IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

THE OBRIA GROUP, INC. and VITA NUOVA, INC., on behalf of themselves and others similarly situated, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; UNITED STATES OF AMERICA, Defendants.	Case No. 4:19-cv-00532-O

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants respectfully ask that the Court enter summary judgment in their favor, deny Plaintiffs' motion for summary judgment, and dismiss Plaintiffs' claim with prejudice. Vita Nuova, Inc. and Obria Group, Inc. challenge a provision of the Church Amendments, 42 U.S.C. § 300a-7(c), first enacted in 1973, that prohibits organizations receiving funds under various federal statutes from discriminating in employment based, among other things, on an individual's performance of (or assistance in) abortions, an individual's refusal to perform (or assist in) such a procedure or activity, and an individual's religious beliefs or moral convictions about such procedures more generally.

As detailed below, Defendants are entitled to summary judgment—and Plaintiffs' motion for summary judgment should be denied—because Plaintiffs cannot prove any plausible injury-in-fact arising out of the challenged provision. The information Defendants have obtained in discovery clearly establishes that Vita Nuova is not in a position to apply for Title X funds at all because, by its own admission, it would not be able to meet the statutory requirements to participate in a Title X funding program, or have the capabilities necessary to be competitive for such a program, even if it were to obtain the relief it seeks in this litigation. Obria also lacks standing. It was a Title X funding recipient as recently as March of this year before it voluntarily withdrew its application for continued funding from consideration. As a former recipient of Title X funding, Obria has no credible claim that Section 300a-7(c) is a barrier to competing for federal funds. Plaintiffs' lack of any injury-in-fact is fatal to their case and requires that the Court enter summary judgment in Defendants' favor.

Even if the Court were to conclude that one of the named plaintiffs has standing, Defendants are entitled to summary judgment on the merits. Plaintiffs fail to show that the mere

existence of Section 300a-7(c)—without any showing that it is likely to be applied to them—substantially burdens their exercise of religion. The government also has a compelling interest in Section 300a-7, which is to preserve its neutrality as to controversial issues related to employment decisions by federal funding recipients with respect to persons who perform abortions or who refuse to perform them. The challenged provision therefore satisfies the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1 *et seq*.) ("RFRA").

BACKGROUND AND STATEMENT OF UNDISPUTED FACTS

Vita Nuova initiated this action on July 3, 2019, and, after the Court granted Defendants' motion to dismiss two of its claims, Vita Nuova amended its complaint most recently on December 18, 2020 to add Obria as a plaintiff. *See generally* Third Am. Compl., ECF No. 50. On December 2, 2020, this Court granted Vita Nuova's motion to certify a class consisting of "[e]very present and future health-care provider in the United States that opposes abortion for sincere religious reasons." Order, ECF No. 46 ("Class Cert. Order").

Vita Nuova is a "fledgling organization," and although it alleges that it "is seeking to establish a network of clinics that will apply for Title X funds and participate in the Title X program in the future," Third Am. Compl. ¶ 10, Vita Nuova has never applied for Title X funding, does not have any employees or a single clinic to provide services, and would not be able to meet the requirements to obtain Title X funding even if the Court were to award the relief that Plaintiffs seek in this litigation. *See* App. 003-004, 006. Specifically, even if Vita Nuova were to apply for Title X funds, it would not be able to meet Title X's statutory requirements to provide a "broad range" of family planning services, to provide services to minors confidentially, or to meet a financial risk analysis to be able to be competitive for an award of Title X funds. *See* App. 012,

015. Vita Nuova also could not reach a particular regional area in order to be competitive for a Title X funding award, or to be able to make rapid and effective use of assistance as required by Title X. *See* App. 012, 015. And Vita Nuova does not have, and has not contracted for, adequate facilities and staff to support a Title X family planning project. *See* App. 013, 015. Vita Nuova has no employees—nor did it employ anyone when it initiated this action—and it has never been faced with an instance in which it was unable to take any employment action because of the requirements in Section 300a-7(c). *See* App. 003, 006.

Obria, for its part, was awarded Title X funding in 2019. *See* App. 020, 023. Obria was a Christian, pro-life organization when it applied for and received Title X funding, and its status as such did not prevent it from obtaining those funds. *See* App. 029, 032. Nor were the requirements in Section 300a-7(c) an obstacle for Obria. *See* App. 029, 032. Obria is not aware of any applicant for employment with its organization having ever performed or assisted in the performance of an abortion, and, like Vita Nuova, Obria has never been prevented from making an employment decision, such as hiring, promoting, or terminating, based on the requirements in Section 300a-7(c). *See* App. 029, 032.

The budget period for Obria's only Title X award expired on March 31, 2021. Declaration of Scott Moore ¶ 4 ("Moore Decl."), App. 036. Obria initially applied for continuation funding for its Title X grant for 2021 fiscal year funds. *Id*. ¶ 5. However, upon consideration of Obria's application, HHS's Office of Population Affairs ("OPA") recommended not providing that continuation funding. *Id.* ¶ 6. In a March 26, 2021 letter to Obria's Chief Operating Officer, Mauricio Leone, OPA identified a number of concerns regarding Obria's progress on its Title X project, including, among other things, that the number and percentage of clients served by the Federally Qualified Health Center sites in the project was significantly lower than anticipated, that

the number of clients Obria served was significantly below the number stated in its application, and that Obria had substantially reduced the anticipated number of clients and geographic areas it planned to serve while simultaneously requesting additional funds. *Id.* ¶ 7. OPA outlined specific next steps for Obria to take for its application to receive further consideration. *Id.* ¶ 8. Mr. Leone responded on April 9, 2021, indicating that Obria was withdrawing its request for continuation of funding. *Id.* ¶ 9.

LEGAL STANDARD

Defendants oppose Plaintiffs' motion for summary judgment and cross-move for summary judgment. Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Merritt-Campbell, Inc. v. RxP Products, Inc.*, 164 F.3d 957, 961 (5th Cir. 1999); Fed. R. Civ. P. 56(c).

ARGUMENT

I. Defendants Are Entitled to Judgment in Their Favor Because Discovery Has Confirmed That Plaintiffs Lack Standing to Challenge Section 300a-7(c).

As this Court has recognized, "[e]very party that comes before a federal court must establish that it has standing to pursue its claims." Memorandum Opinion and Order at 9, ECF No. 28 ("Mem. Op.") (quoting *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013)). "Of the doctrines that have evolved under Article III, . . . the requirement that the litigant have standing is perhaps the most important." *Henderson v. Stalder*, 287 F.3d 374, 378 (5th Cir. 2002). "Standing to sue must be *proven*, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007) (en banc) (emphasis added). To establish standing, "a plaintiff must show: (1) [he] has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the

defendant's conduct; and (3) a favorable judgment is likely to redress the injury." *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (citation omitted).

At the pleadings stage, the Court correctly concluded that Vita Nuova had not alleged an injury-in-fact by asserting merely "a hypothetical event that has no certainty of happening—the employment of individuals who perform or assist in elective abortions." Mem. Op. at 17. A contrary outcome, the Court explained, would create an "absurd result," allowing "employers everywhere to challenge statutes on the supposition that an imagined prospective employee—possessing such characteristics or performing such acts that would go against the employer's wishes—will appear and coincidentally create standing." *Id.* The Court did find, however, that Vita Nuova had alleged an injury-in-fact based on its inability to secure Title X funding. Pointing to the law articulated in *Northeastern Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) ("*Northeastern*"), the Court reasoned that "Vita Nuova need not show that it would successfully obtain Title X funding as an applicant because the injury in fact is the presumptive denial of Title X funding that stems from 42 U.S.C. § 300a-7(c)'s encumbrance." Mem. Op at 17.

Defendants have since had the opportunity to engage in discovery, and the undisputed facts clearly establish that Vita Nuova lacks any plausible, non-hypothetical injury-in-fact. As the Supreme Court recognized in *Northeastern*, although a litigant need not allege that it would have been awarded any particular contract but for the challenged provision, the litigant must still demonstrate that it is "able and ready" to make a bid. 508 U.S. at 666. The Supreme Court recently reiterated the same principle in *Carney v. Adams*, 141 S. Ct. 493 (2020), where it explained that mere "some day intentions" are insufficient to confer standing, and an applicant must be "able and ready" to achieve the desired outcome notwithstanding the challenged requirement. *Id.* at 502.

Vita Nuova does not clear that hurdle, because it would not be eligible to even be *considered* for a Title X grant, even if it were to receive the relief it seeks from this Court, because it does not meet other statutory prerequisites for funding. Indeed, Vita Nuova admits that it would not be able to meet the statutory requirements to provide a "broad range" of family planning services under Title X and to provide services to minors confidentially. App. 012, 015. It also admits that it would not be competitive for an award of Title X funds because it could not reach a particular regional area or make rapid and effective use of assistance. App. 012, 015. Vita Nuova does not have, and has not contracted for, adequate facilities and staff to support a Title X family planning project. App. 012, 015. Indeed, Vita Nuova does not have any employees *at all* or a facility from which to provide services. App. 013, 015.

Given that Vita Nuova does not stand "able and ready" to compete for a Title X funding award, it lacks standing. *Northeastern*, 508 U.S. at 666. Otherwise, there would be no meaningful limit to who could challenge funding requirements. Even entities that exist only on paper—which appears to be the case as to Vita Nuova—could file suit in federal court, even though there is no possibility that they would be competitive for an award. That would be a patently absurd result. To analogize to two of the cases discussed in *Northeastern*, it would mean that even a high school student—who would not otherwise be eligible for consideration for admission to medical school—could challenge the program's selection criteria in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Or that a resident of Oklahoma, otherwise ineligible for election to the Texas legislature, could challenge the automatic reservation provision of the Texas Constitution at issue in *Clemens v. Fashing*, 457 U.S. 957 (1982). Such a broad interpretation of federal jurisdiction cannot be squared with how the Supreme Court has interpreted Article III.

Discovery has further revealed that the other named plaintiff also lacks standing. Obria has already successfully applied for and received Title X funding, despite Section 300a-7(c), and it admits that Section 300a-7(c) was not an obstacle. *See* App. 029, 032. Clearly then, Obria has not suffered the only injury that Plaintiffs allege. *See* Third Am. Compl. ¶ 17 ("The Secretary's enforcement of 42 U.S.C. [§] 300a-7(c) inflicts injury in fact because prevents the plaintiffs from obtaining federal funding unless they agree to allow their employees to perform or assist in abortions."); *see also id.* ¶ 14 ("Obria will not allow its doctors to perform elective abortions, nor will it allow its employees to assist in elective abortions, consistent with the employment practices of Catholic Hospitals and other Christian health-care entities that oppose abortion for sincere religious reasons.").

Obria may argue, alternatively, that it is injured because it is possible, at some point in the future, it may be faced with a situation in which it needs to discriminate against an employee, or prospective employee. But that is precisely the type of hypothetical scenario that this Court has already rejected as overly speculative—*i.e.*, "the employment of individuals who perform or assist in elective abortions." Mem. Op. at 28. By its own admission, Obria is not aware of any of its employees having ever performed or assisted in the performance of an abortion, or of any applicant for employment in its organization having done so. App. 030, 032. Obria also admits that it has never been prevented from making an employment decision, such as hiring, promoting, or terminating, based on the requirements in Section 300a-7(c). App. 030, 032. All of that confirms that any alleged injury is based on pure speculation and is insufficient for the purposes of Article III. To hold otherwise, as this Court explained as to Vita Nuova, would allow "employers everywhere [to] challenge statutes on the supposition that an imagined prospective employee—possessing such characteristics or performing such acts that would go against the employer's

wishes—will appear and coincidentally create standing." Mem. Op. at 17. The same analysis squarely forecloses Obria's claim.

Obria's asserted injury in fact is also speculative for another reason. Obria recently *withdrew* from the Title X program in response to OPA's programmatic concerns regarding Obria's use of Title X funds, and Obria has given no indication that it intends to seek Title X funding imminently. *See* Moore Decl., Ex. B, App. 048. Obria received Title X funding—despite Section 300a-7(c)—and then indicated that it no longer wanted to be considered for a continuation of that funding. It therefore cannot plausibly claim that it is injured by Section 300a-7(c).

Because neither named Plaintiff has standing, judgment must be entered in Defendants' favor. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) ("[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

II. Even If Plaintiffs Had Standing, Defendants Would Be Entitled to Summary Judgment Because Plaintiffs' RFRA Claim Fails on the Merits.

As explained above, because Plaintiffs fail to demonstrate any likelihood that 42 U.S.C. § 300a-7 will ever be applied to Vita Nuova or Obria, they have not suffered any injury in fact. For similar reasons, Plaintiffs fail to show that the mere existence of this statutory provision—without any showing that it is likely to be applied to them—substantially burdens their exercise of religion. Moreover, the government has a compelling interest in preserving its neutrality as to controversial issues related to employment decisions by federal funding recipients with respect to

persons who perform abortions or who refuse to perform them. Defendants therefore respectfully request that the Court enter summary judgment in their favor.

A. The Mere Existence of Section 300a-7(c) Does Not Substantially Burden Plaintiffs' Exercise of Religion Because Plaintiffs Fail to Show Any Likelihood That It Will Ever Be Applied to Them.

Under RFRA, the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1. "[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (emphasis added).[1] A "substantial burden" is one that "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). "[T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Id*.

Defendants are not challenging the sincerity of Vita Nuova's or Obria's beliefs. And although a court likewise accepts a litigant's sincerely held religious beliefs, *see, e.g.*, *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 725 (2014), it must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is substantial. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (explaining that "[i]n addition to showing . . . a sincerely held

[1] While the initial version of RFRA prohibited the government from imposing any "burden" on free exercise, Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion. 139 Cong. Rec. 26180 (Oct. 26, 1993) (statement of Sen. Kennedy); *see id*. (statement of Sen. Hatch), App. 054.

religious belief," plaintiffs "also b[ear] the burden of proving" that the challenged law imposes a substantial burden).

Here, Plaintiffs have failed to satisfy their burden of showing that 42 U.S.C. § 300a-7(c) substantially burdens their exercise of religion. As explained above, Vita Nuova has never applied for Title X funding, and does not meet the requirements for receiving such funding. Therefore, it cannot be the case that Vita Nuova is "truly pressure[d]" to "significantly modify [its] religious behavior and significantly violate [its] religious beliefs" because there is no reasonable expectation that it will ever need to make a choice between receiving Title X funding and hiring or promoting a person who has performed elective abortions. *Adkins*, 393 F.3d at 570. Similarly, as explained above, Obria has received Title X funding in the past without any potential ineligibility issue arising because of Section 300a-7(c). Moreover, Obria is now leaving the Title X program and has given no indication that it will try to participate again. And even were Obria to attempt to participate in the Title X program again, Obria cannot establish that it would reasonably anticipate being denied funding because of its religious beliefs because it has already received funding despite holding such religious beliefs and because it is aware of HHS's "preexisting policy dating back at least to 2008 of not enforcing requirements of the 2000 regulations where they may conflict with the Federal conscience statutes." 84 Fed. Reg. 23,170, 23,191 n.64 (May 21, 2019); *see* App. 030, 032. In short, Plaintiffs have failed to show that this statutory provision has caused either of them to modify their behavior or to violate their sincerely held religious beliefs. Because a law cannot substantially burden religious exercise when "it involves no action or forbearance on [the named plaintiffs'] part, nor . . . otherwise interfere[s] with any religious act in which [they] engage[]," *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008), the Court's inquiry may end here.

Nor does any case law cited by Plaintiffs suggest that the challenged law imposes any substantial burden on their exercise of religion. *See* Br. in Supp. of Pl. Mot. for Summ. J. and Permanent Inj. at 2-5, ECF No. 34-1 ("Pl. MSJ"). By contrast with Vita Nuova and Obria, the plaintiffs in these cases had alleged actual injury and a presently existing substantial burden on their sincerely held beliefs. The petitioner in *Sherbert v. Verner*, 374 U.S. 398 (1963), had been terminated from employment because she would not work on the Sabbath Day of her faith, and was denied unemployment benefits because she could not find suitable employment not requiring her to work on her chosen Sabbath. *Id*. at 399-40. The *Sherbert* appellant was thus forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. The petitioner in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), faced a similar dilemma: either work for a company that produced armaments in violation of his faith as a Jehovah's Witness or lose unemployment benefits. *Id*. at 709-11.

And unlike here, the employers in *Hobby Lobby* and in *Sharpe Holdings v. U.S. Department of Health and Human Services*, 801 F.3d 927 (8th Cir. 2015), demonstrated a presently existing substantial burden on their religious exercise, *viz*., the provision of *current* employees with health-insurance coverage that included contraceptive coverage. *Hobby Lobby*, 573 U.S. at 700-03; *Sharpe*, 801 F.3d at 932-33. Finally, the plaintiffs in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), were parents whose children were currently attending religious schools and had either "already received scholarships" or were "eligible" for them and "planned to apply," but were blocked by state law from using scholarship funds for their tuition. *Id*. at 2252.

Unlike the foregoing cases, the law challenged here "cannot be said to hamper [plaintiffs'] religious exercise because" it does not "'pressure [them] to modify [their] behavior and to violate

[their] beliefs.'" *Kaemmerling*, 553 F.3d at 679 (quoting *Thomas*, 450 U.S. at 718). In short, the case law cited by Plaintiffs confirms that the concerns expressed by Obria and Vita Nuova that they will be required to choose between hiring an employee who has performed elective abortions and foregoing federal funding is purely hypothetical, conjectural, and belied by Obria's past funding and legally binding admissions in this case. Obria received Title X funding and then withdrew from the program due to its inability to provide services, and Vita Nuova has never even applied for Title X funding despite its repeated representations to this Court that it would do so.

As to the certified class, Plaintiffs have made no affirmative showing that "every present and future health-care provider in the United States that opposes abortion for sincere religious reasons" sincerely believes that hiring or promoting persons who have performed abortions would impinge on their religious beliefs.[2] It remains a logical possibility—or even a probability—that such a provider could sincerely oppose abortion but have no religious or moral qualms about hiring such an employee. Thus, even if the Court were to conclude that Vita Nuova and Obria have demonstrated that 42 U.S.C. § 300a-7(c) substantially burdens their exercise of religion—which they have not—Plaintiffs have made no such showing that absent class members are similarly burdened. Accordingly, classwide relief is inappropriate.

[2] The absence of these class members is itself dispositive. Because neither Vita Nuova nor Obria has standing to pursue its claims, neither named plaintiff may represent an absent class even if such unknown and unnamed class members possessed such claims, which has never been established and cannot be known. *See Rector v. City and Cnty. of Denver*, 348 F.3d 935, 937 (10th Cir. 2003) ("[W]e find that the named plaintiffs . . . lack standing to represent the absent class members for the most significant claims presented. We have thus remanded these claims for decertification and dismissal."). Vita Nuova and Obria cannot serve as class representatives for any alleged claims of unknown and unnamed class members when they do not themselves have standing to assert their own claims.

B. Even If Section 300a-7 Did Substantially Burden Plaintiffs, It Would Not Violate RFRA Because It Serves a Compelling Government Interest.

Even if Plaintiffs were able to demonstrate a substantial burden on their religious exercise, they would not prevail because the challenged provision forms a necessary component of a statute that "further[s] compelling governmental interests" in maintaining neutrality with respect to controversial issues related to employment decisions by federal funding recipients on persons who perform abortions, and because the statute constitutes "the least restrictive means of furthering" those interests. 42 U.S.C. § 2000bb-1(b).

The legislative history of Section 300a-7 reveals that Congress aimed to respect the religious and moral beliefs of individuals opposed to abortion as they related to employment decisions by federal funding recipients with respect to persons who perform abortions or refuse to perform them, while maintaining neutrality on this topic. While adopting the Church Amendment guaranteeing that the receipt of federal health funds could not be used as the basis for requiring any institution or individual to perform abortions, Congress also adopted a provision guaranteeing that such institutions and individuals would not be able to "discriminate against a doctor or against health personnel who do not entertain those religious or philosophical beliefs, rather than [allowing] that view on the part of the institution itself to affect the individual liberty of the individuals who may not agree." 92 Cong. Rec. S9599 (Mar. 27, 1973) (statement of Sen. Javits), App. 049. Senator Church, the author of the Church Amendment, was "in full accord with" this non-discrimination provision and believed that it "helped to improve" his own amendment.[3]

[3] *See* 92 Cong. Rec. S9603 (Mar. 27, 1973), App. 053 ("Mr. CHURCH. In other words, if a physician who was part of a staff of a Catholic hospital, let us say, who was not himself a Catholic and had no compunction about performing sterilization or abortion operations, were to perform them in some other hospital, a public hospital, where there is no feeling against it, then he would not be discriminated against by the Catholic hospital for having performed those operations elsewhere. Mr. JAVITS. Exactly. Mr. CHURCH. I am in full accord with that, and I think that helps to improve the amendment.").

These two provisions form part of a single statute and deal with the same subject, and therefore must be read in tandem and construed as part of a single statutory framework. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 252 (2012) ("Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system.") (citation omitted). Taken together, these provisions advance the government's interest in remaining neutral as to whether employees of federally-funded entities that provide family planning services do or do not perform elective abortions outside of the federally-funded program.[4] Instead of only prohibiting discrimination against persons who refuse to perform abortions, it also prohibits discrimination against persons who have performed them. Under the statute, in no event can a grantee be required to perform abortions, or to use its facilities or funds to perform abortions. The only remaining question, then, is whether a grantee may discriminate against a person who has performed or is performing elective abortions outside of those facilities or funds, on his or her own initiative. Section 300a-7(c) answers that question in the negative, preserving the government's neutrality with respect to funded family planning providers by preventing employment discrimination against such persons.

The statute is also the least restrictive means of advancing the government's interest in maintaining neutrality on this controversial subject with respect to employment decisions made by family planning providers receiving federal funds regarding persons who perform abortions or refuse to perform them. The relevant inquiry when determining whether a particular regulatory

[4] Federal funds severely restrict the circumstances under which payment for abortion services may be made, *see generally Harris v. McRae*, 448 U.S. 297, 300-04 (1980) (discussing enactment of the Hyde Amendment), and Title X specifically prohibits programs that include abortion as a method of family planning. *See* 42 U.S.C. § 300a-6.

scheme is the "least restrictive" is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme—or whether the scheme can otherwise be modified—without undermining the government's compelling interests. *See, e.g.*, *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (describing the least restrictive means test as "the extent to which accommodation of [the objector] would impede the state's objectives"); *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). And here, when the statute is understood as a whole, any measures short of those required "would fail to advance the government's compelling interest[s]" and indeed "would . . . do [those interests] a disservice." *Wilgus*, 638 F.3d at 1294. If grantees, as a condition of their receipt of federal funds, could not refuse to participate in elective abortions, it would fail to advance the government's compelling interest in remaining neutral on the subject of whether grantees or employees of grantees perform abortions outside of the federally-funded program. By the same token, that interest would not be advanced if a grantee could refuse to hire a person who has performed or is performing elective abortions outside of its own facilities or funds, and on his or her own initiative. These statutory provisions serve the compelling interest of remaining neutral on this controversial topic—employment decisions concerning persons who perform abortions or who refuse to perform them—in the administration of federal family planning funds.

Nor are Plaintiffs' two counterarguments persuasive. *See* Pl. MSJ at 7-10. First, the fact that this statutory framework applies to recipients of federal funds rather than to the general public does not diminish the government's compelling interest. As explained above, the very purpose of the framework is to achieve government neutrality with respect to controversial issues in the administration of federal funding to family planning providers related to employment decisions involving persons who perform abortions or who refuse to perform them, because a grant of federal

funds can be viewed as a tacit form of official approval of the grantee. It is well recognized that governments may possess compelling interests in enforcing conditions on federal funding. *See, e.g.*, *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 73 (D.C. Cir. 2016) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.") (quoting *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 492 (1989) (plurality opinion)); *Adarand Constructors v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000) ("Although we decline to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress . . . , we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements.").

Second, Plaintiffs misplace their reliance on the Supreme Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S 640 (2000), which is inapplicable here. In that case, the Boy Scouts of America had revoked the membership of an individual because of his sexual orientation. *Id*. at 644-45. The Supreme Court held that the First Amendment right of free association prohibited the application of a state public-accommodations law prohibiting sexual-orientation discrimination to membership in a private organization such as the Boy Scouts of America. *Id*. at 653-59. But in *Dale*, the Boy Scouts of America was not challenging a condition on the receipt of federal funding, much less one intended to preserve government neutrality with respect to the administration of such funding. Instead, it was challenging a public-accommodations law, the scope of which had occasioned concern about its constitutional implications: "As the definition of 'public accommodation' has expanded from clearly commercial entities . . . to membership organizations

such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Id*. at 657. No such concerns are presented here, and the fact that this case involves federal funding conditions distinguishes it from *Dale*. *See S. Dakota v. Dole*, 483 U.S. 203, 207 (1987) (noting that because "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution," "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds") (citation and internal punctuation omitted). Moreover, as Plaintiffs concede, "Vita Nuova is not asserting a First Amendment claim rooted in the right of expressive association." Pl. MSJ at 10. It is thus not correct that this case is "almost indistinguishable" from the situation presented in *Dale*. *Id*. at 9. Different rights are not fungible, and a decision involving the First Amendment right of free association is an ill fit with a case involving statutory rights under RFRA.

In sum, even if Plaintiffs had demonstrated that they had standing and that the challenged funding condition substantially burdened their exercise of religion—which they have not—Section 300a-7 serves a compelling government interest and therefore does not violate RFRA. Thus, the Court should enter summary judgment in favor of Defendants.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court enter summary judgment in their favor and deny Plaintiffs' motion for summary judgment.

Dated: April 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 23, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) or the local rules.

/s/ Daniel Riess
DANIEL RIESS