IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

EAST TEXAS BAPTIST UNIVERSITY, *et al.*, Plaintiffs,	)	
v.	)	Case No. 4:12-cv-03009
KATHLEEN SEBELIUS, *et al.*, Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 56(D) MOTION

In addition to opposing defendant's Motion to Dismiss or, in the Alternative, For Summary Judgment, *see* ECF No. 78, plaintiffs East Texas Baptist University (ETBU) and Houston Baptist University (HBU) have moved the Court under Federal Rule of Civil Procedure 56(d) to "deny or defer Defendants' motion, or otherwise allow further discovery in this case before considering rendering judgment in favor of Defendants." Pls.' Rule 56(d) Mot. at 1, ECF No. 96. Plaintiffs argue in support of their Rule 56(d) motion that no discovery has taken place in this case and that defendants have not yet filed an answer to plaintiffs' amended complaint. *Id.* Neither is a basis for granting Rule 56(d) relief in this case.

ARGUMENT

In order to obtain relief under Rule 56(d), plaintiffs have the burden of showing both (1) "why additional discovery is necessary," and (2) "how additional discovery will create a genuine issue of material fact." *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 445 (5th Cir. 2001); *Robert Half Int'l, Inc. v. Burlingame*, No. 4:12-CV-2621, 2013 WL 3480834, *2 (S.D. Tex. July 9, 2013). A fact is material if it is determinative of an element essential to the outcome of the

case, and such elements are defined according to the substantive law governing the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

At the outset, the Court should reject plaintiffs' Rule 56(d) motion because it ignores the obvious fact that defendants have *moved to dismiss all of plaintiffs' claims*. All or virtually all of defendants' arguments in support of dismissal rely only on the pleadings, documents incorporated by reference into the complaint, and judicially noticeable matters—all of which the Court may consider in reviewing a motion to dismiss—and involve questions of law, not fact. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also, e.g., O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (dismissing similar claims under RFRA, the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, and the APA), *appeal pending*, No. 12-3357 (8th Cir.).[1] Defendants seek summary judgment only in the alternative and only "[t]o the extent the Court *must* consider the administrative record."[2] As defendants have explained elsewhere, however, the Court need not consider the administrative record in order to dismiss each of plaintiffs' claims. *See* Defs.' Reply at 6. Furthermore, the possibility that the Court will disagree, and will eventually rely on the administrative record in order to resolve a particular claim, is not grounds for converting defendants' motion *entirely* into one for summary judgment. Thus, Rule 56(d) is not grounds to defer or deny defendants' dispositive motion, which seeks dismissal of all of plaintiffs' claims.

[1] To the extent defendants seek dismissal of HBU's claims for lack of Article III standing, and rely on HBU's supplemental declaration, *see* Defs.' Reply at 3-5, "[t]he court may consider matters outside the pleadings, such as testimony and affidavits, to resolve a factual challenge to subject-matter jurisdiction, without converting the motion to dismiss to one for summary judgment." *U.S. ex rel. King v. Univ. of Texas Health Sci. Ctr.-Houston*, 907 F. Supp. 2d 846, 849 (S.D. Tex. 2012).

[2] *See* Defs.' Mot. to Dismiss or, in the Alt., for Summ. J., ECF No. 78; Defs.' Mem. in Opp'n to Plaintiffs' Mots. for Prelim. Inj. & Partial Summ J. & in Supp. of Defs.' Mot. to Dismiss or, in the Alt., for Summ. J. at 9 ("Defs.' Mem."), ECF No. 79; Defs.' Reply in Supp. of Mot. to Dismiss or, in the Alt., for Summ. J. at 5-6, ECF No. 103 ("Defs.' Reply").

But even if the Court determines that it must consider the administrative record in resolving some aspect of defendants' motion to dismiss or, in the alternative, for summary judgment, discovery would not be warranted—much less necessary as plaintiffs claim.

First, plaintiffs challenge agency regulations that are the product of a rulemaking, and judicial review should be limited to the administrative record. *See United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Defendants have produced the administrative record in this case. *See* Cert. Admin. Record, ECF No. 72. Furthermore, defendants have made clear that the administrative record contains all non-privileged information that the agencies considered in promulgating the regulations plaintiffs challenge, and thus any discovery outside of that record is not relevant to plaintiffs' claims. *See generally Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), especially where, as here, defendants intend to rely solely on the administrative record for purposes of defending against all of plaintiffs' claims.[3]

Second, plaintiffs have not met their burden of demonstrating that the discovery they seek "is necessary" *or* how it "will create a genuine issue of material fact." *Canady*, 240 F.3d at 445. Plaintiffs' Rule 56(d) motion is built on the notion that, insofar as defendants seek summary judgment, certain of plaintiffs' claims cannot be resolved in defendants' favor because plaintiffs want discovery "tending to show" that the challenged regulations and accommodation "were the

[3] To the extent plaintiffs believe that the administrative record is incomplete, they have not attempted to overcome the strong presumption of regularity that attaches to defendants' designation of the administrative record. *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) ("[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."); *see also NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (requiring a "substantial showing" that the record was incomplete before allowing discovery).

result of intentional discrimination." Pls.' Rule 56(d) Mot. at 3. Defendants promulgated the challenged regulations to improve the health of women and newborns and to promote gender equality, consistent with the statutory requirements in 42 U.S.C. § 300gg-13(a)(4), and have made extensive efforts to accommodate religion by creating the religious employer exemption and additional accommodations for eligible non-profit religious organizations such as plaintiffs. *See* Defs.' Mem. at 4-9; Defs.' Reply at 38. Yet plaintiffs contend that several counts in their amended complaint should not be resolved at this stage because, in plaintiffs' view, defendants' subjective motivation and whether it demonstrates "intentional discrimination" is relevant to these claims and requires discovery. Pls.' Rule 56(d) Mot. at 3 n.2 (discussing free exercise, Establishment Clause, free speech, equal protection, and APA counts). But allegations of intentional discrimination—aside from being baseless—are not relevant to any of plaintiffs' claims. The Court should reject plaintiffs' unsupported attempt to avoid review of these claims for several reasons, discussed below.

Free Exercise: To the extent plaintiffs purport to allege a free exercise violation based upon intentional discrimination, *see* ETBU/HBU Am. Compl. ¶¶ 239-244 (Count III); Westminster Am. Compl. ¶¶ 217-222 (Count III), such a claim does not turn on the government's subjective motivation or intent. Rather, courts assess the text and the effect in real operation of laws to determine if they are neutral and generally applicable. As explained in Section II.B, a law does not violate the Free Exercise Clause if it is neutral and generally applicable. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is neutral if it has as its object something other than the disapproval of a particular religion, or of religion in general; and a law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id.* at 533, 535-37, 545. This test

does not require—indeed, does not permit—inquiry into the subjective motives of legislators or administrators. *See, e.g., Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292-94 & n.3 (7th Cir. 1996).

In discussing the role of motive in constitutional doctrine, the Seventh Circuit has explained that "[t]he subjective motivations of government actors should . . . not be confused with what the Supreme Court referred to, in a Free Exercise Clause case, as the 'object' of a law." *Id.* at 1292 n.3 (quoting *Lukumi*, 508 U.S. at 533). The Seventh Circuit noted that, in concluding that the ordinances at issue in *Lukumi* impermissibly had as their object the suppression of religion, the Supreme Court analyzed the text and the effect in real operation of the ordinances, not the motive behind them. *Id.* (explaining that Justice Kennedy's investigation into motive was joined by only one other Justice); *see also Lukumi*, 508 U.S. at 540-42 (Section II.A.2 of opinion). As Justice Scalia explained in his concurring opinion in *Lukumi*, the Free Exercise Clause "does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: 'Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .'" 508 U.S. at 558. The Free Exercise Clause, therefore, "does not put [courts] in the business of invalidating laws by reason of the evil motives of their authors." *Id.* "Just as [courts] would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution." *Grossbaum*, 100 F.3d 1293; *see also Lukumi*, 508 U.S. at 558-59 (Scalia, J., concurring in part and concurring in the judgment); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (observing in a free speech case that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional

statute on the basis of an alleged illicit legislative motive").[4] Because the subjective motivation of government employees is not an element of a Free Exercise Clause claim, plaintiffs are not entitled to any discovery to support their (purported) intentional discrimination theory. In fact, under applicable legal authority, Count III of the amended complaints should be dismissed, or summary judgment should be entered in the government's favor based on the content of the regulations alone, and, if necessary, review of the administrative record.

Establishment Clause: Likewise, the Establishment Clause does not support plaintiffs' desire for discovery and attempt to avoid disposition of their claims. "Establishment Clause analysis does not look to the veiled psyche of government officers." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 863, 125 (2005). In fact, plaintiffs have moved for summary judgment on their Establishment Clause claim, arguing that the regulations discriminate among religions based on *the text of the regulations at issue*.[5] Plaintiffs offer no bases for this Court to delay review of their Establishment Clause claims, nor could they. Every court to decide similar Establishment Clause challenges to the prior version of these regulations has reviewed (and rejected) such challenges by examining the text of the regulations. *See* Defs.' Mem. at 36-37 (citing cases). This Court should do the same.

Free Speech: Similarly, plaintiffs' purported free speech claim based upon intentional discrimination lacks merit and certainly does not require any discovery. As noted above, the

[4] The Tenth Circuit cases cited by plaintiffs in their Rule 56(d) motion do not require a different result. In *Axson-Flynn*, 356 F.3d 1277, the court looked only to the real operation of a university's policy—not the university officials' subjective intent—in reviewing whether the policy was a neutral rule of general applicability. And *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), involved an employment retaliation action, not a challenge to a law or rule. Furthermore, the Tenth Circuit's suggestion in *Shrum* that "[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral," in the context of an employment retaliation case, misreads *Lukumi* for the reasons stated above.

[5] *See* Pl. Universities' Combined Opp'n to Defs.' Mot. to Dismiss or for Summ. J. & Reply in Supp. of Pls.' Mot. for Prelim. Inj. & Partial Summ. J. at 36-40, 46, ECF No. 97 ("Pls.' Opp'n") (arguing that the challenged regulations "discriminate[] among religious" under *Larson v. Valente*, 456 U.S. 228 (1982)); Pls.' Mem. in Supp. of Mot. for Partial Summ. J. & Prelim. Inj. at 41- 45, ECF No. 70 (same).

Supreme Court has stated in a free speech case that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383. Plaintiffs offer no contrary argument; instead, they merely invoke the familiar principles that the government may not regulate speech based upon its content or message, or engage in viewpoint discrimination. *See* Pls.' Rule 56(d) Mot. at 3 n.2. But those general principles do not support plaintiffs' suggestion that their claims require discovery. Whether a law is content- or viewpoint-neutral, or compels or silences speech, is readily determined by examining its text. Plaintiffs' own case citation is illustrative. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding that express terms of challenged guidelines discriminated based on viewpoint); *id.* at 823-27 (reviewing content of guidelines). The Court can and should resolve plaintiffs' free speech claims—as has every other court to review similar challenges—by examining the text of the regulations plaintiffs challenge.

Equal Protection and Administrative Procedure Act (APA): Finally, and for similar reasons, the Court should reject plaintiffs' arguments that resolution of their Equal Protection and APA claims requires discovery. Indeed, plaintiffs have not even alleged intentional discrimination as a theory supporting the APA arbitrary-and-capricious count in their complaint. *See* ETBU/HBU Am. Compl. ¶¶ 309-314 (Count XIII).[6]

Finally, plaintiffs suggestion that the Court should grant their Rule 56(d) motion because defendants have not yet filed an answer to their complaint, Pls.' Rule 56(d) Mot. at 1, is baseless. *See Freeman v. United States*, No. CIV.A. H-05-1204, 2005 WL 3132185, *2 (S.D. Tex. Nov.

[6] Although defendants' believe that the arguments made here in opposition to plaintiffs' Rule 56(d) motion are sufficient to defeat that motion, they are not exhaustive. Should the Court grant plaintiffs' Rule 56(d) motion in whole or in part, defendants reserve the right to raise these and other objections to discovery, if any, that plaintiffs seek.

22, 2005) ("Plaintiff argues that the Government's motion cannot be treated as a motion for summary judgment because the Government filed the motion before filing an answer. Pursuant to Federal Rule of Civil Procedure 56, however, a motion for summary judgment can be brought at any time.").

In sum, plaintiffs have not met their burden of showing that "additional discovery is necessary" and "how additional discovery will create a genuine issue of material fact." *Canady*, 240 F.3d at 445; *Robert Half Int'l, Inc.*, 2013 WL 3480834 at *2.

CONCLUSION

For the above reasons, defendants respectfully urge the Court to deny plaintiffs' Rule 56(d) motion.

Respectfully submitted this 7th day of November, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

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