IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-03326-REB-CBS

Dr. JAMES C. DOBSON, and
FAMILY TALK,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor;
JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Dr. James C. Dobson and Family Talk seek preliminary injunctive relief against the Affordable Care Act's (ACA) preventive services mandate and the accompanying series of federal regulations (the "Mandate") that force them to violate their religious beliefs. The Government has finalized the Mandate and indicated that enforcement was to begin on January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). For Plaintiffs, that enforcement will commence when their next plan year begins on May 1, 2014. The Mandate continues to require religious organizations, including those that are self-insured like Plaintiffs, to violate their religious beliefs by providing, arranging for, and facilitating access to abortion-inducing products, and related education and counseling. In nearly all cases to consider non-profit organizational challenges to this Mandate, a temporary or preliminary injunction has been awarded. This Court should do the same.

FACTUAL BACKGROUND

A. Dr. Dobson extends his pro-life evangelization by creating Family Talk.[1]

For decades, Dr. James C. Dobson has been a leading public advocate of the Gospel of Jesus Christ and His biblical plan for marriage, family and the sanctity of human life from the moment of conception/fertilization. VC ¶ 2-3, 25. In 2010, Dr. Dobson established Plaintiff Family Talk, a new non-profit organization, for the "express purpose of spreading and propagating the Gospel of Jesus Christ and specifically to provide Christ-oriented advice, counsel, guidance and education to parents and children and to speak to cultural issues that affect the family." VC ¶ 22.

[1] The facts are set forth in the Verified Complaint ("VC"), which is a sworn affidavit and serves as evidence in support of Plaintiffs' motion for preliminary injunction. Those facts are summarized here, with specific references to the complaint as applicable.

Based on the Bible's religious and moral teachings, Plaintiffs sincerely believe that the termination of the life of a preborn child after its conception/fertilization is an intrinsic evil and a sin against God for which Plaintiffs will be held accountable. VC ¶ 32. This includes abortion, methods that prevent or dislodge the implantation of an embryo after its fertilization (hereinafter "abortion" or "abortifacient"), and the provision of education and counseling in support of the same. *Id.* Therefore, abortion and any drug, device or procedure that may terminate the life of an embryo after its fertilization (and before or after its implantation into the uterus) is morally wrong and objectionable to Plaintiffs. *Id*.

Family Talk, under the direction of Dr. Dobson, draws its employees from among those who profess and demonstrate a strong commitment to the Christian faith. VC ¶ 27. Plaintiffs began providing health coverage to their employees on April 1, 2010, subjecting them to the requirements of the ACA. VC ¶ 48. Plaintiffs believe that it would be immoral and sinful for them to participate in, arrange for, facilitate, or otherwise support health coverage for drugs, devices or procedures (or related education and counseling) that may destroy a human life after its fertilization and before (or after) its implantation in its mothers' uterus. VC ¶ 2-3, 34. As a result, Plaintiffs have made sure that Family Talk's current health plan excludes coverage not only of surgical abortion, but also "contraceptives" that they believe may have an anti-implantation effect (hereinafter "abortifacients"), including the morning after pill (Plan B), the week after pill (ella), and IUDs. VC ¶ 49. Many of Family Talk's employees, including Dr. Dobson himself, have moral beliefs against themselves and their families being part of a health plan that covers or causes coverage of abortifacients. VC ¶ 172, 194.

B. Congress generally requires preventive services coverage in the ACA, but not abortifacients and not violations of conscience.

In March 2010, Congress passed the Patient Protection and Affordable Care Act. Pub. L. No. 111-148, 124 Stat. 119 (2010). The ACA requires health plans to abide by multiple rules benefitting patients, such as the requirement that plans cover dependents until age 26. 42 U.S.C. § 18011(3)–(4). But the abortifacient Mandate challenged in this case is not one of those universal requirements.

The ACA requires that some health plans cover preventive care and screenings, including women's preventive services. *Id.* § 300gg-13(a)(4). But Congress did not require that contraception or abortifacients be included in the Mandate. *Id.* To define this category, Defendant the Department of Health and Human Services adopted guidelines formulated by the private Institute of Medicine into its preventive-care requirement. HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Jan. 10, 2014). The guidelines from the IOM—and therefore Defendants' guidelines—require that all FDA-approved contraceptives, sterilization procedures, and related counseling be included in the women's preventive services mandate. *See* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109–10 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 9, 2014); *see also* 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)); 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012). Collectively, the ACA and administrative adoption of these guidelines, and the attendant penalties for their violation, form "the Mandate" being challenged here.

In addition to not requiring abortifacients to be in the Mandate in the first place, Congress empowered Defendants to enact "comprehensive" religious exemptions to the Mandate, providing no guidance as to what should be included or excluded from the exemptions. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). But Defendants decided to exempt only churches and their integrated auxiliaries from the Mandate. *See* 45 C.F.R. § 147.131 (2013); *see generally* 78 Fed. Reg. 39,870 (July 2, 2013). They did so based on the rationale 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." 78 Fed. Reg. at 39,887. Defendants offered no evidence for this speculation, and refused to extend an exemption to religious non-profit entities such as Family Talk even though Family Talk's employees' beliefs are congruent with the beliefs of Family Talk. *Id.*

Furthermore, Defendants refrained from imposing penalties on the plan administrators of certain self-insured non-profit entities that are exempt from ERISA because they are in a "church plan." *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691 (filed Jan. 3, 2014) (stating that church plans are "exempt from regulation" under ERISA). Defendants withheld their enforcement mechanism even though those entities themselves are not churches and therefore Defendants concluded that those entities' employees need to receive contraceptive coverage through the accommodation, rather than being exempt. *See* 78 Fed. Reg. at 39,887. However, Defendants refused to withhold their penalties from administrators of self-insured non-profit plans such as Family Talk's plan, even if they are identically situated to non-profit entities in non-ERISA "church plans"—simply

because Family Talk's plan does not happen to qualify under that ERISA category.

C. Defendants force Family Talk to provide or contract for abortifacient coverage in their own health plan.

To coerce non-profit, non-church, ERISA-governed plans such as Family Talk's plan, Defendants created an "accommodation" (not an exemption, and not a withholding of penalties). *See generally* 78 Fed. Reg. 39,870. Under the "accommodation," Plaintiffs have three basic options for offering health coverage insurance to their employees. First, they would have the "option" of violating Plaintiffs' religious beliefs by Dr. Dobson taking specific action to comply fully with the Mandate, and including coverage of abortifacients in Family Talk's plan. 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)).

Second, Plaintiffs could sign a "certification" form and give it to Family Talk's plan administrator. EBSA Form 700, Dep't of Labor, *available at* http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (last visited Jan. 10, 2013) (Attached as Exhibit 1). That form says two distinct things. It expresses a religious objection to abortifacient coverage, *id.* at 1, and additionally it declares "[t]he obligations of the third party administrator [to provide abortifacient payments] are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A. This certification is an instrument under which the plan is operated." EBSA Form at 2; *see also* 78 Fed. Reg. at 39,894–95; 29 C.F.R. § 2590.715–2713A.

By this language Family Talk would be creating, contracting for, and arranging for legal "obligations" in its plan administrator to obtain payments for abortifacients—and those payments would be part of Family Talk's own plan. *Roman Catholic Archbishop of*

Washington v. Sebelius, 2013 WL 6729515, at *22 (D.D.C. Dec. 20, 2013) (quoting the government's own concession that "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan"). Family Talk's delivery of the form to the plan administrator, and the "obligations" language contained in that form, creates legal obligations requiring the administrator to either quit his job as Family Talk's administrator, provide the objectionable payments as part of Family Talk's plan, or subject himself to the Mandate's fines and penalties. 78 Fed. Reg. at 39,879–80, 39,894–95. And delivery of that executed form also triggers the plan administrator being qualified to receive government reimbursements for providing those payments through Family Talk's plan. *Id.* at 39,897. None of these things are triggered without Family Talk submitting its form. *See* 78 Fed. Reg. at 39,879–80.

Furthermore, in submitting this form to the administrator, Plaintiffs "must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 29 C.F.R. § 2590.715–2713A. Family Talk's delivery of the form to its TPA makes the TPA Family Talk's surrogate in providing the abortion-inducing drugs and devices that Family Talk believes are immoral.[2]

Plaintiffs' third "option" under the "accommodation" would be to continue providing its employees with the generous, non-abortifacient health plan that the

[2] The Civil War's Enrollment Act permitted a man subject to the draft to avoid military service by hiring a surrogate to serve in his place. 37th Cong., Ch. 75, U.S. Stat. at Large, ch. 75, 12 Stat. 731, 733 March 3, 1863). *See also* Eugene C. Murdock, *Patriotism Limited, 1862-1865: The Civil War Draft and the Bounty System* (1967); Eugene C. Murdock, *One Million Men: The Civil War Draft in the North* (1971). United States selective service laws abandoned this morally repugnant practice in the twentieth century.

employees want, but in violation of the Mandate. That would trigger the Mandate's harsh penalties. Employers that violate the Mandate face government lawsuits under ERISA, and fines of up to $100 per day ($36,500 per year) per plan participant. 29 U.S.C. § 1132; 26 U.S.C. § 4980D.

Plaintiffs' fourth "option" would be to forego providing employee health insurance altogether. This option would violate Plaintiffs' religious conviction to promote and provider for the spiritual and physical well-being of their employees and their families, and would make it far more difficult, if not impossible, to hire and keep good employees. VC ¶ 131.

D. Congress refrains from applying the Mandate to tens of millions of women.

Despite Defendants' refusal to exempt Family Talk from the Mandate, they and Congress decided that the preventive services requirement need not be applied to plans across the board. In addition to the religious exemptions and non-penalties listed above, the ACA withholds the Mandate from grandfathered plans (those that have made minimal changes since 2010). 42 U.S.C. § 18011; 76 Fed. Reg. at 46,623 & n.4. The government's data projects that these plans, even as they reduce in number, will cover tens of millions of women. 75 Fed. Reg. 34,538, 34,540–53 & tbl. 3 (June 17, 2010). The ACA declares that these employers have a "right to maintain existing coverage" falling short of the Mandate, 42 U.S.C. § 18011, even if they make certain changes that raise employees' costs, *see generally* 75 Fed. Reg. 34,538. Because Family Talk's plan came into existence just a few days after the ACA was enacted, Defendants do not deem the plan to be grandfathered. VC ¶ 48. The Mandate also does not reach members of certain Anabaptist congregations or participants in health sharing

ministries. 26 U.S.C. § 5000A(d)(2)(A) & (B).

E. The Mandate forces plaintiffs to violate their beliefs or pay massive fines.

Defendants delayed the imposition of the mandate on non-exempt non-profit groups until their first plan year that begins January 1, 2014, or after. HHS, *Guidance on the Temporary Enforcement Safe Harbor* (updated June 28, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf (last visited Jan. 10, 2014). For Family Talk, that makes them subject to the Mandate starting on May 1, 2014. VC ¶ 131.

This Court is Plaintiffs' only recourse from the Mandate's infringement of their religious freedom. Plaintiffs' health plan does not qualify for the variety of secular or religious exemptions Defendants and federal law have chosen to provide from the Mandate. Plaintiffs are instead subject to the "accommodation" for non-profit religious entities, forcing them to contract and arrange for their third party administrator to obtain the same objectionable abortifacient payments and deliver them through operation of Plaintiffs' same health plan. The "accommodation" therefore changes nothing for Plaintiffs. They have no adequate remedy at law. Unless this Court orders preliminary injunctive relief to Plaintiffs before May 1, 2014, so as to prevent the Mandate's applicability to them, Plaintiffs will suffer irreparable harm by Defendants' coercion. The Mandate blatantly violates longstanding religious conscience protections found in federal statute and the Constitution.

ARGUMENT

A preliminary injunction motion turns on four factors: (1) the likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) whether the balance of equities tips in the movant's

favor; and (4) whether the injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.,* 565 F.3d 769, 776 (10th Cir. 2009). Each factor favors the grant of injunctive relief to Plaintiffs.

I. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits.

A. The Mandate violates RFRA.

The Religious Freedom Restoration Act provides that the "[g]overnment shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1 (2012). Such a burden is only permissible if the government proves that it: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id*.

The Tenth Circuit established the framework for analyzing RFRA claims in *Hobby Lobby*. The initial inquiry requires the court to (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013). If there is such substantial pressure, the government action will then be held to strict scrutiny. *Id.* at 1143; *see also* 42 U.S.C § 2000bb-1.

The *Hobby Lobby* court concluded that the Mandate violated RFRA because it substantially pressured the *Hobby Lobby* plaintiffs to violate their sincere religious beliefs against facilitating access to abortifacient drugs and devices and could not satisfy strict scrutiny. *Id.* at 1140–44.

1. There should be no dispute about religious exercise or strict scrutiny.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). There should be no dispute that Family Talk as a religious non-profit entity, and Dr. Dobson as a natural person, are capable of exercising religious beliefs. Their objection to providing or facilitating coverage of abortifacients through Family Talk's health plan, either straightforwardly or through the "accommodation," is an exercise of religion. The government has not disputed the status of the objections non-profit entities as constituting religious exercise, nor has it disputed the sincerity of those objections, in any of the multiple related challenges to this Mandate.

Moreover, in related cases in this circuit, Defendants have "concede[d] that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test." *Reaching Souls Int'l, Inc. v. Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259, at *6 (W.D. Okla. Dec. 20, 2013). *Hobby Lobby* controls here, as does the government's party admission. To preserve the Court's time, therefore, Plaintiffs will address the only remaining element needed to sustain the RFRA claim, that of a "substantial burden" to their religious exercise. If the government decides to dispute RFRA's other elements in the present case, Plaintiffs request the opportunity to rebut them in reply briefing.

2. The Mandate substantially burdens Plaintiffs' religious exercise.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). Here, the Mandate imposes a substantial burden on the Plaintiffs'

religious exercise by forcing them to do precisely what their religion forbids: facilitate access to abortifacient products and related education and counseling. In the vast majority of non-profit organization challenges to this Mandate, the plaintiffs have received preliminary injunctive relief under RFRA.[3]

A law substantially burdens the exercise of religion in one of two ways. First it can compel one "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). Put another way, a law is a substantial burden on religious exercise if it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Second, a substantial burden exists where a law places "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Hobby Lobby*, 723 F.3d at 1141 (government action substantially burdens a religious belief when it "requires participation in an activity prohibited by a

[3] *See Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691 (S. Ct. Dec. 31, 2013) (Sotomayor, J.) (temporary injunction for hundreds of non-profit religious groups); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (injunction pending appeal); *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (injunction pending appeal); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (injunction pending appeal); *Roman Catholic Diocese of Fort Worth* v. *Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting injunctive relief to the University of Dallas); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709-RC (E.D. Tex. Dec. 31, 2013); *Ave Maria Foundation* v. *Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order to religious non-profits because the regulations "likely substantially burden" their religious exercise); *Sharpe Holdings, Inc.* v. *United States Dep't of Health & Human Servs.*, No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting injunctive relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *E. Texas Baptist Univ. v. Sebelius*, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013); *Grace Schools v. Sebelius,* No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius,* No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Southern Nazarene University* v. *Sebelius,* 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Geneva College v. Sebelius,* No. 2:12-cv-0027 (W.D. Pa. Dec. 23, 2013); *Reaching Souls Int'l, Inc.* v. *Sebelius,* 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus* v. *Sebelius,* 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York* v. *Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico* v. *Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik* v. *Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). *But see Univ. of Notre Dame* v. *Sebelius,* No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20. 2013).

sincerely held religious belief," "prevents participation in conduct motivated by a sincerely held religious belief," or "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief") (internal citation and quotation marks omitted). The Mandate burdens Plaintiffs' religious exercise in both ways.

Hobby Lobby's finding that the Mandate substantially burdens religious exercise strongly suggests the same outcome here. *See also* note 3, *supra* (listing preliminary injunctions issued in most non-profit cases). Plaintiffs challenge the same Mandate that was challenged in *Hobby Lobby*, and object to providing the same items in their plan. The government admits that even under the accommodation, coverage of the items will be provided through Family Talk's own plan. *Archbishop of Washington*, 2013 WL 6729515 at *22 (quoting the government's own concession that "[i]n the self-insured case, technically, the contraceptive coverage is part of the plan"). Under that accommodation, because Family Talk is a self-insured entity, Plaintiffs are forced to legally obligate their plan administrator to provide the same coverage that Family Talk itself objects to providing. 78 Fed. Reg. at 39,879. Therefore the Mandate coerces Family Talk to obligate a surrogate to provide coverage of abortifacients in its own plan against its beliefs. This burden is similar to *Hobby Lobby* where the Mandate forced Hobby Lobby to provide coverage of abortifacients in its own plan against its beliefs. Ruling against Family Talk would be inconsistent with the protection afforded to for-profit groups in *Hobby Lobby*.

Under *Hobby Lobby*, the substantial burden issue is also resolved by the fact that the government is coercing Plaintiffs to take action that violates their sincere religious

beliefs. *Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). In *Hobby Lobby*, the Tenth Circuit held that "this dilemma created by the statute" met the "threshold showing regarding a substantial burden." *Id.* at 1138, 1141

As a result, the Mandate is an example of the quintessential kind of substantial burden: a command to violate one's beliefs. The Mandate expressly requires Family Talk (which acts through Dr. Dobson) to either cover abortifacients in its plan, 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)), or to designate its third party administrator as an ERISA "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services [and abortifacients] for participants and beneficiaries," EBSA Form at 2; 29 C.F.R. § 2590.715–2713A. Family Talk is required to create these obligations in its third party plan administrator by including the recitation of these obligations in Family Talk's certification form. *Id*. The coverage that the third party administrator provides under those obligations will be part of Family Talk's own plan. *Id.*; *see also Archbishop of Washington*, 2013 WL 6729515 at *22.

Thus, pursuant to the Mandate, Family Talk as a part of its self-funded plan will be required to instruct its TPA to provide abortifacient coverage without cost-sharing (or else Family Talk must do this itself, which in a self-insured situation amounts to the same thing).[4] Either action violates Family Talk's beliefs (and they both amount to the

[4] Notably, in related cases the government has argued that no substantial burden exists because the self-insured entity must merely recite its religious objection, which it is already glad to declare publicly. This is false as a matter of fact. The government's own form proves that Family Talk must do more than cite a religious objection, it must also recite and create the "obligations" of its third party plan administrator.

same thing in a self-insured plan). Should Family Talk refuse to comply with the Mandate, it would be subject to potential fines of $100 per day per affected beneficiary ($36,500 per year). *See* 26 U.S.C. § 4980D, and government lawsuits under ERISA in which Defendant Department of Labor would sue Family Talk to force it to provide the coverage. 29 U.S.C § 1132. Being forced to "compromise their religious beliefs" and pay substantial fines "is precisely the sort of Hobson's choice" that "establishe[s] a substantial burden as a matter of law." *Hobby Lobby*, 723 F.3d at 1141. And penalizing people who refuse to violate their faith is a prototypical substantial burden. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) (deprivation of unemployment benefits puts "unmistakable pressure upon [applicant] to forgo [her religious] practice" resulting in "the same kind of burden upon the free exercise of religion" as a "fine imposed against appellant for her Saturday worship."); *see also Yoder,* 406 U.S. at 208, 218 (fine of *five dollars* for believers' refusal to violate their faith "not only severe, but inescapable"); *Abdulhaseed v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) (substantial burden exists where government imposes "substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice – an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.");

Moreover, even the portion of the form that expresses Family Talk's religious objections is not a mere expression of objections, because the form only exists in order to trigger the objectionable coverage in Family Talk's own plan. As the district court stated in *Zubik*, 2013 WL 6118696 at *25, the religious objection portion of the form is analogous to "a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife" that renders the second expression objectionable despite being facially similar to the first.

The Mandate also constitutes a burden on Family Talk in the form of "substantial pressure." Being faced with fines amounts to a substantial burden under RFRA—far surpassing, for example, the $5 fine that was a "substantial burden" in *Yoder*. In the face of such similar substantial pressure, the Tenth Circuit concluded in *Hobby Lobby* that a for-profit business organization which challenged the Mandate was likely to succeed on the merits of its RFRA claim and that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [the Hobby Lobby Plaintiffs] enable access to contraceptives that [they] deem morally problematic." 723 F.3d at 1141; *see also Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (same); *Gilardi v. Sebelius*, 733 F.3d 1208, 1218 (D.C. Cir. 2013) (same); *Southern Nazarene Univ. v. Sebelius,* 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013). ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial."). The pressure on Family Talk from government penalties is at least equal. The financial penalty for providing coverage in violation of the mandate amounts to approximately $36,500 per year for each affected plan beneficiary. This is a ruinous amount for a small non-profit religious organization.

The Mandate also substantially burdens Family Talk in its decision to provide high-quality and morally acceptable health coverage for its employees. Family Talk has religious beliefs in favor of caring for its employees, and it does so by virtue of its health plan. VC ¶ 44. It cannot drop its employee health plan without violating its religious beliefs concerning the provision of health coverage and injuring its employees, including

hurting Dr. Dobson himself, by depriving them of that plan. VC ¶ 131. To do so would also send its employees into an insurance market that is both expensive and morally treacherous, since the employees would be forced to violate their own pro-life religious beliefs because plans they could buy would cover abortifacients. Dropping the employee plan would also harm Family Talk's ability to attract and keep good employees. VC ¶ 133. All of this amounts to significant pressure on Family Talk's religious exercise.

The Mandate therefore substantially burdens Family Talk under *Sherbert*, 374 U.S. at 404. In that case, the Supreme Court deemed the mere denial of unemployment benefits to be a substantial burden on an employee who refused to work on the Sabbath, even though no law required the employee to work on the Sabbath or to work in general. Merely forcing Family Talk to "forfeit[] benefits, on the one hand"—the ability to offer employee health coverage, which is itself a religious conviction of Plaintiffs—"and abandoning one of the precepts of [Family Talk's] religion in order to accept [the ability to offer insurance], on the other hand," constitutes a substantial burden on religious exercise. *Id.* "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. "[T]he liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. Conditioning Family Talk's ability to offer employee health coverage on a requirement that their plan also offer abortifacient coverage is a penalty on Plaintiffs' free exercise of religion under Supreme Court precedent.

In *Hobby Lobby* and other cases, the government has argued that the burden under the Mandate is not substantial because the coverage is just a form of compensation and plaintiffs themselves are not being forced to use contraception. But that allegation misunderstands both the facts and the legal standard of substantial burdens. Plaintiffs' religious objection is not only to the use of the objectionable drugs and devices but also being required to actively participate in a scheme to provide such services. VC ¶ 130. "Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable." *Hobby Lobby*, 723 F.3d at 1141; *see also Roman Catholic Archdiocese of New York v. Sebelius,* 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013) ("Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services"). The accommodation the government requires is to sign a form that is, "in effect, a permission slip." *Southern Nazarene,* 2013 WL 6804265, at *8.

As another court in the Tenth Circuit explained, the government's claim that Plaintiffs' objection to signing the form is "legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage" is "simply another variation of a proposition rejected by the Tenth Circuit in *Hobby Lobby.*" *Reaching Souls Int'l,* 2013 WL 6804259, at *7. In RFRA, "substantial" is a measure of the government burden, not of the claimant's religious beliefs or theological culpability. RFRA asks for a "substantial burden," not a "substantial belief." 42 U.S.C. § 2000bb(b). The analysis asks "whether the government has applied substantial pressure." *Hobby*

Lobby, 723 F.3d at 1137. It does not ask how substantial are the plaintiffs' moral qualms.

The Supreme Court rejected the idea that the government can second-guess theological judgments of religious claimants. In *Thomas*, the Court rejected the idea that because Mr. Thomas was not opposed to manufacturing sheet metal, he was not burdened in the requirement to manufacture tank turrets possibly made from that sheet metal. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs." *Thomas*, 450 U.S. at 715–16. Similarly, the government has no business deciding that Family Talk may object to providing abortifacient coverage, but its conscience must accept the requirement to legally obligate its plan administrator to provide that same abortifacient coverage in Family Talk's own plan.

B. The Mandate violates the Establishment Clause.

The Mandate also violates the Establishment Clause of the First Amendment. "A set of rules that "makes explicit and deliberate distinctions between different religious organizations" in order to burden some and not others violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) "By their 'very nature,' the distinctions [among religious organizations] 'engender a risk of politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* at 253 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970)). The Establishment Clause "guard[s] against" government distinctions "inviting undue fragmentation" among religious groups who "inevitably represent certain points of view . . . in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." *Id.* (quoting Walz, 397

U.S. at 695). Instead the government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (quoting New York Const., art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION at 75).

The government's exemptions, "accommodations," and non-enforcement choices create exactly the kind of discriminatory caste system of religious groups that the Establishment Clause prohibits.

(1) First, despite the "comprehensive" discretion Congress provided to exempt all religious objectors, s*ee* 76 Fed. Reg. at 46,623; 45 C.F.R 147.131, the government decided that only churches and their integrated auxiliaries count as "religious employers" entitled to an actual "exemption" from the Mandate, 45 C.F.R. § 147.131. The government's rationale for denying this exemption to other groups such as Family Talk was that only such entities have employees committed to the organization's beliefs on contraception. *See* 78 Fed. Reg. at 39,887. This rationale is factually unsupported, and demonstrably false in this case as well as with other thoroughly Christian organizations.

(2) Second, the exemption includes not just churches but their "integrated auxiliaries." 45 C.F.R. § 147.131. Thus if a church runs a school and does not separately incorporate it, the school is likely exempt; but if a diocese has a separately incorporated religious school it is not exempt. Likewise Family Talk lacks the exemption in this respect because Dr. Dobson did not seek to organize it as an operation of the particular Christian church that he happens to attend. The rule defining integrated auxiliaries is similar to one rejected by *Larson* as an unconstitutional basis to distinguish

between religious organizations. IRS rules define integrated auxiliaries in part based on the percentage of income they receive from a church. 26 CFR § 1.6033-2(h) ("[n]ormally receives more than 50 percent of its support from" outside sources). The Court declared in *Larson*, 456 U.S. at 249, that "we find no substantial support . . . in the record" the government's rationale for distinguishing between religious organizations on that basis.

(3) Third, the government subjected non-exempt religious organizations to a multi-tiered "accommodation" that attempts to decide what will satisfy each organization's conscience. Under the rule, Family Talk is forced to either provide abortifacient coverage itself, 45 C.F.R. § 147.131, or (because it is self-insured) order the administrator of its self-insured plan to do so within its own plan, 78 Fed. Reg. at 39,894-95. The government improperly donned the role of theological arbiter to deem this arrangement satisfactory to Family Talk's conscience. Such a rule imposes "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

Another kind of non-exempt religious organization is treated differently. The government chose not to impose its penalties on the plan administrators of non-profit religious entities even if they are non-exempt just like Family Talk, and have self-insured plans, but those plans are "church plans" exempt from ERISA. *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691. In this respect Family Talk's coerced designation form triggers penalties on its plan administrator for not providing abortifacient coverage, merely because Family Talk does not happen to be enrolled in a self-insured plan that is a "church plan" exempt from

ERISA. The government actually contradicted its rationale in making this distinction. When it refused to "exempt" both Family Talk and "church plan" non-exempt religious groups, the government did so on the basis that all such groups' employees need to receive contraceptive coverage through the accommodation, rather than being exempt. *See* 78 Fed. Reg. at 39,887. But under the "church plan" loophole, the government withheld the principle penalty it chose to use to deliver that exact coverage. The government therefore undermined the premise that any such organization's employees need to receive the coverage.

(4) Fourth, the government deemed religious people in for-profit corporations to not have any claim to religious conscience at all, and therefore to be entitled to neither the exemption nor the accommodation. *See Hobby Lobby*, *passim*. (5) Fifth, however, the government chose to withhold the mandate from tens of millions of women who are in grandfathered health plans. Family Talk, because it was a new organization in 2010 and its health plan began just a few days after the passage of the ACA, was denied the ability to possess grandfathered status that health plans beginning a few days earlier were afforded. Instead Family Talk is comply with the Mandate or obligate abortifacient coverage in its own plan while the government has deemed tens of millions of women at thousands of employers as unworthy of receiving that same abortifacient coverage.

(6) Sixth, the government exempted "health sharing ministries" and their members from the Mandate, if they have been in existence since December 31, 1999. 26 U.S.C. § 5000A(d)(2)(B). The choice of that date is arbitrary. Upon information and belief, the only ministries that meet this qualification are three Evangelical Protestant groups: Samaritan Ministries, Medi-Share, and Christian Healthcare Ministries. Catholic

or other religious denominations that wish to establish health sharing ministries are prohibited by the rule from doing so. *Larson* found an Establishment Clause violation in the context of a scheme that similar had the effect of denominational discrimination. 456 U.S. at 252–55.

(7) Seventh, the ACA exempts from the individual mandate to obtain insurance—and therefore refrains from delivering abortifacient coverage to—members of certain historic Anabaptist congregations which, *inter alia*, oppose the acceptance of insurance and have been in existence at all times since December 31, 1950. *See* 26 U.S.C. § 5000A(d)(2)(A) (referencing 26 U.S.C. § 1402(g)(1)). This adds to the government's patchwork exemption scheme, which nevertheless refuses to offer an exemption from the Mandate to Dr. Dobson and Family Talk.

Such "religious gerrymandering" of religious believers and organizations is unconstitutional. *Larson*, 456 U.S. at 255 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). In *Weaver* the Tenth Circuit held unconstitutional a policy of discrimination among religions that is very similar to the Mandate. The policy in that case attempted to treat "pervasively sectarian" educational institutions differently than other religious institutions. *Id.* at 1250–51. The Mandate here likewise improperly discriminates among religious organizations. It treats them differently based on whether they are churches that receive an exemption from the Mandate, religious nonprofits that are subject to the coercive "accommodation" in different ways, or religious nonprofits deserving of non-enforcement of the Mandate upon their plan administrator. The government explicitly refused to extend its church exemption to entities such as Family Talk based on the incorrect judgment that churches have a greater coherence of beliefs

with their employees. That judgment is of the same brand as a "pervasively sectarian" rule. The Tenth Circuit called such line drawing "puzzling and wholly artificial," even when the government contended, as it does here, that it was merely "distinguish[ing] not between types of religions, but between types of institutions." *Id.* at 1259–60. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial demarcations of discrimination. *Id.* at 1260.

Under *Weaver*, therefore, discrimination because of different types of religious organizations and their religious exercise violates the Constitution. *Id*. at 1256, 1259. The Mandate picks and chooses between different kinds of religious people and practices, respecting some while coercing most others. The government has decided that covering or ordering coverage of abortifacient items does not infringe on Plaintiffs' religious beliefs, while at the same time it: exempted tens of millions of women in grandfathered plans; exempted churches even though religious ministries may have similar congruence between the beliefs of the organization and its employees; exempted churches' integrated auxiliaries even if those entities engage in Christian ministry indistinct from other non-profits; refrained from applying penalties to plan administrators of self-insured non-exempt religious groups in "church plans" even though the government deemed their employees to need the Mandate; refrained from applying the Mandate to health sharing ministries but prohibited the founding of new health sharing ministries of the same or other denominations; and refrained from requiring the mandate on certain religious denominations.

This segregation among religious groups is not only discriminatory, it is largely arbitrary and irrational. It violates the neutrality and non-entanglement requirements of the Establishment Clause and are therefore unconstitutional.

C. The Mandate violates the Free Exercise Clause.

The Mandate violates the Free Exercise Clause of the First Amendment because it is neither religiously neutral nor generally applicable, and as discussed above, it fails strict scrutiny. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

As discussed above, Plaintiffs exercise religion in their objection to the Mandate. *Smith* established that burdens on religiously-motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Both are missing here.

1. The Mandate is selective, not generally applicable.

Unlike in *Smith*, which involved an "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 884, the Mandate here falls short of general applicability.

The ACA creates a vast system of categorical exemptions that frees thousands of employers from the Mandate's scope, as just recited in the Establishment Clause analysis. See supra I.B. Despite all of these exemptions and non-applications of the Mandate and its penalties, however, the government refuses to exempt non-profit

religious groups such as Family Talk.

Such "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Indeed, "categorical" exclusions exacerbate concerns regarding the discriminatory potential of "'individualized exemptions.'" *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). Here, the government's exemptions for secular and religious reasons, in tandem with its arbitrary decision not to extend an exemption to Plaintiffs, demonstrate that the Mandate is selective, not comprehensive, in nature. *See Lukumi*, 508 U.S. at 543 (noting a lack of general applicability when a regulation "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree").

This lack of general applicability justifies strict scrutiny of the Mandate under the Free Exercise Clause. *See id.* at 546. The government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Id.* at 537 (quotation omitted); *Smith*, 494 U.S. at 884 (quotation omitted). But that is precisely what the government seeks to do here. The First Amendment "protects religious observers against [such] unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation and alteration omitted); *see also Gillette v. United States*, 401 U.S. 437, 461 (1971) ("[T]he Free Exercise Clause no doubt has a reach of its own.").

2. The Mandate is not neutral towards religion.

The Mandate is not neutral because it distinguishes among religious objectors, as well as between secular and religious objectors. A neutral law "does not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v.*

Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004); *see also Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding that the city violated the Free Exercise Clause by enforcing an ordinance banning meetings in park against Jehovah's Witnesses but exempting other religious groups). The "government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 169 (3rd Cir. 2002). "The Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Id.* at 165.

Refusing to exempt Plaintiffs from the Mandate in the face of numerous exceptions "devalues [their] religious reasons" for objecting to assisting in the destruction of embryonic life. *Lukumi*, 508 U.S. at 537. Providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Order of Police*, 170 F.3d at 365; *see also Fowler*, 345 U.S. at 69 (noting the dangers inherent in "the state preferring some religious groups over this one"). Discrimination is inherent in the Mandate's departure from "our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette*, 401 U.S. at 453 (quotation omitted). The government has available to it a variety of ways to "accomplish its secular goals without even remotely or incidentally affecting religious freedom." *Braunfeld*, 366 U.S. at 608; s*ee Hobby Lobby*, 723 F.3d at 1144 (concluding that the Mandate fails the least restrictive means requirement); *Korte*, 735 F.3d at 686–87 (same, expanding on least restrictive means analysis); *Gilardi*, 733 F.3d at 1222–24 (same). Indeed, Congress authorized

"comprehensive" religious exemptions, *see* 76 Fed. Reg. at 46,623, yet Defendants chose to exempt only churches, and to refrain from penalizing many non-profit non-churches' plans, while denying either to Family Talk.

By engaging in such arbitrary line drawing between religious people and organizations, and by offering secular exemptions that encompass tens of millions of women, the government has failed to pursue its proffered objectives "with respect to analogous non-religious conduct," as well as to identical conduct by other religious actors whom the government views with a more favorable eye. *Lukumi*, 508 U.S. at 546. The "risks" caused by existing exemptions from the Mandate "are the same" as those posed by the exemption requested here. *See id.* at 544. The millions of women covered by grandfathered plans and the hundreds of non-profit plans exempt from ERISA have no less of the government's alleged "need" for the Mandate's benefits than women covered by Family Talk's plan. Yet those plans receive either exemptions or non-enforcement, while Family Talk is required to cover or order abortifacient coverage in its plan.

The First Amendment prevents Plaintiffs from "being singled out for discriminatory treatment" by the government's refusal to grant them an exemption that would have no different effects than those already approved. *Lukumi*, 508 U.S. at 538. Defendants cannot give a nondiscriminatory reason why Plaintiffs' free exercise of religion must bear the weight of the Mandate when Defendants' own voluntary measures place thousands of other employers, both religious and nonreligious, outside of its scope. *Cf. id.* at 544. Because the Mandate hinders "much more religious conduct than is necessary in order to achieve the legitimate ends asserted in [its] defense," it is

"not neutral." *Id.* at 542; *see also Blackhawk*, 381 F.3d at 209 (explaining that for a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice"). This lack of neutrality subjects the Mandate to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

Finally, it is noteworthy that under the Free Exercise Clause, Plaintiffs need not show that the Mandate imposes a "substantial" burden on their free exercise rights at all: strict scrutiny applies to a non-generally applicable or non-neutral law. *See Lukumi*, 508 U.S. at 546; *Blackhawk*, 381 F.3d at 209 (Alito, J.) (recognizing strict scrutiny applies once non-general applicability or non-neutrality is established); *accord Hartmann v. Stone*, 68 F.3d 973, 979 n.3 (6th Cir. 1995), and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994).

D. The Mandate violates the Free Speech Clause.

1. The Mandate impermissibly compels speech.

The Mandate also violates the First Amendment's protection of the Freedom of Speech. First, by coercing Plaintiffs to engage in speech that is contrary to their religious beliefs.

The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous

scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Here, the Mandate unconstitutionally coerces Plaintiffs to speak a message they find morally objectionable. It explicitly requires Family Talk, as a self-insured entity, not merely to express its religious objection but also to explicitly declare (by Dr. Dobson's signature) that "The obligations of the third party administrator [to provide contraceptive services] are set forth in 26 § C.F.R. 54.9815-2713A, 29 § C.F.R. 2510.3-16, and 29 § C.F.R. 2590.715-2713A. This certification is an instrument under which the plan is operated." EBSA Form at 2; 29 C.F.R. § 2590.715–2713A. The government explained that by means of this speech, Family Talk creates legal obligations in its plan administrator to provide the precise coverage that Family Talk objects to arranging and contracting for, within its own plan. 78 Fed. Reg. at 39,879–80; *Archbishop of Washington*, 2013 WL 6729515 at *22. The government also explained that those legal obligations occur only if Family Talk itself speaks this message—it is necessarily Family Talk's own speech, or else it is not operative. 78 Fed. Reg. at 39,879–80. By this coerced speech, Family Talk is forced to arrange and contract for its plan administrator to provide the exact coverage that the government falsely declares Family Talk does not arrange and contract for.[5] This is speech that Family Talk objects to speaking, VC

[5] In other self-insured cases the government has described the required form as merely an expression of religious objection. As noted above, that description is false. The form also requires Family Talk to recite the above-quoted designation of "obligations" language, and that speech contains specific content and legal import well beyond a religious objection. If Family Talk does not recite this "obligations" language,

¶ 214, 217. Thus the designation requirement constitutes compelled speech in its purest form. It is a straightforward violation of the First Amendment.

2. The Mandate impermissibly censors speech.

Second, the Mandate also censors Family Talk's speech. After forcing Family Talk to speak words that contract and arrange for objectionable "obligations" on its plan administrator, the Mandate goes on to prohibit Family Talk (and Dr. Dobson acting for it) from speaking a contrary message to its plan administrator: "The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, *and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.*" 29 C.F.R. § 2590.715–2713A (emphasis added).

This is a gag rule, prohibiting a Christian organization to speak its Christian beliefs. It strikes at the heart of the freedom of speech enshrined in the First Amendment. It restricts Family Talk's speech based on its content: the content of speech that would try to "interfere" or "influence" someone against providing a service (abortifacient, contraceptive and sterilization coverage) to which Family Talk objects.

The Mandate is therefore a content based restriction on speech that is presumptively unconstitutional. *Turner*, 512 U.S. at 641 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"); *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377,

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the government will impose its full range of penalties. As discussed above, Family Talk also objects to the triggering context of its forced expression of objection in the form.

382 (1992) ("Content-based regulations are presumptively invalid" under the First Amendment).

The Mandate is also an unconstitutional prior restraint on speech. "The term prior restraint is used to describe administrative … orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal citations omitted). The Supreme Court has declared that "prior restraints on speech … are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). "Any system of prior restraints on expression comes to [the Supreme Court] bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971). The Defendants have issued an administrative regulation forbidding Plaintiffs from engaging in speech to their TPA. This is "forbidding [of] communications . . . in advance." *Alexander*, 509 U.S. at 550.

The government cannot meet its burden to satisfy strict scrutiny either for its compelled speech or its censorship of speech. As discussed above, the government has conceded in similar cases it fails the compelling interest test. *See Reaching Souls Int'l,* 2013 WL 6804259 at *6. The government has not shown any compelling interest to justify burdening Family Talk's speech. And violating Family Talk's freedom of speech is not the least restrictive means of pursuing any compelling interest. *See also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 799–801 (1988) (requiring government efforts in the alternative).

II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Plaintiffs seek to continue offering their employee insurance plan without providing abortifaicents and related counseling and education, and without being subject to the Mandate's harsh penalties, lawsuits, and other liability. Without the requested injunction, Plaintiffs would be coerced in violation of their rights under RFRA and the First Amendment, causing actual and imminent loss of their religious conscience rights. This is irreparable injury. *Hobby Lobby* ruled that irreparable injury is satisfied in the presence of the Mandate's violation of RFRA—and noted that the same is true for constitutional violations. *Hobby Lobby*, 723 F.3d at 1146. Irreparable harm is therefore established here as well.

III. The Balance of Equities Strongly Favors the Plaintiffs.

The balance of equities strongly favors the Plaintiffs in this case. Family Talk's plan already omits abortifacients, and through a "safe harbor" for non-profits the government has already delayed the impact of the Mandate on Family Talk well beyond the Mandate's application to other entities. The government will suffer minimal, if any, harm if the injunction is instituted for the duration of this case as well. The government is already withholding the Mandate not only from tens of millions of women in grandfathered plans, but is also withholding enforcement from non-profit organizations indistinguishable from Family Talk except that their plans are not subject to ERISA. And Defendants have conceded that in organizations likely to have employees that share their beliefs on contraception, an exemption serves the government's own interests. Granting preliminary injunctive relief will merely prevent Defendants from enforcing the

Mandate against one religious entity. Defendants cannot possibly show that applying the Mandate to one entity would "substantially injure" others' interests. Any minimal harm in not applying the Mandate against one additional entity, in light of Defendants' willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland v. Sebelius,* 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff'd* 2013 WL 5481997 (10th Cir. Oct. 3, 2013).

Balanced against this non-injury to Defendants is the real and immediate threat to Plaintiffs integrity of religious belief. They face the imminent prospect of being forced to cover or order coverage in violation of their religious beliefs, or suffering massive penalties that Defendants obstinately declare they intend to apply. *See Reaching Souls Int'l,* 2013 WL 6804259 at *8 (finding balance of equities in favor of non-profit challengers to the Mandate); *Southern Nazarene*, 2013 WL 6804265, at *10–*11 (same).

IV. The Public Interest Would Be Served by a Preliminary Injunction.

The public interest is served by granting Plaintiffs' motion for preliminary injunction where fundamental rights protected by the Constitution are at stake. "Vindication of First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1237 (10th Cir. 2005). The government's purported interests in "improving the health of women and children and equalizing the coverage of preventive services for women and men so that women who choose to do so can be a part of the workforce on an equal playing field with men . . . are countered, and indeed outweighed, by the public interest in the free exercise of

religion." *Newland,* 881 F. Supp. at 1295 (internal citations omitted). Furthermore, any interest of Defendants in uniform application of the Mandate is "undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Id.*; *see also Reaching Souls Int'l,* 2013 WL 6804259 at *8 (finding public interest factor in favor of non-profit challengers to the Mandate); *Southern Nazarene*, 2013 WL 6804265, at *11 (same).

Conclusion

For the foregoing reasons, the Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs, Matthew S. Bowman, hereby certifies that the following counsel for Defendants was served with the preceding document by email, with consent of such counsel, on January 21, 2014:

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EXHIBIT 1

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.