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. 14-CV-685-M

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

This case arises out of another case in this district, *Catholic Benefits Association v. Sebelius*, No. 5:13-CV-240-R (W.D. Okla. 2014) ("*CBA I*"), involving all of the parties named here and the same subject matter.[1] Both cases challenge rules (collectively, the "Mandate") burdening the religious practices of The Catholic Benefits Association LCA ("CBA") and its employer-members, coercing these members to violate their sincerely held religious beliefs and creating an unprecedented government scheme of discriminatory religious classifications.

In *CBA I*, the Court on June 4, 2014, granted preliminary injunctive relief to the CBA's then-current members. *CBA I*, CIV-14-240-R, 2014 WL 2522357, at *8-9 (W.D. Okla. June 4, 2014). But it declined to extend this relief to anticipated future members because "[g]ranting relief to *all* future members of the CBA that fit within Group II and III would upset the status quo, and it is too difficult for the Court to *presently* determine whether these future members are entitled to relief." *Id*. at *10 (emphases added).

Within days, the CBA added new members that needed relief from the Mandate by July 1, 2014. The CBA promptly filed a motion to amend, asking the Court to exercise its discretion and extend its relief to these new members (so-called "Post-Injunction Members"). The Court denied the motion to amend on June 26, 2014, stressing that the new CBA members "are free to seek their own relief," Order at 3, *CBA I*, No. 5:14-cv-

[1] The relationship between this case and *CBA I* is spelled out in greater detail in Plaintiffs' Verified Complaint ("VC") ¶¶ 15-26. The Verified Complaint contains detailed factual allegations and legal citations important to this motion. It is incorporated into this motion, by reference, in its entirety.

00240-R (W.D. Okla. June 26, 2014), agreeing with Defendants' argument that "nothing prevent[s]" members unprotected by the June 4 Order "from filing their own lawsuit," Defs.' Opp. to Mot. to Amend at 4, *CBA I*, No. 5:14-cv-00240-R (Dkt. #72).

In response to the Court's invitation, Plaintiffs now file this motion seeking emergency relief for Post-Injunction Members facing ruinous fines beginning July 1, 2014.[2] The CBA seeks a temporary restraining order ("TRO") for itself and its Post-Injunction Members. The Catholic Insurance Company ("Insurance Company") seeks a TRO for itself, its insureds, and its contracting parties.

II. BACKGROUND

The CBA's members are Catholic employers that adhere to the teachings of the Catholic Church on issues such as contraception, abortion, and sterilization. These employers sponsor or participate in health plans providing medical benefits to their employees. *See* VC ¶¶ 2, 4-6. They commit to provide no such benefits inconsistent with Catholic values. The CBA and the Insurance Company exist to help Catholic employers provide morally compliant health benefits to their employees. The CBA has, among its members, over 3,000 parishes and approximately 570 other employer members, including over 150 Post-Injunction Members and over 950 parishes who became members after June 4, 2014. *Id.* ¶ 42.

Defendants have promulgated a series of rules that force the Post-Injunction Members, under pain of crippling fines and other penalties, to pay for, provide, or arrange

[2] In *CBA I*, the Court held that the CBA "possesses associational standing to pursue its members claims." 2014 WL 2522357 at *4.

coverage in their health plans of contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling ("CASC services"). Because their Catholic faith teaches that such services are immoral, CBA members cannot comply with Defendants' Mandate without violating their sincerely held religious beliefs. *Id.* ¶¶ 83-92, 197-212. The Mandate also infringes the CBA's and the Insurance Company's religious practices because it effectively bars their mission: enabling Catholic employer-members to provide morally compliant health plans. *Id.* ¶¶ 31-60, 251-57, 261-65.

A. The Mandate and the "Accommodation"

The Mandate derives principally from 42 U.S.C. § 300gg-13(a)(4), a provision of the Affordable Care Act requiring health plans to cover "preventive care and screenings" for women, including "[a]ll FDA approved contraceptive methods, sterilization procedures, and patient education and counseling."[3] Failure to provide such CASC coverage subjects an employer to fines of up to $36,500 per affected beneficiary per year. *See* 26 U.S.C. § 4980D(b)(1), (e)(1). If the employer fails to sponsor a health plan altogether, the fine is $2,000 per employee per year. *Id.* § 4980H(a), (c)(1).

The Mandate exempts what Defendants inaptly call "religious employers," defined as nonprofit organizations identified in 26 U.S.C. § 6033(a)(3)(A)(i) and (iii). *See* 45 C.F.R. § 147.131(a). This definition of "religious employer" is exceedingly narrow. *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). While "houses of worship" are exempt under this provision, numerous other religious organizations—including Post-Injunction

[3] Health Res. Servs. Admin., Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited June 26, 2014).

Member Catholic Charities and Family Services, Diocese of Norwich, Inc. ("Catholic Charities and Family Services")—are not. Religious for-profit CBA members are also not exempt.

In response to a public outcry over Defendants' narrow definition of "religious employer," Defendants promised rulemaking that would "protect [non-exempt] religious organizations from having to *contract*, *arrange*, or pay for contraceptive coverage" as part of their health plans. 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (emphasis added). Defendants also promised that such coverage would be provided "independent of the objecting religious organization that sponsors the plan." *Id.* When Defendants finalized these rules in June 2013 (the "Final Rules"), both promises went unfulfilled.

The Final Rules' "accommodation" defined an "eligible organization" as one that (1) opposes providing CASC coverage on religious grounds, (2) is a nonprofit, (3) "holds itself out as a religious organization," and (4) "self-certifies, in a form and manner specified by the Secretary, that it satisfies the [previous three] criteria." 26 C.F.R. § 54.9815-2713A(a).

This last requirement, self-certification, is fulfilled when the organization executes and delivers EBSA Form 700 ("Form") to its insurance provider or TPA. *See* **Exhibit A** (EBSA Form 700). The execution and delivery of the Form has numerous effects contrary to Catholic values. For employers of *self-funded plans*, this action amends the employer's plan to include, as a kind of second binder of coverage, the CASC services; makes the third party administrator ("TPA") the plan and claims administrator for those services; obligates the TPA to provide them and to give notice to the employees of their

availability free of charge; subjects the TPA to penalties, fines, and damages if it fails to do so; gags the employer from communicating with the TPA about not providing the CASC services; and gives rise to scandal because the employer so blatantly acts contrary to the Catholic values it espouses. VC ¶¶ 165-82, 198-211.

For employers with *group insurance arrangements*, the execution and delivery of the Form to their health insurers also has effects contrary to Catholic values. This action requires the insurer to provide CASC services, 78 Fed. Reg. at 39,876, 39,880; 26 C.F.R. § 54.9815-2713A(b)(2), (c)(2); obligates the insurer to give notice to the employees of their availability free of charge, 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. §147.131(d); and gives rise to scandal because the employer so blatantly acts contrary to its Catholic values.

There is no separation between the CASC services employees receive and the health plan the organization sponsors. Employees' receipt of CASC services under the accommodation is directly tied to their enrollment in the plan, and employees receive the benefits only because they participate in the plan. *See* 26 C.F.R. § 54.9815-2713A(c)(2)(i)(B) (benefits last only "for so long as [employees] remain enrolled in the plan"); 78 Fed. Reg. at 39,880 (TPA must arrange separate payments "for participants and beneficiaries *in the plan*" (emphasis added)). In the case of self-insured plans, this is all the more clear because the government's Form serves as "an instrument under which the plan is operated" for purposes of ERISA. 29 C.F.R. § 2510.3-16(b); *see also* 78 Fed. Reg. at 39,879. Upon delivery of the Form, the employer itself is "considered to comply with the contraceptive coverage requirement" of the Mandate. 78 Fed. Reg. at 39,879.

Nothing about the supposed accommodation relieves religious objectors of the requirement to "contract" or "arrange" for CASC coverage for their employees. Nor is coverage of CASC services "independent" of the organization or its plan. To the contrary, objecting employers remain the central cog in the government's scheme for delivering CASC services. The Mandate simply presents two options: provide the benefits directly or, under the "accommodation," cause a surrogate to do the same on the employer's behalf. Either way, employees receive CASC services "*under* . . . the [employer's] plan," 78 Fed. Reg. at 39,879 (emphasis added), and the Mandate continues to compel the employer to "contract, arrange, or pay for contraceptive coverage," despite Defendants' promise to "protect" religious objectors from such a requirement. *See* 77 Fed. Reg. at 16,503.

B. The Mandate's Impact on the CBA's Members

The net effect of Defendants' rulemaking over the past several years is a discriminatory classification scheme that singles out some religious organizations for exemption, offers others an empty "accommodation," and subjects religious for-profit businesses to the full force of the Mandate. The Verified Complaint refers to these groups as "Group I Members," "Group II Members," and "Group III Members," respectively. VC ¶ 40. These members' exercise of religion is substantially burdened by the Mandate because it coerces them, under the threat of crushing fines, to pay for, provide, or arrange for CASC coverage contrary to their Catholic faith. *Id.* ¶¶ 196-224.

Group III Members, ineligible for the Defendants' exemption and their "accommodation," bear the full weight of the Mandate. *Id.* ¶¶ 213-17. Group II

Members qualify as "eligible organizations," but Defendants' "accommodation" does not alleviate their religious objections. *Id.* ¶¶ 165-82, 198-211. As explained on pages 4 and 5 above, and in Section III.A.2 below, the Mandate requires Group II Members to violate their sincerely held Catholic beliefs in a variety of ways.

The Mandate also burdens Group I Members. *Id.* ¶¶ 218-24. These Members include dioceses and archdioceses, like Post-Injunction Member the Roman Catholic Diocese of Norwich, that sponsor group health plans not only for diocesan employees, but also for employees of non-exempt affiliated ministries. They do this as part of their religious obligation to provide leadership for and support to other Catholic ministries. *Id.* ¶¶ 119-21. However, because these Group II participating employers are not exempt, Group I Members are forced to sponsor plans that, due to participation by non-exempt ministries, include coverage of CASC services, or to expel Group II employers from their plans. Either way, Group I sponsors are unable to perform faith-commended service to and leadership for these ministries. This burdens Group I Members' religious practices and interferes in matters of internal religious governance. *Id.* ¶ 222.

Even as the government imposes these burdens on the CBA's members, it has chosen not to enforce its Mandate on other employers and other health arrangements for both secular and religious reasons. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 2014 WL 2921709, at *9-10 (2014). Finally, some religious adherents are accorded special treatment and may create alternative health arrangements that make no provision for CASC services at all. *See infra* pp.21-22. Defendants' refusal to grant similar exemptions to Group II and Group III Members is irrational and discriminatory.

C. The Mandate's Impact on the CBA and the Insurance Company

The CBA is a Catholic nonprofit limited cooperative association, and the Insurance Company is a corporation. Both were organized in Oklahoma and were established to enable Catholic employers around the country to provide morally compliant health benefits to their employees. VC ¶¶ 31, 50-51. Many state laws have contraceptive coverage requirements that apply to insurance providers, and now, of course, federal law imposes such a requirement directly on employers.[4] Catholic employers who join the CBA are eligible to create self-insured health plans and purchase stop-loss coverage from the Insurance Company. Such an arrangement will avoid state insurance mandates. It will not avoid the federal Mandate, however.

The Post-Injunction Members, including the Roman Catholic Diocese of Norwich, its affiliates, and its Catholic Charities and Family Services, currently maintain or participate in health plans that exclude coverage of CASC services. VC ¶¶ 67, 75. The Mandate will take effect against these Roman Catholic entities from Norwich—as it will against numerous other Post-Injunction Members—on July 1, 2014. *Id.* ¶¶ 68, 75. Many CBA members plan to explore insurance arrangements with the Insurance Company to enable them to provide benefits consistent with their Catholic faith. *Id.* ¶ 60. But the Mandate prohibits them from doing so and threatens them with crippling fines for noncompliance, both now and in the future. Thus, the CBA and the Insurance Company

[4] *See* Nat'l Conf. of State Legislatures, Insurance Coverage for Contraception Laws, http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited June 26, 2014).

here seek a TRO for the Post-Injunction Members to enable them to lawfully sponsor health plans that exclude CASC coverage.

III. ARGUMENT

The standard for granting a TRO is largely the same as the preliminary injunction standard. *See Thomas v. Carson*, 30 F. App'x 770, 772 (10th Cir. 2002). Here, the Post-Injunction Members are entitled to a TRO because (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable injury if they do not receive prompt injunctive relief; (3) the threatened injury to these Catholic employers outweighs any harm the injury Defendants will suffer under the injunction; and (4) the injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013), *aff'd*, 573 U.S. ___ (2014).[5]

A. Plaintiffs' Likely Success on the Merits

Plaintiffs are likely to succeed on the merits of their Religious Freedom Restoration Act ("RFRA") and Establishment Clause claims.[6]

[5] The Post-Injunction Members are similarly situated to the CBA's pre-June 4 members in all relevant aspects. They are not providing or facilitating access to CASC services through their employee health plans, and the CBA merely asks that the Court act to preserve the status quo. Accordingly, Plaintiffs' request is not subject to a "heightened" standard. *See Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1071 (10th Cir. 2009) ("An injunction disrupts the status quo when it changes the 'last peaceable uncontested status existing between the parties before the dispute developed.'" (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005)).

[6] Because these are adequate to afford complete relief, Plaintiffs do not now seek a TRO on their other claims.

1. If Consolidated with *CBA I,* the Law of the Case Doctrine Controls.

Along with the Verified Complaint, Plaintiffs filed a Notice of Related Case that explains the similarities between *CBA I* and the present case and suggests that the two should be consolidated. Should the present motion be folded into *CBA I*, the law of the case doctrine applies and the Court's June 4 Order should continue to govern the same issues as they are presented in this motion.

a. Law of the Case Applies to the *CBA I* Preliminary Injunction Order.

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. LaHue*, 261 F.3d 993, 1010 (10th Cir. 2001). This doctrine "is based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided." *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir.1998) (citation omitted). The law of the case doctrine should be discarded only in "exceptionally narrow circumstances": (1) when the factual record has changed substantially; (2) when there has been a change in controlling authority; or (3) when the original decision was clearly erroneous and would work a manifest injustice. *LaHue*, 261 F.3d at 1010-11.[7]

None of these "exceptionally narrow circumstances" apply here. As the Court held in *CBA I* on June 26, 2014: (1) no "new evidence exists in this case"; (2) "[i]t is

[7] The law of the case doctrine applies to preliminary injunction rulings. *Prairie Band Potawatomi Nation v. Wagnon*, 402 F.3d 1015, 1026 (10th Cir. 2005) ("[I]t is not true that the law of the case doctrine does not apply merely because [the prior decision] dealt with a preliminary injunction."), *vacated on other grounds*, 546 U.S. 1072 (2005).

undisputed that there has been no intervening change in controlling law in this circuit"; and (3) "the Court is . . . unpersuaded that there is any need . . . to correct clear error or prevent manifest injustice." Order at 2-3, *CBA I*, No. 5:14-cv-00240-R (W.D. Okla. June 26, 2014). Accordingly, the Court's June 4 Order in *CBA I* is law of the case and should easily resolve the legal issues presented in the present motion for a TRO.

b. Law of the Case Does Not Apply to the *CBA I* Order Denying Motion to Amend. While the present motion for TRO and the CBA's recent motion to amend seek substantially similar relief, they are reviewed under different legal standards. *Compare Sherman v. Klenke*, 2014 WL 675417, at *1 (D. Colo. Feb. 20, 2014) (motions to amend are left to the Court's discretion), *with Thomas*, 30 F. App'x at 772 (preliminary injunction and TRO standards). Thus, the law of the case doctrine in no way suggests that the reasoning from the Court's June 26 Order applies here.

2. 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). By "expressly adopt[ing] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," RFRA restored strict scrutiny to free exercise claims. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *see also Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *7 n.3.

To make out a prima facie claim under RFRA, a plaintiff must prove a substantial burden on its sincere exercise of religion. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). The burden then shifts to the government "to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31.

a. The Mandate Substantially Burdens Plaintiffs' Sincere Exercise of Religion. 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).[8]

For Group III Members, the Supreme Court's *Hobby Lobby* decision is controlling: the Mandate imposes a substantial burden on their religious practices. *See* 573 U.S. ___, 2014 WL 2921709, at *22. For Group II Members, the substantial burden is equally unmistakable. *See* pp.4-5, *supra*.[9] As already explained, the accommodation

[8] The CBA's members exercise religion when they choose, for religious reasons, to exclude coverage of CASC services from their group health plans. CBA members also exercise religion when, through the CBA and the Insurance Company, they voluntarily associate to vindicate their shared interest in health coverage that complies with Catholic teachings and to ensure morally compliant health benefits for their members and employees. *See* VC ¶¶ 83-92.

[9] Since last December, six cases in this Circuit have granted preliminary injunctive relief to plaintiffs making this very argument. *See S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259, at *8 (W.D. Okla. Dec. 20, 2013); *Dobson v. Sebelius*, No. 13-CV-03326-REB-CBS, 2014 WL 1571967, at *8-9 (D. Colo.

does not resolve their objections because it makes them cooperate with sin.

Group I Members like the Roman Catholic Diocese of Norwich are exempt from the Mandate, but the Mandate still burdens their religious practice. By requiring non-exempt employers to cover CASC services, the Mandate directly interferes with Group I Members' health arrangements, in which non-exempt employers (Group II Members) often participate. Group I Members are burdened because they must either sponsor health plans that include CASC coverage, expel the non-exempt ministries from their plans, or drop their plans altogether. VC ¶¶ 218-24. Several courts have recognized that this constitutes 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).

The CBA and the Insurance Company exist to enable Catholic employers to provide health coverage to their employees consistent with Catholic teachings. But the Mandate thwarts the religious purposes for which the CBA, its members, and the Insurance Company came together, and makes it illegal or too costly to accomplish those purposes. As the Supreme Court has recognized time and again, this in itself is a

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Apr. 17, 2014); *Fellowship of Catholic Univ. Students v. Sebelius*, No. 1:13-CV-3263-MSK-KMT (D. Colo. April 23, 2014), *available at* http://www.becketfund.org/wp-content/uploads/2014/04/Binder2.pdf; *Catholic Benefits Ass'n LCA v. Sebelius*, No. CIV-14-240-R, 2014 WL 2522357, at *8 (W.D. Okla. June 4, 2014); *Colo. Christian Univ. v. Sebelius*, No. 13-CV-02105-REB-MJW, 2014 WL 2804038, at *5-6 (D. Colo. June 20, 2014). The current nationwide tally is 29 to 4 in favor of nonprofit plaintiffs. *See* The Becket Fund, "Current Scorecard for Non-Profit Cases," at http://www.becketfund.org/hhsinformationcentral/#tab1.

cognizable injury, sufficient to establish standing. *See Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422-23 (1942); *Pierce v. Society of 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." (citing *CBS*, *Pierce*, and *Raich*)).[10]

If the CBA's members maintain fidelity to their religious beliefs and provide health plans that exclude CASC coverage, they pay dearly: fines of up to $36,500 per affected beneficiary per year, plus potential penalties and civil lawsuits. To drop their health insurance plans altogether, members would pay fines of $2,000 per employee per year after the first thirty employees. These burdens are "surely substantial." *Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *19; *see also United States v. Lee*, 455 U.S. 252, 254 (1982); *Thomas*, 450 U.S. at 717; *Yoder*, 406 U.S. at 208.

b. The Supreme Court's *Hobby Lobby* Decision Strengthens Plaintiffs' RFRA Arguments. Plaintiffs and the Post-Injunction Members are even more likely to succeed on the merits in light of the Supreme Court's decision in *Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709. While the Supreme Court did not address the legal status of the

[10] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), does not dictate otherwise. *Lujan* teaches that the causation and redressability elements of standing may be more difficult to establish when they depend on "unfettered choices made by independent actors *not before the courts*." 504 U.S. at 562 (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)) (internal quotation marks omitted). Here, the CBA's Post-Injunction Members are not "independent actors," and all of them, together with the Insurance Company, are "before the cour[t]." *Id.* *Lujan* therefore has no application to this case.

"accommodation" for non-exempt religious nonprofits,[11] it provided helpful guidance on the proper (and improper) role of courts in determining whether a law "substantially burdens" religious exercise.

The Supreme Court squarely rejected the government's argument that Hobby Lobby's objection to the Mandate "is simply too attenuated." *Id.* at *21. "This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) 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.* At issue both in *Hobby Lobby* and the present case is whether plaintiffs' religious exercise is "substantially burdened" when the government requires employers to perform "an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.* The Court admonished "HHS and the principal dissent" for "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" and "in effect tell[ing] the plaintiffs that their beliefs are flawed." *Id.* "For good reasons, we have repeatedly refusing to take such a step." *Id.* The Court concluded, "[I]t is not for us to say that

[11] *See Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *25 ("We do not decide today whether [the accommodation] complies with RFRA for purposes of all religious claims."); *id.* at *25 n.40 ("The [accommodation] accommodates the religious beliefs asserted in *these* cases [*Hobby Lobby* and *Conestoga*], and that is the only question we . . . address."); *id.* at *42 (Ginsberg, J., dissenting) (stating that "[u]ltimately, the Court hedges on its proposal" and noting that plaintiffs were "noncommittal" on whether they would object to the accommodation).

[Hobby Lobby's owners'] religious beliefs are mistaken or insubstantial. Instead, our narrow function . . . is to determine whether the line drawn reflects an honest conviction . . . ." *Id*. at *22 (quoting *Thomas v. Review Bd. of Ind. Empl. Sec. Div*., 450 U.S. 707, 716 (1981)) (internal quotation marks omitted).

Hours after the Supreme Court decided *Hobby Lobby*, the Eleventh and Tenth Circuits granted injunctive relief to nonprofit employers that had been denied such relief below. In *EWTN v. Burwell*, the Eleventh Circuit implicitly disagreed with the district court's analysis, granting injunctive relief "in light of the Supreme Court's decision [in *Hobby Lobby*]." No. 14-12696, slip op. at 1-2 (11th Cir. June 30, 2014). Judge Pryor specially concurred, and his is the first judicial analysis applying *Hobby Lobby* to the nonprofit Mandate cases. Judge Pryor affirmed that "[i]t is neither our duty nor the duty of the United States to tell [EWTN] that its undisputed belief is flawed." *Id*. at 4 (Pryor, J., concurring) (citing *Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *22). Judge Pryor found the Sixth and Seventh Circuit's opinions "den[ying] injunctions in similar appeals" "wholly unpersuasive" and "[r]ubbish" because these courts did exactly what the Supreme Court said courts may not do: "So long as [EWTN]'s belief is sincerely held and undisputed . . . we have no choice but to decide that compelling [EWTN's participation through Form 700] is a substantial burden on its religious exercise." *Id*. at 20-22.

The Tenth Circuit also weighed in yesterday, granting relief to the *Diocese of Cheyenne* plaintiffs by giving them the same accommodation the Supreme Court granted to the Little Sisters of the Poor. *See Diocese of Cheyenne v. Burwell*, No. 14-8090 (10th Cir. June 30, 2014) (citing *Little Sisters of the Poor v. Sebelius*, 134 S.Ct. 1002 (Jan 24,

2014)).[12] The Tenth and Eleventh Circuits' orders granting injunctive relief confirm that the Court's opinion in *Hobby Lobby* strengthens the CBA's argument that the government's accommodation substantially burdens its members' religious exercise.

c. The Mandate and Strict Scrutiny. Because the Mandate substantially burdens CBA members' religious practices, it must satisfy strict scrutiny. It cannot do so. The government's interest in the widespread availability of contraception cannot be compelling when Defendants have exempted millions of plans, covering tens of millions of employees, from the Mandate. VC ¶¶ 110-13. And the government has far less intrusive means at its disposal for addressing this supposed problem.

(i) ***No Compelling Interest.*** To prevail in this case, Defendants must demonstrate 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). Under this test, "[o]nly the gravest abuses, endangering paramount interests" justify restrictions on Plaintiffs' religious practices. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants claim the Mandate serves to increase access to contraceptives, which in turn advances women's health and helps ensure the equality of women in the workplace. *See* 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012). In the first place, this is

[12] Unlike the government's accommodation, the Supreme Court and Tenth Circuit's mechanism is acceptable to these Catholic nonprofit plaintiffs. Under that mechanism, the employers need only "provide[e] written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators." *Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *9 n.9. Merely giving notice of moral objection to HHS, unlike EBSA Form 700, does not trigger delivery of CASC services by a surrogate provider.

hardly a "compelling" problem in need of a solution. As Defendants acknowledge, contraceptives are widely available at non-prohibitive costs, and they are "the most commonly taken drug in America by young and middle-aged women." Statement by Former U.S. Dep't of Health & Human Services Secretary Kathleen Sebelius, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited June 26, 2014). Through its Title X program, HHS spends more than a quarter-billion dollars each year to provide contraceptive access, supplies, and information to all who want and need them. U.S. Dep't of Health & Human Services, Fiscal Year 2015, Budget in Brief, at 21 "Family Planning," *available at* http://www.hhs.gov/budget/fy2015/fy-2015-budget-in-brief.pdf (last visited June 26, 2014). And even before the Mandate was promulgated, contraceptives were covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). The Mandate merely fills a "modest gap" in contraceptive coverage—hardly a compelling interest. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011).

Yet even if Defendants' asserted interests were compelling in the abstract, they cannot be compelling in this context. The Affordable Care Act already exempts millions of plans, covering tens of millions of employees. *See Hobby Lobby*, 573 U.S. ___, 2014 WL 2921709, at *9-10. Defendants have also chosen not to impose their Mandate on health arrangements created by select religious groups as alternatives to insurance coverage. *See* 26 U.S.C. §§ 5000A(d)(2)(A), 1402(g)(1) (Anabaptist exemption); *id.* § 5000A(d)(2)(B) (exemption for "health care sharing ministries"). RFRA requires Defendants to show they have a compelling interest in requiring *these particular*

Plaintiffs to provide CASC services. *See O Centro*, 546 U.S. at 430-31. Defendants cannot make that showing when they have elected not to mandate CASC coverage for millions of American workers for both secular and religious reasons.

(ii) ***Less Restrictive Means Available.*** Even assuming that widespread availability of free contraceptive coverage is a compelling interest, Defendants have not chosen the least restrictive means of advancing it. Defendants have numerous other means at their disposal for broadening access to CASC services. The government could (1) directly provide coverage of CASC services for individuals who do not currently receive such benefits; (2) reimburse those who pay out of pocket for CASC services through a combination of direct subsidies, tax deductions, and tax credits; (3) facilitate greater access to CASC services through the health insurance exchanges; or (4) work with other, willing organizations to expand access to CASC services. Each option advances the government's goals without burdening the Post-Injunction Members' religious exercise.

In promulgating the Mandate, Defendants neither evaluated the feasibility of these alternatives nor explained why they were unworkable. Such regulatory nonfeasance cannot meet RFRA's exacting standard and is fatal to the Mandate. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013); *see also supra* note 12.

For all these reasons, Plaintiffs are likely to prevail on their RFRA claim.

3. 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. Indeed, we 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 these six religious classes or 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.[13]

a. 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). Anabaptists include Mennonites, Amish, Hutterites, and

[13] "[T]he Establishment Clause may be violated even without a substantial burden on religious practice if the government favors one religion over another (or religion over nonreligion) without a legitimate secular reason for doing so." *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013). Plaintiffs may raise this Establishment Clause challenge because they are "directly affected by the laws and practices against which their complaints are directed." *Awad*, 670 F.3d at 1121 (quoting *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222-23 (10th Cir. 2005)) (internal quotation marks omitted).

Bruderhof. VC ¶ 108. There are only three HCSMs—Samaritan Ministries, Medi-Share, and Christian Healthcare Ministries—and each is Evangelical Protestant. *Id.* ¶ 106. The government closed this exemption to other religious groups by limiting the Anabaptist exemption to sects in existence since December 31, 1950, 26 U.S.C. § 1402(g)(1)(E), and by limiting the HCSM exemption to groups in existence since December 31, 1999, *id.* § 5000A(d)(2)(B). A law distinguishing between older and newer religious groups violates the Establishment Clause. *Larson*, 456 U.S. at 1684, n.23.

While these exemptions apply to the individual mandate, they cannot be walled off from the CASC Mandate for two reasons. First, they permit alternative health arrangements excluding CASC coverage and limit them to select religious individuals. Catholics do not fit the Anabaptist exemption, and they cannot form HCSMs. Second, the availability of these alternate health arrangements 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.[14] 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

[14] This is not hypothetical. The HCSMs market themselves to Christian businesses and ministries in addition to individuals. *See* Christian Care Ministry, Group Share for Churches & Christian Employers, http://mychristiancare.org/groups.aspx (last visited June 26, 2014); Christian Healthcare Ministries, Group Memberships, https://www.chministries.org/groups.aspx (last visited June 26, 2014).

employees to the exchanges where all plans cover CASC services. *See* 45 C.F.R. § 147.130(a)(1).

There is no reason for the government to favor Anabaptists and Evangelical Protestants over Catholics in this way. As explicit preferences for two religious groups over others, the Anabaptist and HCSM exemptions violate the Establishment Clause. *See Larson*, 456 U.S. at 244; *Awad*, 670 F.3d at 1128.

b. Three-Tiered Scheme of Religious Objectors. The government deems some employers "religious" and exempts them from the Mandate. 45 C.F.R. § 147.131(a). These are the biggest religious "winners." They include churches, their integrated auxiliaries, conventions of churches, and exclusively religious activities of religious orders, 26 U.S.C. § 6033(a)(3)(A)(i), (iii)—a group that describes the CBA's Group I Members. Group II Members, by contrast, are simply tossed a second-class "accommodation." Group III Members get nothing.

Defendants justify favoring Group I Members over Group II Members by reasoning that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. By using uniformity or intensity of employees' religious beliefs as a basis for discrimination, Defendants have transgressed the Establishment Clause. This was the precise issue in *Colorado Christian University*, where the Tenth Circuit invalidated a state law that denied government benefits to

students that attended religious colleges deemed "pervasively sectarian," defined in part by whether students, faculty, and trustees shared the same "religious persuasion." 534 F.3d at 1250-51. The Mandate's attempt to draw a similar line is likewise invalid. The Establishment Clause prohibits government discrimination "based on the degree of religiosity of [an] institution and the extent to which that religiosity affects its operations." *Id.* at 1259. 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 the Constitution places 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.[15] 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

[15] 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.

sources, 26 C.F.R. § 1.6033-2(h)(4). This "fifty per cent rule" is the very sort of religious classification that *Larson* struck down. *See* 456 U.S. at 247 & n.23.

Finally, there are the Group III Members—religious for-profit employers—who are offered no exemption or "accommodation." Yet even here the government discriminates, claiming that *sole proprietorships* and religious *general partnerships* have standing under RFRA, while religious *limited partnerships* and *corporations* do not. *See* **Exhibit B** (excerpt from transcript of oral argument in *Hobby Lobby*, 723 F.3d 1114).

c. 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. Defendants 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 the Post-Injunction Members, with ardent religious objections to the same obligation, have no such option. Here again, Defendants discriminate against the Post-Injunction Members in violation of the Establishment Clause. 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) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Lukumi*, 508 U.S. at 537-38 (religious practice is "singled out for discriminatory treatment" when government "devalues religious reasons" for behavior and deems them to be "of lesser import than nonreligious reasons").

For these reasons, Plaintiffs will likely prevail on the Establishment Clause claim.

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." *Hobby Lobby*, 723 F.3d 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 Hobby Lobby*, 723 F.3d 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 and its Colorado sister court have followed *Hobby Lobby* repeatedly in holding that nonprofit ministries were entitled to a preliminary injunction.[16] The same conclusions are warranted in this case.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request the Court grant Plaintiffs' Emergency Motion for Temporary Restraining Order filed this day.

DATED: July 1, 2014.

Respectfully submitted,

s/ J. Angela Ables
J. Angela Ables (Okla. Bar #0112)_
Johnny R. Blassingame (Okla. Bar #21110)

[16] *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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EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

Date: May 23, 2013

Case: Hobby Lobby Stores, Inc., et al. v. Kathleen Sebelius

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SEBELIUS

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JUDGE: Before we get to strict scrutiny --

MS. KLEIN: Yes your honor.

JUDGE: Let's talk about the corporate form and let's assume there is a substantial burden on the sole proprietor --

MS. KLEIN: For purposes of argument I guess -- I'm with you.

JUDGE: And think of a different type of government requirement. What if, the proprietor then brings his younger brother into the business as a full partner, they have a partnership. Can they raise this claim?

MS. KLEIN: We think this line of questioning and it also came up yesterday in the Seventh Circuit, underscores the problems with the plaintiff's argument because it's not clear, I mean, yesterday that it was positive, what if it was the 51% --

JUDGE: Well before we get to where there is a problem with this planned reasoning, do you agree that if two people who share in a business they would still have the same free exercise claim?

MS. KLEIN: I'm sorry we talking about a

corporation?

JUDGE: No. I'm talking about --

JUDGE: Partnership.

JUDGE: I started with the sole proprietor and said let's have a situation which you agreed that there is a substantial burden on the free exercise religion of the sole proprietor.

Now the proprietor brings in his kid brother as a full partner, can they claim violation of free exercise?

MS. KLEIN: Well assuming that the one could, I'm not -- I don't see that a second person would alter the inquiry.

JUDGE: Okay. Now say they have a third brother, who's got a lot of money and he's interested in the same business too so he wants to protect his asset from liability in this partnership so he says well, I'll put money in this and I'd like a business interest in it but I don't want to be subject to full liability, so let's make us a limited partnership where I am a limited part.

Now, where are we?

MS. KLEIN: Well --

JUDGE: It's a limited partnership.

MS. KLEIN: Certainly once you're forming a separate legal entity and that entity is the regulated entity and it's funds are being used to comply with whatever law we have, then no --

JUDGE: Well you concede non profit organizations can though so it's not no, except for -- -

MS. KLEIN: We say non-profits -- let's talk about -- go back to churches because --

JUDGE: No, no, no, no, no.

MS. KLEIN: The analysis is different.

JUDGE: No, the analysis is profits to non-profits. That's the line the government asks this court to draw and I'm just a little curious why the tax treatment of profits because non-profits can make profits, it's just how they're handled, they have to be reinvested rather than distributed, okay.

I'm just not sure that I understand why the tax treatment of moneys generated by a company would make a difference as to its RFRA rights.

MS. KLEIN: Well, this is the issue that was the subject of debate in Spencer. Judge --

JUDGE: I'm asking here right now --

MS. KLEIN: And I want to make clear that --

JUDGE: (*)

MS. KLEIN: We've not suggested that non-profit status is sufficient. It's that as under our all --

JUDGE: No but they're not categorically disbarred from being able to assert RFRA rights. You're asking us to find that for-profit companies are categorically disbarred from asserting RFRA rights and I'm just curious why the tax treatment of profits would make a difference categorically in the capacity in bringing RFRA suits.

MS. KLEIN: What we're saying is that when Congress enacted RFRA in 1993, it was not doing for the first time giving for-profit corporations rights against their employees.

JUDGE: Your argument is a textual argument then.

MS. KLEIN: I'm sorry, contextual?

JUDGE: Textual argument.

MS. KLEIN: It's textual and contextual.

JUDGE: All right in (*) to Title VII, there is a bit in Title VII actually doesn't distinguish between profits and non-profits, that's a judicial gloss on that section of Title VII.

MS. KLEIN: And it's animated by establishment --

JUDGE: Let's say it's right, okay, let's say the judicial gloss is correct, why wouldn't that be really hurtful to the government's cause because if Congress knew how to distinguish between profits and non-profits in Title VII and didn't here, normal (*) of construction would be that that difference is entitled to respect.

MS. KLEIN: That is their argument. Their argument is that --

JUDGE: I'm asking that's wrong or right.

MS. KLEIN: I know, I still say that trumps Title VII, the (*) --

JUDGE: We're not interpreting those things, we're interpreting RFRA.

MS. KLEIN: And lets remember, when Congress enacted RFRA, the heartland are the planes of natural person that's when -- when Congress --

JUDGE: RFRA also speaks of entities having rights too. So what we do about that?

MS. KLEIN: Okay, so heartland, natural person, so you know, classic case a prison wants a halal meal. That's this court's Abdul Hased decision. And if you look at the Senate Report, they're talking about, you know, Jews being forced to do autopsies in violation of their religious beliefs.

There is no doubt that there was a reason to use the term "person" because certain types of entities have historically exercised -- have free exercise rights, and that's churches, and entities that are really closely affiliated with that.

JUDGE: So where do we stop? Where does that line stop? Hospitals?

MS. KLEIN: Well what the Supreme Court said in Amos, and this is what --

JUDGE: Schools?

MS. KLEIN: Pardon?

JUDGE: Hospitals, schools? Where does this stop?

MS. KLEIN: Again, the line that the departments that issue these regulations have drawn, is paralleling what Congress has done in Title VII and the other employment statutes and there, there is a debate about how far into secular looking non-profit activities it's appropriate to go to just do with establishment clause.

The paradigm is churches, the Ninth Circuit was willing to go as far as something like the Salvation Army.

JUDGE: Well you've admitted a full proprietorship can exercise religion, you've admitted a partnership can exercise religion, you've admitted a non-profit can exercise religion, why is it inherently about a for-profit corporation that's different than all those other things?

MS. KLEIN: Well I want to be clear, when your honor says partnership, I want to think more about the legal structure --

JUDGE: I think that's what you said, you

said heart, so I'm just repeating what you said. What is about it uniquely, we're talking about one little category over everybody else can do, exercise religion, this one kind over here can't.

MS. KLEIN: Two points, with the Supreme Court when it was faced with this issue in Amos --

JUDGE: This isn't a statutory problem this is a first amendment problem, so don't tell me about Title VII, free exercised of religion is in the constitution and RFRA just reiterated it. So --

MS. KLEIN: Again Hosanna-Tabor is the Supreme Court's word on what an entity can do vis- -vis its employees. And there, what the Supreme Court has said is a church and its spiritual leaders, that's where the church has prerogative, not with respect to other employees.

So if we're talking about the First Amendment. Now if we're talking about which -- how far Congress can go beyond that, that was the issue in Amos. It was okay, the paradigm was, you know, the churches can be exempt from Title VII, the NLRA, but the District Court in Amos said, this violates