IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-02611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated,

CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation, and

CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

THOMAS E. PEREZ, Secretary of the United States Department of Labor,

UNITED STATES DEPARTMENT OF LABOR,

JACOB J. LEW, Secretary of the United States Department of the Treasury, and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION

Defendants' concessions require entry of a preliminary injunction. Defendants do not contest the sincerity or religiosity of Plaintiffs' religious exercise of refusing to participate in Defendants' contraception scheme. Nor do they dispute that Plaintiffs face the exact same penalties on that religious exercise which established a substantial burden in *Hobby Lobby*. Nor do Defendants deny that *Hobby Lobby* controls the strict scrutiny analysis. And Defendants identify no government interest that would be even marginally advanced by denying preliminary relief and forcing immediate participation in the current scheme.

Defendants instead argue that Plaintiffs lack standing because they allegedly face no injury from being forced to participate in Defendants' mandatory scheme in violation of their religious beliefs. Defendants insist that they can use the threat of massive penalties to force the Little Sisters and class members to sign and submit authorization forms for contraceptives, designate a third party administrator ("TPA") to distribute them, create legal duties for Christian Brothers Services and Christian Brothers Trust (the "Christian Brothers Plaintiffs"), and obey Defendants' gag rule—all while no Article III court has power to even consider whether such requirements are lawful. Defendants likewise insist that Christian Brothers Plaintiffs have no standing, even though they must either obey the Mandate within 45 days—which states that they "*shall provide* or arrange payments for contraceptive services"—or openly violate federal law. But the fact is that Defendants are ordering Plaintiffs to take action on pain of massive penalties, and Plaintiffs object to taking any of those actions. This is by itself Article III injury.

Defendants' merits arguments get them no further. As a matter of law, it is for the Little Sisters and the other class members—*not* Defendants—to decide whether and to what extent complying with Defendants' scheme violates their Catholic faith. That scheme: (1) forces Plaintiffs to take actions forbidden by their religion (including authorizing others to provide contraceptives); (2) controls Plaintiffs' speech; and (3) denies Plaintiffs religious exemptions that

are available to other religious organizations with identical religious objections. Yet Defendants have no valid interest in coercing Plaintiffs, especially in light of Defendants' self-claimed inability to enforce other parts of this system. Hence, there is no basis to deny Plaintiffs the temporary protection they seek while this suit proceeds.

I. All Plaintiffs Have Standing

Article III standing requires (1) an injury in fact (2) fairly traceable to the defendant's actions, and (3) likely redressable by a favorable decision. *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013). Defendants argue that they can force Plaintiffs to participate in their regulatory scheme—and that Plaintiffs lack standing to seek protection—because Defendants "lack regulatory authority" to enforce part of the Mandate "at this time": making TPAs of self-insured non-ERISA church plans pay for contraceptives. Opp. at 5-8.[1]

Even if true, Defendants' new position regarding their enforcement authority would not defeat standing. First, Plaintiffs still have standing because the Mandate forces them to take action against their will to avoid massive penalties. *Cressman*, 719 F.3d at 1145. The Little Sisters and class members must either provide objectionable coverage or provide a certification which instructs their TPA to provide payments for abortion-inducing products, contraceptives, and sterilization procedures—or be penalized *See* 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2590.715–2713A. The certification form includes a "Notice to Third Party Administrators of

[1] This position is new. Before this case was filed, Defendants were publicly asserting that they *could* make their scheme work against other church plan participants, such as Houston Baptist University. *See* Dkt. 79, Def's Mot. to Dismiss, *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex. Sept. 20, 2013); Kathleen Sebelius, Remarks at The Forum at Harvard School of Public Health (Apr. 8, 2013), *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (starting at 51:20) (last visited Nov. 15, 2013) ("But Catholic hospitals, Catholic universities, other religious entities *will be providing coverage* to their employees . . . . [E]very employee who doesn't work directly for a church or a diocese *will be included* in the benefit package.") (Complaint ¶ 97).

Self-Insured Health Plans" that recipient TPAs must obey "[t]he obligations of the third party administrator [that] are set forth in 26 CFR § 54.9815-2713A, 29 CFR § 2510.3-16, and 29 CFR § 2590.715-2713A"—the regulations that require TPAs to provide or arrange for contraceptives services—and that the form "is an instrument under which the plan is operated." *See* Ex. O. Furthermore, the gag rule prohibits the class members from "directly or indirectly" asking their TPA *not* to provide payments for the products at issue, 26 C.F.R. § 54.9815–2713A(b)(1)(iii); 29 C.F.R. §2590.715–2713A(b)(1)(iii).[2] Defendants intend to enforce these requirements, which place enormous pressure on Plaintiffs to violate their religious beliefs and compromise their religious missions. Dkt. 15-2 ("Ex. J") ¶¶43-53; Suppl. Mother Loraine Decl. ("Ex. M") ¶¶ 8-9; Suppl. Quirk Decl. ("Ex. N") ¶¶8-11. Defendants' argument—that they can force Plaintiffs to follow these rules, on pain of massive penalties,[3] but that no Article III court can even consider whether such coercion is lawful—is wholly without support in standing law. *See Cressman*, 719 F.3d at 1145.

Second, Defendants' new ERISA-based litigation position does not change the regulations, which on their face apply to *all* TPAs, with no exception for church plan TPAs. The regulations—issued both by the Department of Labor under ERISA *and* by the Treasury Department under the Internal Revenue Code—provide that "if a third party administrator

[2] It is also not clear where the Little Sisters would send a signed certification because the government has not taken a position as to whether Christian Brothers Services is a TPA under the Mandate. *See* Compl. ¶ 148; Ex. M ¶ D n.1.

[3] Massive penalties, of course, are not required for standing. *See, e.g.*, *Sprint Comm's Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (an interest of "only a dollar or two" could establish standing). Measured against this low bar, even the value of the *cost and time required to fill out the form* suffices to create standing. *See* 78 Fed. Reg. 39890 ("[T]he total annual burden for preparing and providing the information in the self-certification" is approximately $41 and 50 minutes for "each eligible organization"); *compare Cressman*, 719 F.3d at 1142, 1145 (license plate renewal fee of $16.50 was an "actual, concrete monetary injury" for standing purposes).

receives a copy of the [self] certification . . . the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715–2713A(b)(2); 26 C.F.R. § 54.9815–2713A(b)(2). "A third party administrator that receives a copy of the self-certification . . . *must* provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39879, 39880 (July 2, 2013) (emphasis added). It is these regulations that Defendants issued in the Code of Federal Regulations—and not the litigation positions in their briefs—which bind Plaintiffs.

"When the suit is one challenging the legality of government action," there is "ordinarily little question" that a plaintiff who is the object of the law has standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The "obligations and burdens imposed by [law] speak for themselves, and no additional evidence is necessary to establish standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1235 (10th Cir. 2004). That is the case here.

II. Defendants' Concessions Require Entry of an Injunction

A. The Mandate violates RFRA.

Plaintiffs are forbidden by their religion from "participating in the federal government's scheme to subsidize and promote the use of sterilization, contraceptives, and abortifacients." PI Br. at 1. Plaintiffs cannot provide these services themselves, *id.* at 4, and cannot authorize someone else to provide them. Dkt. 15-1 ("Ex. I") ¶¶ 46-50; Ex. J ¶¶ 32-34. Plaintiffs' religious beliefs require them to avoid participating in any system that could involve the provision of such services. Ex. I ¶¶ 34-39, ¶¶ 48-51; Ex. J ¶¶ 25-34, 51-54. This religious obligation to avoid participating in Defendants' scheme remains unchanged despite Defendants' new claim that part of that system is not yet fully operational. Ex. M ¶¶ 8-9; Ex. N ¶¶ 5, 8-9.

Hobby Lobby provides the required framework for RFRA analysis. First, a court must "identify the religious belief" at issue. 723 F.3d at 1140. Second, it must "determine whether this

belief is sincere." *Id*. Third, the court must determine "whether the government places substantial pressure on the religious believer." *Id*. Finally, if there is substantial pressure, Defendants' action will be upheld only if it satisfies strict scrutiny. *Id*. at 1143.[4]

Defendants effectively concede virtually every prong of this test. Defendants do not dispute the existence, religiosity, or sincerity of Plaintiffs religious beliefs. And Defendants concede that *Hobby Lobby* requires rejection of their strict scrutiny argument.

Thus, the only part of the *Hobby Lobby* analysis that remains is whether the Mandate "places substantial pressure" on Plaintiffs to violate their beliefs. 723 F.3d at 1140. If Plaintiffs continue their religious exercises, they face the same penalties that constituted "substantial pressure" in *Hobby Lobby*. *Compare* Ex. I at ¶¶ 54-59, *with* 723 F.3d at 1140; *see also Gilardi v. U.S. Dep't of Health & Human Srvs.*, __F.3d__, 2013 WL 5854246, at *7 (D.C. Cir. Nov. 1, 2013) (the Mandate burdens objectors by "pressur[ing] [them] to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties").

Defendants cannot avoid this conclusion by arguing that Plaintiffs really *should* be comfortable signing the self-certification form in light of Defendants' new litigation position. The questions of moral complicity in this case are religious, not legal, and Defendants have no authority to dictate when and whether Plaintiffs' involvement in the scheme is "too attenuated" to implicate their religion. As *Hobby Lobby* instructed:

> [I]t is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect.

[4] Defendants unpersuasively rely on cases from other circuits to state RFRA's legal standards, Opp. at 8, rather than this circuit's controlling RFRA case. *Hobby Lobby* of course concerned slightly different facts—as do *all* of Defendants' out-of-circuit non-RFRA precedents—but it remains this circuit's standard on how to conduct RFRA analysis.

723 F.3d at 1153-54; *Gilardi*, 2013 WL 5854246, at *6 ("When even attenuated participation may be construed as a sin, . . . it is not for courts to decide [what] severs [a religious objector's] moral responsibility") (internal citation omitted); *Korte v. Sebelius*, __F.3d__, 2013 WL 5960692, at *24 (7th Cir. Nov. 8, 2013) (rejecting Defendants' "'attenuation' argument" because it asks whether "th[e] [Mandated] coverage impermissibly assist[s] the commission of a wrongful act in violation of the moral doctrines of the Catholic Church," a question which "[n]o civil authority can decide").[5]

B. The Mandate violates the Religion Clauses.

Plaintiffs have shown that the Mandate discriminates among religious organizations based on their institutional, structural, doctrinal, and financial affiliation. PI Br. at 2, 9-11. Defendants respond that discriminating between religious *institutions* with identical objections is "reasonable" because it is not discrimination among *denominations*. Opp. 11-13 and n.6.

Defendants are wrong in every respect. First, the Constitution requires non-discrimination not only among denominations, but also among religious institutions. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257, 1266 (10th Cir. 2008) (the state must also "treat . . . *religious institutions* without discrimination or preference"); *accord Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982) (rejecting that a law's "disparate impact among *religious organizations* is constitutionally permissible when such distinctions result from application of secular criteria" (emphasis added)); *see also Korte*, 2013 WL 5960692, at *17 ("[B]oth Religion Clauses" give

[5] Defendants' Opposition shows that they insist on Plaintiffs' participation to further their goals of encouraging the use of contraceptives, sterilization, and abortifacients. Defendants argue at length that their interest in this case is promoting access to and use of the services at issue, Opp. at 1, 3-5, that their inability to enforce is temporary, that they actively seek to remedy that temporary inability to "fully and appropriately" pursue their goals, *id.*, and that coercing Plaintiffs serves a compelling interest "in public health and gender equality," *id.* at 9-10.

"special solicitude to the rights of religious organizations *as* religious organizations" (internal quotation omitted)). Defendants may not "discriminate between 'types of institution' on the basis of the nature of the religious practice [such] institutions are moved to engage in." *Weaver*, 534 F.3d at 1259.

Second, the Mandate *does* discriminate among religious denominations: it favors those that exercise their beliefs primarily through "houses of worship," "integrated auxiliaries," or "the exclusively religious activities of religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), and disfavors denominations that, like the Catholic Church, *also* exercise their religion via other ministries such as health care services. *See, e.g.*, Dkt. 15-4, Ex. L, at 7-10. Just as a law may not privilege a denomination with "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, or provide special treatment "solely for 'pervasively sectarian' schools . . . [and thus] discriminat[e] between kinds of religious schools," *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002), a law cannot prefer denominations that exercise religion principally through "houses of worship[] and religious orders," 78 Fed. Reg. 8461, while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Weaver*, 534 F. 3d at 1259. Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte*, 2013 WL 5960692, at *21 (rejecting "the government's argument [that] . . . [r]eligious exercise is protected in . . . the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way").

Third, the claimed basis for Defendants' discrimination—speculation about the likely religious beliefs of those who work for particular religious institutions—is not "reasonable," Opp. 11 n.6, and is flatly prohibited by governing law. *Weaver*, 534 F.3d at 1259 (banning "discrimination . . . expressly based on the degree of religiosity of the institution and the extent

to which that religiosity affects its operations"). The government simply has no business restricting religious liberty rights based on regulators' bare guesses about what religious beliefs employees and beneficiaries of religious institutions likely do or do not hold.[6]

Defendants' reliance on *Gillette v. United States*, 401 U.S. 437 (1971), is misplaced. Opp. 12. *Gillette* upheld military conscientious-objector status because it was based on the *nature of the conscientious objection*. *Id.* at 442 n.5 (granting exemption for objections to "war in any form," but not to only "a particular war"). The religious exemption was therefore available to all sincere objectors—regardless of their faith—who asserted the same objection and sought to engage in the same practice. *Id.* at 450-51. In contrast, the Mandate discriminates among institutions that engage in the *exact same* activity and have the *exact same* religious objections.

C. The Mandate violates Free Speech by compelling both speech and silence.

Defendants' response fails to rebut the two glaring free speech problems with the Mandate: it compels the Plaintiffs to engage in speech they wish to avoid and forbids them from engaging in speech with a message they would like to convey. Each violation merits preliminary relief.

Compelled Speech. The Mandate compels the class members' speech by forcing them to engage in speech they would never willfully make: designating and authorizing others to provide contraceptives, sterilizations, and abortion-inducing drugs. 26 C.F.R. § 54.9815-2713A(a)(4); 29 C.F.R. § 2590.715-2713A(a)(4). The class members' religion forbids them from doing this because they cannot designate or authorize anyone to provide such products and because they cannot impose a duty on Christian Brothers or any TPA to provide them. Ex. M ¶¶ 9, 12-20.

[6] Defendants' attempt to escape *Weaver*, Opp. 13, is unavailing. It makes no sense that the exact practice *Weaver* rejected—discrimination among religious institutions based on the government's view of their "degree of religiosity"—is forbidden concerning student scholarships but is permissible when deciding the more dire question of which religious institutions may be forced to either shut down or violate their faith.

Defendants do not challenge the sincerity of the Little Sisters' claim that they cannot engage in this required speech. Instead, they insist that they can coerce this speech because the speech requirement is "plainly incidental to the . . . regulation of conduct." Opp. 13 (quoting *Rumsfeld v. FAIR Inc.*, 547 U.S. 47, 62 (2006)). But *FAIR* concerned a regulation that the Court found "regulates conduct, not speech" and regulated what affected parties "must *do* . . . not what they may or may not *say*." *FAIR*, 547 U.S. at 60 (emphases original). The exact opposite is true here—the forced speech is *the essential act* Plaintiffs must engage in to trigger the flow of the drugs, devices and services at issue. That central role for the compelled speech explains Defendants' stalwart insistence that the federal government has a "compelling" interest in forcing them to speak in this manner.[7] This case is thus the opposite of *FAIR*.[8]

Compelled Silence. The Mandate also compels the Plaintiffs to remain silent and refrain from conveying a lawful viewpoint to certain audiences. *See* 26 C.F.R. § 54.9815–2713A(b)(1)(iii); 29 C.F.R. § 2590.715-2713A(b)(1)(iii); PI Br. at 11. On its face, this obviously violates the First Amendment by prohibiting speech with one particular viewpoint: discouraging participation in Defendants' scheme by TPAs. The "most basic" principle of First Amendment law is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011).

---

[7] Just last term, the Supreme Court held that it is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *FAIR*, 547 U.S. at 61). The Court went on to hold that "[w]ere it enacted as a direct regulation of speech, the [government requirement that private institutions adopt government speech as their own] would plainly violate the First Amendment." *Id.* Such a direct regulation of speech is what is currently before this court.

[8] Defendants' string-cite of other cases, Opp. 13-14, likewise fails. None of these cases concerned the type of stand-alone forced speech requirement at issue here.

Defendants try to avoid this "most basic" First Amendment rule by comparing such speech to a business's "threat of reprisal or force" made "to its employees." Opp. 14-15. But Plaintiffs are not seeking the right to make threats to their employees. They are seeking the right to be able to speak freely and lawfully *with their TPAs* about their obligation not to be involved in the distribution of such products. Defendants offer no theory under which they can forcibly silence that lawful message.

D. A preliminary injunction will not harm Defendants or the public.

Defendants claim that an injunction protecting the Plaintiffs "would injure the government and the public." Opp. at 15. This makes no sense in light of Defendants' acknowledgement that they claim that they cannot enforce their system against TPAs.[9]

CONCLUSION

As set forth in Plaintiffs' proposed order, Plaintiffs respectfully request that this Court enter an injunction protecting Plaintiffs and class members, including their third party administrators, from application of the Mandate or any of its associated penalties while this lawsuit is pending.

Respectfully submitted this 15th day of November, 2013.

[9] Defendants' argument that Plaintiffs must be coerced into this scheme because "Congress found it to be in the public interest to direct an agency to develop and enforce," *id.* at 15, is also incorrect: Congress did not mandate contraceptive coverage, Defendants did; Congress instructed the government to respect religious freedom in RFRA; and Congress left church plans like the one at issue here outside of ERISA. 29 U.S.C. § 1003(b)(2). In any case, just yesterday Defendants voluntarily provided widespread temporary relief from many of the requirements Congress *did* create—but not from Defendants' own contraceptive scheme. *See* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.

/s/ *Mark Rienzi*

Mark Rienzi
mrienzi@becketfund.org
Daniel Blomberg
dblomberg@becketfund.org
Adele Keim
akeim@becketfund.org
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street NW, Suite 220
Washington, DC 20007
Tel.: (202) 955-0095
Fax: (202) 955-0090

Carl C. Scherz
cscherz@lockelord.com
Seth Roberts
sroberts@lockelord.com
Locke Lord LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201
Tel.: (214) 740-8583
Fax: (214) 756-8583

COUNSEL FOR PLAINTIFFS LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO; LITTLE SISTERS OF THE POOR, BALTIMORE, INC.; CHRISTIAN BROTHERS SERVICES; AND CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST

Kevin C. Walsh
kwalsh@richmond.edu
University of Richmond School of Law
28 Westhampton Way
Richmond, VA 23173
Tel.: (804) 287-6018

COUNSEL FOR PLAINTIFFS LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO; AND LITTLE SISTERS OF THE POOR, BALTIMORE, INC.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the Court's ECF filing system on counsel for Defendants.

/s/ *Mark Rienzi*
Mark Rienzi