise Clause); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868-70 (2d Cir. 1996) (no claim that another faith group was treated better than plaintiffs); *Cooper v. Tard*, 855 F.2d 125, 130 (3d Cir. 1988) (same).

[13] The government wrongly describes this case as one where "some individuals receive exemptions, and other individuals with identical beliefs do not." Opp. 36. That was the *plaintiff*'s characterization of the claim, not the Ninth Circuit's. *See Droz*, 48 F.3d at 1124.

many cases require a statement of faith. *See* Mem. 39-40 (describing Universities' religious requirements for employment). There is no rational basis for exempting houses of worship that employ people of the same faith, while refusing to exempt religious universities that employ people of the same faith. At minimum, the Universities should have the opportunity to explore the basis for this presumption at trial. The Court should deny summary judgment on the Equal Protection and Due Process claims.[14]

E. The Mandate violates the Universities' right to expressive association under the Free Speech Clause.

Defendants also seek dismissal or summary judgment on the Universities' expressive association claim, Count X. The government's brief argument—presented in just two paragraphs—cannot carry its heavy burden on a motion to dismiss or motion for summary judgment.

Defendants argue that there can be no expressive association claim based on the composition of the Universities' "workforces, faculties, or student bodies" which it says are unaffected by the Mandate. Opp. 42. This is true as far as it goes. But the government's brief incorrectly suggests that the *only* possible infringement on expressive association is forced acceptance of unwanted members. *Id.* As the Supreme Court has explained, however, unconstitutional burdens on expressive association "take many forms" only "one of which" is a "regulation that forces the

[14] The government makes no separate argument with regard to the Plaintiffs' Due Process claims so that argument is waived.

group to accept members it does not desire." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

Here, Plaintiffs' claim is not that the Mandate interferes with their hiring practices, but that it interferes with the *message* they intend to send through their association. Both HBU and ETBU deliberately aim to create communities built around religious principles. Ex. A ¶ 13 (ETBU employees must affirm and share same religious beliefs as ETBU); *see also* Ex. B ¶ 8 (same requirement for HBU employees). Both expressly require their employees to profess Christian faith and exhibit a lifestyle consistent with that faith. Ex. A ¶ 13 (ETBU); Ex. B ¶ 8 (HBU). The Universities have these requirements in part for expressive purposes: to create and to model a religious educational community constructed around shared Christian principles. Ex. A ¶ 15 (ETBU "is committed to the integration of learning and Christian faith in the pursuit of truth"); Ex. B at ¶¶ 8, 10 (HBU is guided by its commitment to "stand as a witness for Jesus Christ" and thus aims to "express Christ's Lordship as a function of its academic mission").

The Mandate interferes with this deliberate expressive association by introducing a required term—insurance coverage for abortion-inducing drugs and devices, both for employees and their dependents—into the relationship between and among the members of this community. That required term conflicts with the very purpose of these religious expressive associations, and represents an "intrusion into the internal structure or affairs of" these associations. *Dale*, 530 U.S. at 648 (quoting *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984)).

Expressive associations are "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647-648. Here, the plaintiffs simply seek to continue unmolested in the exercise of their right to associate based on their religious convictions, and without introducing payment for abortion-inducing drugs and devices as a mandatory term into their relationship. *See Hosanna-Tabor*, 132 S. Ct. at 712 (Justices Alito and Kagan, concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State.") (internal citations omitted); *Dale*, 530 U.S. at 647 (noting right to associate for "educational, religious, and cultural ends"); *Hobbs v. Hawkins*, 968 F.2d 471, 482 (5th Cir. 1992) (recognizing that "the constitutional right of association" is based in part on the right to the free exercise of religion and is "an indispensable means of preserving other individual liberties").

F. The Mandate violates the Free Speech Clause because it delegates unbridled discretion to Defendants.

Defendants devote just half a footnote to their argument that the Universities cannot make out an unbridled discretion claim. Opp. 35 n.25. Such a brief argument does not suffice to carry Defendants' summary judgment burden and summary judgment on this claim should therefore be denied on that ground alone.

Aside from its brevity, the argument—that HRSA has promulgated guidelines so there is no discretion—is also an *ipse dixit*. "Guidelines" are just that—Defendants retain discretion to amend them whenever they like. Indeed, Defendants have

frequently made changes to both the religious exemptions as well as the broader ACA requirements by means of "guidance"—sometimes appearing in the form of web postings, blogposts, or press conference announcements. *See*, *e.g.*, Ex. C-3 (HHS press release announcing a one-year safe harbor from the Final Mandate to religious nonprofits). This guidance is not binding and can be taken back at any time, without notice. For example, Defendants announced in a blogpost on the Department of Treasury website that they would suspend the Section 2980D penalties—one set of the fines that make up the burden here—for a year. Ex. C-7. However, there is nothing stopping Defendants from writing another blogpost that takes that forbearance away.

Moreover, the ACA itself gives unbridled discretion to Defendants (including their subagency HRSA) to decide whether to have a religious exemption at all and how to define it. HRSA has of course issued Guidelines, but nothing in the law itself defines how these Guidelines were to be promulgated. They are entirely a creature of regulatory discretion.

First Amendment rights cannot be subjected to this level of unfettered bureaucratic discretion. "[W]hen [a law or regulation] clearly grants unguided discretion to an actor, a plaintiff can attack that [law or regulation] without pointing to any particular impermissible exercises of discretion, as it is 'the pervasive threat inherent in [discretion's] very existence that constitutes the danger[.]'" *Int'l Women's Day*, 619 F.3d at 365 n.27 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)) (fourth alteration in original).

Although legislative discretion is not subject to the unbridled discretion doctrine, wide-ranging regulatory discretion like that at issue here is. *Id.* The "free exercise of religion" cannot be subjected to suppression by laws "of the most general and undefined nature[.]" *Cantwell v. State of Connecticut*, 310 U.S. 296, 307-8 (1940); *see also Fernandes v. Limmer*, 663 F.2d 619, 629 (5th Cir. Unit A, Dec. 11, 1981) (rejecting airport regulatory scheme that gave officials "unbridled discretion" to determine "legitimacy" of religious organization and thereby give it or deny it privileges). Although Plaintiffs have not moved for summary judgment on their unbridled discretion claim against the ACA and the Mandate, the procedural history alone suffices to make out an unbridled discretion claim, much less survive Defendants' motion for summary judgment.

G. The Mandate violates the Administrative Procedures Act.

The Amended Complaint also states valid claims under the Administrative Procedure Act (APA): That Defendants (1) improperly adopted the recommendations of the Institute of Medicine (IOM), a non-governmental advisory body, without notice-and-comment rulemaking, and then enacted Final Rules that are (2) arbitrary and capricious and (3) violate the law.

1. Defendants failed to follow mandatory notice-and-comment procedures in violation of the APA when they promulgated the HRSA Guidelines without notice and comment or even publication in the Federal Register.

The APA requires HHS to engage in notice-and-comment rulemaking when it formulates rules, which are "'agency statements of future effect' designed to 'implement, interpret, or prescribe law or policy.'" *U.S. Steel Corp. v. E.P.A.*, 595

F.2d 207, 213 (5th Cir. 1979) (quoting 5 U.S.C. § 551(4)). Congress gave HHS' sub-agency, the Health Resource Services Administration (HRSA), the authority to enact "comprehensive guidelines" for women's preventive health. *See* 42 U.S.C. § 300gg-13(a)(4) (delegating authority to HRSA); *see also* 45 C.F.R. § 147.130(a)(iv) (repeating delegation). Those guidelines are now binding on the Universities, who must either adopt an insurance plan that complies with HRSA's guidelines and HHS' exceptions, or face massive fines. 26 U.S.C. § 4980D, 4980H (fines and penalties for noncompliance). This is a quintessential delegation of rulemaking authority, but instead of following the requirements of notice-and-comment rulemaking, HRSA simply adopted the recommendations of a nongovernmental body—IOM—in a press release. *See* Ex. C-1 (Health Res. & Servs. Admin., Women's Preventive Servs.: Required Health Plan Coverage Guidelines). Under the APA, this was an abuse of discretion.

The APA notice-and-comment procedures that the Defendants should have followed are "familiar:" "agencies issuing rules must publish notice of proposed rulemaking in the *Federal Register*" at least 30 days before their effective date if they are substantive rules and must "give interested persons an opportunity to participate in the rule making by allowing submission of comments."[15] *City of*

[15] To be sure, Congress authorized the Defendants to issue any "interim final rules" that they "determine[] are appropriate to carry out" the Affordable Care Act (ACA). 42 U.S.C. § 300gg–92. But that authorization is best read "to require that interim final rules be promulgated either with notice and comment or with 'good cause' to forego notice and comment." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010) (construing the nearly identical statutory language in 29

Arlington, Tex. v. F.C.C., 668 F.3d 229, 244 (5th Cir. 2012) *aff'd,* 133 S. Ct. 1863 (2013). Here, however, HRSA delegated the task of developing guidelines to a private health policy organization, IOM, announced that it was adopting IOM's recommended guidelines via a statement on HRSA's website. *See* Ex. C-1. HRSA then incorporated the IOM-provided guidelines without change in a fully binding Interim Final Rule that Defendants promulgated the *same day*. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

Under the APA, the HRSA guidelines are plainly "legislative" rules that should have been subject to notice-and-comment rulemaking. "When Congress authorizes an agency to create standards, it is delegating legislative authority," and it has "authorize[d] an agency to impose a duty." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 169 (7th Cir. 1996). As a result, "the formulation of that duty becomes a legislative task entrusted to the agency." *Id.* "[A] rule promulgated pursuant to such a delegation" is "the clearest possible example of a legislative rule, as to which the notice and comment procedure . . . is mandatory." *Id.*

Here, it is neither the statute nor the final rules that give content to the Mandate. Both merely incorporate the HRSA guidelines by reference. *See* 42 U.S.C.

U.S.C. § 1191c, 26 U.S.C. § 9833 (replacing "part" with "chapter"), and 42 U.S.C. § 300gg–92 (replacing "part" with "subchapter")).

The APA's "good cause" exception requires the agency to "find[]" and state in the Federal Register its reason for finding, "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). For obvious reasons, courts have held that this exception "is to be "narrowly construed and only reluctantly countenanced." *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). With respect to the HRSA guidelines, Defendants complied with *none* of these procedures.

§ 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). Thus, the HRSA guidelines themselves are the rules that impose "arbitrary" duties and obligations upon the Universities—specifically, the duty to provide *all* FDA-approved contraceptives to their employees. *Hoctor*, 82 F.3d at 171-72. Rules imposing such arbitrary limits are a classic exercise of legislative rulemaking, whether the Defendants label them "rules," "guidelines," or something else. *Id.* at 168, 170 (holding that an internal agency memorandum was a "legislative rule[]"). "It is for the courts to say whether it is the kind of rule that is valid only if promulgated after notice and comment," *Id.* at 172, and therefore—notwithstanding Defendants' protests to the contrary (Opp. 44-45)—the HRSA guidelines are "legislative rule[s], as to which the notice and comment procedure . . . is mandatory." *Id.* at 169.

Indeed, HHS' actions with respect to other aspects of the preventive services mandate admit as much. The same statute that instructed HRSA to develop guidelines for women's preventive services also requires HRSA to develop "comprehensive guidelines" for *children's* preventive care. 42 U.S.C. § 300gg-13(a)(3). As with the Mandate, Defendants promulgated a rule mirroring the statutory language. *See* 45 C.F.R. § 147.130(a)(1)(iii). But, unlike the HRSA guidelines on women's preventive services, Defendants published the guidelines governing children's preventive services in the Federal Register. *See* 75 Fed. Reg. 41,726, 41,740 *et seq.* (July 19, 2010) ("Comprehensive guidelines for infants,

children, and adolescents supported by HRSA appear in two charts that follow.").[16] No less was required here.

It is no answer to say that the Universities were not prejudiced by this deeply flawed procedure. *Cf. City of Arlington*, 668 F.3d at 244 (identifying "prejudice" as the "touchstone" for analyzing cases where the agency has failed to comply with the APA). The harm to the Universities' interests was severe. The APA requires public comments in part to "ensure fair treatment for persons to be affected by regulation." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (internal quotations omitted), but the groups that IOM invited to make presentations were narrow and *un*representative. IOM's invited presenters included the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), Prof. John Santelli, a Senior Fellow at the Guttmacher Intitute, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America and Prof. Sara Rosenbaum, a proponent of government-funded abortion. Dkt. 61, Am. Compl. ¶ 79. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling—the very people most "affected by" the recommendations—were among the invited presenters. *Cain*, 583 F.3d at 420; Am. Compl. ¶ 80.

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[16] The children's preventive services guidelines were published as "interim final rules" without notice and comment. *See* 75 Fed. Reg. 41,729-30. HHS relied on 42 U.S.C. § 300gg–92 and the "good cause" exception to the APA to justify this procedure. *Id.* Publication in the Federal Register alone may not have been enough to fully comply with the APA, *see Coalition for Parity,* 709 F. Supp. 2d at 19, but it is certainly more than the Departments did here.

Unsurprisingly, IOM's recommendations completely failed to account for the concerns of religious believers like the Universities, who only object to a small subset of contraceptives. IOM recommended that the preventative services include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." IOM, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011) ("IOM Report") AR 000285 to 000534. But although it discussed the use of contraceptives in general, the IOM Report mentioned *emergency* contraceptives—the drugs at the heart of this lawsuit—only in passing. *See id.* at AR 000403 (noting that "[a] wide array of safe and highly effective FDA-approved methods of contraception is available, including . . . emergency contraception" and that "[s]ome methods, such as . . . emergency contraceptives, are available without a prescription"). Because neither the IOM nor HRSA provided the public with an opportunity to comment before the IOM Report was adopted, the Universities and their fellow believers had no opportunity to question the assumptions on which the IOM Report's recommendations were based.

Nor can Defendants claim that the Universities' later opportunities to comment on the Mandate cure this prejudice. The Fifth Circuit rejected this argument long ago when it held that "[p]ermitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way," because it is "doubt[ful]" that the agency "would seriously consider their suggestions after

the regulations are a Fait accompli." *U.S. Steel Corp.*, 595 F.2d at 214-15 (internal citations and quotations omitted).

Defendants' chief response is that it is common for agencies to request assistance from private organizations in developing legal standards. Opp. at 44-45. But while nothing prohibits Defendants from seeking scientific recommendations from private organizations, doing so does not grant them license to adopt the recommendations *without* notice-and-comment rulemaking. *National Association of Farmworkers Organizations v. Marshall*, for example, involved an agency's promulgation of a rule that incorporated a private organization's recommendations. 628 F.2d 604, 607-10 (D.C. Cir. 1980). The rule involved an exemption to child-labor laws for the harvesting of short-seasoned crops. *Id.* at 607. The exemption delegated to the Department of Labor the ability to grant waivers to those laws if the pesticides used on the crops would not harm children. Under the regulations, a company needed to submit evidence that the specific pesticides it used were not harmful, unless those pesticides fell within the agency's "approved list of pesticides." *Id.* at 607-10, 621. As with the creation of the HRSA guidelines, the agency created its "approved list" by adopting recommendations received from a third party. *Id.* at 621. The court held that adoption of the approved list violated the APA because the agency had not followed notice-and-comment rulemaking. *Id.* The list was "exactly the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism." *Id.* So, too, the Mandate's determination that Plaintiffs

must cover abortion-inducing drugs deserves "development and exposure to public and expert criticism."

In short, the statute and regulation have no substance without the HRSA guidelines, but they were not published in the Federal Register and did not proceed through notice and comment. The Mandate is thus an invalid legislative rule that must be vacated. *See* 5 U.S.C. § 706(2)(D).

2. The Mandate and its exemption are arbitrary and capricious.

The Final Rule violates the APA because it is arbitrary and capricious. A rule is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence" before the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Texas v. E.P.A.*, 690 F.3d 670, 677 (5th Cir. 2012), *cert. granted*, Oct. 15, 2013. The Final Rule fails both prongs of this test.

First, Defendants showed that they "entirely failed to consider an important aspect of the problem," *Texas v. E.P.A.*, 690 F.3d at 690, when Defendant Secretary Sebelius announced the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the many substantive objections to the Final Rule. *See* The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services*, *supra* (see 51:30-52:00). "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to

rationally consider arguments." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011). Here, "over 400,000 comments" were submitted in response to Defendants' NPRM, and many of them pointed to serious difficulties created by the Defendants' proposal to treat religious organizations differently based on their tax status. 78 Fed. Reg. 39870, 39871 (published July 2, 2013); *see, e.g.*, Church Alliance NPRM Comments (April 8, 2013), *available at* http://church-alliance.org/initiatives/comment-letters, AR CMS 2012-0031-80021-A1. Yet on April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius announced at Harvard University that "religious entities will be providing coverage to their employees starting August 1st."[17] The Final Rule followed Defendant Secretary Sebelius' announced rule, and her comments demonstrate that the outcome of the rulemaking was determined in advance.

Second, the Final Rule is arbitrary and capricious because Defendants "offered an explanation for its decision" to limit the religious employer exemption to churches and church-like institutions "that runs counter to the evidence before the agency." *Texas v. E.P.A.*, 690 F.3d at 677. Defendants claim that the limits they have imposed on the religious employer exemption are justified because objecting "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection, and

[17] The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services*, 51:30-52:00 (April 8, 2013) *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (last visited October 17, 2013).

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. 39874. But that is simply not true, and Defendants knew it.[18] As the Council for Christian Colleges and Universities stated in its comments on the NPRM:

> The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, **because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution.** Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.

CCCU NPRM Comments at 5 (Apr. 8, 2013), AR CMS-2012-0031-82670-A1 (emphasis in original).

This is not an insignificant issue: CCCU represents 119 religious colleges and universities—nearly 15% of the 900 religiously-affiliated institutions of higher education in the United States. CCCU, Profile of U.S. Post-Secondary Education, *available at* https://www.cccu.org/about. And the same can be said for HBU and ETBU, both of whom are CCCU members. CCCU, Members and Affiliates, https://www.cccu.org/members_and_affiliates. As noted above, HBU and ETBU both require their employees to profess Christian faith and live accordingly, for the specific purpose of creating and modeling a religious educational community constructed around shared Christian principles. *See* Section II(E); Dkt. 70-1, Ex. A

[18] Or they would have known it had they actually reviewed comments before adopting the Final Rule.

¶ 15; Dkt. 70-2, Ex. B at ¶¶ 8, 10. Defendants' Final Rule is arbitrary and capricious because their explanation for limiting the religious employer exemption to churches and church-like institutions "runs counter to the evidence" that was before them. *Texas*, 690 F.3d at 690.

In short, when enacting the Mandate and exemption, Defendants ignored key aspects of the problem before them and relied on misinterpretations of facts and laws. Defendants thus acted arbitrarily and capriciously in violation of the APA. *See Texas,* 690 F.3d at 690; *Motor Vehicle*, 463 U.S. at 43.

3. The Mandate violates governing law.

In response to the Universities' claim that the Final Mandate violates the Administrative Procedures Act because it violates the Weldon Amendment, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011), and the Affordable Care Act, 42 U.S.C. § 18023(b)(1)(A), Defendants first raise the issue of prudential standing. Opp. 47. But the "prudential standing test . . . is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation omitted). The test requires only that a plaintiff's asserted interest is "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Id.* There is no required "'indication of congressional purpose to benefit the would-be plaintiff,'" *id.*, because the test is applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Id.* In accord with

Congress's "evident intent," the Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.*

The Weldon Amendment to the Consolidated Appropriations Act of 2012 prohibits the use of funds by a "Federal agency or program" if that agency or program discriminates against "any institutional or individual health care entity" because the "health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). The Amendment defines "health care entity" broadly to include "a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2). The Universities have prudential standing to challenge the Final Mandate because it discriminates against their "health insurance plan[s]" precisely because their plans do not provide coverage for abortion-inducing products. At the very least, the Universities' interest is "arguably within the zone of interests to be protected" by the Weldon Amendment, which Congress passed to restore the right to conscientiously object to providing, paying for, or facilitating what an individual viewed as abortion. *See*, *e.g.*, 148 Cong. Rec. H6566-01, at H6577-78, 2002 WL 31119206 (daily ed. Sept. 25, 2002) (Rep. Bilirakis: "this is not about abortion. This is about freedom. . . . basically giving people the moral rights to make their decisions. That is what it is all about.").

Similarly, the Universities meet the low bar for prudential standing to assert under the APA that the Final Mandate violates the Affordable Care Act, which forbids "requir[ing] a qualified health plan to provide coverage of [abortion services]." 42 U.S.C. § 18023(b)(1)(A)(i). The Universities' interest in not being required to provide coverage for abortion services falls within the plain language of the statute and plainly within the "zone of interests to be protected" by the statute. *Patchak*, 132 S. Ct. at 2210.

Defendants' fall-back argument that the Final Mandate does not run afoul of the Weldon Amendment or the Affordable Care Act because the drugs at issue do not cause "abortion," as used in the Amendment and Act, also fails. Opp. 47-49. Defendants offer no analysis of "abortion" as used in the Amendment or Act and cite no statutory or medical definition of "abortion." Instead, Defendants cite the IOM Report, the HHS Guidelines based on the same IOM Report, and an HHS press release announcing the same, none of which are owed any deference or shed any light on Congress's intent in enacting the Weldon Amendment or 42 U.S.C. § 18023. Indeed, with respect to the Act, the interpretation that is entitled to deference is that of the "issuer of a qualified health plan," not that of the HHS or IOM. *See* 42 U.S.C. § 18023(b)(1)(A)(ii). Likewise, Defendants' interpretation of the Weldon Amendment is not entitled to any deference since Defendants have no particular expertise in enforcing appropriation bills or the limits Congress places on them. *See Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (same level of deference not owed agency interpretation of

statute not within "the agency's particular expertise and special charge to administer").

In the absence of any statutory definition for "abortion" in the Weldon Amendment, the court should give the term its ordinary meaning, which is informed by contemporaneous dictionaries. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.") Stedman's Medical Dictionary defines "abortion" as the "[e]xpulsion from the uterus of *an embryo* or fetus [before] viability." *Stedman's Medical Dictionary* 4 (28th ed. 2006) (emphasis added); *see also id.* at 1438 (defining "pregnancy" as "[t]he state of a female *after conception* and until the termination of the gestation") (emphasis added), *Dorland's Illustrated Medical Dictionary* 1500 (30th ed. 2003) (defining pregnancy as "the condition of having *a developing embryo* or fetus in the body, after union of an oocyte and spermatozoon").[19] Under these definitions, some of the Mandate's required services qualify as "abortion" in contravention of the Weldon Amendment and the Affordable Care Act and, therefore, the APA.[20] Moreover, interpreting "abortion" according to its ordinary meaning and holding that the Mandate violates the Weldon

[19] This definition is the same one used for other mammals. *See*, *e.g.*, Janet Amundson Romich, An Illustrated Guide to Veterinary Medical Terminology 251, 253 (3d ed. 2009) ("pregnancy" defined as "time period between conception and parturition"; "abortion" defined as "termination of pregnancy").

[20] Defendants cite Representative Weldon's understanding that the 2002 amendment did not include "emergency contraceptives" within the meaning of "abortion," but that sheds little light on Congress's intent in 2011. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 n. 15 (2002).

Amendment and the Affordable Care Act fulfills the purpose of both laws—to allow individuals and plans to choose for themselves whether to provide or pay for abortion services—by leaving to the individual and plan the choice of providing abortion services. *See* Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 Ave Maria L. Rev. 527, 528-30 (2007); *see generally* 148 Cong. Rec. H6566 *et seq.*, 42 U.S.C. § 18023(b)(1).

III. The Universities are entitled to an injunction.

As demonstrated in their opening memorandum, the Universities easily meet all four preliminary injunction factors, *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (citation omitted), and are entitled to an injunction. Mem. 49. In their opposition, Defendants make little effort to negate any factor other than the substantial likelihood of success factor.

A. The Universities have a substantial likelihood of success on the merits.

For the same reasons set forth in Sections I and II above and discussed in the Universities' opening memorandum, Mem. 49-51, the Court should also find that the Universities' burden has been met by demonstrating a substantial likelihood of success on the merits.

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

Defendants concede that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Opp. 49 (*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*, 904 F. Supp. 2d at 129 (citation omitted).

Defendants also concede that if the Universities prevail on the substantial likelihood of success factor, then the irreparable injury factor has also been met: "[i]n this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together." Opp. 49-50. Because the Universities have a substantial likelihood of success on the merits, they automatically face a substantial threat of irreparable injury if the injunction is not issued.

Moreover, as explained more fully in the Universities' opening memorandum, Mem. 50, coercing the Universities to facilitate access to abortion-causing drugs in direct violation of their faith is the epitome of irreparable injury. And the impending enforcement of the Mandate is adversely affecting the Universities' ability to hire and retain employees, constituting irreparable injury difficult to evaluate in terms of money damages. *See* Ex. A ¶ 36 (ETBU); Ex. B ¶ 34 (HBU).

C. The threatened injury to the Universities far outweighs any harm to Defendants that might result.

Defendants argue that the balance of equities tips in their favor because it is necessary to the government's ability to achieve its interests that the Universities be forced to facilitate access to abortion-causing drugs in violation of their conscience. Defendants insist on this despite the fact that granting the Universities an injunction will merely preserve the status quo, and even that with respect to only a small subset of the contraceptive methods covered by the Mandate.

Defendants' argument is further undermined by both the widespread access to the drugs and devices, as well as the fact that the government has chosen to exempt "over 190 million health plan participants and beneficiaries." *Newland v. Sebelius*, 881 F.Supp.2d 1287, 1298 (D. Colo. 2012). The government also "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, __F. Supp. 2d__, Case No. 2:12-cv-00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). While Defendants argue that they consented to these preliminary injunctions in an effort to conserve "judicial and governmental resources," Opp. 51 n.36, the conservation of these resources is not a compelling government interest.

Thus any harm the Defendants might claim from a preliminary injunction is *de minimis*. In contrast, the Universities face government compulsion to violate their religious beliefs or face crippling fines of up to $8 million and nearly $13 million per year. Dkt. 70, Ex. A ¶ 69; Ex. B ¶ 69. The severity of the fines the Universities face for exercising their sincerely held religious beliefs far outweighs any harm to the Defendants.

D. An injunction will not disserve the public interest.

Finally, issuing a preliminary injunction will not disserve the public interest. Defendants argue that it would be contrary to the public interest to deny the Universities' employees access to the full range of FDA-approved contraceptive services. They further contend that the fact that the Universities object to only four out of twenty contraceptive methods "should not be an important consideration"

because the woman, not the employer, should decide which contraceptive method is right for her. Opp. 51, n.37. Defendants go on to list the various purported benefits of contraceptive use.

Defendants completely miss the point: the Universities do not seek to prevent their female employees and their employees' dependents from accessing emergency or any other contraceptives. The government can subsidize emergency contraceptives—and has already. The Universities object only to their own coerced facilitation of the transaction.

As explained in the Universities' opening memorandum, Mem. 53, the public interest in enforcing long-standing First Amendment and religious freedom protections certainly outweighs the interest in immediate enforcement of a new and shaky federal regulation that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *rev'd on other grounds*, 723 F.3d 1114 (10th Cir. 2013) (en banc). Between the public interests furthered by the ACA and those furthered by RFRA, the latter, by the statute's very language, trumps.

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 the Universities' consciences and their civil and constitutional rights.

CONCLUSION

The Universities 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. The Universities also respectfully request that Defendants' motion to dismiss and motion for summary judgment be denied in their entirety.

Respectfully submitted,

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Dated: October 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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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