**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 Surreply to Defendants' Motion to Dismiss and for Summary Judgment and Notice of Supplemental Authority in support of Plaintiffs' Motion for Preliminary Injunction and Partial Summary Judgment**

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Plaintiff Universities submit this combined surreply and notice of supplemental authority in support of their Motion for Preliminary Injunction and Partial Summary Judgment and in opposition to Defendants' motion to dismiss or for summary judgment. The Universities hereby incorporate by reference their statements of the nature and stage of the proceeding and statements of the issues set forth in their opening memorandum, Dkt. 70 at 21-22, and combined opposition and reply, Dkt. 97 at 5-7. Court Procedures 6.A.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

I. In their reply brief, Defendants raise for the first time an argument that HBU lacks standing because it participates in a church plan. This last-minute argument fails because Defendants do not contest the other Plaintiffs' standing, and Defendants are still requiring HBU to do something that violates HBU's conscience—fill out a certificate authorizing HBU's third-party administrator ("TPA") to distribute abortifacients, send that form to the TPA for the sole purpose of facilitating the distribution of abortifacients, and refrain from asking the TPA not to distribute those abortifacients.

Defendants' new standing argument also severely undermines their existing arguments. If, as Defendants claim, filling out the form and submitting it to the TPA are meaningless acts, then Defendants cannot possibly meet the much higher compelling interest standard justifying forced submission of the form. Defendants' new argument also undermines their previous arguments regarding freedom of speech and the Administrative Procedures Act.

II. As Plaintiffs demonstrated in their previous submissions, the Mandate violates RFRA. Defendants' RFRA arguments fail because they continue to conflate the "burden" in the text of RFRA with the "religious exercise," Dkt. 97 at 9-14, and they also conflate the "religious exercise" at issue with "behavior." Gov't Reply 7-10. Courts of Appeals have thus far been unanimous in finding that the religious exercise here is the actions of the objecting plaintiffs, not their employees. Two more decisions issued just this week by the D.C. Circuit and the Seventh Circuit reject precisely the same "insubstantial burden" and "attenuation" arguments the government raises here. *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013), *pet. for cert. filed*, Nov. 6, 2013; *Korte v. Sebelius*, No. 12-3841 (7th Cir. Nov. 8, 2013), attached as Exhibit E-2.[1]

Moreover, Defendants' strict scrutiny affirmative defense fails because they have still not identified a compelling interest, they openly admit that their chosen means does not further their alleged interests, and they have not used least restrictive means.

III. Defendants' additional arguments also fail for the reasons outlined below.

## ARGUMENT

### I. Defendants' eleventh hour standing argument not only fails; it also undermines their other arguments.

In their reply brief, Defendants raise for the first time an argument that HBU lacks standing because Defendants now concede that under ERISA they cannot

[1] Because *Korte* was issued late Friday evening, it had not yet appeared on Westlaw by the time this document was submitted. Therefore Plaintiffs have attached the slip opinion as Exhibit E-2.

force church plan TPAs to provide abortifacients. Gov't Reply 3-5. Defendants claim that they just realized that HBU might be on a church plan because of the Mooney Declaration attached to most recent Plaintiffs' filing. *Id.* at 4. This statement is remarkable not least because Plaintiffs have throughout the course of this lawsuit repeatedly described the fact that HBU is on a church plan—at the August conference, Dkt. 60, in the amended complaint at ¶ 56, Dkt. 61, and in several subsequent filings. Dkt. 62 at 2 ("HBU participates in a Southern Baptist Convention 'church plan' under 26 U.S.C. § 414(e)"), Dkt. 70, Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment and Preliminary Injunction at 18; Dkt. 70-2, Declaration of Dr. Robert B. Sloan at ¶ 27. Defendants cannot plausibly claim that they are just now discovering that HBU is on a church plan.

Plaintiffs submit that rather than the Mooney Declaration, the real reason for the new standing argument was that Defendants decided during the week of October 28 to begin making this new standing argument in all of the Mandate-related cases involving church plans, including two recently-filed class action lawsuits. *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611 (D. Colo. filed Sept. 24, 2013); *Reaching Souls International, Inc. v. Sebelius*, No. 13-cv-1092 (W.D. Okla. filed Oct. 11, 2013).[2] Defendants' abrupt change in litigation tactics comes shockingly late in this lawsuit—less than eight weeks before the Mandate goes into effect—and should not be allowed to stand in the way of

[2] One of the plaintiffs in *Reaching Souls International v. Sebelius* is HBU's church plan, GuideStone Financial Resources of the Southern Baptist Convention.

preliminary relief for HBU.

Defendants' feigned epiphany aside, their new argument fails for several reasons on the merits.

First, the "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.11 (5th Cir. 2008) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)). Since Defendants have conceded the standing of ETBU and Westminster, HBU need not demonstrate standing.

Second, Defendants argue standing only with respect to the RFRA claim. But even taking Defendants' new standing argument at face value, they are still forcing HBU to engage in a very specific form of compelled speech (filling out the self-certification form and submitting it to the TPA) and are also compelling HBU to be silent under Defendants' gag rule, 29 C.F.R. § 2590.715-2713A. These two actions result in an Article III injury to HBU. The fact that the regulation may not be enforceable against *someone else* (at least temporarily) does not trump the fact that Defendants continue to insist that the rule *is enforceable against these plaintiffs* right now. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Similarly, forcing an employer to provide a certification that Defendants claim is meaningless is by definition arbitrary and capricious.

Third, even with respect to the RFRA claim itself, Defendants' argument makes little sense. HBU is suffering an injury because it is being forced to do something

that still violates its conscience—fill out a certificate purporting to authorize a third-party administrator ("TPA") to distribute abortifacients and then send that form to someone—the government has still not said who—for the sole purpose of facilitating the distribution of abortifacients. *See* Sloan Dec. at ¶ 46 ("The Mandate does not provide any guidance for 'eligible organizations' that are insured through church health plans like GuideStone. For example, it is not clear whether Houston Baptist is required to deliver its self-certification to GuideStone, which provides Houston Baptist with its health plan, or Highmark Blue Cross Blue Shield ("Highmark"), the third party administrator that GuideStone has contracted with to administer its church health plan. Either course of action would violate Houston Baptist's religious beliefs"). The form on its face purports to trigger provision of abortifacients by the TPA: "the provision of this certification to a third party administrator . . . constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A." Ex. E-1. Those "obligations" are of course the provision of abortifacients.

Defendants say that they can't enforce this provision against GuideStone's TPA, and that therefore HBU is not the trigger for the flow of abortifacients. But at the same time, Defendants make clear that they are seeking ways—perhaps through a new rule-making—to force church plan TPAs to provide the abortifacients. And Defendants are still forcing HBU, on penalty of massive fines, to fill out the form and submit it, and are still forcing HBU comply with the gag rule. Govt Reply 4. In

effect, Defendants are telling HBU, "Sign the pre-authorization form, and we'll figure out how to use it later to distribute abortifacients." Indeed, after HBU submits the abortifacient authorization to GuideStone's TPA, (1) the TPA will likely begin providing the abortifacients in accordance with the text of the form, (2) HBU will be prohibited from requesting them to do otherwise, and (3) once HBU submits the form authorizing the abortifacients to start flowing, HBU will never know whether the TPA has begun doing so. HBU thus suffers an Article III injury by being forced to sign what amounts to a blank check, or an abortion-drug pre-clearance form.

Fourth, Defendants' compelling interest argument is in direct conflict with their standing argument. How can filling out the form and submitting it to another organization be meaningless and *incapable* of causing injury if the government has an "interest of the highest order" in forcing HBU to fill it out and submit it? It is quite possible for HBU to have an Article III injury without the government having a compelling interest, but the reverse cannot logically be true in this case.

**B. Defendants' new standing argument undermines their existing arguments.**

Although Defendants' new argument does not have any bearing on HBU's standing, it does serve the purpose of further demonstrating the weakness of several of Defendants' other arguments.

First, Defendants' concession directly contradicts their strict scrutiny argument. As noted above, by stating that the self-certification form is meaningless, Defendants have conceded that they don't really have a compelling governmental

interest at stake. Moreover, signing a meaningless form cannot actually advance the interest, nor is it actually necessary. Dkt. 97 at 31-32; *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011); *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

Second, the new argument demonstrates discrimination among religious groups in perhaps the starkest way possible. Religious groups that have "common religious bonds" with a particular church enjoy the accommodation without having to provide abortifacients. 26 U.S.C. § 414(e)(3)(D). But religious groups that are unaffiliated with a particular church cannot do so. Here, HBU will, under Defendants' new interpretation of the regulation, be allowed to enjoy the accommodation. But ETBU, which is in an essentially identical situation, but self-insures not through a church plan but on its own, will receive no accommodation.

Finally, since Defendants now concede that the Final Rule is invalid, they have no grounds to argue that any aspect of the Final Rule should be enforced. The logical result would be to issue a preliminary injunction enjoining the rule they concede is invalid.

**II. The Mandate violates RFRA.**

Rather than respond to Plaintiffs' arguments, Defendants' reply consists mostly of attempts to distinguish entire lines of case law based on factual differences. Defendants ask this Court to set an entirely new standard for RFRA, one that neither the Fifth Circuit nor the Supreme Court has ever endorsed. According to the clear precedent, however, the Mandate violates RFRA by requiring the Plaintiffs to

violate their beliefs or be subject to massive fines. Indeed, every Court of Appeals to address Defendants' interpretation of RFRA has rejected it.

### A. Plaintiffs' religious exercise concerns what *they* are required to do, not their employees.

Plaintiffs described the "particular religious exercise" at issue in this litigation in their motion for preliminary injunction and partial summary judgment. *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2010) (quoting *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008)). It violates Plaintiffs' Christian faith to participate in distributing drugs and devices that end human life. Dkt. 70 at 25; Dkt. 97 at 8-14. Instead of addressing Plaintiffs' objections to the specific actions the Mandate would force them to carry out, Defendants attempt to rewrite the complaint, claiming that what Plaintiffs really object to are external actions taken by the government or Plaintiffs' employees. Gov't Reply 8-10. But the religious exercise at issue here is not Plaintiffs' employees' personal decision-making or the government's actions. It is the *Plaintiffs'* action of abstaining from participating in a scheme to provide objectionable drugs and devices. Dkt. 70 at 25.

Among many other conflations, Defendants' argument conflates "behavior" with "religious exercise." They argue that because Plaintiffs' "behavior"—which Defendants appear to view as simply a series of physical actions—doesn't have to change (much), there is no burden on their religious exercise. But religious exercise is not reducible to a series of discrete physical acts characterized as "behavior," particularly when the religious exercise in question is *abstaining* from immoral activity. Even though the physical actions may be identical, it matters a great deal

from a moral and religious perspective whether someone's head is at the end of the barrel when one pulls the trigger. The same physical actions can be moral or immoral, depending on the circumstances.

Here, Plaintiffs' religious exercise does not depend on the actions and decisions of others, but on Plaintiffs' *participation* in the actions and decisions of others. Plaintiffs are asking to stay out of those decisions and actions, and the Mandate imposed by Defendants forces them to take part in them. This is where their consciences draw the line, and they cannot cross it. *See Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

Courts of Appeals to reach this question thus far have been unanimous that the act of determining what goes in the coverage "basket" is the particular religious exercise at issue, not employees' subsequent actions.[3] Defendants perhaps unsurprisingly make no mention of the D.C. Circuit's opinion in another Mandate case, *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013), *pet. for cert. filed*, Nov. 6, 2013, even though it was decided three days before they filed their reply. Defendants' silence presumably stems from *Gilardi*'s direct support for Plaintiffs' arguments on religious exercise and substantial burden. The D.C. Circuit "disagree[d] with the government's

[3] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 13-5069, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013); ); *Korte v. Sebelius*, No. 12-3841 at 59 (7th Cir. Nov. 8, 2013), Ex. E-2. The Sixth Circuit and the Third Circuit decided Mandate cases on issues exclusive to for-profit corporations and did not reach substantial burden. *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013), *pet. for cert. filed*, Sept. 19, 2013; *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), *pet. for cert. filed*, Oct. 15, 2013.

foundational premise." *Id.* at *7 (rejecting government's claim that the "burden is too remote and too attenuated"). "The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan." *Id.* "In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." *Id.* (citations omitted).

Here, the Universities are asked to fill that basket of goods by submitting a self-certification to their third party administrators. That self-certification triggers the flow of objectionable drugs and devices. Plaintiffs cannot be true to their beliefs and be complicit in that flow.

*Gilardi* explains that the burden on that exercise is the "pressure[ ] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties." *Id.* Defendants' approach, by contrast, is to continue conflating the exercise with the burden. Particularly galling is their claim that because it takes only a "matter of minutes" to fill out the self-certification form, Gov't Reply 8-9, it can't possibly be burdensome.[4] But one can become morally complicit and thus violate one's religious beliefs by the briefest of physical actions. It takes a split second to tell a lie, break one's Sabbath, or take a suicide pill. Whether avoiding such actions is a religious exercise has nothing to do with a clock.

*Korte v. Sebelius*, decided just today, also decisively rejects Defendants'

[4] According to the self-certification form itself, the "matter of minutes" is in fact "50 minutes." Ex. E-1.

arguments concerning burden. Ex. E-2 (slip op.). In that case, the Seventh Circuit held that by imposing the Mandate's penalties—"ruinous fines"—on the plaintiffs, "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. . . . This is at least as direct and substantial a burden as the denial of unemployment compensation benefits in *Sherbert* and *Thomas*, and the obligation to withhold and pay Social Security taxes in *Lee*." *Id.* at 57. The Defendants made the same responses in that case as they have here, and the Seventh Circuit rejected them: "the government's insistence that the burden is trivial or nonexistent simply misses the point of this religious liberty claim. The government focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraception coverage and an employee's decision to use it." *Id.* at 58-59. Like *Gilardi*, the *Korte* court held that the relevant actions were the plaintiffs' actions in obtaining coverage, not subsequent acts by employees: plaintiffs "can . . . object to being forced to provide insurance coverage for these drugs and services in violation of their faith." *Id.* at 59.

*Korte* also firmly rejects Defendants' attenuation argument: "This argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question." *Id.* Moral complicity is outside the purview of Defendants and of the federal courts.

Defendants also continue to insist that *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), is inapposite because, as a for-profit organization, Hobby Lobby is not "eligible for the accommodation." Gov't Reply 15-16 n.9. But Defendants fail to acknowledge that *Hobby Lobby* directly contradicts their rejection of the "substantial pressure" standard, which "rests firmly on Supreme Court precedent." 723 F.3d at 1138; *see also Gilardi*, 2013 WL 5854246, at *7 ("A 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (citation omitted)); *Korte*, slip op. at 57 ("federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate"). The for-profit and non-profit plaintiffs are facing the same Mandate and the same pressure on their consciences.

On the question of the burden, Defendants simply ignore Fifth Circuit precedent, arguing that the factual dissimilarities between this case and other Fifth Circuit RFRA and RLUIPA cases negate the legal standard. Gov't Reply 15-16 & n.9. But the Fifth Circuit substantial burden standard is even more accommodating than that of *Hobby Lobby*, requiring only "influence[ ]" on an adherent to "violate[ ] his religious beliefs." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 793 (5th Cir. 2013). Defendants do not even refer to this standard, let alone offer a reason to depart from it. The Mandate creates a burden that lies directly on Plaintiffs' religious exercise, and Defendants cannot possibly show that millions of dollars in fines is not a substantial burden.

Defendants' argument that Plaintiffs do not have to change their behavior as a result of the Mandate fails on an additional level. Defendants claim that "Plaintiffs need *only* self-certify they are a non-profit religious organization with a religious objection to providing contraceptive coverage and to provide a copy of that self-certification to their issuer/TPA." Gov't Reply 8 (emphasis added). Defendants assume that Plaintiffs "would have to . . . [do this] voluntarily anyway." *Id.* This assumption is incorrect—HBU, for example, takes no such steps because it uses a religious benefits provider, who does not need to be informed of its religious practices. In any event, Defendant Department of Labor has recently released the form that Plaintiffs must fill out for this purpose, and it is not anywhere near "purely administrative." *Id.*; Ex. E-1. Rather than requiring the Universities to say "virtually nothing," Gov't Reply 6, other than what Defendants wrongly assume the Universities would already otherwise say, the Universities would be required to fill out this two page form, which is designated "an instrument under which the plan is operated," and submit it as "notice" of a TPA's purported obligation to provide the objectionable drugs to HBU's employees. This is much more than simply expressing an objection to abortifacient drugs and devices. Not only is the form designed to transform the TPA into a "plan administrator" under ERISA by creating an ERISA "instrument," the form on its face purports to trigger provision of abortifacients by the TPA: "the provision of this certification to a third party administrator . . . constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-

16, and 29 CFR 2590.715-2713A." *Id.* Those "obligations" are of course the provision of the abortifacients, the process Plaintiffs are religiously obligated to avoid. In short, this is a lot more than "virtually nothing."

**B. Defendants' strict scrutiny affirmative defense fails.**

Defendants also make no attempt to distinguish *Gilardi*'s rejection of their practically identical strict scrutiny defense in that case. *Gilardi* addresses each of the supposedly compelling interests that the Defendants claim in enforcing the Mandate against Plaintiffs, *viz.* public health and gender equality. *Gilardi*, 2013 WL 5854246, at *10-*13.[5] The D.C. Circuit pointed out that the government's "recitation" of its compelling interests is "sketchy and highly abstract," *Id.* at *10, and went on to hold that "'public health' seems too broadly formulated to satisfy the compelling interest test." *Id.* Furthermore, the D.C. Circuit found that the term "gender equality" is a "misnomer," explaining that "the interest at issue is resource parity." *Id.* at *12. And lastly, the D.C. Circuit rejected the government's analogy to *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), holding that *Roberts* cannot be stretched to cover this factual situation because "it is difficult for the government to suggest the interests of women are monolithic, and unlike the U.S. Jaycees, the

[5] *Gilardi* also addresses—and rejects—three interests within public health that the Defendants claimed in that case: "the integrity of 'the health and insurance markets,'" "a woman's compelling interest in autonomy," and "avert[ing] 'negative consequences for both the woman and the developing fetus.'" The court held, respectively, that "the comprehensive sweep of the Affordable Care Act will remain intact with or without the mandate;" "autonomy is not the state's interest to assert;" and that though the government's interest in maternal or fetal health "has been deemed legitimate and substantial[,] . . . it has never been *compelling*" and is not compelling "in this particular context." *Gilardi*, 2013 WL 5854246, at *11-*12 (citing *O Centro*, 546 U.S. at 431).

government's proposed solution clearly impinges on other core prerogatives." *Gilardi*, 2013 WL 5854246, at *13. *Gilardi* also agreed that Defendants cannot show that they have satisfied the least restrictive means requirement by "ipse dixit," *id.* at *14, and have not demonstrated the disastrous consequences "if employers objecting on religious grounds could opt out of one part of a comprehensive coverage requirement." Defendants make no response to these objections.

Similarly, *Korte* rejects Defendants' stated interests in "public health" and "gender equality": "By stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, slip op. at 61. "There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Id.* at 62. The Seventh Circuit also noted that as here, the government "has not made *any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality." *Id.* at 63 (emphasis original).

Defendants' strict scrutiny defense fails.

**III. Defendants' other arguments fail**

Defendants' other arguments are in large part a repetition of their previous arguments. Plaintiffs respond to only some of those arguments here.

**A. Free Exercise**

Plaintiffs have shown that the Mandate is neither neutral nor generally applicable because it creates categorical exemptions for secular conduct that do not apply to religious objections, it gives exemptions specifically to some religious groups but excludes others, and it favors secular reasons for noncompliance over

religious reasons. Dkt. 70 at 35-41; Dkt. 97 at 31-36. Defendants do not respond to these arguments, instead making only a feeble attempt to distinguish the facts of *Lukumi*. They do not address the reasoning behind the prohibitions on categorizations like the Mandate, which 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*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). Defendants refuse to recognize the importance of Plaintiffs' religious objections, and that the resulting regulations—which exempt millions of plans for secular reasons—target a certain kind of religious exercise: specifically, Plaintiffs' abstention from providing access to drugs that end human life.

**B. Establishment Clause**

Plaintiffs have also shown how the Mandate plainly treats religious organizations differently based on their institutional, structural, doctrinal, and financial affiliation. Dkt. 70 at 41-45; Dkt. 97 at 36-40. Defendants' response is to take refuge in semantics, claiming that their behavior is constitutionally sanctioned because it does not discriminate between specific *denominations*. But they present no explanation for why discrimination among specific religious organizations is any less constitutionally suspect than discrimination among specific denominations. The principle animating this part of Establishment Clause jurisprudence is the neutrality principle. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (government actors may not abandon neutrality). Here, it requires one Baptist university to distribute

abortifacients to its employees, while the other may (according to Defendants) abstain. The government offers no argument why this is not plain discrimination.

Moreover, the Mandate *does* show denominational preference. Some denominations are more hierarchical and likely to support organizations that are closely tied to their churches, and thus be eligible as church auxiliaries. *See, e.g.*, Lutheran Hour Ministries, http://www.lhm.org/about/auxiliary.asp. Other denominations deliberately foster institutional autonomy for theological reasons. *See, e.g.*, Southern Baptist Convention, http://www.sbc.net/aboutus/psautonomy.asp. Under Defendants' approach, the Baptists are more likely to run afoul of Defendants' preference for church auxiliaries, as opposed to the neutral practice of protecting religious exercise where they find it.

**C. Internal Church Affairs**

After having waived an objection to Plaintiffs' internal church governance argument in their opening brief, Defendants argue that because this case has a different subject matter than *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), that case is inapposite. Gov't Reply 28. They fail to acknowledge the broad holding of *Hosanna-Tabor*, which is that "government interference with an internal church decision that affects the faith and mission of the church itself" is forbidden. *Id.* at 132 S.Ct. at 707. *Hosanna-Tabor* distinguishes between government regulation of "outward physical acts" such as smoking peyote, and the government "lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Id.* (quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)) (brackets in original). Plaintiffs

are real religious communities that have a stake in being able to teach their faith and ordering their behavior in a way that reflects that faith. The Mandate is the government's thumb on the scale, requiring the Universities to make internal decisions that directly contravene who they are as a faith community and how they would choose to faithfully care for the members of that community.

**D. Due Process and Equal Protection**

Claiming that Plaintiffs' Due Process and Equal Protection arguments fail under the Establishment Clause, Defendants insist that the Mandate should be subject only to rational basis scrutiny under Due Process and Equal Protection. Gov't Reply 29. Their Establishment Clause argument fails, *see supra* part IV, but even if their "denominational" theory were correct under the Establishment Clause, it would not import that restrictive language onto Equal Protection and Due Process case law, which recognizes religion itself is a suspect class. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Defendants cite to no authority that the Due Process or Equal Protection analyses are limited to their "denominational" theory of religious discrimination, and Plaintiffs have shown that the Mandate makes impermissible religious distinctions by applying theological criteria about the possible faith of a religious organization's employees. Dkt. 97 at 36-40, 49-52.

**E. Expressive association**

Plaintiffs showed in their Opposition that interfering with "the composition of plaintiffs' workforces, faculties, or student bodies" is not the only way to violate expressive association rights. Dkt. 97 at 52-54. Again attempting to limit an entire line of Supreme Court jurisprudence to its respective facts, Defendants insist that

Plaintiffs' claim fails. They do not respond to Plaintiffs' argument that the Mandate intrudes impermissibly "into the internal structure or affairs of" the Plaintiffs' expressive associations. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

**F. Unbridled discretion**

In response to Plaintiffs' unbridled discretion argument, Dkt. 97 at 54-56, Defendants complain that the HRSA Guidelines are not subject to unbridled discretion just because "they could theoretically change in the future." Gov't Reply 31. But Defendants have changed the Mandate several times over the past two years, leaving Plaintiffs very uncertain as to their future. The Safe Harbor guidance was instituted as a result of opposition to the Mandate and the Defendants changed that guidance as more objections arose in time. Dkt. 70, Ex. C-4. Defendants have issued a notice delaying the effects of the Mandate for employers who do not offer any insurance to their employees for one year, Ex. C-7, and currently, Defendants admit that they "continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans" despite their position that they cannot enforce the Mandate against HBU's TPA. Gov't Reply 1. This history makes it clear that the amount of discretion that Defendants have certainly constitutes unbridled discretion "of the most general and undefined nature." *Cantwell v. Conn.*, 310 U.S. 296, 307-08 (1940).

**G. Intentional discrimination**

On the question of intentional discrimination, Defendants argue that discovery is not permitted in order to determine the intent behind the Mandate. Gov't Reply

39-41. This is wrong with respect to each of Plaintiffs' claims that turn (in part) on intentional discrimination.

**Free Exercise Clause.** Defendants are wrong that courts may not consider the intent of the decisionmakers in enacting legislation that contravenes the Free Exercise Clause. Though intent of the lawmakers is not the only element in determining a law's neutrality, it is certainly one way to prove evidence of a law's "object." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see, e.g.*, *Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed,"). Defendants cite only one case on this point, which rather than prohibiting consideration of hostility toward religion, supports Plaintiffs' point more than theirs:

> "[T]he relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue."

*Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1294 (7th Cir. 1996). Where, as here, Plaintiffs have pointed to evidence of targeting and animus, Dkt. 97 at 47-48, they should be allowed to investigate further "in order to give full effect" to their claims of discrimination.

**Establishment Clause.** "To be sure, where governmental bodies discriminate out of 'animus' against particular religions, such decisions are plainly unconstitutional. But the constitutional requirement is of government *neutrality*,

through the application of 'generally applicable law[s],' not just of governmental avoidance of bigotry." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.) (quoting *Smith*, 494 U.S. at 881).

Defendants' citation to *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) is likewise misguided. Gov't Reply 40. The passage of *McCreary* they cite dealt with the question of whether hidden legislator motives would suffice to make out a claim under the purpose prong of the well-known *Lemon* test. But *Larson v. Valente*, which governs discrimination among religions, is a completely separate Establishment Clause test. *See*, *e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1126-27 (10th Cir. 2012) (distinguishing between the two lines of precedent); *cf. Croft v. Perry*, 624 F.3d 157, 165-66 (5th Cir. 2010) (separately analyzing plaintiffs' *Lemon* and *Larson* claims).

Moreover, what *McCreary* critiqued was the effort to discover the "veiled psyche" of individual lawmakers. 545 U.S. at 863. It is beyond cavil that if the Defendant County Board had stated, in public or in private, that the purpose of the display was to advance Christianity, the Court would clearly have found an Establishment Clause violation.

Finally, that case had to do with legislators, not regulatory agencies. Individual lawmakers' private opinions are not as relevant to an illegal Establishment Clause purpose because they are part of a larger body and determining the subjective opinion of that body is a task fraught with difficulty. But the Executive Branch does not suffer under the same difficulty. Agency decisionmakers' hostility or targeting is

very relevant to making out an Establishment Clause claim. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (considering "pervasive hostility to the Catholic Church and to Catholics in general" in Establishment Clause claim).

**Administrative Procedures Act**

Defendants also claim that Plaintiffs did not properly allege intentional discrimination in their arbitrary-and-capricious claim. Gov't Reply 41. But "[u]nder the Federal Rules of Civil Procedure, a pleading, or pretrial order, need not specify in exact detail every possible theory of recovery—it must only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Thrift v. Hubbard*, 44 F.3d 348, 356 (5th Cir. 1995) (quotation omitted). One hopes that by now Defendants have sufficient notice of the claims Plaintiffs have brought. In any case, Defendants' newest position—that their regulation cannot achieve its intended end, but that they still have the power to force Plaintiffs to make statements and submit forms anyway—is the very definition of arbitrary and capricious government action. Under any definition of that phrase, the Mandate fails.

## CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' other submissions, Plaintiffs' motion for partial summary judgment and for a preliminary injunction should be granted, and Defendants' motion to dismiss or for summary judgment should be denied.

Respectfully submitted,

/s/ *Eric C. Rassbach*

Eric C. Rassbach (Texas Bar. No. 24013375)
S.D. Texas Bar No. 872454
*Attorney in charge*
Diana M. Verm
*Of Counsel*
(Admitted pro hac vice)
Eric S. Baxter
*Of Counsel*
(Admitted pro hac vice)
The Becket Fund for Religious Liberty
3000 K St. NW, Ste. 220
Washington, DC 20007
Tel.: (202) 955-0095
Fax: (202) 955-0090
*erassbach@becketfund.org*
*dverm@becketfund.org*
*ebaxter@becketfund.org*

Reagan W. Simpson
*Of Counsel*
James E. Zucker
*Of Counsel*
Yetter Coleman LLP
Chase Tower
221 West 6th Street ~ Suite 750
Austin, Texas 78701
*rsimpson@yettercoleman.com*
*jzucker@yettercoleman.com*

*Counsel for Plaintiffs East Texas Baptist University and Houston Baptist University*

Dated: November 8, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2013, the foregoing memorandum was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ *Eric C. Rassbach*
Eric C. Rassbach