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

THE CATHOLIC BENEFITS ASSOCIATION LCA; THE CATHOLIC INSURANCE COMPANY; THE ROMAN CATHOLIC ARCHDIOCESE OF OKLAHOMA CITY; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF OKLAHOMA CITY, INC.; ALL SAINTS CATHOLIC SCHOOL, INC.; ARCHBISHOP WILLIAM E. LORI, ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE AND HIS SUCCESSORS IN OFFICE; THE CATHEDRAL FOUNDATION, INC. d/b/a CATHOLIC REVIEW MEDIA; VILLA ST. FRANCIS CATHOLIC CARE CENTER, INC.; and GOOD WILL PUBLISHERS, INC.	)	Civil Case No. 14-CV-00240-R
Plaintiffs,	)	
v.	)	
KATHLEEN SEBELIUS, 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.		

REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Defendants' response (cited herein as "RB") clarifies that these issues are not in dispute: (1) that Group I and II Members have standing; (2) that Plaintiffs' Catholic beliefs are sincerely held; (3) that their decisions, for religious reasons, to exclude CASC services from their health plans constitute the "exercise of religion"; (4) that Defendants lack a compelling interest in enforcing the Mandate against Plaintiffs; (5) that the application of the Mandate to Plaintiffs is not the least restrictive means of furthering the government's interests; (6) that *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), requires this Court to find that the Mandate, as applied to similar for-profit employers religiously opposed to providing CASC services, violates the Religious Freedom Restoration Act ("RFRA"), *see* RB at 15 n.8; and (7) that the Affordable Care Act ("Act") includes an elaborate classification scheme, creating religious winners and losers, vis-à-vis the Mandate.

Defendants contest only three main issues: (1) whether certain Plaintiffs have standing; (2) whether the Mandate burdens the religious exercise of Group I and II Members; and (3) whether the Act's religious classification scheme violates the Establishment Clause. In addition, the ACLU, as *amicus*, contends that the interests of Plaintiffs' employees constrain Plaintiffs' RFRA rights. These contentions lack merit.

II. STANDING

A. Good Will Publishers Has Standing.

Good Will Publishers is a for-profit publisher of Catholic Bibles, Catholic literature, and other Catholic merchandise. Its owners and board are Catholic. Its values and the objects of its charity are Catholic. *See* Verified Complaint ("VC") ¶¶ 58-70.

Good Will Publishers is subject to two different legal regimes that require its health plan to cover CASC services: North Carolina General Statutes § 58-3-178 and the federal Mandate. While these laws operate differently and are not coextensive, both inflict injury on Good Will Publishers by requiring it to pay for CASC services in violation of its sincerely held religious beliefs. That is why Good Will Publishers and its owners, the Gallaghers, have been engaged in concerted, parallel efforts to change and/or gain religious exemptions from *both* laws. *See* VC ¶ 78 (describing numerous such efforts). The government's brief incorrectly implies the contrary.

The government contends that Good Will Publishers lacks standing, reasoning that since North Carolina law already requires coverage of "contraceptive services," a ruling invalidating the Mandate would not redress Good Will Publishers' injury. RB at 10. But standing doctrine does not demand "complete redressability." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012). "[A] plaintiff need show only that a favorable decision would redress '*an* injury,' not '*every* injury.'" *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Even an incremental step that increases the likelihood that an injury will be redressed is sufficient for standing purposes. *See Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007). The question is whether "the risk of

harm would be reduced *to some extent* if [Plaintiffs] received the relief they seek." *King*, 678 F.3d at 902 (quoting *Massachusetts v. EPA*, 549 U.S. at 526) (internal quotation marks omitted).

That standard is met here. Good Will Publishers is presently forced to compromise its religious beliefs both by North Carolina law and by the Mandate. A ruling invalidating the Mandate would not completely eliminate this injury, but it would solve that aspect of Good Will Publishers' moral dilemma arising from federal law. Although the company "would not be out of the woods, a favorable decision would relieve [its] problem 'to some extent,' which is all the law requires." *Id.* at 903 (quoting *Massachusetts v. EPA*, 549 U.S. at 526).

Indeed, invalidation of the Mandate is much more than an incremental improvement for Good Will Publishers. It is a crucial first step. *See Massachusetts v. EPA*, 549 U.S. at 524. Because North Carolina law regulates only insurers, not employers, Good Will Publishers may permissibly avoid North Carolina law by adopting a self-insured plan. *See* N.C. Gen. Stat. § 58-3-178(a). But the Mandate eliminates self-insurance as a viable option because it requires for-profit employers to cover CASC services regardless of the insured or self-insured status of their plans. Invalidating the Mandate would change this state of affairs and restore to Good Will Publishers' the option of adopting a self-insured plan that permissibly excludes CASC coverage (including one facilitated by the Insurance Company).

Invalidation would have other real-world consequences, too. The Verified Complaint outlines past efforts by Good Will Publishers to change North Carolina law

and gain a religious exemption. VC ¶ 78. With the Mandate in place, these efforts are fruitless since no change in North Carolina law could ever affect the federal Mandate's requirement that Good Will Publishers cover CASC services. Invalidation of the Mandate would remove this barrier and make it more likely that Good Will Publishers will find a (state-law) solution to its moral dilemma. Invalidation would, in other words, reduce the harm to Good Will Publishers "to some extent." *King*, 678 F.3d at 902 (quoting *Massachusetts v. EPA*, 549 U.S. at 526) (internal quotation marks omitted). Article III requires no more.[1]

B. The Insurance Company Has Standing.

The government believes the Insurance Company seeks a form of third-party or associational standing. *See* RB at 12. It does not. The Insurance Company is here asserting its own right to carry out the purposes for which it was formed: to contract with Catholic employers consistent with Catholic values and to assist them in providing

[1] Good Will Publishers also notes that, while the Verified Complaint states that North Carolina law requires the company's plan to cover abortion-inducing drugs (also known as "emergency contraception"), VC ¶ 75, that in fact is inaccurate. *See* N.C. Gen. Stat. § 58-3-178(c)(4); Guttmacher Institute, *State Policies in Brief: Insurance Coverage of Contraceptives* (updated Apr. 1, 2014), *available at* https://www.guttmacher.org/statecenter/spibs/spib_EC.pdf (noting that North Carolina is one of two states whose insurance mandate does not require coverage of emergency contraception such as Plan B). The Mandate, by contrast, does require such coverage. The Mandate is therefore more extensive and more onerous than North Carolina law. It inflicts an injury and imposes a burden that North Carolina law does not. That additional injury is anything but trivial to Good Will Publishers, for while Catholic teaching condemns contraception, it condemns abortion, and drugs that induce abortion, in even stronger terms. *See* VC ¶ 120 (abortion is "gravely contrary to the moral law"). A decision invalidating the Mandate would redress this injury in full, eliminating any legal requirement that Good Will Publishers subsidize the destruction of human life in contravention of its sincerely held religious beliefs.

morally compliant employee health coverage. VC ¶ ¶ 97, 101. The Mandate makes that religious mission effectively illegal by threatening to impose huge fines on Group II and III employers qualifying to do work with the Insurance Company. The Mandate thus destroys the Insurance Company's ability to serve and contract with many Catholic employers. This is enough for standing.[2]

C. The Association Has Standing.

Finally, the government challenges the Association's standing, arguing that its members must be named plaintiffs. In the government's view, RFRA's elements—substantial burden, compelling government interest, and least restrictive means—"vary from claimant to claimant," so that each must "seek its own relief." RB at 13.

The government's key authority here is *Harris v. McRae*, 448 U.S. 297, 321 (1980), where an association of "pregnant Medicaid eligible women" brought a free-exercise challenge to the Hyde Amendment, which prohibited federal funding of abortions. The Court denied standing and wrote (in language the government quotes), "Since it is necessary in a free exercise case for one to show the coercive effect of the

[2] *See Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422-23 (1942) (broadcasting network (CBS) had standing to challenge rules that regulated independent stations; it was "enough that . . . the regulations purport to operate to alter and affect adversely [CBS'] contractual rights and business relations with station owners"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (schools had standing to challenge law that regulated parents because law threatened schools with loss of "business and property" through "unwarranted compulsion [of] . . . present and prospective patrons of their schools"); *Truax v. Raich*, 239 U.S. 33, 38 (1915) (discharged employee had standing to challenge law that regulated employer because "[t]he employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion"); *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.").

enactment as it operates against him in the practice of his religion, the claim asserted here is one that ordinarily requires individual participation." *Id.* (quotation and citation omitted). Key to that conclusion was the Court's next sentence, where it explained *why* individual member participation was necessary in that case: the association had conceded that "the permissibility . . . of abortion according to circumstance is a matter about which *there is diversity of view within our membership*." *Id.* (emphasis added, quotation and alteration omitted). Thus, the standing problem in *Harris* was that individual members had different free-exercise *claims*. Indeed, some members did not have such claims at all in light of the "diversity" of members' views on abortion. That is not the case here. All Association members are religiously opposed to CASC services and mandated CASC coverage. VC ¶¶ 85-87, 118-26. The Mandate burdens and coerces all members in equal measure.[3]

III. RELIGIOUS FREEDOM RESTORATION ACT

When enacting RFRA, Congress declared that the "free exercise of religion [i]s an unalienable right" and that the compelling interest test applies "in all cases where free exercise of religion is substantially burdened"— even if the law is "'neutral' toward religion" or "generally applicable," and even if religious exercise is "not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. §§ 2000bb(a)(1), (b)(1), 2000bb-

[3] Defendants' reliance on *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 990 n.3 (E.D. Mich. 2012), is likewise inapposite. The Legatus association had diverse membership. It had not alleged that its members held the same religious views on contraception, so the court "d[id] not know" how these possible differences affected standing. *Id.* The Court here does not have that problem. All Association members must be Catholic and religiously opposed to CASC coverage. VC ¶ 85-87.

2(4), 2000bb-3(b), 2000cc-5(7)(A). Having conceded it cannot meet strict scrutiny under *Hobby Lobby*, the government focuses its RFRA argument exclusively on whether the Mandate substantially burdens the religious exercise of Group I and II Members.

A. The Mandate Substantially Burdens Group II Members' Religious Exercise.

Hobby Lobby sets forth the controlling test in this Circuit for "substantial burden."[4] A law substantially burdens religion if it "(1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138. The Mandate burdens Plaintiffs' religious exercise each way.

Defendants falsely contend that Plaintiffs "do not even attempt to make an argument as to why the [Mandate] impose[s] a substantial burden on" Group II Members. RB at 18. In their Opening Brief ("OB"), Plaintiffs wrote, "The substantial burden on Group II Members . . . is equally unmistakable, ***see* pp. 4-5, *supra***." OB at 18 (emphasis added). Those pages of the Opening Brief explain why signing and delivering EBSA Form 700 (the "Form") substantially burdens Group II Members' religious exercise. Group II Members must no more sign and deliver the Form than Eve should have tasted the serpent's fruit.

Plaintiffs see the signing and delivery of the Form as material cooperation with evil because of the cascading effects. VC ¶¶ 124-126. The law ensures, VC ¶¶ 200-17,

[4] Defendants improperly rely on D.C. Circuit case law. *See* RB at 15-16.

that when an employer with a self-funded plan signs and delivers the Form, it triggers these effects:

- It amends the employer's plan, creating a second binder of CASC coverage. *See* OB, Ex. A (Form 700, last sent.); 29 C.F.R. § 2510.3-16(b); VC ¶¶ 201, 205, 207.
- It makes the third party administrator ("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); VC ¶ 208.
- 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); VC ¶¶ 202, 206, 209.
- 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); VC ¶ 212.
- 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); VC ¶ 214.
- 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); VC ¶ 215-16.[5]
- It gives rise to scandal because the employer so blatantly acts contrary to the Catholic values it espouses. VC ¶¶ 125, 237(f), 239-41.

Signing and delivering the Form to group insurers has similar effects. OB at 4-5.

As indicated in the Complaint, verified by three Catholic archbishops, signing and delivering a form unleashing the effects described above constitutes material cooperation with evil. VC ¶¶ 119-26, 238-39, 297-98. This, Plaintiffs cannot do.

[5] Defendants argue that Plaintiffs "are free . . . to voice their disapproval of contraception." RB at 17. Not so. The gag rule effectively says employers may voice disapproval to anyone but the TPA who provides CASC services to their employees.

The government and the ACLU belittle these results. They call the Form an exemption form, a "*de minimis* step," and the "mere act of opting out." RB at 20, 2. They say the "accommodation" requires the employer "to do next to nothing," *id*. at 16; *see* AB at 10, and that Plaintiffs "play[] no role" in their employees use of CASC services. RB at 19; AB at 12. If the Group II Plaintiffs' certification "plays no role," why doesn't the government exempt them just as it does others?

More importantly, it is not the government's place to declare the Catholic conscience satisfied. As the Tenth Circuit notes, *see Hobby Lobby*, 723 F.3d at 1138-39, such is the government overstepping that the Supreme Court condemned in *Thomas v. Review Board*, 450 U.S. 707 (1981). Eddie Thomas was a Jehovah's Witness and, therefore, a pacifist. When his steel-fabricator employer transferred him from the roll foundry to the "department that produced turrets for military tanks," *id*. at 709, Thomas' religious convictions led him to resign. In the unemployment compensation hearing, the government argued that making tank turrets did not burden Thomas' conscience. It even called another Jehovah's Witness to testify that *his* reading of the Scripture permitted the manufacture of weapons of war. *Id*. at 715. Just as here, the moral issue involved line drawing: when does the proposed action constitute material cooperation with evil?

Here, the government similarly contends, by mischaracterizing the Form, that the "accommodation" ought not trouble Plaintiffs' Catholic consciences. But the Supreme Court concluded that Thomas "drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715. The Tenth Circuit reached the

same conclusion for for-profit corporations opposed to the Mandate. *See Hobby Lobby*, 723 F.3d at 1139. This Court should do likewise here.

The Tenth Circuit offered a reasonable way to avoid the *Thomas* problem: "identify the religious belief, . . . determine whether this belief is sincere, [and assess] whether the government places substantial pressure on the religious believer." *Id*. at 1140. Defendants do not contest Plaintiffs' Catholic beliefs or their sincerity. The substantial pressure is that Group II Plaintiffs must either provide CASC coverage, deliver the Form with its cascading effects, or pay the fine up to $36,500 per employee per year. VC ¶¶ 232-47.

Defendants also contend that Plaintiffs "simply cite two cases in this district in which judges have found a substantial burden." RB at 18. While Plaintiffs do cite two excellent cases from the Western District of Oklahoma, they also cite eight others where Courts have found for Group II employers. OB at 13-14 n.4. In fact, of the twenty decisions involving Group II employers, courts have granted injunctions nineteen times, and have refused the injunction only once. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 564 n.1 (7th Cir. 2014) (Flaum, J, dissenting) (collecting cases).

The government heavily relies on that one outlier decision—*Notre Dame*. This split decision, penned by Judge Richard Posner, is founded upon a breathtaking disregard for the nineteen prior contrary decisions,[6] clear error, and a misguided "Quaker hypothetical" parroted by Defendants and the ACLU here. The first error is that the

[6] Judge Posner makes only passing reference to one and neither discusses nor attempts to distinguish the other eighteen. *See Notre Dame*, 743 F.3d at 554.

Seventh Circuit fundamentally misunderstood the Mandate by concluding that, regardless of whether the University self-certified, the TPA "must provide the services no matter what." *Notre Dame*, 743 F.3d at 555. This is clearly wrong, and neither Defendants nor the ACLU argue this. *See* RB at 18; AB at 6 (admitting that "*[o]nce* an issuer or [TPA] receives the self-certification form, it will provide payments for contraceptive services" (emphasis added)). The Form itself states that it amends the employer's plan. *See* OB Ex. A ("certification is an instrument under which the plan is operated"); *see also* 29 C.F.R. § 2510.3-16(b). The signing and delivery of the Form is the direct and but-for cause of the TPA's or group insurer's delivery of CASC services to employees. 26 C.F.R. § 54.9815-2713A (b)(2), (c)(2). Indeed, the government has admitted elsewhere that TPAs "become a plan administrator and are required to make these payments [for CASC services] **by virtue of the fact that they receive the self-certification form from the employer.**" Ex. B, Tr. of Hr'g at 12-13, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (emphasis added).

The second error is that the Seventh Circuit improperly assessed burden. The University argued that, by completion and delivery of the Form, it would be "complicit in the provision of contraceptives to the university's students and staff." *Notre Dame*, 743 F.3d at 554-55. The Seventh Circuit replaced the University's moral analysis with its own, stating, "It amounts to signing one's name and mailing the signed form . . . ." *Id.* at 558. But the burden on the University's values is a religious determination a court may not lightly ignore. *Hobby Lobby*, 723 F.3d at 1138-41 (discussing *Thomas*).

For similar reasons, the Quaker hypothetical posited by Judge Posner, *see* 743 F.3d at 556, and repeated by Defendants and the ACLU here, *see* RB at 19; AB at 13-4, is inapposite. That hypothetical posits a Quaker who, having applied for and received a religious exemption from participating in the violence of war, asserts that his exemption also bars the government from drafting another to serve in his place. This analogy fails, first, because there is no burden in the mere act of requesting a religious exemption—Plaintiffs have *never* made that argument. Second, the Quaker's application did not cause a third party to deliver war materiel to the Quaker's employees, reimburse the third party for doing so, and guarantee him a 10% profit for his trouble. Third, the Quaker's application did not trigger the cascading effects that participating in the accommodation will have. Finally, these Plaintiffs are not, through this lawsuit, demanding that the government cease providing CASC services to their employees or anyone else. Indeed, in their least restrictive means analysis, Plaintiffs identify ways the government could make CASC services even more available than they are today. OB at 17.[7]

B. The Mandate Substantially Burdens Group I Members' Religious Exercise.

The Mandate substantially burdens Group I employers' religious exercise by preventing them from including affiliated Group II ministries in a morally compliant diocesan health plan. VC ¶¶ 253-60.

The difference between the two cases that dismissed diocesan plaintiffs (which the governments cites, RB at 16) and those that have granted them preliminary injunctions

[7] Plaintiffs do not condone expanding availability of CASC services, which they believe to be unethical. They simply identify ways the government might accomplish its purposes without substantially burdening Plaintiffs' religious practices.

turns on the dioceses' allegations of burden. When dioceses do not allege that including affiliated ministries in their group plan was a religious practice, courts have found no substantial burden.[8] But where dioceses *have* alleged that removing affiliated ministries from their group plans affects their pastoral ministry, courts grant injunctive relief.[9]

Here, the Archdioceses of Baltimore and Oklahoma City have plainly alleged a substantial burden. By including affiliated ministries in their health plans, the archdioceses support affiliated ministries, educate ministry leaders on Catholic doctrine, and model ways to access morally compliant health care—all of which further their religious exercise and pastoral ministry. *See* OB at 14; VC ¶¶ 253-60.[10]

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[8] *See Roman Catholic Archdiocese of N.Y. v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 6579764, at *15 (E.D.N.Y. Dec. 16, 2013) ("[P]laintiffs do not state that the Diocesan plaintiffs' religious beliefs require them to have all their affiliate organizations on a single health plan[.]"); *Catholic Diocese of Nashville v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 6834375, at *5 (M.D. Tenn. Dec. 26, 2013); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, --- F. Supp. 2d ----, 2014 WL 1256373, at *16 (N.D. Ga. Mar. 26, 2014).

[9] *See Zubik v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 6118696, at *3, 27 (W.D. Pa. Nov. 21, 2013) (By "caus[ing] a division between the Dioceses and [affiliated] organizations which fulfill portions of Dioceses' mission," "the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs."); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 6843012, at *14 (N.D. Ind. Dec. 27, 2013) (expelling nonexempt affiliates would "prevent[] [diocese] from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings"); *Catholic Diocese of Beaumont v. Sebelius*, --- F. Supp. 2d ----, 2014 WL 31652, *8 (E.D. Tex. Jan. 2, 2014) ("The Diocese could dump Catholic Charities from its health plan, but this runs afoul of Church teachings on social justice and the rights of employees. This 'Hobson's Choice' is a quintessential 'substantial burden' on the free exercise of religious belief, prohibited by RFRA.").

[10] Defendants acknowledged this traditional practice when they originally proposed the exemption, allowing nonexempt employers to "piggy back" on a diocesan plan. The government later eliminated this option, shrinking the exemption so that eligibility is "determined on an employer-by-employer basis." *See* VC ¶¶ 182, 220, 282, 331.

IV. THE INTERESTS OF THIRD PARTIES

The ACLU's argument that Plaintiffs' employees have a right to receive CASC services does not warrant a different result. Other than endorsing and modeling Catholic values, Plaintiffs take no action to prevent their employees from acquiring CASC services. In fact, Plaintiffs identify four less restrictive means that would "advance the government's goals without burdening Plaintiffs' religious exercise." OB at 17-18.

Both the government and the ACLU ignore this plain statement and proceed as if Plaintiffs demand the right to impede the rights of third parties. The government, leaning on the *Notre Dame* decision, claims that Plaintiffs are arguing for "the right to prevent *anyone else* from providing such coverage to their employees." RB at 18 (emphasis in original). The ACLU's brief is even more inflammatory. Its major premise is that Plaintiffs have brought this suit in order to "harm others," to "deny others their rights and interests under the law," to "injure others," to "impose their religious beliefs on their employees," and to "interfere with the rights of women." AB at 2, 15-16, 19.

None of these alleged interests are even remotely at issue here. Plaintiffs do not forbid their employees from acquiring CASC services. They merely seek freedom not to cooperate in the delivery of such. OB at 17-18; VC ¶¶ 124-27, Prayer for Relief.

If the Court is to take into account the interests of Plaintiffs' employees, neither the government nor the ACLU has stated how such a consideration fits into RFRA analysis. RFRA's provisions are concerned only with a plaintiff (whether its religious exercise is burdened) and the government (whether it demonstrates a narrowly tailored compelling interest). *See Hobby Lobby*, 723 at 1125-26.

Whatever role third-party burdens play in RFRA analysis, it does not complicate Plaintiffs' prima facie case. The interests of third parties have no bearing on whether a plaintiff's religious exercise is burdened or on a plaintiff's sincerity. If third-party interests fit at all within RFRA analysis, they must bear on whether the law at issue passes strict scrutiny.

Consider, for example, how the court took into account the interests of third parties in *Stormans v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012). *Stormans* concerned whether the government could force a closely held for-profit company to provide women with access to emergency contraceptives over its religious objections. The government argued that the mandate at issue was justified by its "stated goal of increasing patient access to all medications." *Id.* at 1999. While the government was unyielding as to the plaintiff company, the court found that the rules at issue were "riddled with secular exemptions" and were not enforced against other religious groups. *Id.* These exemptions "undermine[d]" the government's stated interest in increasing patient access and proved the rules "not at all narrowly tailored." *Id.* Thus, the rules failed strict scrutiny and the company was entitled to an injunction. *Id.* at 1199, 1201.

Concerns about third-party burdens are likewise part of the government's case here. The government appears to agree that one of its asserted "compelling interests" is in "ensuring that women have equal access to health care." RB at 6. That being so, the third-party interests stressed by the ACLU have no bearing on the motion now before the Court. The government concedes that the en banc Tenth Circuit has rejected its argument that the challenged regulations "are the least restrictive means of serving compelling

governmental interests," and acknowledges "that this Court is bound by that decision." RB at 20-21. Therefore, because third-party interests inform whether the government has passed strict scrutiny, and the government has conceded that the Tenth Circuit has decided that issue, the ACLU's arguments have no bearing on whether Plaintiffs are entitled to a preliminary injunction.

V. ESTABLISHMENT CLAUSE

The core of the Establishment Clause[11] jurisprudence is that government cannot use religious classifications to favor one type of religious person or entity over another. *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *Colo. Christian Univ.*, 534 F.3d at 1257-60. "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.*, 534 F.3d at 1257. The neutral treatment of religions '[t]he clearest command of the Establishment Clause.'" *Id.*

Under the Establishment Clause, government classifications of religious persons and entities cannot stand regardless of whether there is proof of "discriminatory animus" or "animus against religion." *Id*. at 1260. It also does not matter if the classification is "framed in terms of secular considerations," as in *Larson*, or religious considerations, as in *Colorado Christian University*. *Id.* at 1259. The problem of government-made

[11] While the Establishment Clause "frames much of [the] inquiry" with regard to the rule that government cannot "discriminat[e] among and within religions," "the requirements of the Free Exercise and Equal Protection Clauses proceed along similar lines." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257-58 (10th Cir. 2008).

religious classifications also "does not go away" when a targeted group modifies its practices or structure to avoid regulatory burden. *Id*. at 1259.

Given the clarity and strength of this Establishment Clause doctrine, it is surprising that Defendants never disagree with this statement in Plaintiffs' Opening Brief:

> [W]e can identify no law with as elaborate a classification scheme, creating religious winners and losers, as the Affordable Care Act. The Act's scheme makes the quantum of government-permitted religious freedom depend upon which of the six religious classes or their respective subclasses fit a person or entity . . . .

OB at 19. The government does not contest the specific discussion of the Act's religious classes and subclasses. Nor does it contest that courts have previously found some identical religious classifications unconstitutional. For example, the government favors "houses of worship" with the "religious employer" exemption because of its perception that houses of worship are more intensely religious than other religious employers. *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (reasoning that houses of worship are more likely to employ people faithful to church teaching regarding contraceptives). The Tenth Circuit itself struck down a classification based on religious intensity—the "pervasively sectarian test." *Colo. Christian Univ.*, 534 F.3d at 1259. Similarly, *Larson* struck a religious classification based on the ministry's degree of internal financial support. Defendants, nevertheless, use this same test to assess whether a ministry qualifies as an "integrated auxiliary," and, therefore, is eligible for the Act's "religious employer" exemption. *See* OB at 22. Defendants say nothing about these provisions.

Defendants instead oppose Plaintiffs' Establishment Clause claim by making eight micro-arguments. First, they conclusorily assert that "nothing in any of the preventive

services coverage regulations . . . discriminate among religions." RB at 22. This is patently false. Under the government's present classification scheme, soup kitchens operated by Group I employers are exempt, but not if they separately incorporate. Integrated auxiliaries with strong internal financial support are exempt, while those funded mostly by outsiders are not. Businesses structured as general partnerships and sole proprietorships have RFRA standing. Corporations do not. TPAs conscientiously opposed to providing CASC services can opt out. Catholic Charities cannot. Anabaptist employees are not driven to the CASC-only policies on the federally-funded exchange if their ministry employers drop coverage. Catholic employees are. *See* OB at 20.

Second, Defendants contend that one religious exemption does not, *ipso facto,* require universal religious exemption. RB at 23 n.11. Plaintiffs do not argue otherwise.

Third, Defendants say that every court to have considered the Establishment Clause claim as applied against the Act has rejected it. RB at 23 n.12. The reality is that 95% of the Group II cases and 85% of the Group III cases have resulted in injunctive relief for the religious employer, and these were decided on a RFRA basis,[12] leaving courts with little need to reach the Establishment Clause claim. None of Defendants' cases discuss the full religious classification scheme presented here. In those cases, plaintiffs argued that any religious exemption required total religious exemption. Plaintiffs do not argue this. The Establishment Clause claim here is about the full discriminatory scheme of religious classifications. It is an issue of first impression.

[12] *See* The Becket Fund, HHS Mandate Central at http://www.becketfund.org/hhsinformationcentral/ (last visited on April 8, 2014).

Fourth, Defendants suggest that proof of "explicit intention" or animus is required. RB at 21. As previously explained, it is not. *Colo. Christian Univ.*, 534 F.3d at 1260.

Fifth, Defendants hint that an unconstitutional religious classification scheme has to be based on denominational discrimination. RB at 20-21. This is not so. The statutes in *Larson* and in *Colorado Christian University* did not identify particular denominations. Indeed, Colorado Christian University is a non-denominational Christian college.

Sixth, Defendants suggest that *Colorado Christian University* should be limited to facial challenges and statutes denying public benefits. RB at 23 n.11. Whether *Colorado Christian University* was a facial or as-applied challenge was not part of the Tenth Circuit's analysis. Even so, Plaintiffs here bring a facial challenge to the Mandate. Also, *Larson* was not a denial-of-benefits case.

Seventh, Defendants treat as irrelevant the exemptions for Anabaptists and Health Care Sharing Ministries ("HCSMs") from the individual mandate and, therefore, from the requirements forcing individuals to buy policies with CASC coverage. RB at 22 n.10. The law at issue here is the Affordable Care Act and whether it provides a means for Catholic employers to assist their employees with health care coverage that does not include CASC services. Both the substantive requirements for these exemptions and their terminal dates—December 31, 1950, for the Anabaptists and December 31, 1999, for HCSMs—close such options for Catholic employers. These dates create a subclass of religious exemptions unheard of in American law. One cannot imagine the Title VII religious employer exemption limited to entities formed before December 31, 1950.

Finally, Defendants dismiss the fact that the government has provided a means for TPAs that are conscientiously opposed to the Mandate to walk away from their contracts and avoid providing CASC services. RB at 22 n.10. This provision for TPAs matters because it is another example of the government preferring some religious objectors and because it shows that the government knows how to accommodate those it favors.

VI. CONCLUSION

For these reasons, Plaintiffs respectfully request the relief stated in their motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

Ian S. Speir
Ian S. Speir

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,	:	
	:	Docket No.: CV 13-1441
Plaintiffs,	:	
	:	Washington, DC
vs.	:	10:05 a.m., Friday
	:	November 22, 2013
KATHLEEN SEBELIUS, et al.,	:	
	:	
Defendants.	:	

REPORTER'S OFFICIAL TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

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some foundational questions, because I really think what it is that these regulations actually do, as opposed to how the parties characterized the regulations, is -- has to be the foundation for my ruling.

The regulations divide the eligible employers into two categories: Those insured under a group health insurance plan, in which case, under the regulations, the coverage has to be expressly excluded from the plan, and then it's the insurer who becomes obligated to provide the services without passing the costs along in any way.

That much is correct.

MR. PRUSKI: Right.

THE COURT: Okay. Then there are those who are self-insured, in which case, it's the third-party administrator that's obligated to arrange for separate payments for the contraceptive services without any cost to the eligible organization.

So the third-party administrator's duty is triggered by his own agreement to contract with the religious organization, having been advised of the religious organization's objection, right?

MR. PRUSKI: I wouldn't put it in terms of an agreement to contract with. They're already in a

relationship with the self-insured employer.

They are not required, upon receiving the self-certification, to make the payments. They can walk away from the relationship entirely. But if they remain in the relationship, then, yes, upon receiving the self-certification form, the third-party administrator -- I'll just called them the TPA going forward -- the TPA is then -- becomes a plan administrator solely for the purpose of providing the separate payments, and it is the TPA's responsibility entirely to make those payments for contraceptive coverage. And as Your Honor referenced, the TPA is not permitted to charge, and in fact is expressly prohibited from charging the employer any premium or costs associated with those payments.

THE COURT: But his duty to do that only arises by virtue of the fact that he has a contract with the religious organizations?

MR. PRUSKI: Yes. They become a plan administrator and are required to make these payments by virtue of the fact that they receive the self-certification form from the employer.

THE COURT: All right. So if the regulations permit the -- I've got "third-party administrator" written in my notes all over the place,

so I'm not going to say "TPA." I might, but I don't think so.

If the regulations permit them, once they receive the self-certification, to decline to be in the contractual relationship, what happens then? Is the employer obligated to go out and find another one?

MR. PRUSKI: The employer is not obligated to find another TPA, no. An employer might find it convenient to do that. Perhaps they prefer to have a TPA rather than to administer everything about the plan themselves, but they are not obligated to find a new TPA.

THE COURT: Now, wait a minute.

They have somebody administering their health care plan, and when they go to them and say, oh, by the way, we absolutely don't want to have anything to do with the contraceptive part of health care; that's your responsibility. And he says, well, then, I don't want to be your TPA anymore, then they have to get another one.

MR. PRUSKI: And if they do get another one, then they need to provide -- and they provide the self-certification form to that TPA, it would be the same. That TPA would become responsible for making the separate payments for the coverage.