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

THE CATHOLIC BENEFITS ASSOCIATION LCA; THE CATHOLIC INSURANCE COMPANY Plaintiffs, v. SYLVIA M. BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY Defendants.	)	Civil Case No. 5:14-cv-00685-R

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

On June 4, this Court held that the Departments'[1] "accommodation" to the CASC[2] Mandate substantially burdens the religious exercise of the Catholic Benefits Association ("CBA") and its members: "Plaintiffs sincerely believe that in executing [Form 700] they play a central role in the provision of contraceptive services to their employees. . . . This is where the Court's inquiry ends, as it is not the Court's role to say Plaintiffs' religious beliefs are mistaken." *Catholic Benefits Ass'n v. Sebelius*, 2014 WL 2522357, at *8 (W.D. Okla. June 4, 2014) ("*CBA I*"). Since then, the Supreme Court has granted others relief from the CASC Mandate: on June 30, 2014, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("*HL II*") (for-profit plaintiffs), and on July 3, 2014, in *Wheaton College v. Burwell*, 134 S. Ct. 2804 (2014) (nonprofit plaintiff). When this Court granted a TRO in this case, *CBA II*, on July 1, 2014 (Dkt. 12), it became the fourth court in 24 hours to affirm that, after *Hobby Lobby*, the government's "accommodation" burdens religious exercise.

The CBA returns to this Court, first, because Catholic employers continue to join the CBA and are not protected by *CBA I*'s injunction, and second, because CBA members now need relief both from the Mandate, the first "accommodation," and the new "augmented accommodation" pronounced in the August 27, 2014, interim final rules.[3]

The question before the Court is narrow. The Departments "concede that this Court

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[1] This brief refers to Defendants collectively as the "Departments."

[2] The "CASC Mandate" requires employers' group health plans and "health insurance issuers" to provide coverage for **c**ontraceptives, **a**bortion-inducing drugs and devices, **s**terilizations, and related **c**ounseling.

[3] This brief refers to "CBA Members" and other subgroups thereof (e.g., "Group I Members"). By these terms, Plaintiffs mean only those members or subgroups thereof that meet the definition of "Post-June 4 Members" in Plaintiffs' Amended Verified Complaint (hereinafter "AVC").

is bound by *Hobby Lobby* in determining that [they] cannot satisfy the compelling interest test." *CBA I* at *7; *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013) ("*HL I*"). Thus, the CBA's motion "turns on whether Plaintiffs can establish a substantial burden on their religious exercise under RFRA." *CBA I* at *7. The Supreme Court holds that the CASC Mandate burdens religious exercise. *HL II* at 2778-79. This Court holds that the "accommodation" burdens religious exercise. *CBA I* at *8. The final issue is whether the augmented accommodation lifts this burden.

It does not. It merely gives CBA members another way to violate their religion. They must *still* send notices that trigger government action modifying their own plans and causing their third party administrators ("TPAs") or group insurers to deliver CASC services to their plan beneficiaries. This is not "accommodation." It is hijacking plans to make those plans do what Catholic employers cannot do. Ignoring the Supreme Court's advice that the "most straightforward" way to accomplish the Department's objectives is to provide contraceptives themselves, *HL II* at 2780, the Departments continue to act as if the only means to pursue their interests is to take over private plans of religious objectors.

The Departments' August 27 regulations make it *clearer than ever* that the accommodation, even after augmentation, requires CBA members to cause the delivery of CASC services through their health plans and, often, to share in paying for these services. Furthermore, the CASC Mandate still discriminates among religious groups in violation of the Establishment Clause, and the Departments' regulations, worse than before, violate the Administrative Procedure Act. The CBA and its subsidiary, the Catholic Insurance

Company ("CIC"), therefore, seek a preliminary injunction as set forth in the motion filed herewith.[4]

II. BACKGROUND

A. The Mandate and Original Accommodation

The CASC Mandate: The CASC mandate is that a "group health plan and a health insurance issuer offering group or individual health insurance coverage," 42 U.S.C. § 300gg-13(a), must include CASC services[5] or pay ruinous fines, *CBA I* at *2. It has not changed since this Court granted the CBA relief on June 4 and July 2.

Exemptions: The Mandate "does not apply to tens of millions," *HL II* at 2764, including employees of houses of worship, 45 C.F.R. § 147.131(a); grandfathered plans, *HL II* at 2764 n.10 ("the total number of Americans" on grandfathered plans is "substantial, and there is no legal requirement that grandfathered plans ever be phased out"); and small employers that can avoid the Mandate without penalty by not offering insurance at all, 26 U.S.C. §§ 4980H(c)(2)(A), 4980D(d).

The Accommodation: The Departments' small exemption excludes most religious nonprofits and offers them only an "accommodation." Under this accommodation, "an employer must execute and deliver EBSA Form 700" to its insurers or TPAs. *CBA I* at *2. The delivery of Form 700 triggers cascading effects, including amending the CBA member's plan and making its TPA the plan and claims administrator for CASC services. 78 Fed. Reg.

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[4] *CBA I* held that the CBA has "associational standing" to pursue member claims," *CBA I* at *4. Defendants do not contest this. *See* Unopposed Motion Regarding Procedural Issues etc. Dkt. 27. The Court has twice granted temporary relief to CBA members in this case. Dkts. 12, 28.

[5] Health Res. Servs. Admin., Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 2, 2014).

39,870, 39,879 (July 2, 2013); AVC Ex. 5, Form 700. The same form, when delivered to a group insurer, requires the insurer to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39,875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B).

B. ***Hobby Lobby* and *Wheaton College***

On June 30, 2014, the Supreme Court held that the CASC Mandate, as applied to closely held corporations, like CBA Group III members, violates RFRA. *HL II* at 2785. The Court rejected the Departments' "main argument," that the employers' religious objections were "simply too attenuated" to support a RFRA claim. *Id.* at 2777. It also held that the Departments failed to meet strict scrutiny. The Court agreed with the Tenth Circuit's reasoning that the Departments had too broadly articulated their interest to satisfy the focused inquiry RFRA requires. *See HL II* at 2779-80; *HL I* at 1144. It did not decide on this basis, however, as the "exceptionally demanding" least-restrictive-means test proved the lower-hanging fruit. *HL II* at 2780-83.[6]

One did not have to wait long to understand *Hobby Lobby*'s impact on nonprofit Mandate cases. When this Court granted the CBA a TRO the next day, it became the fourth court to issue relief to nonprofit plaintiffs.[7] No court has held otherwise since.

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[6] The Departments gave no reason for excluding closely held corporations from the accommodation. All three opinions in *Hobby Lobby II* recognized that the Court had no opportunity to assess whether the accommodation satisfied RFRA because it had not been offered to the plaintiffs, who therefore had taken no position on whether it was morally acceptable. *HL II* at 2782 & n.40 (opinion); *id.* at 2786 (Kennedy); *id.* at 2803 (Ginsburg).

[7] *Eternal Word Television Network, Inc. v. Sec'y of HHS*, 756 F.3d 1339 (11th Cir. 2014) (injunction pending appeal "[i]n light of" *HL II)*; Order in *Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir., June 30, 2014) (injunction pending appeal "in light of" *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1002 (Jan 24, 2014)); *Archdiocese of St. Louis v. Burwell*, 4:13-CV-2300-

Later that week, the Supreme Court granted Wheaton College an injunction, mirroring the relief it had granted the Little Sisters of the Poor in January. *Compare Wheaton Coll.*, 134 S. Ct. 2806, *with Little Sisters*, 134 S. Ct. 1022. Wheaton could merely inform HHS of its status and no longer had to send Form 700 to its TPA. It also was not required to provide its TPA's contact information. *Wheaton Coll.*, 134 S. Ct. at 2807.

C. **After *Hobby Lobby* and *Wheaton College*, the "Augmented Accommodation"**

Hours after *HL II*, the Administration started pushing Congress "to take action to pass another law that would address this problem."[8] Congress declined.[9] The Departments then issued an August 27, 2014, proposed rule that lumps closely held for profits with non-exempt nonprofits, forcing them to choose between the accommodation and the Mandate's ruinous fines. *See* 79 Fed. Reg. 51,118 (Aug. 27, 2014).

The same day, the Departments issued an interim final rule that "augment[ed]" the accommodation "in light of" *Wheaton College*. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014). It left the original *mechanism, goal, and effect* in place. The only difference is that employers can send a notice to HHS, instead of Form 700 to their insurers or TPAs. Unlike the Supreme Court's solution in *Wheaton College*, the notice to HHS requires the employer to convey the name and contact information "of the plan's [TPAs] and health insurance issuers" along with other data. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii). Delivering this notice to

JAR, 2014 WL 2945859 (E.D. Mo. June 30, 2014).

[8] Zeke J. Miller & Kate Pickert, White House Chooses Congressional Fight Over Hobby Lobby Decision, *Time*, June 30, 2014, http://time.com/2941491/hobby-lobby-white-house-politics-congress/ (last visited Oct. 2, 2014).

[9] Kristina Peterson, Senate Bill to Nullify Hobby Lobby Decision Fails, *Wall Street Journal*, July 16, 2014, http://online.wsj.com/articles/senate-bill-against-hobby-lobby-decision-fails-1405537082 (last visited Oct. 2, 2014).

HHS triggers a second notice from the government—from HHS to insurers; from Labor to TPAs—obligating them to comply with the Mandate as to the plan's participants. 26 C.F.R. § 54.9815-2713AT(b)(2), (c)(2) (Treasury); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2) (Labor).

The "augmented" rule also has the *same goal* as the original accommodation—"preserving participants' and beneficiaries' . . . access" to CASC services. 79 Fed. Reg. at 51,092. And it has the *same effect*: "Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules [using Form 700], or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers and/or TPAs . . . are the *same*."[10]

D. **The Mandate's Impact on CBA Members**

The CBA's membership criteria and ethical standards are unchanged from when this Court ruled on *CBA I*. *CBA I* at *4-5, 10 n.16. On July 10, the CBA's Ethics Committee, comprised of four Catholic archbishops, studied the new accommodation and unanimously adopted this resolution:

> [T]hat the use of contraceptives, abortion-inducing drugs and devices, sterilization, and counseling in support of such options ("CASC services") is contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with the government's CASC mandate, with the "accommodation" provided to "eligible employers," or with the "augmented accommodation"—unless such an employer has exhausted all alternatives that do not effect a greater evil and unless such an employer has taken reasonable steps to avoid giving scandal.

Amended Verified Complaint ("AVC") ¶ 91.

The Departments' rules still divide CBA members into three categories: Group I

[10] Ctr. for Consumer Info. & Ins. Oversight, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Oct. 2, 2014) ("CCIO Fact Sheet").

exempt dioceses and religious orders, most of which sponsor group health plans for their employees and those of affiliated ministries; Group II non-exempt, nonprofits eligible for the morally unacceptable "accommodation" and "augmented accommodation"; and Group III closely held, for-profit employers protected from the Mandate under *Hobby Lobby II*. Even though Group I members are exempt, many affiliated ministries that participate in their plans are not. The Mandate, therefore, burdens Group I employers' religious exercise and interferes in their internal affairs by forcing them to either sponsor plans that include CASC services or cease serving Group II employers in their plans. *Id.* ¶¶ 252-58.

E. The Mandate's Impact on the CBA and CIC

Both the CBA and CIC were established to help member Catholic employers provide morally compliant health benefits. AVC ¶¶ 31, 50-51. Catholic employers who join the CBA may create self-insured plans and purchase stop-loss coverage from the CIC. This avoids state CASC mandates,[11] but CBA members still need relief from the federal Mandate.

III. ARGUMENT

Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable injury without judicial relief; (3) the threatened injury outweighs any harm the Departments will suffer under the injunction; and (4) the injunction is in the public interest. *See HL I* at 1128.

A. Plaintiffs are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on the merits of their RFRA, Establishment Clause, and Administrative Procedure Act ("APA") claims.

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[11] At least 26 states have CASC mandates. *See* Nat'l Conf. of State Legislatures, Ins. Coverage for Contraception Laws, http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Sept. 25, 2014).

1. **The Mandate Violates RFRA.**

Under RFRA, the government may not "substantially burden a person's exercise of religion" unless it shows that "application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).[12]

a. **Both the Accommodation and the Augmentation Burden CBA Members' Sincere Exercise of Religion.**

"Without question," the accommodation substantially burdens CBA Members' religious exercise. *CBA I* at *8.[13] The only question for this Court is whether (1) the Supreme Court's *Hobby Lobby* decision or (2) the Department's "augmentation" change this conclusion. They do not.

The Supreme Court in *Hobby Lobby* rejected the Departments' "main argument" "that the connection between what the objecting parties must do" and "the end that they find to be morally wrong" was "too attenuated." *HL II* at 2777. The Court cautioned against second-guessing plaintiffs' sincere answer to a

> difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating commission of an immoral act by another.

Id. at 2778. It also criticized the Departments for "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" that would "in effect

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[12] *See also HL II* at 2761 n.3 (RFRA "provide[s] even broader protection for religious liberty than was available" under *Sherbert v. Verner* and related cases.).

[13] CBA members exercise religion when they, for religious reasons, exclude CASC services from their group health plans. They also exercise religion when, through the CBA and CIC, they associate to provide morally compliant health coverage for their members and employees. *See* AVC ¶¶ 82-92.

tell the plaintiffs that their beliefs are flawed." *Id.* The Court said such an approach by the Departments "dodges the question that RFRA presents" and "instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.*

Hobby Lobby thus confirms this Court's analysis in *CBA I*, which "focused upon how the plaintiffs themselves measure their degree of complicity in an immoral act." *CBA I* at *8. Here, CBA members believe that the Departments' "accommodation"—before and after the augmentation—forces them to "play a central role in the provision of contraceptive series to their employees—something [CBA members] find morally repugnant." *Id.*; *see* AVC ¶¶ 229-30 (listing effects of accommodation). "This is where the Court's inquiry ends, as it is not the Court's role to say [CBA members'] religious beliefs are mistaken." *CBA I* at *8.

The Mandate substantially burdens CBA members' exercise of religion because it puts them to a "Hobson's choice—an illusory choice where the only realistically possible course of action trenches on [CBA members'] sincerely held religious belief[s]." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); AVC ¶¶ 223-58. This is true for CBA Members with insured and self-insured plans, under both the original and the augmented accommodation. The "augment[ed]" accommodation has a *similar mechanism* and the *same goal and effect* as the original version. *See CBA I* at *8. The new notice method merely introduces an alternative way for CBA members to do what their religion forbids: comply with the Mandate and play an active role in the Departments' "mechanism" to provide CASC benefits in conjunction with their own benefits plan. *See* 79 Fed. Reg. at 51,092. The Departments *still* insist on hijacking CBA members' insurance plans instead of advancing their interests independently. Thus, the accommodation *still* substantially burdens CBA

members' religious exercise. This comes into sharper relief by examining separately how the accommodation works in self-insured and insured plans.

(i) ***Both the accommodation and the augmentation burden members with self-insured plans.***

Plaintiffs see the signing and delivery of Form 700 as material cooperation with evil because of the cascading effects. AVC ¶¶ 171-90, 229. When an employer with a self-funded plan signs and delivers the Form 700 to its TPA, it triggers these effects:

- It amends the employer's plan, creating a second binder of CASC coverage. *See* AVC, Ex. 5, Form 700, last sent.; AVC Ex. 6 Aug. 2014 Form 700 last sent.); 29 C.F.R. § 2510.3-16(b).

- It makes the TPA the plan and claims administrator for the second binder of CASC services. 26 C.F.R. § 54.9815-2713A; 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b).

- It requires the TPA to provide free CASC services. 26 C.F.R. § 54.9815-2713A(b)(2); 29 C.F.R. § 2510.3-16(b), (c).

- It requires the TPA to give employees notice of the availability of free CASC services. 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).

- It reimburses the TPA for providing CASC services and guarantees it a 10% profit for doing so. 45 C.F.R. § 156.50(d)(3), (7).

- It subjects the TPA to penalties, fines, and damages if it fails to do so. 29 C.F.R. § 2510.3-16(b); 78 Fed. Reg. at 39,879; 29 U.S.C. §§ 1131, 1132 (a).

- It gags the employer from communicating with the TPA about not providing the CASC services. 26 C.F.R. § 54.9815-2713A(b)(1)(iii).[14]

- It gives rise to scandal because the employer so blatantly acts contrary to the Catholic values it espouses. AVC ¶¶ 232-34.

[14] While the augmented accommodation regulation does away with the gag rule, it identifies other federal statutes that function equivalently. *See* Fed. Reg. at 51,095.

The effects of the Departments' new notification scheme are the same.[15] The only difference is that the employer sends the notices to HHS, along with the TPAs' contact information, so HHS can have DOL tell the TPA of its new CASC-related duties of the amendment of the plan to include a second binder of CASC coverage.

CBA members, informed by the resolution of the CBA Ethics Committee, reasonably object to this arrangement: it is no solution to tell a mother she can decline to poison her child only if she causes another to do so in her stead. The bottom line is that both the accommodation and the augmented accommodation depend upon employers' assistance in having the Departments co-opt the employers' plans and their TPAs to provide that which their Catholic faith will not permit.

(ii) ***Both the accommodation and the augmentation burden members with insured plans.***

The Mandate affects CBA members with insured plans differently. The moment when a CBA member contracts with an insurer, that insurer is automatically obligated to provide "coverage" for CASC services as part of the contracted plan or coverage. *See* 42 U.S.C. § 300gg-13(a). Accordingly, a CBA member cannot contract with an insurer without triggering coverage for CASC services. The ACA itself, therefore, hijacks CBA members' insured plans at the start and thereby burdens their religious exercise.

While the accommodation and the augmented accommodation may provide two mechanisms for an employer to satisfy the CASC mandate and avoid employer liability, *see* 26 C.F.R. § 54.9815-2713AT(c), they do not provide avenues by which an employer's insurer can abstain from providing CASC coverage. Furthermore, the Departments, in their

[15] *See* CCIIO Fact Sheet, *supra*, note 10, and related text.

regulatory comments related to calculating refunds for excess profits or premiums, permit insurers to take the cost of providing the additional CASC coverage into account in determining whether the insurer owes a premium rebate under the medical loss ratio limitations of 42 U.S.C. § 300gg-18.[16] Accordingly, CBA employers with group insurance not only suffer the Departments' co-opting of their policies to include CASC services, but many of them will also share in paying the premiums for those services.

(iii) ***The CASC Mandate Burdens the CBA, the CIC, and Group I Members***

The religious mission of the CBA and the CIC is to assist CBA members with providing healthcare benefits consistent with Catholic values. AVC ¶¶ 31, 50. Similarly, the religious mission of the CBA's Group I members (many of which are Catholic dioceses) includes arranging for their Group II affiliates to participate in the diocesan healthcare plans. *Id.* ¶ 254-55. The Departments' exemption of Group I members from the Mandate for Group I employees does nothing to alleviate the burden that bars Group I members from serving their Group II affiliates. *See id.* ¶¶ 256-58.[17] "[V]endors and those in like positions [like association] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 439 U.S. 190, 195 (1976).[18]

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[16] *See* 78 Fed. Reg. at 39,878 (group insurers "may treat . . . payments [for CASC services] as an adjustment to claims costs for purposes of medical loss ratio and risk corridor program calculations. This adjustment compensates for any increase in incurred claims associated with making payments for contraceptive services.").

[17] Several courts have recognized that this is a substantial burden. *See Catholic Diocese of Beaumont*, 2014 WL 31652, at *8 (E.D. Tex. Jan. 2, 2014); *Zubik v. Sebelius*, 2013 WL 6118696, at *23-27 (W.D. Pa. Nov. 21, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, 2013 WL 6843012, at *14 (N.D. Ind. Dec. 27, 2013).

[18] *See also Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422-23 (1942); *Pierce v. Soc. of*

b. **The Government Fails Strict Scrutiny**

Because the Mandate substantially burdens CBA members' religious practices, "the burden [of strict scrutiny] is placed squarely on the [g]overnment." *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 429 (2006). To meet its burden, the Departments must show that the Mandate both (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that interest. *HL II* at 2779; 42 U.S.C. § 2000bb-1(b). No court has found that the Departments' CASC Mandate survives strict scrutiny.

(i) ***The Departments have no compelling interest to enforce the mandate against these plaintiffs or CBA's members***

To survive strict scrutiny, the Departments must first prove that the Mandate furthers interests "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[19] *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

The Departments have "concede[d] that this Court is bound by *Hobby Lobby* [*I*] in determining that the federal government cannot satisfy the compelling interest test." *CBA I* at *7. Because the Supreme Court did not rule on whether the Departments had shown a

Sisters, 268 U.S. 510, 535 (1925); *Truax v. Raich*, 239 U.S. 33 (1915); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 141 (1951) ("We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them.").

[19] Even "important interests" usually fail the demanding compelling interest test. *HL I* at 1143 ("We recognize the importance of [the government's] interests [in public health and gender equality]. But they nonetheless in this context do not meet the Supreme Court's compelling interest standards."); *see also HL II* at 2779 (acknowledging public health and gender equality as "important interests").

compelling interest, *HL II* at 2780, the Tenth Circuit's decision is still controlling and correct because the Departments fail each compelling interest standard.

1. ***"Broadly formulated interests" are inadequate***. The Tenth Circuit found the Departments failed two separate Supreme Court tests. First, the Departments' interests in "public health" and "gender equality" "are insufficient under *O Centro* because they are 'broadly formulated interests'" and "the government offers almost no justification for not 'granting specific exemptions to particular religious claimants.'" *HL I* at 1143 (quoting *O Centro*, 546 U.S. at 431); *see also HL II* at 2779 ("RFRA . . . contemplates a 'more focused' inquiry.").

2. ***Exemptions leave appreciable damage prohibited.*** The Mandate "presently does not apply to tens of millions of people." *HL II* at 2764 (quoting *HL I* at 1143). But "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest prohibited." *HL I* at 1143 (quoting *Lukumi*, 508 U.S. at 547). Thus, the Departments' interests "cannot be compelling," given the exemptions for "grandfathered plans, employers with fewer than fifty employees, and colleges and universities run by religious institutions." *Id.*; *see also HL II* at 2780. Also, grandfathered plans comply with *some* of the ACA's mandates—its "particularly significant protections," 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)—"[b]ut the contraceptive mandate is expressly excluded from this subset," *HL II* at 2780.

3. ***Marginal advancement is not enough.*** Strict scrutiny also requires the Departments to prove their "marginal interest in enforcing the mandate *in these cases*." *HL II* at 2779 (emphasis added) (citing *O Centro*, 546 U.S. at 431). The Departments admit that "nearly 99% of women in the United States" have been able to use contraceptives. CCIO

Fact Sheet, *supra*, note 10. In 2009, "over 85 percent of employer-sponsored health insurance plans" covered contraceptives. 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). The ACA has already increased coverage considerably.[20] By contrast, the Supreme Court rejected a "modest" 20% gap as "hardly . . . a compelling state interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). "[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

4. ***There is no direct causal link.*** Professor Alvaré shows that the Institute of Medicine ("IOM") Report the Departments rely on does not provide, as strict scrutiny requires, "a direct causal link between the restriction imposed and the injury to be prevented."[21] *See United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012). The IOM Report merely claims that eliminating "cost sharing for contraception . . . could greatly increase its use," and suggests that "[i]t is thought that greater use of [IUDs] might help further reduce unintended pregnancy rates." IOM, *Clinical Preventive Services for Women: Closing the Gaps*, 109, 108 (2011) www.nap.edu/catalog.php?record_id=13181 (last visited Oct. 2, 2014) [hereinafter "IOM Report"].

Elsewhere, the IOM Report *claims* a causal relationship, but the authorities it cites do not bear this weight. The Report asserts that "greater use of contraception . . . *produces* lower unintended pregnancy and abortion rates," but the studies it cites merely claim these factors are "associated." *Id.* at 105 (emphasis added). One cited study expressly "do[es] not attempt

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[20] Adam Sonfield, *Implementing the Federal Contraceptive Coverage Guarantee: Progress and Prospects*, 16 Guttmacher Policy Review 4 (Fall 2013), http://www.guttmacher.org/pubs/gpr/16/4/gpr160408.html (last visited Oct. 2, 2014).

[21] *See generally* Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379 (2013) (critiquing IOM Report).

to resolve this debate" about the "causes and consequences of teen pregnancy."[22] Again, the IOM Report claims that "[t]he *consequences* of an unintended pregnancy . . . have been documented." IOM Report at 103 (emphasis added). But an earlier IOM report admits it is unclear "whether the [undesirable] effect is *caused by* or merely *associated with* unwanted pregnancy," a serious "methodological problem."[23] Another cited study cautions that "although longitudinal data may provide *some inferences* about the observed associations" between "pregnancy intention and its potential health consequences," "causality is difficult if not impossible to show."[24] Without evidence of causation, "both health outcomes and pregnancy intentions may be jointly determined by a single, often unobserved factor."[25] Studies that are "based on correlation, not evidence of causation," like the IOM report, "cannot show a direct causal link." *Brown*, 131 S. Ct. at 2738-39. The government cannot just "make a predictive judgment that such a link exists, based on competing . . . studies"—"ambiguous proof will not suffice." *Id.* at 2738-39.

5. ***Congress does not treat the Mandate as a compelling interest.*** The *executive* branch's policy preferences cannot be a compelling *government* interests when *Congress* will not touch them with a ten-foot pole. The Framers considered "structural protections of freedom," including "separation of powers," the "most important" protections of freedom.

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[22] John S. Santelli & Andrea J. Melnikas, *Teen Fertility in Transition: Recent and Historic Trends in the United States*, 31 Ann. Rev. Pub. Health 371, 373, 377-78 (2010).

[23] Institute of Medicine, *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families*, 65 (1995), http://www.nap.edu/catalog.php?record_id=4903 (last visited Oct. 2, 2014).

[24] Gipson, J.D., et al., *The Effects of Unintended Pregnancy on Infant, Child and Parental Health: A Review of the Literature*, 39(1) Studies on Family Planning, pp. 19-20 (2008).

[25] *Id.* at 20.

NFIB v. Sebelius, 132 S. Ct. 2566, 2676-77 (2012) (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). "The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Id.* Justice Kennedy echoed these concerns when the ACA returned to the Supreme Court: under our "constitutional structure," it should be "Congress," not an "agency," that decides matters related to "a First Amendment issue of . . . this consequence." Tr. of Oral Argument at 56:19-57:4, *HL II*.

Those concerns are heightened here: since 1997, at least 21 bills have been introduced in Congress to mandate prescription contraception coverage in private health plans, none which even made it out of committee.[26] When Congress passed the Women's Health Amendment, which added women's health preventive services to the ACA, it conspicuously avoided defining this category. Most recently, the Administration wanted a law passed to "fix" the *Hobby Lobby* decision, but Congress again declined. *See supra*, notes 8-9. The CASC Mandate is therefore "incompatible with the expressed or implied will of Congress," where the executive branch's "power is at its lowest ebb." *Medellin v. Texas*, 552 U.S. 491, 525 (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637-38 (1952)).

6. ***HHS does not treat Mandate as a compelling interest.*** Like Congress, HHS also declined to take responsibility for deciding what preventive services should be mandated: HHS passed this "hot potato" to HRSA, which deferred to the IOM, which itself relied on an external committee. This shirking of responsibility—first by Congress, then by

[26] "Equity in Prescription Insurance and Contraceptive Coverage Act" (Introduced in 1997, 1999, 2001, 2005 http://www.scotusblog.com/2014/02/symposium-the-contraceptives-coverage-controversy-whats-old-is-new-again/); "Prevention First Act."

HHS—is not the mark of an "interest of the highest order."

(ii) ***Less restrictive means are available.***

Even assuming the Departments can prove a compelling government interest, they must still satisfy the "exceptionally demanding" least-restrictive-means test. *HL II* at 2780 (citing 42 U.S.C. § 2000bb-1(b)(2)). To survive strict scrutiny, the Departments must prove that their chosen "mechanism"—hijacking private group health plans—is "actually necessary to achieve" the Departments' interests. *Alvarez*, 132 S. Ct. at 2549.

HHS admits it did not begin to consider less restrictive alternatives existed until after it issued its final rules. AVC ¶ 284. Government counsel may wish to contend that the government has *now* hit rock-bottom, and can do no more to accommodate religious exercise. But the Supreme Court has already found otherwise, holding that the Departments failed to prove that the "most straightforward" path—providing free CASC services itself, without hijacking the private health plans of religious objectors—"is not a viable alternative." *HL II* at 2780. The Supreme Court specified what the Departments must do to meet their burden, and nothing of the sort has been produced since. *Id.* at 2780-81.

Nor can the Departments simply dismiss alternatives because they would require Congressional action or government expenditures. The Supreme Court rejected the Government's contention that the least-restrictive-means test does not require the Government to "creat[e] entirely new programs" or "spend even a small amount" to "accommodate citizens' religious beliefs," finding that "HHS's view . . . reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted [RFRA]." *Id.* at 2781. In fact, the Departments have already offered to pay for CASC services under some circumstances, even offering at least 10% extra to cover overhead. 45

C.F.R. § 156.50.

To survive strict scrutiny, the Departments must prove that the alternatives the CBA proposed back on March 13, 2014, are not feasible: (1) directly providing coverage of CASC services;[27] (2) reimbursing those who pay out of pocket for CASC services through a combination of direct subsidies, tax deductions, and tax credits; (3) facilitating greater access to CASC services through the health insurance exchanges; or (4) working with other, willing organizations to expand access to CASC services. (*CBA I*, Dkt. 5 at 17-18). Each option advances the Departments' goals.

2. **The Mandate Violates the Establishment Clause.** "From the beginning, this nation's conception of religious liberty included, at a minimum, the equal treatment of all religious faiths without discrimination or preference." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). Neutral treatment of religious groups is "[t]he clearest command of the Establishment Clause." *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)) (internal quotation marks omitted). A law violates the Establishment Clause when it deliberately discriminates among religions, *Awad v. Ziriax*, 670 F.3d 1111, 1128 (10th Cir. 2012), or when it draws "distinctions between different religious organizations," even on the basis of ostensibly neutral criteria, *Colo. Christian Univ.*, 534 F.3d at 1259 (quoting *Larson*, 456 U.S. at 244) (internal quotation marks omitted). The Mandate fails in both respects. We can identify no law with as elaborate a classification scheme, creating religious winners and losers, as the ACA. The Act's scheme makes the quantum of government-permitted

[27] Public expenditures for family planning services totaled $2.37 billion in FY 2010, 75% which was from Medicaid and 10% from Title X. *Fact Sheet: Facts on Publicly Funded Contraceptive Services in the United States*, Guttmacher Institute (Aug. 2014), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html.

religious freedom depend upon which of these six religious classes *and their respective subclasses* fit a person or entity: (1) Anabaptist, (2) health care sharing ministry ("HCSM"), (3) "religious employer," (4) "eligible organization," (5) religious for-profit employer, or (6) objecting TPA.

Anabaptists and HCSMs. Members of historic Anabaptist congregations and members of HCSMs are exempt from the individual mandate. *See* 26 U.S.C. § 5000A(d)(2)(A), (B); *see also* AVC ¶ 105-08. Because the Anabaptist and HCSM exemptions are limited to groups in existence before January 1, 2000, 26 U.S.C. §§ 1402(g)(1)(E), 5000A(d)(2)(B), the ACA also distinguishes between older and newer religious groups in violation of the Establishment Clause. *Larson*, 456 U.S. at 1684 n.23. These exemptions constitute explicit government preference for two religious groups over others. *See Larson*, 456 U.S. at 244; *Awad*, 670 F.3d at 1128.[28]

Three-Tiered Scheme of Religious Objectors. The Departments segregate CBA members into three groups, assigning them different rights. The Departments justify favoring Group I over Group II by reasoning that "[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

[28] While these exemptions apply to the individual mandate, they cannot be walled off from the CASC Mandate for two reasons. First, they are alternative health arrangements excluding CASC coverage restricted to favored religious individuals. Catholics do not fit the Anabaptist exemption, and they cannot form new HCSMs. Second, the availability of these alternatives gives Anabaptist and Evangelical Protestant employers a *viable moral option for avoiding the Mandate*. Such employers may drop their health plans altogether, advise their employees to access the available alternate arrangements, and even subsidize their health care in these arrangements. In this way, employees are cared for, and the Mandate's objectionable requirements are avoided. Catholic employers, like the Post-Injunction Members, do not have this option. If the Post-Injunction Members dropped their health plans, they would drive their employees to the exchanges where all plans cover CASC services. *See* 45 C.F.R. § 147.130(a)(1).

objection [to the CASC Mandate], and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.[29] By using uniformity or intensity of employees' religious beliefs as a basis for discrimination, the Departments have also violated the Establishment Clause's entanglement prohibition. *Colo. Christian Univ.*, 534 F.3d at 1250-51, 59. Moreover, whether to employ persons of the same faith or intensity of faith is an "internal . . . decision" affecting a religious organization's "faith and mission"—matters beyond the government's purview. *See Hosanna-Tabor Evan. Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

Even within the government's class of "religious employers," there are subclasses constituting further discrimination between types of religious groups. When a Group I Member separately incorporates a high school or a Catholic Charities instead of performing such ministry as an unincorporated operating division, that ministry drops from the most favored "religious employer" class to the "eligible organization" class.[30] This burdens the Group I Member's decision to opt for separate corporate status for significant ministries. Further, "integrated auxiliaries" enjoy most favored "religious employer" status, 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), but only if they are "internally supported," i.e., only if less than 50% of their support comes from outside sources, 26 C.F.R. § 1.6033-2(h)(4).

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[29] HHS's designated representative has admitted under oath that the Departments have no basis for this guess. AVC ¶ 284.

[30] CCIO Fact Sheet, *supra*, note 10; 45 C.F.R. § 147.131(a) (separately incorporated ministries other than "churches, their integrated auxiliaries, and conventions or associations of churches" or "religious activities of religious orders" as described in 26 U.S.C. § 6033(a)(3)(A)(i), (iii) do not qualify for "religious employer" exemption); *see also* 77 Fed. Reg. at 16,502.

This "fifty per cent rule" is the very sort of religious classification that *Larson* struck down. *See* 456 U.S. at 247 & n.23.

Objecting TPAs. Under the Final Rules, a TPA that receives an eligible organization's self-certification form has "no obligation" to provide or arrange for payment of CASC services if it "objects to any of these responsibilities." 78 Fed. Reg. at 39,880. The Departments have not limited the grounds on which a TPA may so object. A TPA may therefore object on *religious or secular grounds* and be relieved of this obligation. Yet CBA members, ardent religious objections to the same obligation, have no such option. The government may not prefer some religious objections over others, nor may it prefer secular objections over religious ones. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *cf. Lukumi*, 508 U.S. at 537-38.

3. **The Mandate Violates the Administrative Procedure Act.**

Finally, the CASC Mandate violates the APA, which requires "the Court [to] set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Sierra Club, Inc. v. Bostick*, 2013 WL 6858685, at *4 (W.D. Okla. 2013) (quoting 5 U.S.C. § 706(2)(A)).

The Departments have acted contrary to law in numerous ways. First, the accommodation (including the augmentation) violates ERISA. Labor claims "broad rulemaking authority" under ERISA, 78 Fed. Reg. at 39,880, to allow it, a federal agency, to execute an "instrument under which [an employer's] plan is operated" and thereby designate a plan administrator for CASC coverage. 29 U.S.C. § 1002(16)(A)(i). Nothing in ERISA or the ACA empowers Labor to do this. Under ERISA, it is exclusively the employer, as plan sponsor, who "creates the basic terms and conditions of the plan, executes a written

instrument containing those terms and conditions, and provides in that instrument 'a procedure' for making amendments." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011) (quoting 29 U.S.C. § 1102)); *see Kaufmann v. Prudential Ins. Co. of Am.*, 840 F. Supp. 2d 495, 498 (D.N.H. 2012) ("Only the plan sponsor can set the terms of the plan and it must do so in the written instrument establishing the plan."). Labor's interpretation also violates the plain language of 29 U.S.C. § 1002(16)(A). There *is* an "orphan" provision in the statute—subparagraph (iii)—that permits Labor to designate a plan administrator in certain circumstances not applicable here. Yet if Labor already had that authority by virtue of subparagraph (i), then subparagraph (iii) becomes superfluous. Agencies may not read statutes this way. *See Corley v. United States*, 556 U.S. 303, 304 (2009).

Second, the Departments have violated the APA by rubber-stamping the findings and recommended guidelines of the IOM. In making factual determinations, agencies are required to take a "'hard look' at information relevant to the decision," *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009), and "[f]actual determinations must be supported by substantial evidence; *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 759-60 (9th Cir. 2014). Moreover, an agency has a duty to "engage the arguments raised before it," including the arguments of dissenting voices. *See Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 224 (D.C. Cir. 2014). The Departments did none of that here. HHS simply adopted, nearly verbatim, the IOM's recommended guidelines, even though the IOM Report repeatedly acknowledged that its review was limited, rushed, and failed to take account of numerous relevant factors. *See* AVC ¶¶ 129-33. HHS was required to do more than simply "accep[t] the [IOM's] assertions at face value." *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 313 (3d

Cir. 2013). "There is no indication that [HHS] examined the relevant data, nor did it articulate a satisfactory explanation for its action." *Id.* (alteration omitted) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted). Its facile adoption of the IOM Report was arbitrary and capricious.

The same is true of the Departments' decision to exclude unquestionably religious organizations from the "religious employer" exemption simply because they do not fit under a certain provision of the tax code. *See* 78 Fed. Reg. at 39,874. The distinction that HHS drew between "religious employers" and "eligible organizations" is based on nothing more than a hunch. *See* AVC ¶ 165. Agencies may not "act on hunches or wild guesses," particularly when, as here, they are freighted with such constitutional significance. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). Nor may agencies draw such "categorical conclusion[s]" without reasoned explanation. *See Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 718 F.3d 974, 978 (D.C. Cir. 2013).

B. **Other Preliminary Injunction Factors Established**

To find the remaining preliminary injunction factors satisfied, this Court need not tread new ground. It is settled law that "a likely RFRA violation satisfies the irreparable harm factor." *HL I* at 1146. The same is true for the Establishment Clause. *Awad*, 670 F.3d at 1131. The balance of harms also clearly favors Plaintiffs, given the Mandate's enormous fines. *See HL I* at 1146. Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 1147; *Awad*, 670 F.3d at 1132 (enjoining Establishment Clause violation). *Hobby Lobby* drew these conclusions in the context of for-profit employers, and this Court (*CBA I* at *10) and its Colorado sister court have followed

Hobby Lobby repeatedly in holding that nonprofit ministries were entitled to a preliminary injunction.[31] The same conclusions are warranted here.

C. **Relief for All Post-June 4 Members, Present and Future**

Plaintiffs request preliminary injunctive relief for all Post-June 4 Members of the CBA, including all present Post-June 4 Members and all such members who join the CBA in the future. All members join the CBA under identical criteria, and all members, therefore, are equally entitled to any preliminary injunctive relief issued by this Court. Moreover, judicial efficiency favors extending preliminary injunctive relief to future CBA members pending the Court's resolution of Plaintiffs' claims on the merits.

IV. **CONCLUSION**

For these reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Motion for Preliminary Injunction and provide the relief described therein.

[31] *See S. Nazarene Univ.*, 2013 WL 6804265, at *10; *Reaching Souls*, 2013 WL 6804259, at *8; *Dobson v. Sebelius*, No. 13-CV-03326-REB-CBS, 2014 WL 1571967, at *9-10 (D. Colo. Apr. 17, 2014); *Catholic Benefits Ass'n LCA v. Sebelius*, No. CIV-14-240-R, 2014 WL 2522357, at *7 (W.D. Okla. June 4, 2014); *Colo. Christian Univ. v. Sebelius*, No. 13-CV-02105-REB-MJW, 2014 WL 2804038, at *8 (D. Colo. June 20, 2014).

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Respectfully submitted,

s/ L. Martin Nussbaum
L. Martin Nussbaum (Colo. Bar #15370)
Ian S. Speir (Colo. Bar #45777)
Eric Kniffin (D.C. Bar #999473)
LEWIS ROCA ROTHGERBER LLP
90 S. Cascade Ave., Suite 1100
Colorado Springs, CO 80920
o:719-386-3000; f:719-386-3070
mnussbaum@lrrlaw.com
ispeir@lrrlaw.com; ekniffin@lrrlaw.com

and

Angela Ables (Okla. Bar #0112)
Johnny R. Blassingame (Okla. Bar ##21110)
Kerr, Irvine, Rhodes & Ables
201 Robert S. Kerr Ave., #600
Oklahoma City, OK 73102
405-272-9221; f:405-236-3121
aables@kiralaw.com
jblassingame@kiralaw.com

ATTORNEYS FOR PLAINTIFFS

sdg

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ L. Martin Nussbaum
L. Martin Nussbaum