No. 25-

IN THE

Supreme Court of the United States

BREANNA RENTERIA AND LAURA SMITH

Petitioners,

v.

NEW MEXICO OFFICE OF THE SUPERINTENDENT OF INSURANCE AND ALICE T. KANE, SUPERINTENDENT OF INSURANCE, IN HER OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Breanna Renteria and Laura Smith joined a ministry with fellow Christian believers to share healthcare costs. Petitioners' religious beliefs compelled them not only to share these costs, but to abstain from health insurance that requires insureds to subsidize religiously objectionable treatments. The Affordable Care Act ("ACA") expressly recognizes such ministries, defining them as health care sharing ministries ("HCSMs"). By participating in their ACA-allowed HCSM, Petitioners are not only exempt from the ACA's individual mandate to obtain minimum essential coverage, they also enjoy statutory protections for their religious exercise. This protection was suddenly threatened, however, when the New Mexico Office of the Superintendent of Insurance ordered Petitioners' ministry to either cease in-state operations or comply with the New Mexico Insurance Code—an act that would effectively kill the HCSM. Petitioners sought a preliminary injunction, which the district court denied. On review, the Tenth Circuit, over the dissent of Judge Carson, imposed heightened requirements on Petitioners to prove the law was not neutral or generally applicable under *Employment Division v. Smith*, 494 U.S. 872 (1990), and determined that New Mexico's decision to block ACA-exempt organizations from operating in in its borders was not preempted by federal law. Ultimately, it found Petitioners unlikely to succeed on the merits of their claims.

The questions presented are:

1. Under *Smith*, whether state laws must always be deemed "neutral" unless plaintiffs prove officials acted against them with subjective religious animus and discriminatory motive.

2. Under *Smith*, whether courts determining a law's "general applicability" must disregard the law's preference for secular over religious organizations on the grounds that secular and religious organizations are inherently motivated by different purposes and thus incomparable, or alternatively, whether courts must consider the law's preference for secular over religious organizations so long as their activities pose a similar risk to the government's asserted interest in the law.
3. Whether hostile statements of government actors against religious adherents are sufficient to establish a First Amendment free exercise violation, or whether states may try to justify their hostility by satisfying strict scrutiny.
4. Whether the ACA's exemption for individuals who participate in HCSMs preempts New Mexico's determination that those individuals' HCSMs may not operate in New Mexico until they forfeit their federal statuses as HCSMs under the ACA.

PARTIES TO THE PROCEEDING

Petitioners Breanna Renteria and Laura Smith were plaintiffs-appellants below. Tammy Waters was also a plaintiff-appellant who was dismissed from the appeal by agreement of the parties. The New Mexico Office of the Superintendent of Insurance and Alice T. Kane, Superintendent of Insurance, in her official capacity, were defendants-appellees below.

STATEMENT OF RELATED PROCEEDINGS

This case is related to the following proceedings:

Gospel Light Mennonite Church Med. Aid Plan, d/b/a Liberty HealthShare & Jana Robertson v. Off. of the Superintendent of Ins., Jennifer Catechis, Alice Kane, Russell Toal, & R. Alfred Walker, in their official capacities, No. D-506-CV-2025-00603 (N.M. Dist. Ct., Lea Cnty., May 5, 2025) (dismissing one defendant)

Breanna Renteria, Laura Smith, & Tammy Waters v. N.M. Off. of the Superintendent of Ins., Alice T. Kane, Superintendent of Ins. in her Official Capacity, No. 23-2123 (10th Cir., Apr. 28, 2025) (denying petition for rehearing en banc)

Breanna Renteria, Laura Smith, & Tammy Waters v. N.M. Off. of the Superintendent of Ins., Alice T. Kane, Superintendent of Ins. in her Official Capacity, No. 23-2123 (10th Cir., Feb. 27, 2025) (affirming denial of preliminary injunction)

Gospel Light Mennonite Church Med. Aid Plan, d/b/a Liberty HealthShare & Jana Robertson v. Off. of the Superintendent of Ins., Jennifer Catechis, Alice Kane, Russell Toal, & R. Alfred Walker, in their official capacities, No. D-506-CV-2025-00603 (N.M. Dist. Ct., Lea Cnty., Feb. 24, 2025) (dismissing two defendants)

N.M. Off. of the Superintendent of Ins. & Alice T. Kane, in her official capacity as the N.M. Superintendent of Ins. v. Gospel Light Mennonite Church Med. Aid Plan, Inc. d/b/a Liberty HealthShare, No. A-1-CA-42047 (N.M. Ct. App., Feb. 18, 2025) (denying petition for certiorari in part and dismissing direct appeal)

Gospel Light Mennonite Church Med. Aid Plan, d/b/a Liberty HealthShare v. the Hon. Francis J. Matthew, Dist. Ct. Judge, First Judicial Dist. Ct., Off. of the Superintendent of Ins., & Alice T. Kane, in her official capacity as the superintendent of Ins., No. S-1-SC-40429 (N.M. Sup. Ct., July 22, 2024) (denying petition to superintend control and response)

Off. of the Superintendent of Ins. v. Gospel Light Mennonite Church Med. Aid Plan, D-101-CV-2023-00660 (N.M. Dist. Ct., Santa Fe, June 18, 2024) (affirming interim superintendent of insurance order)

Gospel Light Mennonite Church Medical Aid Plan, d/b/a Liberty HealthShare, Breanna Renteria, Laura Smith, & Tammy Waters v. New Mexico Office of the Superintendent of Insurance, Alice T. Kane, Superintendent of Insurance, in her Official Capacity, No. 1:23-CV-00276-MLG-KK (D.N.M., Oct. 12, 2023) (granting in part and denying in part reconsideration)

Gospel Light Mennonite Church Med. Aid Plan, d/b/a Liberty HealthShare, Breanna Renteria, Laura Smith, & Tammy Waters v. N.M. Off. of the Superintendent of Ins. & Jennifer A. Catechis, Interim Superintendent of Ins., in her Official Capacity, No. 1:23-CV-00276-MLG-KK (D.N.M., July 14, 2023) (denying motion for preliminary injunction)

In the Matter of Gospel Light Mennonite Church Med. Aid Plan d/b/a Liberty HealthShare, No. 2021-0085 (N.M. Off. of Superintendent of Ins., Mar. 28, 2023) (conditionally granting stay and order modification)

In the Matter of Gospel Light Mennonite Church Med. Aid Plan d/b/a Liberty HealthShare, No. 2021-0085 (N.M. Off. of Superintendent of Ins., Feb. 22, 2023)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Breanna Renteria and Laura Smith are among hundreds of New Mexicans who have joined the Gospel Light Mennonite Church Medical Aid Plan ("Gospel Light"), a religious ministry. They chose Gospel Light instead of health insurance because they sincerely believe Christians must share healthcare costs with other believers, as is commanded by Galatians 6:2 and Acts 2:44-45, and must abstain from health insurance given the objectionable services and procedures it provides—such as contraceptives, contraceptive counseling, and abortifacients. Gospel Light is recognized as a valid healthcare sharing ministry ("HCSM") under the Affordable Care Act ("ACA") by the Centers for Medicare and Medicaid Services rather than as an insurer. As such, Petitioners are exempt from the ACA individual mandate to obtain minimum essential health insurance coverage. 26 U.S.C. § 5000A(d)(2)(B). Gospel Light and other HCSMs minister in all 50 States to support the religious convictions of people like Petitioners and to protect them from the ACA individual mandate that, absent conscience protections, would violate their religious convictions.

Petitioners' Gospel Light ministry, however, was a lightning rod that attracted the anti-Christian animus of New Mexico insurance officials (collectively "OSI"). OSI ordered Gospel Light to pay a multi-million dollar fine, register as a New Mexico insurer, and comply with other provisions of the New Mexico Insurance Code ("NMIC") that contradict federal law and violate Petitioners' sincere religious beliefs. OSI did so even though the NMIC itself grants exemptions from insurance regulations for multiple comparable

secular organizations. OSI, too, was blatantly hostile to Petitioners' religious exercise. Its attorney mocked Petitioners' beliefs, asking whether there is "anywhere in the scripture that says something about, along the lines that, thou shall be a member of a healthcare sharing ministry." Vol.IV.0686.[1] OSI characterized Petitioners' religious practices as merely "being charitable," "a value shared by people of all creeds and no creeds," Vol.II.0482, and as illegitimate because Petitioners did not "produce[] any citations to Scriptural or other texts" referencing HCSMs and instead allegedly "base[d] their case on vague Biblical verses that, essentially, require them to be charitable" while "[m]any other Christians, not to mention atheists and members of non-Christian faiths, manage to live by such a commandment without participating" in HCSMs, Vol.III.0550. With these statements and others, OSI unconstitutionally "favor[ed] certain religions" over others, conveyed to Petitioners "that they are outsiders, not full members of the political community," *Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1583, 1591 (2025) (quotation omitted), and characterized Petitioners' religious beliefs "as merely rhetorical—something insubstantial and even insincere." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 635 (2018).

The resulting litigation triggered a Tenth Circuit decision that, by approving OSI's shocking conduct, widened a circuit split on the fundamental meaning of *Employment Division v. Smith*, 494 U.S. 872 (1990). If the Tenth Circuit and the other circuits

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[1] All "Vol.__" citations are to the record on appeal filed in the Tenth Circuit in *Renteria v. Kane*, Case No. 23-2123.

it joins are left unchecked, their reimagined *Smith* will foreclose free exercise challenges in much of the country. By making it nearly impossible to prove an act is not "neutral" or "generally applicable," these circuits' reimagined *Smith* will bless even obvious attacks on religious exercise. Indeed, by requiring heightened proof of animus to sustain any free exercise claim, these dissenting circuits threaten to overthrow even recent precedent such as *Masterpiece Cakeshop*. This multi-circuit rebellion against the Court's authority should be quelled now.

Petitioners' case is an ideal vehicle and calls out for immediate review because of a quirk in the text of the ACA's statutory conscience protections. If any HCSM is invalidated in one state, that HCSM will no longer operate irrespective of a member's home state, and therefore all HCSM members will lose ACA protection nationwide. 26 U.S.C. § 5000A(d)(2)(B)(ii)(II). And if any HCSM complies with a state order to register as a for-profit insurance company, that HCSM will also lose its 501(c)(3) status, and therefore all HCSM members will lose ACA protection nationwide. *Id.* §§ 501(m)(1), 5000A(d)(2)(B)(ii)(I). And once HCSMs are gone, they are gone for good. *Id.* § 5000A(d)(2)(B)(ii)(IV) (requiring HCSMs to be in continuous operation and without interruption since at least December 31, 1999, to qualify for the exemption). These quirks mean that the animus of a single state like New Mexico can extinguish HCSMs nationwide, quickly unraveling core ACA conscience protections for the entire country. New Mexico's rebellion against federal law, U.S. CONST. art. VI, cl. 2, now ratified by the Tenth Circuit, must end here. Given the "outsized effects" of this decision, the Court should grant

certiorari. *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1488 (2025) (Gorsuch, J., dissenting from the denial of certiorari).

OPINIONS BELOW

The court of appeals' decision affirming the district court's denial of the preliminary injunction (Appendix (App.) A.1a-68a) is unreported. The court of appeals' decision denying en banc review (App.E.133a-134a) is unreported. The district court's order and opinion denying the preliminary injunction (App.C.92a-123a) is unreported.

JURISDICTION

The court of appeals entered its opinion and judgment affirming the denial of the preliminary injunction on February 27, 2025. The court of appeals entered judgment denying en banc review on April 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions are reproduced in Appendix F (App.135a-164a): The Supremacy Clause of the U.S. Constitution, the First and Fourteenth Amendments of the U.S. Constitution, 26 U.S.C. §§ 501(m)(1), 5000A, 42 U.S.C. § 300gg-13(a), (a)(4), and N.M. Stat. §§ 59A-1-15, 59A-1-16, 59A-15-16, 59A-16-12, 59A-16-21.2, 59A-22-42, 59A-44-16, 59A-44-23, 59A-44-40(A)(1)-(2), (F).

STATEMENT OF THE CASE

A. The Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act ("ACA"), 124 Stat. 119, was watershed legislation that comprehensively reformed our nation's existing

healthcare laws. *King v. Burwell*, 576 U.S. 473, 478–79 (2015); *California v. Texas*, 593 U.S. 659, 688 (2021) (Alito, J., dissenting). At the ACA's heart lies the individual mandate, which is "closely intertwined" with its other key provisions. *King*, 576 U.S. at 481–82; *see also California*, 593 U.S. at 688 (Alito, J., dissenting).

Congress designed the individual mandate to strike an important balance. On the one hand, it required individuals like Petitioners to maintain "minimal essential coverage." 26 U.S.C. § 5000A(a); 42 U.S.C. § 18091. This mandate forces individuals to obtain ACA-approved health insurance, such as government-sponsored programs, employer-sponsored plans, and health plans in the individual market. 26 U.S.C. § 5000A(f). Important here, the ACA then mandates that these forms of health insurance provide coverage for certain medications and procedures—including contraceptives, abortifacients, and contraceptive counseling. 42 U.S.C. § 300gg-13(a)(4); 26 C.F.R. § 54.9815-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Res. & Servs. Admin., *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines (last visited July 17, 2025).

On the other hand, Congress recognized that many citizens hold sincere religious beliefs compelling them to abstain from such requirements. Striking a balance, Congress crafted a carefully delimited conscience-based exemption to the individual mandate for individuals who are members of "a health care sharing ministry" for the applicable month. 26 U.S.C. § 5000A(d)(2)(B)(i).

> The term "health care sharing ministry" means an organization—

> **(I)** which is described in section 501(c)(3) and is exempt from taxation under section 501(a),
> **(II)** members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
> **(III)** members of which retain membership even after they develop a medical condition,
> **(IV)** which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and
> **(V)** which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

Id. § 5000A(d)(2)(B)(ii). To maintain 501(c)(3) status under the law, the HCSM cannot substantially provide "commercial-type insurance." *Id.* § 501(m)(1).

B. Gospel Light's Exemption as an HCSM

The Gospel Light Mennonite Church was founded in Virginia in 1995. Vol.II.0357. Since then, members have "adhere[d] to the Anabaptist tradition dating back many centuries to share one other's burdens." *Id.* They "believe in a literal interpretation of the Bible that caring for one another can and should

include sharing one another's health care expenses." *Id*. Living those beliefs, the Church established the Gospel Light Mennonite Church Medical Aid Plan ("Gospel Light") in 1995. Vol.II.0358. Gospel Light members have shared medical expenses continually and without interruption ever since. *Id*. Gospel Light has since expanded its membership to include Petitioners and other fellow Christian believers across the country. In 2014, Gospel Light sought and received from the U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services ("CMS") recognition of its HCSM status under the ACA. Vol.II.0355-0356. In doing so, CMS determined that Gospel Light met all requirements of 26 U.S.C. § 5000A(d)(2)(B)(ii). Gospel Light also received a letter from the Internal Revenue Service ("IRS") confirming its 501(c)(3) tax-exempt status. Vol.II.0353-0354. Gospel Light began serving New Mexico members like Petitioners as early as 2014 and no later than June 2015. Vol.II.0464.

C. Petitioners' Participation in Gospel Light for Religious Reasons

Petitioner Breanna Renteria lives in Santa Teresa, New Mexico, and has been a member of Gospel Light since approximately 2019. Vol.II.0385:9-20; Vol.IV.0633:14-17, 0634:20-21, 0636:23-25. She joined Gospel Light because she was attracted to the "religious aspects" of the HCSM, "the common beliefs and the sharing amongst other believers," the religious community where members answer each other's prayer requests, and the "updated e-mails of actual ministry encouragement edification." Vol.IV.0637:1-7, 16-0638:9; *see also* Vol.IV.0640:25-0641:5. Her religious beliefs compel her to "support other believers and to be able to share . . . financial

burdens with others" in her religious community; she exercises those beliefs through her participation in Gospel Light. Vol.II.0394:1-0395:14. Her sincere religious beliefs compel her to abstain from health insurance because it would require her "to be involved in financially supporting abortion, or other surgeries . . . changing young children," violating her sincere religious objections to those procedures. Vol.IV.0638:10-20.

Petitioner Laura Smith lives in Farmington, New Mexico, and has been a member of Gospel Light since 2017. Vol.II.0396:18-19, 0397:9-14. Like Ms. Renteria, the religious aspects of Gospel Light are "[v]ery, very important" to her. Vol.II.0397:25-0398:5. She appreciates that Gospel Light does not require members to financially support the use of contraceptives or abortions because her faith opposes those activities. Vol.II.0400:14-22.

As members of Gospel Light, Petitioners voluntarily contribute financial resources to others' health care expenses. Vol.II.0372. Their sharing is specifically tailored to health procedures that conform to their Christian beliefs. *Id*. For example, they do not share expenses related to nearly all abortions, contraceptives, drug abuse, or gender transition procedures. Vol.II.0376. Nor do they share medical costs related to impotence, infertility, or surgical sterilization or reversal. Vol.II.0377.

As members, Petitioners ascribe to the following beliefs:

> We share each other's medical expenses not as a matter of convenience or cost savings, but because we are compelled by God and conscience to do so. *Sharing such burdens is part of our religious,*

> *ethical and moral code.* It is our biblical obligation to help our fellow man when in need. We are our brother's keeper! It is our spiritual duty to God and our ethical responsibility to ourselves and the other members of our cost-sharing ministry to care for our bodies and maintain our health. It is also our ethical responsibility to be good stewards of the resources of our community. Finally, it is our fundamental right and responsibility to make decisions about our healthcare and not to relinquish that right to others.

Vol.II.0374 (emphasis added). They also vow to live a "Godly Lifestyle," meaning:

> Members highly value the spiritual principles that our bodies are gifts from God and we must respect and care for our physical bodies. Further, we have an ethical obligation to our fellow members to live healthy lives and make wise choices so as not to place any unnecessary burdens on those who are sharing with us. As a community of people we try our best to live out Jesus Christ's mandates.

Vol.II.0375. They had to endorse, before joining the ministry, a statement of Christian beliefs affirming:

> [] We believe that our personal rights and liberties originate from God and are bestowed on us by God and are not concessions granted to us by governments or men.
>
> [] We believe every individual has a fundamental religious right to worship

> the God of the Bible in his or her own way.
>
> [] We believe it is our biblical and ethical obligation to assist our fellow man when they are in need according to our available resources and opportunity.
>
> [] We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors or habits that produce sickness or disease to others or ourselves.
>
> [] We believe it is our fundamental right of conscience to direct our own healthcare, in consultation with physicians, family or other valued advisors, free from government dictates, restraints and oversight.

Vol.II.0374. As part of the ministry, they pledged to live in accordance with Biblical principles, honor the Biblical teaching to share one another's burdens, and participate in regular worship or prayer. *Id.*

D. New Mexico Insurance Code

The New Mexico Insurance Code ("NMIC") oversees and regulates "health insurance carrier[s]" offering "health benefit plan[s]." N.M. Stat. §§ 59A-15-16, 59A-16-21.2(C). The Office of the Superintendent of Insurance and Superintendent of Insurance (collectively "OSI") enforce the NMIC. *Id.* §§ 59A-2-1, 59A-2-8, 59A-2-11. Among other things, the NMIC requires health insurance carriers to: (1) refuse to treat applicants or insureds differently based on their religions, *id.* § 59A-16-12; (2) provide contraceptives, *id.* §§ 59A-22-42, 59A-23-7.14, 59A-46-44; and (3) pay

massive fees and taxes to obtain a certificate of authority from OSI and operate in New Mexico, *id*. § 59A-6-1.

The NMIC provides full or partial exemptions to many organizations, including fraternal benefit societies, nonprofit health care plans, health maintenance organizations, prepaid dental plans, motor clubs, charitable gift annuities, certain labor organizations, and risk management divisions. *Id*. §§ 59A-1-15, 59A-1-16. For example, a wide swath of fraternal benefit societies is completely "exempt from all [] provisions of the general insurance laws of this state." *Id*. § 59A-44-40(A)(1)–(2), (F). Specifically, all "grand or subordinate lodges of societies, orders or associations" and "orders, societies or associations that admit to membership only persons engaged in one or more crafts or hazardous occupations" dating back to 1978 may conduct the business of insurance without any regulation. *Id*. § 59A-44-40(A)(1)–(2), (F). And many other fraternal benefit societies can provide "health insurance benefits," without complying with key NMIC requirements. *Id*. §§ 59A-1-15(A), 59A-7-3, 59A-44-16, 59A-44-23. Finally, any labor organization that meets certain standards and incidentally "maintains funds to assist members and their families in times of illness, injury or need, and is not for profit" is wholly exempt. *Id*. § 59A-1-16(A).

E. The New Mexico OSI's Unlawful Targeting of Religious HCSMs

On March 26, 2020, OSI issued a notice warning "consumers who have subscribed, or are considering subscribing, to health benefit plans offered by Health Care Sharing Ministries (HCSM) that these are not authorized health insurance plans." Vol.I.0128. The notice characterized HCSMs as

"unauthorized insurance product[s] that likely will not provide the protections of an authorized, regulated, and ACA compliant major medical plan." *Id*. It then warned that HCSMs "do NOT comply with the ACA, even if their materials say they do," implying that HCSMs lie and blatantly contradicting the ACA's explicit definition of HCSMs and permissible exemption for members from the individual mandate. *Id*. It represented that HCSMs may leave "important notification[s] . . . obscured or buried in fine print" and "may use marketing practices that suggests [their] plans include protections found in approved health insurance plans." *Id*. It criticized "religious or moral restrictions" in HCSMs, casting such beliefs in a negative light and offering these "restrictions" as evidence that consumers should forego participation. *Id*. The notice "urge[d] consumers" to buy health insurance instead. *Id*. The notice strongly suggested that HCSMs engage in fraud and misrepresentation, that their religious beliefs hurt consumers, and that consumers should avoid them.

OSI's March 2021 "advisory" was scathing. Vol.II.0407-0408. OSI condemned HCSMs as "scammers trying to lure people into purchasing low-quality health insurance or health insurance-like products," "low-quality product[s]," and "bad health plan[s]." *Id*. HCSMs, it charged, were "non-ACA health plan[s]" that "deny and limit health care coverage." *Id*. OSI's warnings disparaged all HCSMs with lies about their compliance with the ACA and coverage for participants.

F. OSI's Order to Gospel Light to Cease Operating in New Mexico

Nonetheless, Gospel Light continued to operate freely in New Mexico as it had since at least 2015. That all changed on November 23, 2021, when OSI issued preliminary findings and conclusions ordering Gospel Light to immediately cease operating in New Mexico. Vol.II.0241-0243. The order alleged that Gospel Light was an unregistered insurance plan and did not qualify as an HCSM under the ACA. Vol.II.00235-0236, 0240. The order accused Gospel Light of having "falsely claimed to be exempt from the ACA." Vol.II.0240. OSI later stipulated, and the OSI hearing officer recognized, that whether Gospel Light met the definition of an HCSM under the ACA was irrelevant to whether it must comply with the NMIC. Vol.II.0274.

Nonetheless, OSI continued to target Gospel Light. And after hearings and recommendations from an OSI hearing officer, on February 22, 2023, OSI ordered Gospel Light to stop operating in New Mexico until it complied with the NMIC. App.D.131a. OSI also fined Gospel Light $2,510,000. App.D.132a. On March 8, 2023, Gospel Light moved to stay the final order pending appeal. Vol.II.0457. OSI effectively denied this request and again ordered Gospel Light to immediately cease and desist from all operations in New Mexico, stripping Petitioners of protection from the ACA's mandate. Vol.II.0460.

G. Procedural History and OSI's Hostility to HCSMs During Litigation

On March 31, 2023, Petitioners filed this lawsuit, seeking declaratory and injunctive relief to stop OSI from enforcing its order or the NMIC against Gospel Light and other HCSMs. Vol.I.0010, 0086-

0087. Among their claims, Petitioners asserted that OSI's interpretations of the NMIC were preempted by federal law. Vol.I.0074-0080. Petitioners also brought a 42 U.S.C. § 1983 claim alleging that OSI's actions violated their rights under the Free Exercise Clause of the First Amendment of the U.S. Constitution. Vol.I.0055-0061. Petitioners moved for a preliminary injunction. Vol.II.0202.

Litigation further exposed OSI's hostility to Petitioners' sincerely held religious beliefs and practices. For example, in a Motion to Dismiss, OSI belittled Petitioners' religious beliefs as relying on "several highly generalized Biblical verses indicating a general obligation to be charitable." Vol.II.0482. OSI claimed Petitioners had no "particularized" religious belief based on Biblical teachings to "[b]ear one another's burdens, and so fulfil the law of Christ" and therefore had suffered no harm. *Id*. OSI derided health care sharing as nothing more than "being charitable . . . a value shared by people of all creeds and no creeds." *Id*. OSI compared Petitioners' religious practices to "donating to GoFundMe pages" and argued Petitioners should advance their religious beliefs, which OSI slighted as merely advocating "community support," through other, secular means. *Id*.

OSI's hostility toward Petitioners' religious practices and beliefs was so extreme that it told the district court that it could take enforcement action against even five individuals who pooled money to cover each other's health costs. Vol.IV.0586:22-0587:14.

Even after these proceedings, the district court denied Petitioners' request for a preliminary injunction. Petitioners appealed to the U.S. Court of

Appeals for the Tenth Circuit, which denied the request for a preliminary injunction over the dissent of Judge Carson.

Applying *Smith* on the First Amendment issues, the Tenth Circuit first determined that the law was neutral and generally applicable. For its neutrality holding, the panel considered only one issue: whether subjective government motivations exhibited clear, religious animus against Petitioners and HCSMs. App.A.16a-18a, 21a. It refused to account for the NMIC's multiple exemptions for other secular organizations. The panel then determined that the exemptions for secular organizations did not undermine the law's general applicability because the purposes of exempt secular organizations and non-exempt religious HCSMs were not comparable, and the provision of health insurance by secular organizations was only ancillary to their primary purposes. App.A.21a-24a. The panel then determined that the law survived rational basis review. App.A.24a-25a.

In a short analysis on the question of ACA preemption, the panel held that the ACA did not preempt state law because the NMIC only forced HCSMs "to choose between functioning as a nonprofit or selling commercial insurance," and Plaintiffs did "not cite any authority confirming or suggesting they have a legal right to remain a HCSM." App.A.29a. Upon finding that Petitioners were not likely to succeed on the merits, the Tenth Circuit did not reach the remaining preliminary injunction factors. App.A.32a.

Petitioners filed a Petition for Rehearing En Banc, which the Tenth Circuit denied. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition because the Tenth Circuit has decided important questions of federal law that have not been, but should be, resolved by this Court; has decided important, fundamental federal questions in ways that egregiously depart from this Court's precedents; and has entered a decision that conflicts with the decisions of other United States Courts of Appeals on the same important matters. Sup. Ct. R. 10.

The Court has granted certiorari in several cases in the same procedural posture as this one—*i.e.* on review of a denial of a preliminary injunction. For example, the Court has done so when the lower court's decision creates or deepens a circuit split. *See, e.g.*, *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *cert. granted*, 145 S. Ct. 1328 (2025). It has also done so when the case presents an issue of national importance that, if left unresolved, threatens a fundamental constitutional right. *See, e.g.*, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (implicating First Amendment religious rights); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018); *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387 (1923). Both counsel in favor of immediate relief in this Court.

I. The decision below violates the First Amendment.

Employment Division v. Smith, 494 U.S. 872 (1990), and its progeny have created confusion in the lower courts over what "neutrality" and "general applicability" require in analyzing claims under the Free Exercise Clause of the First Amendment, U.S. CONST. amend. I. The Court's most relevant precedents have involved facts at opposite ends of the spectrum. *Compare Smith*, 494 U.S. at 884 ("[an]

across-the-board criminal prohibition"), *with Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–46 (1992) (striking down law "gerrymandered with care" to apply "*only* against" religious conduct (emphasis added)). As a result, a "deep and wide circuit split" has emerged. Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5–6, 15 (2016). This leaves lower courts with a "perplexing test" that is "not [] clearly established." *Pleasant View Baptist Church v. Beshear*, 78 F.4th 286, 305 (6th Cir. 2023) (Murphy, J., concurring), *cert. denied*, 144 S. Ct. 1348 (2024).

The Tenth Circuit waded into the heat of this debate, and unfortunately, chose all the wrong sides. It made three specific doctrinal errors that further create or exacerbate existing circuit splits. Specifically, it erroneously (A) required petitioners to demonstrate clear animus to establish non-neutrality and refused to consider the disparate treatment of analogous secular exemptions in its neutrality analysis, (B) applied a general applicability standard that turned on whether the *purposes* of secular and religious organizations were comparable and whether exempt secular organizations' provision of health insurance was *ancillary* to their purposes, and (C) failed to hold that religious animus alone violates the Free Exercise Clause under *Masterpiece Cakeshop*. Given the divisions in the lower courts and these grave errors of constitutional law in violation of this Court's precedent, this Court should grant certiorari.[2]

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[2] The First Amendment issues are ripe for review. OSI has already admittedly targeted Petitioners because of their religious beliefs in public documents. No further fact-finding is necessary.

A. The Tenth Circuit erroneously applied a heightened standard for neutrality.

First, the Tenth Circuit erroneously imposed a heightened standard for neutrality in holding that Petitioners must prove clear animus toward religion to show non-neutrality. App.A.21a ("Plaintiffs have not shown that OSI's motivations were based on religious animus rather than enforcement of the NMIC."); App.A.18a ("whether government action is neutral depends on the government's motivations"); App.A.44a, 46a (Carson, J. dissenting) ("The majority does not consider the possibility of a religious gerrymander, but rests on its animus finding.").

To be sure, government officials' statements of animosity can inform the neutrality analysis. *See, e.g.*, *Lukumi*, 508 U.S. at 540–41. They may demonstrate that a seemingly neutral law is not neutral after all. *See, e.g.*, *Masterpiece Cakeshop*, 584 U.S. at 638–39. Officials' statements, however, need not rise to the Tenth Circuit's clear animus standard to be non-neutral. As this Court recently held in *Catholic Charities*, "invidious discrimination" is not the standard to trigger strict scrutiny. 145 S. Ct. at 1592–93 (quotation omitted). "The Free Exercise Clause bars even subtle departures from neutrality on matters of religion." *Masterpiece Cakeshop*, 584 U.S. at 638 (quotation omitted). Disparagement may be obvious when state actors describe another's faith "as despicable." *Id*. at 635. It also persists when state actors characterize religious beliefs "as merely rhetorical—something insubstantial and even insincere." *Id*. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534. Any departure from the "neutral and respectful

consideration" the Constitution demands warrants strict scrutiny. *Masterpiece Cakeshop*, 584 U.S. at 634.

And importantly, government officials' words and subjective motivations do not conclude the neutrality analysis. *Lukumi*, 508 U.S. at 542–45 (looking also to texts of ordinances, secular exemptions, and proscriptions on religious conduct compared to the government's stated interests to determine if the ordinances were neutral). In fact, *Lukumi* instructs lower courts to examine "the object of the *laws* at issue," not the "subjective motivation of the *lawmakers*" to determine whether a law is neutral. *Id.* at 558 (Scalia, J., concurring in part and in judgment) (refusing to join the opinion of the Court as to parts that departed from this "general focus" of the opinion). Whether the government "actually *intended* to disfavor the religion" of a particular group is irrelevant. *Id.* (Scalia, J., concurring in part and in judgment); *see also Cath. Charities*, 145 S. Ct. at 1593 (holding "[a] statute that excludes religious organizations from an accommodation" on certain grounds violates the principle of neutrality because it "facially favors some denominations over others," regardless of lawmakers' intent). Rather, when examining the "object" of the law, this Court has instructed lower courts to look beyond facial neutrality and "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (quoting *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664, 696 (1993) (Harlan, J. concurring)). "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. Most notably, secular exemptions and prohibitions on religious conduct demonstrate a

potential religious gerrymander. *Id*. at 537 (noting when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason'" (quoting *Smith*, 494 U.S. at 884)). Evidence that the law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends" is also relevant. *Id*. at 538. Finally, any differentiation among religious sects "based on the content of their religious doctrine" triggers strict scrutiny. *Cath. Charities*, 145 S. Ct. at 1591. Because the Tenth Circuit used the wrong standard (*i.e.* by treating a law's "object" as a pure question of subjective intent and requiring proof of clear animus) and refused to analyze these objective factors, it failed to identify the blatant "religious gerrymander[]" right in front of it. *Lukumi*, 508 U.S. at 537.

The Tenth Circuit also contributed to an existing circuit split. While circuits agree that the "object" of a law cannot be to suppress religious conduct based on *Lukumi*, they divide over what "object" means.

In issuing this decision, the Tenth Circuit joined the Second and Third Circuits, which have adopted a subjective approach to neutrality that focuses exclusively on the motives of government officials. *Spivack v. City of Philadelphia*, 109 F.4th 158, 167 (3d Cir. 2024) (describing the "neutrality inquiry" which "focus[es]" on the "policymakers' subjective intent," "purpose," or "motivation," and distinguishing that inquiry from "general applicability" which "focuses on the objective sweep of the policy" (citation omitted)); *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th

130, 145, 149 (2d Cir. 2023) (holding plaintiffs "must demonstrate" government officials' "hostility," "animosity," "distrust," or "a negative normative evaluation," which "denote a subjective state of a mind on a government actor's part," to show non-neutrality (quotation omitted)).[3]

The Eleventh and Seventh Circuits correctly recognize that the neutrality inquiry does not require a showing of clear animus and that any language in *Lukumi* that focused on the subjective motivations of policymakers was joined only by Justices Kennedy and Stevens. *See, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (holding without regard to officials' subjective motives that a facially neutral ordinance failed the neutrality requirement because it was underinclusive, overbroad, and selectively enforced against religious conduct); *id.* at 1234 n.16 ("We reject Surfside's contention that the SZO is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion in enacting the SZO. Under *Lukumi,* it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation." (citing *Lukumi*, 508 U.S. at 540–42 (Kennedy, J.,

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[3] However, earlier Second Circuit case law suggests a more objective approach. *New Hope Fam. Servs. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (emphasizing that "the effect of a law in its real operation" may be "strong evidence of its object"). This divergence within the Second Circuit reflects the broader uncertainty over whether neutrality should be judged by subjective intent or objective effect.

concurring); *id.* at 558 (Scalia, J., concurring in part and in judgment))); *Grossbaum v. Indianapolis–Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292 n.3 (7th Cir. 1996) (emphasizing that "subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to . . . as the 'object' of a law," which requires courts to analyze the law's text and operation, not the "motive behind the ordinances" (quoting *Lukumi*, 508 U.S. at 533)); *id.* (noting that "Justice Kennedy's investigation into motive (in Part IIA–2 of his opinion [in *Lukumi*]) was joined by only Justice Stevens").

The correct constitutional standard for non-neutrality is recognized by the Seventh and Eleventh Circuits: whether the law targets religious conduct through its text, operation, or enforcement. The First Amendment does not require a showing of clear animus or subjective discriminatory motives of government enforcers. The Court should intervene to mend this deepening divide.

When the proper standard is applied, both government officials' hostile statements toward Petitioners' religious beliefs and the NMIC's religious gerrymander of HCSMs reveal the law's non-neutrality.

First, OSI has enforced the NMIC in a non-neutral way against religious entities through its shifting enforcement policies and expressions of hostility. In 2019, OSI recognized that HCSMs "do not offer insurance." Vol.I.0126-0127. One year later, OSI began targeting Gospel Light and all other HCSMs. Vol.I.0128-0129, 0199-0201. Its 2021 public advisory warned New Mexicans to avoid HCSMs, which it labeled as "scammers trying to lure people into purchasing low-quality health insurance or health

insurance-like products." Vol.II.0407-0408. OSI erroneously warned that HCSMs are an "unauthorized insurance product that likely will not provide the protections of an authorized, regulated, and [ACA] compliant major medical plan," "urge[d] consumers" to buy health insurance rather than join HCSMs, and accused HCSMs of burying important notifications "in fine print." Vol.I.0128. After OSI brought an enforcement action against Gospel Light, and Petitioners challenged the action, OSI sharply criticized Petitioners' religious beliefs, belittling their religious practices as merely "being charitable," "a value shared by people of all creeds and no creeds." Vol.II.0482. OSI challenged Petitioners' beliefs as illegitimate because Petitioners did not "produce[] citations to Scriptural or other texts" referencing HCSMs and instead allegedly "base[d] their case on vague Biblical verses that, essentially, require them to be charitable" while "[m]any other Christians, not to mention atheists and members of non-Christian faiths, manage to live by such a commandment without participating" in HCSMs. Vol.III.0550. Such actions targeting Petitioners for how they worship and practice their religion plainly violate the commands of the First Amendment. *Cath. Charities*, 145 S. Ct. at 1591.

Furthermore, OSI's counsel mocked Petitioners' beliefs, asking whether there is "anywhere in the scripture that says something about, along the lines that, thou shall be a member of a healthcare sharing ministry." Vol.IV.0686. OSI equated Petitioners' beliefs to "donating to GoFundMe pages" and contended Petitioners could use GoFundMe to scratch any religious itch. Vol.II.0482. Yet New Mexico also insinuated that even five people

who agreed to share healthcare costs after church could be targeted for unlawfully practicing insurance. Vol.IV.0586-0587. OSI has used the NMIC to unlawfully target Petitioners and HCSMs. Such action is not neutral, regardless of whether OSI betrayed clear animus.

Second, the NMIC is not neutral toward religious HCSMs because it operates to create a religious gerrymander around them. The NMIC creates abundant exemptions for secular organizations, but not religious HCSMs. N.M. Stat. §§ 59A-1-15, 59A-1-16 (fully or partially exempting fraternal benefit societies, nonprofit health care plans, health maintenance organizations, prepaid dental plans, motor clubs, charitable gift annuities, certain labor organizations, and risk management divisions). In doing so, the NMIC singles out religious HCSMs for disparate, unfavorable treatment. *Lukumi*, 508 U.S. at 534; *see also infra* Part I.B.

B. The Tenth Circuit erroneously applied a heightened standard for general applicability.

The panel majority also erroneously held the law is generally applicable because Gospel Light's *purposes* differ from the purposes of exempt, secular organizations—including fraternal benefit societies and labor unions—and because secular organizations' provision of health insurance is only "incidental or ancillary" to their primary purposes. App.A.23a-24a. These two new rules—the comparable purposes rule and ancillary conduct rule—violate this Court's precedents and threaten to defang *Smith*'s "generally applicable" inquiry.

To begin, the comparable purposes rule contravenes well-established precedent. In *Tandon v.*

Newsom, this Court held that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." 593 U.S. 61, 62 (2021) (per curiam). To determine "whether two activities are comparable for purposes of the Free Exercise Clause," they "must be judged against the asserted government interest that justifies the regulation at issue." *Id.* at 62–63. They are comparable if they "undermine[] the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021); *see also Lukumi*, 508 U.S. at 543 (assessing comparability based on whether secular conduct "endangers [the government's] interests in a similar or greater degree than" religious conduct). "Comparability is concerned with the *risks various activities pose*, not the *reasons why* people gather." *Tandon*, 593 U.S. at 63 (emphasis added). Circuit courts across the country have confirmed. *See, e.g.*, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 686, 689 (9th Cir. 2023).

The Tenth Circuit departed from this Court as well as every other circuit to reach the issue by solely comparing secular and religious organizations' purposes. Judge Carson, while mostly correct throughout his dissent, also misapplied the test by focusing on secular and religious organizations' *activities*, rather than their risks. Other circuits have made clear that the *risks* religious and secular organizations pose to a government's stated interest are the relevant comparators to assess whether secular exemptions undermine a given law's general applicability. *See, e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dept.*, 984 F.3d 477, 480

(6th Cir. 2020) ("Whether conduct is analogous (or 'comparable') for purposes of this rule does not depend on whether the religious and secular conduct involve similar forms of activity. Instead, comparability is measured against the *interests* the State offers in support of its restrictions on conduct."); *Does 1-6 v. Mills*, 16 F.4th 20, 31 (1st Cir. 2021); *We the Patriots v. Hochul*, 17 F.4th 266, 286 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *Spivack v. City of Philadelphia*, 109 F.4th 158, 175–77 (3d Cir. 2024). The Court should grant certiorari to correct this confusion.

Second, no other circuit has adopted the Tenth Circuit's novel rule linking comparability to whether conduct is "ancillary" to an organization's overarching purpose. By "focusing on whether insurance-like activity is 'ancillary' to the mission of fraternal organizations" to assess whether the purposes of fraternal organizations and HCSMs are comparable, the Tenth Circuit created a new rule that imposes more onerous requirements on religious organizations than the First Amendment and this Court's precedents require. App.A.53a (Carson, J. dissenting); *Tandon*, 593 U.S. at 62. This is a grave error worthy of this Court's intervention.

Under the proper comparability analysis, it is clear that New Mexico's law is not generally applicable. OSI's asserted interest in enforcing the NMIC "is the protection of the consumers of New Mexico by the proper regulation of the insurance industry." Appellee Brief 25.[4] But many organizations

[4] All "Appellee Brief __" citations are to Defendants-Appellees' Brief filed in the Tenth Circuit in *Renteria v. Kane*, Case No. 23-2123.

are fully or partially exempt from the regulation, including fraternal benefit societies, nonprofit health care plans, health maintenance organizations, prepaid dental plans, motor clubs, charitable gift annuities, certain labor organizations, and risk management divisions. N.M. Stat. §§ 59A-1-15, 59A-1-16. For example, any labor organization that incidentally "maintains funds to assist members and their families in times of illness, injury or need, and is not for profit" and meets certain standards is exempt. *Id.* § 59A-1-16(A). All "grand or subordinate lodges of societies, orders or associations" and "orders, societies or associations that admit to membership only persons engaged in one or more crafts or hazardous occupations" dating back to 1978 that provide actual insurance are wholly exempt. *Id.* § 59A-44-40(A)(1)–(2), (F). Other fraternal benefit societies can provide "health insurance benefits" without complying with key NMIC requirements. *Id.* §§ 59A-1-15(A), 59A-7-3, 59A-44-16, 59A-44-23.

New Mexico's broad purported interest in protecting consumers through insurance regulation is no more impacted by an exemption for HCSMs than by exemptions for these organizations. For example, because fraternal benefit societies provide actual health insurance, unlike Gospel Light, exemptions for them undermine New Mexico's stated interest more than any HCSM exemption. *Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (holding a single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct); *Midrash Sephardi, Inc.*, 366 F.3d at 1235 (holding a single exemption for lodges and private clubs "violates the principles of neutrality and general applicability

because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues"). And because Gospel Light is not insurance, recognition of its HCSM status under the ACA and an NMIC exemption would pose no harm and would, in fact, further "proper regulation of the insurance industry." Appellee Brief 25.

The Tenth Circuit's rules would render the laws in *Lukumi*, *Fulton*, *Tandon*, and almost all, if not all, other cases generally applicable. Religious organizations exist for sectarian purposes that differ from those of their secular counterparts. Protection only for religious organizations that shed their religious missions for secular ones to satisfy this heightened comparability standard would be no First Amendment protection. This Court should intervene to correct this grave error.

C. The Tenth Circuit failed to apply the correct standard for official expressions of hostility.

Fourth, the Tenth Circuit failed to state and hold that OSI's animus toward religious individuals alone demonstrates a violation of the First Amendment. This Court has made clear that official hostility toward religion accompanied by government action that burdens religious exercise is alone sufficient to establish a Free Exercise Clause violation. *Masterpiece Cakeshop*, 584 U.S. at 639 (invalidating state action because government officials made "official expressions of hostility" toward the petitioner's religious beliefs and forgoing strict scrutiny analysis); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 n.1 (2022) ("A plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or

policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry." (quoting *Masterpiece Cakeshop*, 584 U.S. at 639)); *Dr. A v. Hochul*, 142 S. Ct. 552, 553–55 (2021) (Gorsuch, J., dissenting from denial of injunctive relief) (reasoning that New York's vaccine mandate was likely unconstitutional as applied, given the governor's statement that religious objectors were not "listening to God," which "exude[d] suspicion of those who hold unpopular religious beliefs"). These opinions show that official hostility, when it accompanies a burden on religious practice, independently violates the Free Exercise Clause.

The Tenth Circuit failed to apply that framework in the instant case. It treated evidence of animus not as a standalone path to a First Amendment violation, but as one component of its broader neutrality analysis. App.A.16a-21a. In doing so, the Tenth Circuit departed from *Masterpiece Cakeshop*'s holding that even a single official expression of hostility can render the action constitutionally suspect.

It also departed from and split with other circuits, which have faithfully applied this precedent. *See, e.g.*, *Couzens v. City of Forest Park*, 114 F.4th 571, 580 n.6 (6th Cir. 2024) (holding a Free Exercise claim can proceed under two distinct theories: (1) the challenged policy burdens a sincere religious practice pursuant to a policy that is not neutral or generally applicable, or (2) the government action burdening religion is accompanied by "official expressions of hostility" toward religious belief (quotation omitted)); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020); *King v. City of New York*, No. 22-231,

2023 WL 2398679, at *2 (2d Cir. Mar. 8, 2023) (similar).

When this proper standard is applied, it is evident that OSI's "official expressions of hostility" toward Petitioners, as discussed in *supra* Part I.A., independently violate the Free Exercise Clause without any strict scrutiny analysis. *Cf. Masterpiece Cakeshop*, 584 U.S. at 639.

II. The decision below extinguishes the ACA's carefully crafted carveout for HCSMs and their participants.

Separately, the Court should grant certiorari to correct New Mexico's *de facto* elimination of a critical exemption under the ACA for religious objectors. Congress spilled much ink (906 pages to be exact) in drafting the ACA. And courts across the country and this Court have spilled much ink in interpreting its sweeping reconstruction of American healthcare law. That's especially true for the individual mandate. This Court has previously determined that Congress did act pursuant to its lawful Article I authority when it initially enacted the ACA individual mandate. *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012). And this Court has granted certiorari on the question of whether Congress acted pursuant to its lawful Article I authority when it removed penalties from the ACA individual mandate. *California v. Texas*, 593 U.S. 659, 666–68 (2021) (granting certiorari on the question but dismissing for lack of standing). But this Court has yet to address the ACA's preemptive effect on state insurance regulation under the Supremacy Clause, even though like Article I, this closely related constitutional provision similarly "limits state sovereignty" and "indirectly restricts the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S.

453, 470–71 (2018). This imperative question of national importance should be settled by this Court.

Review is particularly urgent because the Tenth Circuit's decision has grave and immediate ramifications beyond the Circuit's borders. In upholding New Mexico's requirement for HCSMs to license as for-profit insurance companies, the Tenth Circuit puts HCSMs and their participants *everywhere* in a lose-lose situation. Either HCSMs must register as for-profit insurance companies in New Mexico and consequently, lose their 501(c)(3) statuses and ACA exemptions, 26 U.S.C. §§ 501(m)(1), 5000A(d)(2)(B)(ii)(I), or HCSMs must cease operations in New Mexico and lose their ACA exemptions because they no longer share expenses "without regard to the State in which a member resides," *id.* § 5000A(d)(2)(B)(ii)(II). As such, this single order from one State will effectively render HCSMs extinct and unravel Congress's entire compromise. *Id.* § 5000A(d)(2)(B)(ii)(IV) (requiring HCSMs to be in continuous operation and without interruption since at least December 31, 1999, to qualify for the exemption).

Worse still, the Tenth Circuit applied the incorrect standard to reach this conclusion. It reasoned that the New Mexico law is not preempted because it only forces Gospel Light to "choose between functioning as a nonprofit or selling commercial insurance." App.A.29a. Even if this analysis were correct (it is not, as explained above), it is not the law to assess preemption claims.

The Ninth Circuit has already determined that the ACA individual mandate preempts conflicting state laws. *See, e.g.*, *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014). The Tenth Circuit departed from its sister

circuit and became the first circuit to hold that the ACA individual mandate, including its core conscience protection for participants in HCSMs, 26 U.S.C. § 5000A(d)(2)(B)(ii), does not preempt state laws that eliminate this exemption. "Yet, even if no other circuit ever follows the [Tenth] Circuit's lead, its outlying rule will have outsized effects." *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1488 (2025) (Gorsuch, J., dissenting from the denial of certiorari). The Court should intervene to correct this erroneous legal standard and to settle this important question on a monumental statute that impacts every aspect of American healthcare.[5]

The Supremacy Clause of the U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. "This means that when federal and state law conflict, federal law prevails and state law is preempted." *Murphy*, 584 U.S. at 471. "[C]onflict preemption . . . occurs 'when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *United States v. Locke*, 529 U.S. 89, 109 (2000) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01 (1989)); *see also Gade*

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[5] Furthermore, the preemption question is ripe for review because it involves pure questions of law. The Court need only examine the federal statute as a whole and the state law or interpretation of state law to determine if a conflict exists. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012). The State has already construed the state law through OSI's determination. *Cf. id.* at 415. No further factfinding is necessary to determine whether Petitioners are likely to succeed on the merits.

v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 103 (1992) ("A state law . . . is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal." (quotation omitted)). Federal agency action can also have a preemptive effect over conflicting state laws. *Locke*, 529 at 109–10.

Congress's intent to preempt is critical to the inquiry. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Congress's intent, if not express, may be inferred from the statutory language and framework. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). This Court has emphasized the importance of interpreting the words of the ACA "in their context and with a view to their place in the overall statutory scheme." *King*, 576 U.S. at 486 (citation omitted). The Court's "duty, after all, is to construe statutes, not isolated provisions." *Id.* (quotation omitted).

Congress's intent to preempt state laws is evident from the comprehensive nature of the ACA. The statute's 906 pages and thousands of pages of regulations span nearly every aspect of American healthcare law. At the heart of this scheme lies the individual mandate, which Congress carefully calibrated to protect HCSM members like Petitioners from the ACA's objectionable demands on their consciences—including contraceptives, abortifacients, and contraceptive counseling. 42 U.S.C. § 300gg-13(a)(4). To obtain these protections for their members, HCSMs must operate as nonprofit, tax-exempt organizations whose "members . . . share a common set of ethical or religious beliefs and share medical expenses . . . in accordance with those beliefs" and "without regard to the State in which a member resides or is employed." 26 U.S.C.

§ 5000A(d)(2)(B)(ii)(I)–(II). The exemption ensures that Americans would have access to HCSMs in every State.

The New Mexico order conflicts with the ACA and thereby violates the Supremacy Clause in at least six ways:

First, Congress necessarily defined HCSMs as "not insurance" when it exempted HCSM participants from the ACA's individual mandate. 26 U.S.C. § 5000A(d)(2)(B). The HCSM exemption would have been unnecessary had Congress understood HCSMs to provide insurance because HCSM participants could have satisfied the individual mandate without any exemption. Because OSI's interpretation that HCSMs are insurance would render the federal safe harbor meaningless, it creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the ACA and must be preempted.

Second, because OSI's order prevents Gospel Light and other HCSMs from operating in New Mexico, the order prevents Gospel Light from complying with federal law to share medical expenses equally nationwide "without regard to the State in which a member resides," 26 U.S.C. § 5000A(D)(2)(B)(ii)(II), because New Mexico residents must necessarily be excluded from health care sharing. OSI's order thereby strips Petitioners specifically and Gospel Light members nationwide of their ACA exemption due to non-compliance with ACA requirements. OSI's interpretation of state law makes Gospel Light's "compliance with both federal and state regulations" impossible and must be preempted.

Third, Gospel Light cannot simultaneously comply with (i) the ACA and IRC requirements to facilitate the sharing of medical expenses only among "members . . . which share a common set of ethical or religious beliefs" and (ii) the NMIC prohibition on discrimination based on religion. N.M. Stat. § 59A-16-12(A)–(B). In short, an organization cannot be both an HCSM as defined under the ACA and an insurance carrier under New Mexico law. Accordingly, OSI's order to comply with the NMIC renders "compliance with both federal and state regulations" utterly impossible and must be preempted.

Fourth, the IRC's requirements for an HCSM reflect Congress's intent that HCSMs are not regulable as insurers. To qualify for the exemption, an HCSM must be a 501(c)(3) nonprofit organization, which cannot substantially provide "commercial-type insurance." 26 U.S.C. §§ 501(m)(1), 5000A(d)(2)(B)(ii)(I). The Tenth Circuit scoffs at this as a non-conflict, saying Gospel Light can simply "choose between functioning as a nonprofit or selling commercial insurance." App.A.29a. But if health care sharing is insurance, then no ministry could qualify as an ACA-exempt HCSM, notwithstanding Congress's intent to exempt such entities and protect Petitioners' conscience rights. Accordingly, OSI's interpretation of state law creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the ACA and must be preempted.

Fifth, and relatedly, the IRS has recognized Gospel Light's status as a 501(c)(3) tax-exempt organization for over a decade. Vol.II.0353-0354. Again, the IRS may recognize an entity's 501(c)(3) status "*only if no substantial part* of its activities

consists of providing *commercial type insurance*.'" 26 U.S.C. § 501(m)(1) (emphasis added). Therefore, the IRS has already determined that Gospel Light does not "substantially" provide "commercial insurance." *Id*. OSI has negated this determination by reaching the opposite conclusion and has thereby acted to impede the federal government's authority to create a space for conscience protection.

Sixth, CMS has recognized Gospel Light's status as a 501(c)(3), ACA-exempt HCSM for over a decade. Vol.II.0355-0356. In doing so, CMS has entitled Petitioners and all Gospel Light members to an exemption from the ACA individual mandate. OSI has stripped Petitioners of their rights under federal law by seeking to override CMS's determination. Accordingly, their action is preempted.

By interpreting state insurance law to create an irreconcilable conflict with the ACA and gutting the determinations of CMS and IRS, OSI has created an overwhelming obstacle to Congress's purposes and objectives in the ACA, rendered simultaneous compliance with federal and state law impossible, and sought to overrule federal determinations on federal law. For all the above reasons, OSI's interpretation of New Mexico insurance law, contrary to federal law, to label Gospel Light's and Petitioners' ministry as "insurance" is preempted by federal law under the Supremacy Clause. This Court should grant certiorari to correct this critical error, provide clarity to the States and lower courts, and block continued frustration of Congress's objective of protecting HCSM members like Petitioners from an individual mandate to fund practices which their religious beliefs compel them to reject.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 27, 2025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-2123
(D.C. No. 1:23-CV-00276-MLG-KK)
(D. N.M.)

BREANNA RENTERIA; LAURA SMITH;
TAMMY WATERS,

Plaintiffs-Appellants,

v.

NEW MEXICO OFFICE OF THE
SUPERINTENDENT OF INSURANCE; ALICE T.
KANE, SUPERINTENDENT OF INSURANCE,
IN HER OFFICIAL CAPACITY,

Defendants-Appellees,

and

GOSPEL LIGHT MENNONITE CHURCH
MEDICAL AID PLAN, D/B/A LIBERTY
HEALTHSHARE,

Plaintiff.

Appendix A

Before **CARSON**, **ROSSMAN**, and **FEDERICO**, Circuit Judges. CARSON, Circuit Judge, dissenting.

ORDER AND JUDGMENT*

This appeal arises from an enforcement action taken by the New Mexico Office of the Superintendent of Insurance (OSI) against Gospel Light Mennonite Church Medical Aid Plan (d/b/a Liberty HealthShare) (Gospel Light), which resulted in a final order that required Gospel Light to cease operating as a health care sharing ministry (HCSM) in New Mexico. Plaintiffs are Breanna Renteria, Laura Smith, and Tammy Waters (Plaintiffs), three members of Gospel Light.[1] Defendants are OSI and Alice T. Kane, the Superintendent of Insurance, in her official capacity. Plaintiffs sought a preliminary injunction to enjoin OSI from enforcing the final order, which the district court denied. Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we affirm the denial of the preliminary injunction.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

1. As detailed more fully below, the district court abstained from hearing all claims raised by Gospel Light, the corporate entity, based upon the *Younger* abstention doctrine and dismissed these claims with prejudice. *See* Aplt. App. V at 100. Although Gospel Light appealed that order generally, it did not specifically appeal the dismissal so that decision is not before us in this appeal. Nevertheless, for simplicity's sake, we will refer to the individual Plaintiffs interchangeably with Gospel Light.

Appendix A

I

A

The Internal Revenue Code (IRC) defines HCSMs as tax-exempt § 501(c)(3) organizations, "members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs." 26 U.S.C. § 5000A(d)(2)(B)(ii)(I)-(II). An HCSM must share expenses "without regard to the State in which a member resides or is employed," must allow members to "retain membership even after they develop a medical condition," and must have existed and shared expenses "continuously and without interruption since at least December 31, 1999." *Id.* § 5000A(d)(2)(B)(ii)(II)-(IV).

In recent years, OSI issued statements warning the public about HCSMs operating in New Mexico. In a press release dated December 3, 2019, OSI stated:

> A few health care sharing ministries (also known as health care sharing organizations) operate in New Mexico. These organizations do not offer insurance, but may present plans in a way that look and feel similar to a health insurance plan. Members of these organizations "share" health costs on a voluntary basis. Consumers should be aware that these plans have no obligation to pay for any medical services and have no requirement to cover any particular categories of health care services, such as preventive care.

Aplt. App. I at 129-30. On March 26, 2020, OSI issued another press release that described HCSMs as "an unauthorized insurance product that likely will not provide the protections of an authorized, regulated, and [Affordable Care Act (ACA)] compliant major medical plan"; listed examples of potential gaps in coverage a consumer could face; and urged consumers to purchase "an ACA compliant plan." *Id.* at 131. Finally, OSI issued a "Consumer Advisory" in March of 2021[2] that stated:

> As the Special Enrollment Period gets underway, OSI wants consumers to know that there are scammers trying to lure people into purchasing low-quality health insurance or health insurance-like products. These low-quality products DO NOT meet the requirements of the ACA because they offer extremely limited coverage. These might be short-term plans, trade association plans, health care sharing ministries or other limited plans. These bad plans can leave consumers stuck with huge medical bills from doctors and hospitals. These non-ACA plans deny and limit health care coverage by:
>
> ✓ Limiting coverage for pre-existing conditions
>
> ✓ Limiting prescription coverage

2. The consumer advisory itself does not display a year. Plaintiffs asserted in their motion for a preliminary injunction that OSI issued the consumer advisory in 2021.

- ✓ Limiting coverage for hospitalizations and emergency rooms
- ✓ Limited or no coverage for mental health / behavioral health treatment
- ✓ Limiting coverage for outpatient / same-day surgery

Id. at 200.

B

Gospel Light's members make monthly voluntary gifts to assist other members with medical expenses but nonetheless maintain ultimate responsibility for their own medical bills. Members must live by Christian standards and may not request sharing for certain medical expenses, for example, contraceptives, abortion, gender affirming care, or alcohol or drug rehabilitation.

On July 1, 2020, OSI received a consumer complaint in which a Gospel Light member asserted that the HCSM was "continuing to take money and not give [the consumer his] reimbursement." Aplt. App. II at 56. On May 12, 2021, OSI received another consumer complaint in which a different member asserted that despite paying her premiums on time, Gospel Light canceled a payment for a hospital bill after sending it to the wrong address and subsequently put the consumer "back on the 6 month wait." *Id.* at 59.

After investigating these complaints, OSI initiated an administrative enforcement action. It also ordered Gospel Light "to cease and desist from transacting insurance business in New Mexico," to provide OSI with data on Gospel Light's plans sold in New Mexico, and to show cause why OSI should not fine Gospel Light for each unauthorized insurance transaction. *Id.* at 43.

Gospel Light requested a hearing, and an OSI hearing officer found that Gospel Light "pa[id], indemnif[ied], or guarantee[d] [its] members as to loss from certain specified contingencies, perils, or risks," and as such, met the New Mexico definition of insurance. *Id.* at 123. The hearing officer also found that Gospel Light sold benefit plans or insurance without a certificate of authority issued by OSI. Based on these conclusions, the hearing officer recommended that OSI fine Gospel Light $10,040,000 and order Gospel Light to cease operations in New Mexico until it complied with the New Mexico Insurance Code (NMIC). On February 22, 2023, in a final order, OSI adopted the hearing officer's recommendation that it should order Gospel Light to cease operations until it complied with the NMIC but reduced the fine to $2,510,000.

II

Plaintiffs appealed OSI's final order in New Mexico state court and filed a complaint in the United States District Court for the District of New Mexico. In federal court, Plaintiffs asserted, *inter alia*, the following federal claims:

- Claim 1: 42 U.S.C. § 1983 claim for violations of the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause based on OSI's failure to act neutrally toward religion;

- Claim 2: § 1983 claim for violation of the Free Exercise Clause based on OSI's failure to treat both secular and religious activities in a generally applicable manner;

- Claim 3: § 1983 claim for violation of the Establishment Clause based on OSI's preferential treatment to entities that do not share Plaintiffs' faith;

- Claim 4: § 1983 claim for violation of the Free Speech Clause based on OSI's infringement of Plaintiffs' rights to express themselves without regard to the content of their speech;

- Claim 5: § 1983 claim for violation of the Free Speech and Assembly Clauses based on OSI dictating Gospel Light's membership;

- Claims 9 and 10: federal preemption and declaratory judgment claims under which Plaintiffs argued that OSI's final order conflicted with the McCarran-Ferguson Act (MFA), the ACA, and the IRC.

Plaintiffs moved for a preliminary injunction, primarily arguing that the enforcement of OSI's final order would violate their rights under the Free Exercise Clause as alleged in Claims 1 and 2. Defendants responded in opposition and also filed a motion to dismiss based on, *inter alia*, the *Younger* abstention doctrine. On June 2, 2023, the district court held a hearing on the pending motions and ordered the parties to file supplemental briefing. In this supplemental briefing, the parties advanced arguments about Plaintiffs' likelihood of success on the merits of the Free Exercise Clause claims (Claims 1 and 2) and the federal preemption claims (Claims 9 and 10).

On July 14, 2023, the district court granted OSI's motion to dismiss in part, applying the *Younger* abstention doctrine to dismiss Gospel Light as an organizational plaintiff from the federal suit because the state court provided an adequate forum for Gospel Light's claims and because an important state interest was at play. The district court also dismissed the state law claims based upon sovereign immunity. In that same opinion, the district court denied Plaintiffs' motion for a preliminary injunction, very briefly reasoning that any irreparable harm was too speculative because it was uncertain whether the state court would enforce OSI's final order. On August 4, 2023, Plaintiffs gave "notice of the filing of an appeal, to the United States Court of Appeals for the Tenth Circuit, of the *Memorandum Opinion and Order Granting in Part Motion to Dismiss and Denying Motion for Preliminary Injunction*[,] . . . taken against the New Mexico Office of the Superintendent of Insurance and Alice T. Kane, Interim Superintendent of Insurance in

her official capacity." Aplt. App. V at 104. This filing gave notice that Plaintiffs were appealing the July 14, 2023, district court opinion and order denying their motion for a preliminary injunction.

The New Mexico state court subsequently issued a decision enforcing OSI's final order against Gospel Light. Thereafter, in federal court, Plaintiffs filed an emergency motion pursuant to Federal Rule of Civil Procedure 59 to reconsider the denial of the preliminary injunction.

On August 30, 2023, this court granted Plaintiffs' motion to hold their appeal in abeyance until the federal district court could rule on the motion to reconsider, which it did on October 12, 2023. In that order, the federal district court (1) granted the motion to reconsider to the extent that the state court order was new evidence and (2) again denied Plaintiffs' request for a preliminary injunction. Plaintiffs did not file another notice of appeal with this court, and this appeal proceeded to briefing.

III

A

This court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Gen. Motors Corp. v. Urb. Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). "A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings," *id.* (quoting *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006)), or acts in a manner that

"is arbitrary, capricious, or whimsical," *Amoco Oil Co. v. EPA*, 231 F.3d 694, 697 (10th Cir. 2000) (quoting *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)).

"Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003). The grant of a preliminary injunction is "the exception rather than the rule." *Gen. Motors Corp.*, 500 F.3d at 1226 (quoting *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984)). To obtain injunctive relief, "a party generally must demonstrate: (1) a substantial likelihood of success on the merits, (2) irreparable injury in the absence of the injunction, (3) its threatened injury outweighs the harm to the opposing party under the injunction, and (4) the injunction is not adverse to the public interest." *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1139 n.2 (10th Cir. 2017). When the government is the opposing party, factors three and four merge. *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

B

Before addressing the merits of the parties' arguments, we must first examine which district court decisions are before us on appeal. Here is the relevant timeline:[3]

July 14	District court order denying Plaintiffs' motion for a preliminary injunction

3. All events listed occurred in 2023.

Appendix A

Aug 4	Plaintiffs' notice of appeal filed with the district court
Aug 9	Plaintiffs' motion to reconsider filed with the district court
Aug 25	Plaintiffs' unopposed motion to hold appeal in abeyance filed with the Tenth Circuit
Aug 30	Tenth Circuit order granting motion to abate the appeal
Oct 12	District court order granting reconsideration but again denying request for a preliminary injunction
Oct 13	Tenth Circuit order lifting abatement of appeal with appeal proceeding to briefing

Under Federal Rule of Appellate Procedure (FRAP) 4, "[a] party intending to challenge an order disposing of [a Rule 59 motion] . . . must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(B)(ii). "Put differently, '[w]hen an appellant challenges an order ruling on a [Rule 59 motion], a new or amended notice of appeal is necessary . . . .'" *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1160 (10th Cir. 2023) (quoting *Husky Ventures, Inc. v. B55 Invs., Ltd.*, 911 F.3d 1000, 1010 (10th

Cir. 2018)); *see also Wall Guy, Inc. v. FDIC*, 95 F.4th 862, 870-875 (4th Cir. 2024) ("[A] notice of appeal filed *before* the district court has even announced a decision on a future or pending motion cannot confer appellate jurisdiction over an appeal from a later order related to that motion . . . . Rule 4(a)(4)(B)(ii) explicitly required [the appellants] to file a new or amended notice of appeal[.]").

The provision in FRAP 4 stating that a notice of appeal "becomes effective to appeal a judgment or order" once an order disposing of a motion for reconsideration is entered, refers to the appeal of the judgment or order entered *before* the notice of appeal. Fed. R. App. P. 4(a)(4)(B)(i). Here, Plaintiffs filed a notice of appeal before the district court ruled on their motion for reconsideration, and Plaintiffs did not file "a new or amended notice of appeal" after the district court ruled on that motion. *See Matney*, 80 F.4th at 1160 (quoting *Husky Ventures, Inc.*, 911 F.3d at 1010).

Plaintiffs' motion for reconsideration before the district court, filed five days after they filed a notice of appeal with this court, operated like a tolling motion under FRAP 4(a)(4)(A). We said as much in our Order granting the Plaintiffs' motion to abate the appeal. Order (Aug. 30, 2023) ("[D]ue to the pending 'Motion to Reconsider,' filed within 28 days after entry of the order being appealed, the notice of appeal will not become effective until the district court enters an order disposing of the 'Motion to Reconsider.'" (citing Fed. R. App. P. 4(a)(4))).

The primary problem for Plaintiffs isn't timing, it is sequence. Because no new or amended notice of appeal

was filed *after* the district court disposed of the motion for reconsideration by an order dated October 12, 2023, that order is not before us on appeal. Hence, the only district court decision or ruling on appeal before us in this appeal is the July 14, 2023, order denying Plaintiffs' motion for a preliminary injunction because that is the only order Plaintiffs provided notice of appealing in compliance with procedural rules. We thus proceed with our review accordingly.

IV

Turning now to the merits, Plaintiffs seek a preliminary injunction that would, before trial, halt the enforcement of OSI's final cease and desist order against Gospel Light. As set out above, Plaintiffs carry a heavy burden to prevail. Plaintiffs have not shown a substantial likelihood of success on the merits of their Free Exercise Clause claims. Nor have they done so with respect to their preemption claims because there is no conflict between the NMIC and either the IRC or the ACA.[4]

A

We first lay the foundation for the Free Exercise Clause analysis by setting forth the applicable legal principles. The First Amendment provides that "Congress

4. Plaintiffs did not advance their Establishment Clause arguments in the briefing before the district court. Because it is now waived, there is no need to further discuss or consider their Establishment Clause claims. *See Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1234 (10th Cir. 2018).

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[5] U.S. Const. amend. I. The Free Exercise Clause of the First Amendment "protects not only the right to harbor religious beliefs inwardly and secretly" but also "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022) (quoting *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). "[T]he First Amendment provides absolute protection to religious thoughts and beliefs." *Harmon v. City of Norman*, 61 F.4th 779, 793 (10th Cir. 2023) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006)). Religious conduct, on the other hand, may validly be regulated by Congress and local governments. *Id.*

"The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task[.]" *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). "However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* "[C]ourts should refrain from trolling through a person's or institution's religious

5. The Free Exercise Clause is applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000); *see also Thomas*, 450 U.S. at 716 (determining that the narrow function of the court was not to dissect scriptural interpretation, but rather to determine whether a "petitioner terminated his work because of an honest conviction that such work was forbidden by his religion").

If a plaintiff shows that "a government entity has burdened [the plaintiff's] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable,'" then the court applies strict scrutiny to a claim that a plaintiff's Free Exercise Clause rights have been violated. *Kennedy*, 597 U.S. at 525 (quoting *Smith*, 494 U.S. at 879-81). Under this level of scrutiny, the government must "demonstrat[e] its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)).

If the government action "is both neutral and generally applicable," this court applies rational-basis review, even if the action "incidentally burdens religious exercise." *Harmon*, 61 F.4th at 793. Rational-basis review is a "highly deferential" level of scrutiny. *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 767 (10th Cir. 2023) (quoting *Maehr v. U.S. Dep't of State*, 5 F4th 1100, 1122 (10th Cir. 2021)). It merely requires the government action to be "rationally related to a legitimate government end." *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002). "A party challenging a law under rational-

basis review must 'negative every conceivable basis which might support it.'" *Citizens for Const. Integrity*, 57 F.4th at 767 (quoting *Fcc v. Beach Commc'ns*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). In addition, under rational-basis review, the classification is "presumed constitutional," and this Court will uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for it." *Petrella v. Brownback*, 787 F.3d 1242, 1266 (10th Cir. 2015) (first quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681, 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012); and then quoting *Beach Commc'ns, Inc.*, 508 U.S. at 313).

"An ordinance is neutral 'so long as its object is something other than the infringement or restriction of religious practices.'" *Harmon*, 61 F.4th at 794 (quoting *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232-33 (10th Cir. 2009)). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1272 (10th Cir. 2024) (quoting *Fulton v. Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021)). If, for example, legislators pass a law with the purpose of "infring[ing] on religious views," that law is not neutral. *Harmon*, 61 F.4th at 794.

"[W]here governmental bodies discriminate out of animus against particular religions," "'impose[] regulations that are hostile to the religious beliefs of affected citizens[,]' or 'act[] in a manner that passes judgment upon or presupposes the illegitimacy of religious

beliefs and practices,' it is appropriate to 'set aside'" the government action. *Does 1-11*, 100 F.4th at 1269 (first quoting *Ashaheed v. Currington*, 7 F.4th 1236, 1244 (10th Cir. 2021); and then quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638-39, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)). "That is because government action motivated by religious animus cannot be narrowly tailored to advance a compelling governmental interest." *Id.* (internal quotation marks and citation omitted); *accord Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 531. As such, "official expressions of hostility" amount to a Free Exercise violation. *Kennedy*, 597 U.S. at 525 n.1 (quoting *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 639).

Before the district court, Plaintiffs contended that OSI has "targeted [HCSMs] for regulation and enforcement under state insurance law."[6] Aplt. App. II at 23. Plaintiffs further argued that the March 26, 2020, press release — which did not mention Gospel Light, its members, or their religious beliefs, but wherein the Superintendent

6. The dissent mimics this language by stating that Gospel Light "fell into the Superintendent's crosshairs." Dissent at 2. The dissent also states that before OSI began its investigation, "no state or government entity ever concluded that Gospel Light, . . . should be regulated as an insurance carrier." *Id.* at 2-3. However, during the pendency of this litigation, the Ohio Attorney General, in a *parens patriae* capacity, settled a federal lawsuit in which the plaintiffs alleged, "[d]espite holding itself out as an HCSM, it is alleged that [Gospel Light] is actually an unlicensed insurer because it fails to meet federal and state requirements for the exception." *Glasgow v. Beers*, No. 5:21-CV-2001, 2024 U.S. Dist. LEXIS 49183, 2024 WL 1210790, at *2 (N.D. Ohio Mar. 20, 2024). Individual plaintiffs claims against Gospel Light remain pending in that case.

stated that religious and moral restrictions associated with HCSMs could leave members responsible for health care costs — was a "signal of official disapproval" of the religious beliefs of Gospel Light's members. Aplt. App. V at 59. Finally, Plaintiffs argued OSI "revealed its animosity and judgment dismissal" of Plaintiffs' religious, expense sharing practice when OSI stated during the federal district court proceedings that charitable giving is not unique to Plaintiffs, HCSMs, or Christians, and that if Gospel Light ceased operations in New Mexico, Plaintiffs could share expenses via GoFundMe pages, church donations, or other religious or secular charities. *Id.* at 60 n.12.

On appeal, Plaintiffs initially argued that the NMIC is not neutral because it is not generally applicable. This argument fails because whether government action is neutral depends on the government's motivations, not whether the action is generally applicable. *See Harmon*, 61 F.4th at 794. Plaintiffs, however, went on to argue that OSI targeted Gospel Light for enforcement out of religious animus, citing as examples (1) the March 26, 2020, press release, (2) the March 2021 consumer advisory referring to some HCSMs as scams, and (3) OSI's suggestion that GoFundMe could be a suitable alternative for religious sharing of health care expenses.

In the March 26, 2020, press release, OSI cautioned consumers that HCSMs "will not provide the protections of an authorized, regulated, and ACA complaint major medical plan." Aplt. App. I at 131. This press release further advised, correctly, that "[m]embers may also be

subject to religious or moral restrictions from the sharing ministry[.]" *Id.* Plaintiffs explained in their opening brief that "its members [sic] religious, doctrinal positions" are reflected in Gospel Light's sharing guidelines, which preclude sharing for, *inter alia*, abortion, contraception, and treatment of sexually transmitted infections without consideration of gender identity.[7] Op. Br. at 52.

The dissent finds this press release "fairly read" to express "disdain for those - including Plaintiffs - whose beliefs preclude them from purchasing ordinary insurance products[.]" Dissent at 8. "Disdain" is hard to find in this press release which, again, does not mention Gospel Light, its members, or any religious beliefs. Indeed, the best reading is that OSI intended to caution consumers about HCSMs that do not comply with the ACA, do not cover pre-existing conditions, leave members uncovered to pay their own medical bills, as well as that health care providers are under no obligation to accept or honor discounts from HCSMs if there is contract with them to do so. After all, that is precisely what was said in this press release.[8]

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7. Gospel Light's full list of medical expenses that are not eligible for sharing can be found at Appellant Appendix I at 153-56.

8. We are also mindful that OSI only began investigating Gospel Light when it received complaints from Gospel Light members who paid their shares but whose expenses were then not paid. The origin of the investigation distinguishes this case from the *Church of Lukumi Babalu Aye, Inc.*, where the city council adopted a resolution after it received "'concerns' expressed by residents of the city 'that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety.'" 508 U.S. at 526 (citations omitted). In other words, the genesis of the action in

In addition, although Plaintiffs are correct that OSI warned New Mexico consumers in the March 2021 consumer advisory that certain plans, including HCSMs, may be "scammers trying to lure people into purchasing low-quality health insurance," Aplt. App. I at 200, Gospel Light conceded the existence of such fraudulent HCSMs in the preliminary injunction hearing, Aplt. App. IV at 217, 227 ("[T]hese kind of fraudulent type entities . . . that are not legitimate healthcare sharing ministries . . . that keep 85 percent of the contributions for themselves, for their cars, for their houses, fraud, quite frankly. . . . I understand in a case like that . . . these people should not be operating because these people are out taking advantage of people."). Given that Gospel Light acknowledged the existence of fraudulent HCSMs, an identical statement from OSI, grounded in fact, cannot rise to an official expression of hostility. Finally, Plaintiffs provide no argument in support of why OSI's GoFundMe comment amounts to hostility.

In sum, the examples Plaintiffs point to as evincing a lack of neutrality in OSI's application of the NMIC are not persuasive. *Cf. Masterpiece Cakeshop, Ltd.*, 584 U.S. at 635 (determining a Colorado commissioner made an official expression of hostility because he described the "use [of] religion to hurt others" as "one of the most despicable pieces of rhetoric that people can use," thus describing religion as "despicable" and "characterizing it as merely rhetorical—something insubstantial and

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Church of Lukumi Babalu Aye, Inc. was at least partially animus towards the religious practices. As noted, evidence of similar animus is absent here.

even insincere"). Plaintiffs have not shown that OSI's motivations were based on religious animus rather than enforcement of the NMIC.

B

We next look at general applicability. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534. Even if the government treats "some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue," this court must apply strict scrutiny if the government treats "*any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17-19, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020)). Whether the secular and religious activities are comparable "must be judged against the asserted government interest that justifies the regulation at issue." *Id.* (determining comparability of secular activities and religious worship based on their respective risks of spreading COVID-19).

Before the district court and on appeal, Plaintiffs argued that the NMIC is not generally applicable because it provides exceptions for secular activities, namely,

fraternal benefit organizations and labor organizations, without oversight. To start, the parties do not dispute at least *some* fraternal benefit societies are secular. *See* N.M. Stat. § 59A-44-5(A)(2) ("A [fraternal benefit] society shall operate for the benefit of members and their beneficiaries by . . . lawfully operating for one or more social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic or *religious* purposes[.]" (emphasis added)). Even so, it is not true that fraternal benefit societies and labor organizations operate without oversight. The NMIC lists eleven articles and sections that apply to fraternal benefit societies. *Id.* § 59A-44-41.

In addition, the NMIC restricts the exemption for labor organizations by applying several conditions to their activities. *Id.* § 59A-1-16(A) (providing that "the [NMIC] shall not apply to . . . a labor organization that, incidental only to operations as a labor organization, issues benefit certificates to members or maintains funds to assist members and their families in times of illness, injury or need, and is not for profit"). This exemption for labor organizations is consistent with federal statutes providing that (1) the Employee Retirement Income Security Program governs labor organizations' employee benefit plans, such as health plans, 29 U.S.C. § 1003(a)(2), and (2) such federal statutes "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," *id.* § 1144(a).

Plaintiffs are, however, correct that fraternal benefit societies and labor organizations are partially exempted under the NMIC. *See* N.M. Stat. § 59A-1-16;

id. § 59A-1-15(A) ("No provision of the [NMIC] shall apply to . . . fraternal benefit societies, as identified in Chapter 59A, Article 44 NMSA 1978, except as stated in that article[.]"). Nevertheless, Plaintiffs still have not shown that the NMIC is not generally applicable. It is not enough for a secular activity to be treated more favorably than religious exercise, the secular activity must also be *comparable* to the religious activity. *See Tandon*, 593 U.S. at 62 (determining comparability of secular activities and religious worship based on their respective risks of spreading COVID-19). Comparability "must be judged against the asserted government interest that justifies the regulation at issue." *Id.*

Gospel Light's sole purpose is to act as an HCSM. By contrast, any medical payments provided by the fraternal benefit societies or labor organizations is incidental or ancillary to their other, primary purposes for being.[9] OSI's enforcement action here was not because of Gospel Light's religious beliefs, it was because they operated outside of

9. The dissent finds error with this reasoning; it concludes that what matters is whether a secular organization receives "a better deal" when it engages "in a similar *activity*." Dissent at 18-19 (emphasis in original). But importantly, apart from *arguments* about the NMIC, there are not *facts* or *evidence* in the record before us as to whether the non-comparable benefit societies or labor unions are engaged in helping members pay medical bills. The dissent's sole authority on this point is a 1937 district court decision about the "Modern Woodmen Society." *Id.* at 20, n.10 (citing *Mod. Woodmen of Am. V. Casados*, 17 F. Supp. 763, 767 (D.N.M. 1937). The extent to which other organizations are getting "a better deal" for activity that may or may not be occurring was not developed by Gospel Light below and is not part of the record in this appeal.

the bounds of the NMIC that applied to their business activities. In other words, OSI's asserted interests were to protect New Mexico consumers by regulating the insurance industry, not to burden or regulate religious conduct. That other organizations, not entirely secular and not comparable to Gospel Light, merit partial exemptions under the NMIC does not carry the water for Plaintiffs that the NMIC treats a secular activity more favorably than a comparable religious activity.[10] Consequently, rational-basis review applies.

C

Rational-basis review merely requires the government action to be "rationally related to a legitimate government end." *Hardman*, 297 F.3d at 1126. This level of review is appropriate even if the government action "incidentally burdens religious exercise." *Harmon*, 61 F.4th at 793.

OSI sought to enforce the NMIC to protect consumers. The "regulation and licensure of insurance producers" are "important state interests," *Hunter v. Hirsig*, 660 F. App'x 711, 717 (10th Cir. 2016), and OSI's final order, which enforces the NMIC against Gospel Light, is rationally related to the regulation of health insurance. As such, the

10. Plaintiffs list other organizations that receive exemptions under the NMIC in the section of their Opening Brief pertaining to weighing the opposing party's and the public's interests. Even if Plaintiffs had included these exemptions to support their arguments regarding strict scrutiny, Plaintiffs did not raise these exemptions in the relevant briefing before the district court and, regardless, have not shown comparability. *See Tandon*, 593 U.S. at 62.

government action here satisfies rational-basis review, and Plaintiffs have not shown a substantial likelihood of success on the merits on their Free Exercise claims.

V

A

Turning to Plaintiffs' preemption claims, Plaintiffs argue they are likely to succeed on the merits of their claim that the ACA and the IRC preempt OSI's enforcement of the NMIC. The record before us is scant as to whether this argument was fully adjudicated by the district court such that it is before us to review.

The district court's discussion of preemption was part of a broader analysis on *Younger* abstention and whether there was an important state interest. Its discussion of preemption was thus cabined within its ruling on the motion to dismiss. Although the district court ruled on the motion to dismiss and the motion for a preliminary injunction in the same opinion, it did not analyze the preemption arguments related to the motion for a preliminary injunction. Plaintiffs made this same point in their Opening Brief claiming it to be error.

This court "can reach issues that were either 'pressed' by the appellant before, or 'passed upon' by, the lower court." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 992 (10th Cir. 2019) (citations omitted). Reviewing the pleadings before the district court that were made part of the record before us, we are satisfied the Plaintiffs

pressed their preemption claim enough to preserve it for appeal. We next proceed to consider and decide the preemption issue.

B

"Put simply, federal law preempts contrary state law." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016) (quoting *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016)). There are two cornerstones of preemption jurisprudence. *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)). "Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied," we begin "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Medtronic, Inc.*, 518 U.S. at 485) (internal quotation marks omitted).

Federal preemption must be supported by the text of the United States Constitution, a federal statute, or even a regulation promulgated under a federal statute. *Sup. Ct. of N.M.*, 839 F.3d. at 918-19. "There is no federal pre-emption *in vacuo*[.]" *P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 503, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988). Conflict preemption, the type at

issue here, occurs (1) when compliance with federal and state law is impossible or (2) because the state provisions are an "obstacle to the accomplishment and execution of the full purposes and objectives of" the federal law. *Sup. Ct. of N.M.*, 839 F.3d. at 918 (quoting *Arizona v. United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)).

On appeal, Plaintiffs argue they are likely to succeed on the merits of their preemption claims and proffer several arguments as to why federal law preempts the NMIC:[11]

(1) because the IRC prohibits nonprofits from providing commercial insurance, Gospel Light would lose its nonprofit status; *see* 26 U.S.C. § 501(m)(1) ("A[] [§ 501(c)(3)] organization . . . shall be exempt from

11. Plaintiffs also argue on appeal that because the NMIC forbids discrimination based on religion, compliance with the NMIC would cause Gospel Light to lose its status as an HCSM, which would preclude its members from sharing medical expenses in accordance with their religious beliefs; *see* N.M. Stat. § 59A-16-12(A)-(B) ("No insurer shall, on the basis of the race, color, religion or national origin of any individual or group of persons: A. refuse to make insurance available to any applicant for insurance; or B. treat any such applicant or insured differently than any other applicant or insured with respect to the terms, conditions, rates, benefits or requirements of any such insurance contract."); *but see* 26 U.S.C. § 5000A(d)(2)(B) (exempting from the individual mandate HCSM members who "share a common set of ethical or religious beliefs" from the individual mandate). Plaintiffs did not present this argument in the relevant briefing before the district court, and as such, we will not consider it on appeal. *See Singleton*, 428 U.S. at 120.

tax . . . only if no substantial part of its activities consists of providing commercial-type insurance.");

(2) if Gospel Light complied with the NMIC, Gospel Light's unaltered operations in other states would prevent Gospel Light from sharing medical expenses without regard to the state in which a member resides, as called for by the "uniformity requirement" of the ACA; *see id.* § 5000A(d)(2)(B)(II) (defining a "health care sharing ministry" as "an organization" whose members share expenses "without regard to the State in which a member resides or is employed"); and similarly, ceasing operations in New Mexico would violate the ACA's uniformity requirement and would cause New Mexicans to lose the religious ministry exemption to the ACA's individual mandate.[12]

None of Plaintiffs' arguments succeed. Plaintiffs' first argument sputters because any nonprofit could flout state law by arguing that compliance would cause their

12. Although OSI is correct that the individual mandate has been reduced to zero, *see id.* § 5000A(c)(3)(A), these provisions of the ACA are still in effect, *see id.* § 5000A(d)(2)(B). Also, although the district court did not reach a conclusion on Plaintiffs' preemption arguments based on Gospel Light's nonprofit tax status, it nonetheless noted that "an HCSM could . . . improperly engage in the business of insurance in violation of the requirements of its nonprofit status." Aplt. App. V at 94 n.12. On Plaintiffs' preemption arguments based on the ACA, the district court concluded that although "the ACA defines and exempts HCSMs from the federally imposed individual mandate," "states are free to regulate HCSMs, and the ACA did not cabin state oversight of HCSM operations." *Id.* at 94-95.

organization to land outside of the IRC's definition of a nonprofit. The answer is not to deem the NMIC preempted by federal law, but rather for Gospel Light to choose between functioning as a nonprofit or selling commercial insurance. Similarly, as to Plaintiff's second argument about the uniformity requirement, they do not cite any authority confirming or suggesting they have a legal right to remain a HCSM.

The MFA says: "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance[.]" 15 U.S.C. § 1012(b). The MFA's anti-preemption provision is consistent with the Centers for Medicare & Medicaid Services' (CMS) letter to Gospel Light, in which CMS determined that Gospel Light was an HCSM under the ACA and stated as follows:

> [T]his determination does not supersede other relevant state or federal laws that govern the conduct of Gospel Light Mennonite Church Medical Aid Plan. Furthermore, this determination does not reflect any decision by the Internal Revenue Service regarding Gospel Light Mennonite Church Medical Aid Plan's status as a health care sharing ministry or compliance with the Internal Revenue Code.

Aplt. App. I at 93. Accordingly, the NMIC does not conflict with the IRC.

Also, the MFA provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). During the proceedings before the district court, Gospel Light's expert, a former Floridan Insurance Commissioner, testified that "states are free to regulate [HCSMs] as they choose." Aplt. App. V at 94. That is because, "[w]hatever its form, pre-emption analysis 'starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress. Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis.'" *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

The dissent says this point is wrong because Gospel Light sufficiently alleged that it does not provide insurance. Dissent at 26. But the problem with the dissent's view is as much procedural as substantive.

Out of the gate, the OSI Hearing Officer made extensive findings that Gospel Light entered into a legally enforceable contract with its members (payment of monthly share amounts in exchange for a promise of reimbursement for medical expenses), that Gospel Light "provides coverage in this state for health benefits" and is thus "subject to the provisions" of the NMIC, and that Gospel Light "is a health insurance carrier." Aplt. App. V at 112-21. The hearing officer's findings were adopted by OSI.

After Gospel Light filed this suit, the district court took no position on whether Gospel Light was engaged in the "business of insurance," as defined by state or federal law, because it found that it must abstain from exercising jurisdiction over the question due to *Younger* abstention. Gospel Light did not appeal the decision of the district court to abstain.

The dissent glosses over these points and engages in its own analysis of the "defining hallmarks of practices that fit within the 'business of insurance'" that are absent from the district court record below. Dissent at 28. In so doing, the dissent constructs an argument that was not made by Plaintiffs and relies upon cases not cited or discussed by Plaintiffs. So, although Plaintiffs did make a preemption argument and the general point (repeatedly) that they are not engaged in the business of insurance, we do not as a general matter permit parties to pursue a new theory on appeal. *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993) ("[W]e have held that where an issue is raised but not pursued in the trial court, it cannot be the basis for the appeal.").

Plaintiffs bear the burden to show a clear and unequivocable right to the extraordinary remedy of a preliminary injunction. Our review is for an abuse of discretion, and, unlike the dissent, we cannot conclude the district court abused its discretion by declining to resolve arguments not made, inadequately developed, and subject to abstention.

In sum, like the Free Exercise claim, Plaintiffs have not carried their burden and shown a substantial likelihood of success on the merits of their preemption claim. Because we have concluded that Plaintiffs have failed to show a substantial likelihood to succeed on any of the claims properly before us, "we find it unnecessary to address the remaining requirements for a preliminary injunction." *Warner v. Gross*, 776 F.3d 721, 736 (10th Cir. 2015), *aff'd sub nom. Glossip v. Gross*, 576 U.S. 863, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015).

VI

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (quoting *U.S. ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989)). Here, Plaintiffs have not shown that the district court abused its discretion when it determined Plaintiffs did not merit such an extraordinary remedy. The district court's denial of Plaintiffs' motion for a preliminary injunction is **AFFIRMED**.

Entered for the Court

Richard E.N. Federico
Circuit Judge

Appendix A

Renteria, et al. v. New Mexico Office of the Superintendent, et al., No. 23-2123

CARSON, Circuit Judge, dissenting:

State governments must enforce statutes in a neutral and generally applicable manner. In this case, that means the New Mexico Office of the Superintendent of Insurance ("OSI") cannot regulate Gospel Light Mennonite Church Medical Aid Plan ("Gospel Light"), a religious organization, more stringently than it regulates similarly situated secular organizations like labor unions and fraternal organizations. But the district court reached the opposite conclusion when it allowed the OSI to impose statutory restrictions upon Gospel Light while exempting similarly situated secular organizations. The majority upholds the OSI's impermissible action. Because the district court's and the majority's conclusions run contrary to established Tenth Circuit and Supreme Court precedent precluding discrimination based on religious views, I respectfully dissent.

The First Amendment protects the sincere practice of religion. It forbids the government from harnessing the weight of its enforcement authority to target with hostility those who hold a set of religious beliefs the government finds distasteful. So when state law creates a favored *secular* class, the state must justify why it deprives *religious* classes the same favorable treatment. *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 29, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (Kavanaugh, J., concurring). The New Mexico Insurance Code (NMIC), as interpreted

by the OSI, creates a favored secular class for certain organizations by exempting them from its statutory requirements. But the OSI cannot, as it must, justify its treatment of Gospel Light in a manner that satisfies strict scrutiny.

I.

Plaintiffs hold sincere religious beliefs that, among other things, (a) require them to share the burden of medical expenses with likeminded persons, and (b) preclude them from sharing the expense of certain procedures, including abortions, contraceptives, gender-transition treatments, substance abuse programs, and sexually transmitted disease treatments. Plaintiffs choose to carry out their beliefs through membership in Gospel Light, an organization that accepts as members only those who adhere to its belief statement, affirm that they want to share others' medical expenses out of a spiritual duty and not for secular reasons, and agree to live a defined "Godly Lifestyle." In turn, Gospel Light facilitates not only cost-sharing for medical expenses but also a wide range of other religious conduct, such as internet-based events for members to pray and sing together, an online prayer-sharing community, and ministry led by a dedicated pastoral-care team.

Founded in 1995, Gospel Light operated for years in all fifty states and the District of Columbia until it fell into the Superintendent's crosshairs.[1] Before then, no state

1. Plaintiffs name as Defendant the Superintendent of Insurance in her official capacity. Thus, although at least some

governmental entity ever concluded that Gospel Light, which is recognized by the United States government as a healthcare sharing ministry ("Sharing Ministry"),[2] should be regulated as an insurance carrier.[3] Indeed, as I explain later, an entity cannot be both a healthcare sharing ministry as defined under federal law **and** an insurance carrier under New Mexico state law. Relying on this premise, Gospel Light operated for years without following the New Mexico Insurance Code ("NMIC"), correctly believing it had the right to do so as a federally recognized Sharing Ministry—not as an insurance carrier.

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of these statements occurred when a prior individual served as Superintendent, I attribute to Defendant all official statements made by anyone occupying the role of Superintendent or issued from the OSI. [Appellee's Br. at 1 n.1, 26-27.] Defendant has disavowed no statements made by her predecessors, nor does the record show that she has halted or significantly altered any relevant enforcement action that her predecessors began.

2. The federal Department of Health and Human Services certified Gospel Light's status as a Sharing Ministry as defined in the Affordable Care Act ("ACA"). *See* IRC § 5000A(d)(2)(B)(ii).

3. During this appeal's pendency, Gospel Light and the Ohio Attorney General settled an investigation into Gospel Light in Ohio. *Glasgow v. Beers*, 2024 U.S. Dist. LEXIS 49183, 2024 WL 1210790, at *3 (N.D. Ohio March 20, 2024). But Gospel Light made no public admissions of wrongdoing, and the Court in that case made no determination on the merits nor decided Gospel Light was an insurance company. Regardless, a settlement in a different case in a different state certainly has no bearing on the question of whether the Superintendent targeted Gospel Light in this case.

The majority holds the district court did not abuse its discretion in denying Plaintiff's preliminary injunction because Plaintiffs did not show they are substantially likely to succeed on the merits of their Free Exercise claim. I disagree.[4]

A.

The majority concludes that the OSI acted neutrally toward Gospel Light, but the opposite is true. The Enforcement Action lacks neutrality. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021) (first citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 636-39, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018); and then *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). When a government expresses hostility to religion, its actions can never pass strict scrutiny, so courts must strike down or enjoin them. *Masterpiece*, 584 U.S. at 639; *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (discussing

4. I agree with the majority that our precedent on Federal Rule of Procedure 4(a)(4)(B)(ii) deprives us of appellate jurisdiction to review the district court's Memorandum Order Granting in Part and Denying in Part Motion to Reconsider. But because we lack jurisdiction over the likelihood-of-success issue from the second Order, I begin my analysis by addressing the district court's finding on irreparable harm, and only proceed to analyze the other prongs after resolving the irreparable harm issue.

interrelationship between lack of neutrality and animus). The Enforcement Action reveals a lack of neutrality in two ways: 1) through the OSI's displays of animus toward Plaintiff's religious beliefs and 2) through what looks like the OSI's impermissible targeting of "religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534. Thus, Plaintiffs will likely succeed on their Free Exercise claim on this basis without us even undertaking a full strict-scrutiny analysis.

In reviewing the OSI's actions, we must keep in mind that "[f]acial neutrality is not determinative." *Id.*; *Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1276 (10th Cir. 2024) (holding that a vaccine mandate without religious exemptions was not neutral even though it was not a mere pretext). Indeed, the Supreme Court has warned that in reviewing lower court decisions, we should be on the lookout not necessarily for blatant violations; but for "subtle departures from neutrality," "covert suppression[s] of particular religious beliefs," "distinctive treatment" of "religious conduct," "masked" governmental hostility, and "religious gerrymanders." *Lukumi*, 508 U.S. at 534 (first quoting *Gillette v. United States*, 401 U.S. 437, 452, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); then *Bowen v. Roy*, 476 U.S. 693, 703, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986); and then *Walz v. Tax Comm'n*, 397 U.S. 664, 696, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)). To avoid these more subtle violations, we must "survey meticulously the circumstances," *id.* (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring), and "probe the sincerity of the government's justifications . . . to evaluate whether they 'were but pretexts for discriminating against' religion,"

Does 1-11, 100 F.4th at 1276 (quoting *Trump v. Hawaii*, 585 U.S. 667, 699, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018)) (citing *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998)).

Lukumi provides the framework for determining whether a law is neutral. There, the Supreme Court held that even if the animal-sacrifice ordinances were facially neutral from a plain reading of the text, they were still non-neutral because of their real-world effect. 508 U.S. at 535. Town Council members made clear, shocking comments on the public record that they opposed the Santeria religion and wanted to use the ordinances to shut down that religious sect or run it out of town. *Id.* at 528, 542. More importantly, at least for purposes of this case, the Supreme Court *also* found "strong evidence" of hostility outside of these comments. *Id.* at 535. Read and applied in tandem, the multiple ordinances accomplished a "religious gerrymander" by singling out those with a specific set of religious beliefs and prohibiting their sincere religious practices. *Id.* at 535. The "net result of the gerrymander"—caused by the slew of exemptions—was that the ordinances punished *only* those who engaged in the targeted activity for religious reasons. *Id.* at 536-37. This improper targeting of religious practice showed lack of a neutral motivation preempting the need for a strict scrutiny analysis. *Id.* at 537-38.

And in *Masterpiece*, a state commission required the plaintiff, a cakeshop owner, to comply with state regulations in violation of his sincerely held religious beliefs. 584 U.S. at 630. In adjudicating the plaintiff's

complaint, commission members informed the plaintiff that he needed to "compromise" if he wanted to "do business in the state" and disparaged the plaintiff's beliefs by implying that his faith was despicable and insincere. *Id.* at 634-35. The commission showed less hostility toward—and found for—other bakers who did not share the plaintiff's religious views and conscientiously objected based on their own beliefs. *Id.* at 636-37. The commission's "disparity in treatment" and "official expressions of hostility to religion" showed that the commission "was neither tolerant nor respectful of [the plaintiff's] religious beliefs." *Id.* at 637-39. On these facts, the Supreme Court inferred the commission's lack of neutrality, held it amounted to animus, and set aside the government's enforcement action without even undertaking a strict scrutiny analysis. *Id.* at 639.

Finally, in *Does 1-11*, we found animus even with less contemporaneous hostility. 100 F.4th at 1275. There, the public university's COVID-19 vaccination policy lacked neutrality because it provided secular exemptions under a purportedly neutral policy and maintained that it acted purely to protect the health and safety of those on campus. *Id.* at 1258. But we held that the policy was not neutral because the university had, in the prior weeks and months, made overtly hostile statements and crafted policies targeting the religious beliefs of those it did not exempt. *Id.* at 1277. Although the hostile statements did not occur during the adjudication or enforcement of the policy at issue and did not expressly target the plaintiffs, the government's general attitude of hostility, which it never disavowed, still served as evidence of the government's

intolerance. *Id.* Thus we held that the policy at issue was a mere pretext to create a religious gerrymander that would—for purportedly neutral reasons (but in fact not at all neutral)—preclude a subset of religious believers from receiving an exemption. *Id.* at 1275-77. We also held that the policy resulted in "real-world discrimination among religions" because it imposed regulations hostile to those adhering to a certain set of religious beliefs while allowing exemptions to those who adhered to other sets of formal religious teachings. *Id.* at 1269. Despite the university's claims of inclusion and neutrality, the only plausible explanation for its actions was animus, so we struck down the policy as unconstitutional. *Id.* at 1257, 1269.

Following our precedent, I put aside the Superintendent's subjective protestations that she (and the OSI generally) felt no hostility toward Plaintiffs' beliefs and religious conduct and intended only to protect the public. I instead look for objective evidence of subtle departures from neutrality; covert suppression, disparate treatment, masked hostility, and religious gerrymanders to determine whether the Enforcement Action was a pretext for discriminating against Plaintiffs' beliefs and desired conduct. It's not hard to find.

I place the greatest weight on the fact that the NMIC as implemented by the OSI provides a veritable "slew of exemptions" for secular organizations that do not extend to Gospel Light. The exemptions speak loudly. But that does not mean that official statements from the OSI are irrelevant. Indeed, the OSI's statements support a religious gerrymander's existence.

Complaints from members whose health expenses were not reimbursed provided the perfect pretext for the OSI to pursue HCSMs in New Mexico. Fairly read, the OSI's March 26, 2020, press release expressed disdain for those—including Plaintiffs—whose beliefs preclude them from purchasing ordinary insurance products and instead dictate they share healthcare expenses through Sharing Ministries such as Gospel Light. The press release described *all* Sharing Ministries (including Gospel Light) as "unauthorized insurance product[s]," and it harnessed the weight and authority of the OSI to cast a negative light on the "religious or moral restrictions" associated with Sharing Ministries. It aspersed many HCSMs by claiming they may obscure or bury their payment obligations in "fine print." It also stated HCSMs "do NOT comply with the ACA, even if their materials say they do," and "urge[d] consumers" to avoid Sharing Ministries. The OSI's disdain for HCSMs becomes even clearer when one examines the record, which clearly belies Gospel Light's participation in the nefarious practices alleged by the OSI. Gospel Light does not attempt to trick consumers into believing it provides insurance; time and time again it has publicly disclaimed providing insurance.[5] HCSMs are a clearly recognized ACA exemption, so do comply with federal

5. Gospel Light prominently displays, in a bright purple box at the bottom of the Table of Contents—before even the first page—that it does not provide insurance. Gospel Light also displays, in a bright blue box on the first page of its legal notices, that "[t]his program is not an insurance company nor is it offered through an insurance company." In the second sentence of its complaint's recitation of the facts, Gospel Light proclaims "[a]n HCSM is not insurance."

law.[6] And Gospel Light prominently proclaims it does not guarantee payment for healthcare—one of the hallmarks of traditional insurers.[7] This is like the university in *Does 1-11* making hostile statements and crafting hostile policies in the months leading up to its violative enforcement action, objectively targeting a particular set of religious beliefs. As we found in *Does 1-11*, these objective facts show Defendant's hostile motivation and the OSI's intolerance for Plaintiffs' religious motivations.

In March 2021, the OSI issued an advisory in which it described Sharing Ministries as likely to be "scammers trying to lure people into purchasing low-quality health insurance" and offering "low-quality products" and "bad plans." The warning stated that a "red flag" of one of these "bad plans" was if it was "ACA-exempt." Because the ACA statutorily exempts Sharing Ministries, this statement expressly targeted Sharing Ministries—including Gospel Light. This is analogous to the commission member in *Masterpiece* stating generically that "we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most

6. IRC § 5000A(d)(2)(B) describes HCSM's religious exemptions to the ACA's individual mandate. Gospel Light received an exemption letter to operate as a HCSM by HHS. Gospel Light also received tax-exempt status from the IRS. The OSI's press release painted all HCSMs as uncompliant with the ACA, even when they actually comply with the exemptions to the ACA.

7. While the district court ultimately abstained from ruling on whether Gospel Light was in the business of insurance, these facts in the record demonstrate the level of blatant animus and disregard for the truth shown by the OSI in its attacks on HCSMs.

despicable pieces of rhetoric that people can use to—to use their religion to hurt others." 584 U.S. at 635. Although the commission member did not specifically ascribe this "rhetoric" or hurtful practice to the plaintiff, the Supreme Court held that the comment did in fact refer to the plaintiff and disparage his religion. *Id.* Similarly, read fairly, the OSI's consumer warning—though veiled in neutral language—is directed toward Plaintiffs' religious beliefs.

And throughout this litigation neither the OSI nor its Superintendent has ever disavowed these statements. Instead, the Superintendent doubled down on her comments. Although during the OSI's enforcement process the agency stated that it did not question the sincerity of Plaintiffs' beliefs, Defendant's motion to dismiss argued that Plaintiffs' religious beliefs were not faith-based and merely a universally shared desire to be charitable. She opined that Plaintiffs could sufficiently exercise the same religious beliefs with alternate conduct such as donating to a GoFundMe page or to secular charities—disregarding Plaintiffs' conviction to share healthcare expenses with likeminded believers, and discounting the significant additional religious activities that Gospel Light facilitates. She also argued that Plaintiffs could practice their beliefs by buying ordinary health insurance plans—showing a lack of consideration for Plaintiffs' sincere religious beliefs that preclude them from contributing to contraceptives, abortions, and other procedures that ordinary New Mexico health insurance plans must cover.

The majority dismisses the Superintendent's official expressions of hostility as "not persuasive" and negates them because Gospel Light previously agreed that *some* fraudulent organizations that purport to be Sharing Ministries are illegitimate. But the fact that Gospel Light distinguished other organizations as failing to meet the ACA requirements for Sharing Ministries is irrelevant to whether the OSI expressed hostility toward its religiously motivated conduct. This is especially true where the OSI strongly implied that *all* Sharing Ministries were suspect and likely to be fraudulent, urged consumers to avoid Sharing Ministries (including Gospel Light), and singled out religious beliefs as a reason for its warning. *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

The majority also errs, in my view, by merely finding that the government did not show clear animus, and, on that basis, dismissing any thought of non-neutrality. That justification conflicts with our decision in *Colorado Christian University*, where we held that a plaintiff need not show the government acted with "bigotry," but can establish non-neutrality through a showing of "intent to discriminate." 534 F.3d at 1260.

Even if the OSI never made the statements about Gospel Light specifically, the Enforcement Action would still lack neutrality because the OSI has created

a "religious gerrymander" around Plaintiffs' religious beliefs. The NMIC as administered by the OSI punishes Gospel Light, while allowing various secular organizations to escape the same level of regulation through various exemptions. Of particular note, labor unions and fraternal organizations may offer "health benefits plans," but OSI has not required them to register as insurance providers or pay the same fees and taxes imposed on Gospel Light. As interpreted by OSI, fraternal benefit organizations may discriminate freely based on religious beliefs when they accept members. But Gospel Light's attempts to limit participation in its organization to only those sharing common religious beliefs places it in violation of the OSI's interpretation of the statutory regime. Likewise, labor organizations may reimburse members for health expenses without following *any* of the NMIC's requirements. But Defendants deprive Gospel Light of a similar avenue for its religiously motivated conduct.

The majority opinion notes—and everyone agrees—that some fraternal organizations in New Mexico have religious affiliations. But this fact has no bearing on this case. The religiously affiliated fraternal organizations did not receive their exemptions *because of* their religious ties. On the contrary, their qualification for the exemptions is based on items separate and apart from religion. And even assuming the fraternal groups' religious affiliations contributed to their exemptions, OSI still cannot treat them more favorably than Gospel Light.

It is well-settled that the First Amendment bars both discrimination against religion and discrimination among

religions. *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."); *see also Lukumi*, 508 U.S. at 532 ("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."). So the notion that some fraternal organizations are religious provides no safe harbor to the majority because disparate treatment among religious organizations is as unconstitutional as disparate treatment between secular and religious organizations. And, as noted above, *Tandon* requires strict scrutiny "whenever [government] treat[s] *any* comparable secular activity more favorably than religious exercise." 593 U.S. at 62 (citing *Roman Catholic Diocese*, 592 U.S. at 19).[8] Whether the secular or religious fraternal organizations receive more favorable treatment through is irrelevant, then, because any amount of disparate treatment is prohibited.

The majority does not consider the possibility of a religious gerrymander, but rests on its animus finding. But this approach leaves the applicable neutrality analysis only half-done. The Supreme Court has admonished us to look

8. The fact that some fraternal-benefit organizations are religious makes them an even more obvious comparator to Gospel Light. Surely if we can compare religious fraternal organizations to Gospel Light, then we can compare secular fraternal organizations as well.

beyond mere "facial neutrality" and "survey meticulously the circumstances of governmental categories." *Lukumi*, 508 U.S. at 534 (quoting *Walz*, 397 U.S. at 696 (Harlan, J. concurring)). Here, by making it impossible for Gospel Light to comply with both state and federal law, the OSI impermissibly prohibited Gospel Light from putting its religious beliefs into practice.

So even without considering the hostility in statements by the Superintendent and the OSI, the NMIC, as applied by the OSI, created a religious gerrymander by singling out Plaintiffs' beliefs as not eligible for exemption. As in *Masterpiece, Does 1-11*, and *Lukumi*, I would infer that the OSI's enforcement of the NMIC lacked neutrality. When governmental enforcement is not neutral—even if it lacks animus—we must apply strict scrutiny. *Does 1-11*, 100 F.4th at 1272 (quoting *Colo. Christian Univ.*, 534 F.3d at 1260) (citing *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022)). As I discussed, Defendant fails to show her "course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* (citing *Lukumi*, 508 U.S. at 546). So I would alternatively hold that simply because Defendants acted in a non-neutral way, Plaintiffs would likely succeed on the merits of their Free Exercise claim.

B.

The OSI must also demonstrate that the statutes and regulations it seeks to impose on Gospel Light are generally applicable. "Neutrality and general applicability

are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Government enactments lack general application "and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. Put another way, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534 (citing *Lukumi*, 508 U.S. at 542-46).

In *Lukumi*, the Supreme Court held city ordinances violated the principle of general application because the ordinances achieved the city's asserted ends only for conduct motivated by religious beliefs. 508 U.S. at 527-29. The city council had outlawed certain types of animal killings—allegedly to protect public health and to prevent cruel treatment of animals. *Id.* at 534. The ordinances provided broad exemptions for many secular purposes—including for hunting, eradicating pests, advancing medical science, and handling stray or excess animals. *Id.* at 544. But none of the exemptions applied to the Santeria religion's practice of animal sacrifice. *Id.* at 544. The Supreme Court determined the ordinances were underinclusive—failing to achieve the government's pretextual purpose—because the council provided no religious exemptions even though secular and religious killings posed identical health risks. *Id.* at 543-45. This showed that the government "in a selective manner impose[d] burdens only on conduct motivated by [the Santeria adherents'] religious belief." *Id.* at 534, 543. The

governmental action lacked general application, and the Supreme Court applied strict scrutiny. *Id.* at 545-46.

We followed the Supreme Court's directive in *Does 1-11*, holding that a public university's policy requiring COVID-19 vaccinations lacked general application because the university granted exemptions on more favorable terms for secular objectors than it did for religious objectors. 100 F.4th at 1277. Specifically, the policy denied medically motivated exemptions only when the exemption did not pose a "direct threat" to others' "health or safety"—but the policy set a lower bar for denying religious-based exemptions. *Id.* Because of this disparate treatment, the policy made a "value judgment in favor of secular motivations, but not religious motivations." *Id.* at 1277-78 (quoting *Grace United Methodist Church v. Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006)). Because the policy lacked general application, we applied strict scrutiny. *Id.* at 1278.

The OSI's method of enforcing the NMIC here lacks general application for largely the reasons expressed in *Lukumi* and *Does 1-11*. The NMIC governs "health insurance carriers" that offer "health benefits plans." N.M. Stat. Ann. § 59A-15-16, 59A-16-21.2(C). Among many other provisions, these entities must (a) refrain from discrimination based on religious beliefs, *id.* § 59A-16-12; (b) provide contraceptive treatments, *id.* §§ 59A-22-42, 59A-23-7.14, 59A-46-44, 47-45.5; and (c) obtain a certificate of authority from the OSI and pay hefty fees and taxes for the privilege of existing and operating in New Mexico, *id.* § 59A-6-1. Defendant contends Gospel Light is a "health

insurance carrier" because it offers "health benefits plans" and thus it is subject to the NMIC. But were Gospel Light to comply with these provisions, the organization would no longer provide a forum for Plaintiffs' religious conduct. Indeed, compliance would require Plaintiffs share the burden of, among other things, contraceptive treatments (which are definitionally contrary to their religious beliefs) and generally share medical expenses with those who do not adhere to similar beliefs. And if the Enforcement Action causes Gospel Light to cease operating in New Mexico, even temporarily, Plaintiffs lose the benefit of the other religious conduct that Gospel Light facilitates. Defendants thus put Gospel Light to an impermissible choice: give up sincerely held religious beliefs or give up providing members with financial assistance for health-related costs and other religious services. *See Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring); *see also Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) (holding employees may not be put to a "choice between fidelity to religious belief or cessation of work.").

Many categories of insurance-related providers enjoy significant exemptions from the NMIC. N.M. Stat. Ann. §§ 59A-1-15, 59A-1-16. For example, the NMIC allows fraternal benefit societies to provide "health benefit plans" but fully exempt the societies from the anti-discrimination requirement and provide them an enormously discounted fee schedule.[9] *Id.* §§ 59A-44-23, 24, 36. The NMIC also

9. In 1939, the New Mexico Supreme Court decided *New Mexico ex rel Biel v. Royal Neighbors of Am.*, 1939- NMSC 057, 44 N.M. 8, 96 P.2d 705 (N.M. 1939), which held that licensed fraternal

wholly exempts any labor organization that incidentally "maintains funds to assist members and their families in times of illness, injury or need, and is not for profit." *Id.* § 59A-1-16(A). But the NMIC fails to provide a similar exemption for organizations such as Gospel Light, whose members engage in similar health expense reimbursement activities for religious reasons. This disparate treatment consists of a "value judgment in favor of secular motivations, but not religious motivations." *Does 1-11*, 100 F.4th at 1277-78 (quoting *Grace United*, 451 F.3d at 654).

Defendant argues Gospel Light must comply with the NMIC scheme to protect the public. Maybe that's fine, but Defendant may not protect the public from Gospel Light while not protecting the public from the same conduct attributable to secular organizations. And, to be sure, Defendant has not—and cannot—demonstrate how unregulated (or less regulated) "health benefit plans" and medical expense sharing present a greater risk to the public when offered by a Sharing Ministry than by a labor organization or fraternal society. NMIC offers broad exemptions for the secular entities—but not, according to the OSI's interpretation—for Gospel Light. OSI's NMIC

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benefit societies are exempt from insurance taxes, because they "are simply not members of that class of insurance companies or societies that are subject to the tax in question and are therefore exempt." (citing *Lutheran Mut. Aid. Soc. v. Murphy*, 223 Iowa 1151, 274 N.W. 907, 907 (Iowa, 1937)). I find it instructional that for almost one hundred years fraternal benefit societies in New Mexico have not been subject to insurance regulations even though they provide insurance, yet here Gospel Light does not provide insurance and the majority presumes it is subject to insurance regulation.

enforcement is thus "underinclusive" for the government's asserted goals, selectively imposing a burden only on faith-motivated conduct. In other words, the OSI treats some "comparable secular activity more favorably than religious exercise"—violating the general application principle. *Tandon*, 593 U.S. at 62.

The majority excuses the OSI's disparate treatment by holding that the insurance-related or healthcare expense-sharing activities of labor organizations and fraternal societies are not "comparable" to the similar activity of a Sharing Ministry. Specifically, the majority determines that the relevant activities are not "comparable" because the insurance activities of fraternal societies and labor organizations are ancillary to the entities' general purpose. The majority concedes the fraternal organizations and labor unions are receiving a better deal. And even without record evidence, this fact is plain: these organizations receive preferential treatment by operation of statute. *See e.g.*, N.M. Stat. Ann. §§ 59A-44-23, 24, 36. But the majority says the exemptions' impacts are smaller because unions and fraternal organizations' real focus is on activities unrelated to healthcare. No court has previously recognized this novel distinction.

The majority's "ancillary conduct" distinction rests on a misinterpretation of the *Tandon* rule. *Tandon* does not instruct us to ask about an organization's *purpose*. 503 U.S. at 62. Instead, *Tandon* says a law is not neutral when it treats more favorably any comparable secular *activity*. *Id.* In fact, *Tandon* specifically decries the purpose-based inquiry, explaining that "comparability . . . is concerned

with the risks various *activities* pose, not the reasons why people [engage in the activity]." *Id.* at 62 (emphasis added) (citing *Roman Cath. Diocese*, 592 U.S. at 17).

The majority thus errs in focusing on whether insurance-like activity is "ancillary" to the mission of fraternal organizations or whether the exempted organizations still receive partial regulation. What matters is whether any secular organization receives more favorable treatment when it engages in a similar *activity*—here, assisting members with medical expenses or providing "health benefits plans." We must judge the similarity by whether the allegedly comparable activity objectively carries the same risk of which the government complains—here, public safety—not by the similarity of the organization or how many other activities the organization also conducts.

The majority opines on a lack of record evidence to establish that fraternal benefit societies help members pay medical bills. But again, this argument does not need record evidence, because the preferential treatment for fraternal societies is plain on the face of the statutory text. *See* N.M. Stat. Ann § 59A-44-40(A)(1), (2).

Plaintiffs show—and Defendant does not dispute—that Gospel Light exists as a nonprofit organization and maintains a fund to assist its members in their healthcare expenses. This activity is nearly identical to the activities in which the NMIC permits labor organizations to engage. *Id.* Defendant asserts that these activities by Gospel Light consist of providing "health benefits plans"—just

as fraternal benefit societies may do, unfettered. *See id.* § 59A-1-15(A). Gospel Light's activity is comparable to fraternal societies' activity, and the activity itself poses the same risk, so the activities are comparable regardless of whether they are at the core of an organization's mission.[10]

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10. Even comparing the *organizations* instead of their *activity*, I would still easily find comparability. First, Gospel Light exists primarily for people with a commonality to join together; this is similar to the general purpose of fraternal benefit societies. Second, the majority rests its holding on the fact that fraternal benefit societies' insurance-adjacent activities are ancillary to the organization's main activities. But Gospel Light stands in a similar position: although it is a stand-alone entity, it began its healthcare-sharing activities and continues to function as an ancillary ministry of the Mennonite church. Third, the OSI disputes comparability because fraternal societies receive a governmental certification, and the majority distinguishes labor organizations as having recognition in federal law. But Sharing Ministries like Gospel Light are recognized in federal law. The ACA recognizes Sharing Ministries, and the federal Department of Health and Human Services certified Gospel Light's status as a Sharing Ministry. So Gospel Light is organizationally comparable to at least these two categories of the Regulations' exempted organizations.

And finally, I doubt whether the insurance-adjacent activities of fraternal benefit societies are truly as ancillary as the majority would have us think. As far back as 1937, the New Mexico District Court found that the Modern Woodmen society's main operation had become insurance, and that other traditional fraternity benefits and hallmarks had been pushed aside. *Modern Woodmen of Am. v. Casados*, 17 F. Supp. 763, 767 (D.N.M. 1937). Even so, *Modern Woodmen* found the ancillary nature (or lack thereof) of the society's insurance activities didn't affect whether it could benefit from the tax benefits of the insurance code exemption. This simply underscores that activities just being ancillary is not legally sufficient for purposes of this analysis.

Thus the OSI's enforcement of the NMIC is not generally applicable, and we should apply strict scrutiny.

To pass strict scrutiny, Defendant must show that each statute and regulation she seeks to enforce against Gospel Light is narrowly tailored to meet her asserted interest and that the interest outweighs Plaintiffs' need to exercise their religious beliefs. *See Kennedy*, 597 U.S. at 524. Defendant asserts her interest is public safety, but she doesn't argue—nor could she reasonably contend—that the entire NMIC is narrowly tailored to meet this interest or that the interest is sufficiently compelling. Because the OSI does not generally apply the NMIC and OSI fails its burden on strict scrutiny, I would hold Plaintiffs are substantially likely to succeed on the merits of their Free Exercise claim.

II.

There is another issue present here that, in addition to the Free Exercise claim, is dispositive and worthy of discussion. Separate from their First Amendment claims, Plaintiffs argue that the ACA preempts Defendant from enforcing the NMIC against Sharing Ministries, including Gospel Light. Plaintiffs urge that their preemption claim is substantially likely to succeed on the merits, thus also supporting a preliminary injunction. I agree.

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, Congress has "power to enact statutes that preempt state law." *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (citing *Northwest Cent. Pipeline Corp.*

v. State Corp. Comm'n, 489 U.S. 493, 509, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989)). We recognize three brands of preemption: express, field, and conflict. *Id.* (quoting *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Express preemption exists when a federal statute "reveals an express congressional intent to preempt state law." *Id.* (quoting *Mount Olivet*, 164 F.3d at 486). And field preemption exists when Congress legislates such a pervasive regulatory scheme that it must have intended to oust any supplemental state regulations in the same area. *Id.* But nothing indicates Congress's express intent that the IRC preempt state law.[11] And although the ACA allows for and defines Sharing Ministries, it does not set forth an express intent or pervasive regulatory scheme related to them. So the ACA as a whole cannot establish express preemption or field preemption.

The doctrine of conflict preemption produces a different result. Conflict preemption exists when either (a) "compliance with both federal and state regulations is a physical impossibility" or (b) the state provision "stands

11. Congress expressly stated: "Nothing in this title [Title 42] shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d). The definition of Sharing Ministries isn't in Title 42, which sets forth the ACA, but rather in in IRC § 5000A, the portion of the Internal Revenue Code that details the individual mandate that is central to the ACA. But Title 42 §§ 18091 and 18092 reference the individual mandate and cite IRC § 5000A. So I consider it likely that Congress intended § 18041(d) to apply generally to the ACA. If so, this provision underscores both that no express or field preemption exists—but also that the ACA's Sharing Ministry provision can and will preempt state law that conflicts with its purpose.

as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law. *Id.* (quoting *Mount Olivet*, 164 F.3d at 486). Of course, as the OSI argues, an organization may provide a means for individuals to share healthcare expenses and avoid violating either federal law or state law. But this alone does not avoid conflict prevention.

The OSI interprets the NMIC to apply to Sharing Ministries; in the Enforcement Action, it enforces the NMIC against Gospel Light, a Sharing Ministry. Under the Internal Revenue Code, Gospel Light will lose its nonprofit status if it complies with the NMIC's requirement to register as an insurance provider. IRC § 501(m)(1). And the NMIC's anti-discrimination provision prevents Gospel Light from accepting as members only those who share similar religious beliefs. N.M. Stat. Ann. § 59A-16-12. But to be a Sharing Ministry under the ACA, an entity *must* exist as a nonprofit organization, and it *must* consist of those who share similar beliefs. IRC § 5000A(d)(2)(B). Thus, if Gospel Light complies with the NMIC, it no longer qualifies as a Sharing Ministry under the ACA. This shows the "physical impossibility" of "compliance with both federal and state regulations"—thus establishing conflict preemption.

Conflict preemption also exists because the NMIC, as applied, "stands as an obstacle" to the purposes of the religious exemptions within the ACA. *O'Donnell*, 627 F.3d at 1324 (quoting *Mount Olivet*, 164 F.3d at 480). We determine the purpose of the ACA by looking at the words of the statute. *See Ausmus v. Perdue*, 908 F.3d 1248, 1253

(10th Cir. 2018) (quoting *Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159, 1163 (10th Cir. 2017)) (holding we determine Congress's intent by looking at the statute's text); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

The ACA generally requires all individuals buy ACA-approved insurance products—which necessarily include coverage for contraceptives and other procedures contrary to Plaintiffs' beliefs. IRC § 5000A(a),(f); 42 U.S.C. §§ 18022(b)(1), 18091; 26 C.F.R. §§ 54.915-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv), Department of Labor, et al., *FAQs About Affordable Care Act Implementation Part 64* (Jan. 22, 2024), available at https://www.cms.gov/files/document/faqs-part-64.pdf [https://perma.cc/SN9H-J7CX] (last visited Feb. 25, 2025). The ACA's religious-exemption provision exempts from this requirement individuals who are members of a Sharing Ministry—but requires that the Sharing Ministry be a nonprofit organization and all its members "share a common set of ethical or religious beliefs and share medical expenses in accordance with those beliefs and without regard to the State in which a member resides or is employed." IRC § 5000A(d)(2)(B). This text clearly communicates Congress's statutory purpose to provide a nationwide, religious, conscience-based exemption to insurance regulations. Congress intended to guarantee that Sharing Ministries could exist in each state as a means for individuals who hold religious beliefs related to healthcare expenses to live

out those beliefs with each other without being burdened by ordinary insurance regulations that could violate their consciences. IRC § 5000A(d).

The Enforcement Action conflicts with the purpose of the religious exemption provision of the ACA. The NMIC—as OSI enforces it against Gospel Light—prohibits Gospel Light from functioning as a non-profit organization and prohibits Gospel Light from accepting only members who share a common set of religious beliefs. Indeed, the OSI argues that the Superintendent can institute an "outright ban" on all Sharing Ministries within the State of New Mexico. This precludes Gospel Light from functioning as a Sharing Ministry and thus strips away Plaintiffs' ability to gain a religious conscience-based exemption to the ACA through membership in Gospel Light.

Respectfully, the majority makes two errors in analyzing Plaintiffs' preemption claim. First, the majority oversimplifies Plaintiffs' arguments and construes them as merely claiming that any organization has a right to exist as a nonprofit. Plaintiffs' argument is more nuanced: they contend that if Gospel Light were to comply with the NMIC—including by eliminating its nonprofit status in New Mexico—it would no longer constitute a Sharing Ministry for purposes of the ACA's religious exemption and thus the NMIC impermissibly conflicts with the purpose of the ACA. As counsel for Plaintiffs stated at oral argument: "There is under the Internal Revenue Code a statutory structure that [Sharing Ministries] must follow . . . [Gospel Light] cannot be a Healthcare Sharing Ministry if they need to comply with the non-

discrimination [provision] and [other regulations] . . . New Mexico's insurance code directly conflicts with the national [Sharing Ministry] provisions that [Gospel Light] would have to follow." [Oral Arg. at 11:20-13:14.] The OSI's own press release acknowledged that one of the hallmarks of a "bad plan" was if it was "ACA-exempt," throwing the NMIC into direct conflict with the ACA's exemptions. Addressing this argument as I do above, Plaintiffs show substantial likelihood of success on the merits on this issue.

The majority holds federal law does not preempt the NMIC as applied because all it does is force Gospel Light to "choose between functioning as a nonprofit or selling commercial insurance." But this ignores the entire point of conflict preemption and, in my view, demonstrates the irreconcilable conflict between the state and federal laws at issue in this case.

The proper measure of conflict preemption is "whether the matter on which the State asserts the right to act is in any way regulated by the [f]ederal [a]ct." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (holding that if the matter is in any way regulated by the federal government, "the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State"). When the federal government has provided a statutory exemption and state law makes it impossible to qualify for the federal exemption, the state and federal laws conflict. In those situations, principles of conflict preemption mandate the federal law supersedes the state law, because state law

may not "stand[] as an obstacle to accomplishment and execution of the full purpose and objectives of Congress." *Mount Olivet*, 164 F.3d at 488. Otherwise, states could effectively veto federal law by enforcing their own laws over the federal law. But the Supremacy Clause of the Constitution does not permit this outcome—hence the doctrine of conflict preemption.

Second, the majority justifies its holding by concluding that the McCarran-Ferguson Act ("Act") precludes preemption here because it generally precludes federal preemption of state law regulating "the business of insurance." But the Defendant *conceded* this point on appeal, acknowledging that the Act *doesn't* preclude preemption in this situation and merely arguing that federal law does not actually preempt the NMIC as applied to Gospel Light. Appellee's Br. at 33 ("The issue is not whether the federal government *may* pre-empt state regulation of healthcare sharing, the question is whether it *does*.") (emphasis added).

The majority also holds that Gospel Light did not sufficiently allege preemption or that it does not provide insurance, so addressing the issue is constructing "an argument that was not made by [Gospel Light]." But this argument is contradicted by the record, as we have shown above. Even if Gospel Light inartfully pled the preemption issue, as long as the "issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin.*

Servs., Inc., 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991). Once a party has raised the issue, we may resolve it in whatever manner best conforms to the law, even if neither party advocated for such a conclusion. *United States v. Cortez-Nieto*, 43 F.4th 1034, 1052 (10th Cir. 2022).

The majority also contends that because the district court abstained from ruling on whether Gospel Light engaged in the "business of insurance" that we cannot address those claims. In the same breath, however, the majority puts forward evidence that Gospel Light, is, in fact, engaged in the "business of insurance," and therefore presumes it is subject to regulations under the MFA and the NMIC. It applies rational basis review, and holds the state passes the test because "regulation and licensure of insurance producers," is an important state interest. Inherent in that determination is that Gospel Light is, in fact, an insurance provider—surely New Mexico does not have a rational interest in applying the insurance code to entities that do not provide insurance. But we cannot simultaneously abide by the district court's decision not to rule on an issue, and yet proceed as if it had reached our favored outcome. Either we must abide by the district court's decision to abstain, and so cannot conclude either way whether Gospel Light is in the "business of insurance," or we reject the district court's abstention and determine whether Gospel Light is in the "business of insurance." Instead, the majority "affirms" the district court, but assumes without stating that Gospel Light is in the "business of insurance," and so avoids the need to support its conclusions with any legal authority showing

that Gospel Light's activities fit into the "business of insurance." At the very least, if a non-binding dissent cannot opine on an issue not determined by the district court, surely the majority cannot.

The Act provides that, generally, state legislatures and not Congress will regulate "[t]he business of insurance":

> (a) **State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) **Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012. The Supreme Court listed three defining hallmarks of practices that fit within the "business of insurance" to determine whether such activities are susceptible to preemption by federal law under the Act: (1) whether it transfers or spreads a policyholder's risk; (2) whether it's essential to the policy relationship between insurer and insured; and (3) whether it's limited to entities

within the insurance industry. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)). Reimbursement arrangements or schemes that do not underwrite risk or guarantee payments do not constitute "insurance" under the Act. *EagleMed LLC v. Cox*, 868 F.3d 893, 904-05 (10th Cir. 2017) (holding that the Act did not preclude preemption because the state law at issue did not serve to underwrite or spread policyholders' risks); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366-371, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002) (holding critical to its status as an insurer an HMO's assumption of risk and guarantee to its members); *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 71, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959) a contractual arrangement that did not guarantee payments did not underwrite risks and thus did not constitute insurance).

Gospel Light is a not-for-profit entity that operates on a reimbursement basis, doesn't guarantee payment, and expressly disclaims any assumption of risk.[12] It

12. OSI's position here seems particularly unjustifiable. OSI found that Gospel Light's members understand and acknowledge that—although Gospel Light has a strong history of paying medical bills that they submit—Gospel Light need not do so, and its members are ultimately responsible to pay their own medical bills. These statements strongly suggest that Gospel Light is not providing "insurance" and that, at least initially, the OSI did not believe Gospel Light was providing insurance. But later, for whatever reason, OSI found that Gospel Light "undertakes to pay or indemnify its members as to loss from certain specified contingencies or perils, or to pay

doesn't purport to provide an insurance product; in fact, it prominently proclaims the opposite. Rather than focusing on ordinary insurance-policy matters, Gospel Light's membership materials focus on its members' shared beliefs, religious convictions, and faith-based purposes. Gospel Light's core functions—living out religious beliefs and sharing financially to meet others' needs—are in no way limited to the insurance industry but are implemented primarily by religious and other nonprofit organizations. Because of these characteristics, Gospel Light's practices—the same practices that Defendant seeks to regulate—are not activities within the "business of insurance." This comports with the text of the ACA itself, which establishes that Sharing Ministries are not engaged in the "business of insurance"—or in any "business" enterprise—because Ministries are not-for-profit organizations under IRC § 501(c)(3) and are *outside* the bucket of "minimum coverage" requirements for ordinary health insurance. IRC § 5000A(d)(2).

Because Gospel Light isn't engaged in the "business of insurance" for the purpose of the Act, I would hold the Act does not preclude federal preemption. The NMIC, as

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or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies." This shift in position by OSI seems arbitrary and, arguably, an after-the-fact attempt to shoehorn Gospel Light's activities into the text of the NMIC. OSI's motivations seem especially questionable where it is undisputed that even though Gospel Light takes on itself the goal of providing cost-sharing for all or much of its members' medical expenses, it does not expressly contract to do so, and expressly does not guarantee payment or contractually assume risk.

applied, impermissibly conflicts with the ACA's purpose. Thus, I would conclude Plaintiffs are likely to succeed on the merits of their preemption claim.

We have held that, "[a]t the preliminary injunction stage . . . [i]f the moving party is likely to succeed on each of several theories, the party's argument for preliminary relief is stronger than if the party has only one claim that is likely to be viable." *Id.* at 1267. As Plaintiffs are likely to succeed both on their Free Exercise claim—based on three independent theories—and on their preemption claim, Plaintiffs' showing on the first prong for an injunction is particularly strong.

III.

Because Plaintiffs established the first prong of a preliminary injunction based on their Free Exercise claims, the remaining prongs also weigh in their favor. *See Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024) (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), aff'd sub nom. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014)).

"[O]ur precedent is clear that a First Amendment violation constitutes irreparable injury." *Id.* (citing *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019)). This is an ironclad rule in our Circuit; when we find likelihood of success on a First Amendment claim, we must also find irreparable

injury, and we need not conduct any further analysis.[13] *Id.* "The Supreme Court has made clear that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality op.)) (first citing *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001); then *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 & n. 2 (10th Cir. 2001); then *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); and then *Cmty. Commc'ns Co. v. City of Boulder*, 660 F.2d 1370, 1380 (10th Cir. 1981)). So Plaintiffs established irreparable harm—the second prong of a preliminary injunction.

Plaintiffs also established the third and fourth prongs, weighing of harms between the parties and public interest—which merge in the case of a governmental defendant. "A governmental interest in upholding a mandate that is likely unconstitutional does not outweigh a movant's interest in protecting his constitutional rights." *Pryor*, 99 F.4th at 1254 (citing *Hobby Lobby*, 723 F.3d at 1145). And "[i]t is always in the public interest to prevent

13. To show irreparable harm, a plaintiff must establish a significant risk of imminent harm. *New Mexico Dep't of Game and Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1250 (10th Cir. 2017) (quoting *Heideman*, 348 F.3d at 1189). Plaintiffs show harm that is sufficiently imminent, because at time of the hearing for the First Order, Defendant had asserted jurisdiction over Gospel Light's operations and, under the full weight of the OSI, took its Enforcement Action.

the violation of a party's constitutional rights." *Hobby Lobby*, 723 F.3d at 1145 (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)). Defendant lacks an interest in enforcing the NMIC against Gospel Light because doing so violates Plaintiffs' rights; conversely, Plaintiffs—and the public in general—maintain a strong interest in protecting and exercising their First Amendment right to religious exercise. Thus, all prongs favor Plaintiffs.

For these reasons, I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED OCTOBER 12, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. 1:23-cv-00276-MLG-KK

GOSPEL LIGHT MENNONITE CHURCH MEDICAL AID PLAN D/B/A LIBERTY HEALTHSHARE, BREANNA RENTERIA, LAURA SMITH, AND TAMMY WATERS,

Plaintiffs,

v.

NEW MEXICO OFFICE OF THE SUPERINTENDENT OF INSURANCE, AND ALICE T. KANE, NEW MEXICO SUPERINTENDENT OF INSURANCE, IN HER OFFICIAL CAPACITY,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO RECONSIDER

This matter comes before the Court on Breanna Renteria, Laura Smith, and Tammy Waters' (the "Individual Plaintiffs") Emergency Motion to Reconsider

Appendix B

Memorandum Order Denying Motion for Preliminary Injunction, filed August 9, 2023. Doc. 44. Having reviewed the parties' submissions and the applicable law, the Court grants the motion to the extent it requests that the Court consider new evidence. However, the Court finds that the new evidence is insufficient to change its previous ruling and therefore denies the motion to the extent it seeks a different outcome on the July 14, 2023, Memorandum Opinion and Order ("July 14, 2023, MOO"). Doc. 38.

INTRODUCTION

The Individual Plaintiffs, alongside Gospel Light Mennonite Church Medical Aid Plan d/b/a Liberty HealthShare ("Gospel Light"), filed a complaint seeking various forms of injunctive relief, all of which are encompassed by their demand that Gospel Light receive a blanket exemption from New Mexico's Insurance Code. Doc. 1 at 78 (requesting a "permanent injunction enjoining Defendants from enforcing the New Mexico Insurance Code against [Gospel Light] and other HCSMs"). Along with the complaint, Plaintiffs filed a motion for preliminary injunction that, if granted, would stall the Office of the Superintendent of Insurance's efforts to take administrative enforcement actions against Gospel Light. Doc. 3 at 27. The Court refused to issue a preliminary injunction, but after a state court issued a temporary restraining order commanding Gospel Light to comply with an OSI cease-and-desist order, Individual Plaintiffs filed the instant motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). For the reasons explained below, the Court again finds that Individual

Plaintiffs have not demonstrated they are entitled to the relief sought.

FACTUAL BACKGROUND

The underlying facts giving rise to this litigation were summarized in the July 14, 2023, MOO, Doc. 38, and that discussion is incorporated by reference here. However, some background is provided below for clarity.

Gospel Light is a foreign corporation that "facilitates voluntary contributions for the sharing of qualifying health care costs between members . . . based on shared ethical and religious beliefs." Doc. 1-10 at 4. To effectuate that objective, Gospel Light collects a "monthly share amount" from its members. *Id.* at 34. The amount of those contributions is "determined by majority vote of the Board of Directors" who look to various factors including the "amount of bills," "the amount needed to administer the [p]rogram," and "the number of participating [m]embers." *Id.* at 10. Gospel Light also collects membership enrollment dues, annual dues, and administrative fees from its members to "defray administrative costs" and address overhead. *Id.* at 11. Although "[e]ach month a Sharing Member is assigned a specific need in which to share," *id.*, Gospel Light bears no responsibility or obligation to pay for any healthcare bill. *Id.* at 36.

After two consumer complaints were lodged against Gospel Light, the New Mexico Superintendent of Insurance ("Superintendent") initiated an administrative enforcement action against the corporation, which resulted

in an Order to Cease and Desist and Order to Show Cause ("Order to Show Cause"). Doc. 3-3. That decision was appealed to a hearing officer, who recommended that the Superintendent uphold all aspects of the Order to Show Cause. Doc. 3-4 at 98. Ultimately, Gospel Light was fined $5,000 for each of the 502 plans issued in New Mexico (a total of $2,510,000.00) and required to cease operating until the corporation complied with the New Mexico Insurance Code. Doc. 3-5 at 7 (Superintendent's final order adopting the hearing officer recommendations). Gospel Light appealed that decision to the New Mexico State District Court, and Judge Francis J. Mathew upheld the prior directives providing Gospel Light with a choice—comply with pertinent statutory authority or discontinue its operations.[1] Doc. 51-1. That order is pending and remains in effect until sixty days from August 17, 2023. *Id.* at 2. Thereafter, it may be amended, continued, or vacated conditional on written argument from the parties. *Id.*

During the pendency of the state proceedings, the Individual Plaintiffs and Gospel Light filed the present federal suit against the New Mexico Office of the Superintendent of Insurance as well as the Superintendent herself in her official capacity (collectively "OSI"), asserting various violations of state and federal law. Doc. 1.

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1. Judge Mathew granted a temporary restraining order ("TRO") requiring Gospel Light "to cease and desist from soliciting, offering to sell, selling, collecting membership fees or monthly share amounts, or servicing Health Care Sharing Ministries in New Mexico until [Gospel Light] complies with the requirements of the New Mexico Insurance Code." Doc. 51-1 at 2. That order does not address the fines issued to Gospel Light. *See generally id.*

These parties also sought a preliminary injunction. Doc. 3. OSI responded with a motion to dismiss. Doc. 8. The Court held an evidentiary hearing on the preliminary injunction and carefully considered the parties' briefing. Ultimately, the Court granted, in part, the Superintendent's motion to dismiss and denied the preliminary injunction. Doc. 38. Gospel Light was dismissed from the federal suit, but the Individual Plaintiffs were permitted to move forward with their claims. *Id.* Plaintiffs filed a notice of appeal, Doc. 41, and the Individual Plaintiffs filed a motion to reconsider the Court's July 14, 2023, MOO. *See* Docs. 38, 44. The stated basis for that request is Judge Mathew's decision, which the Individual Plaintiffs assert gives rise to "new evidence that was unavailable at the time the motion was decided." Doc. 44 at 1.[2]

LEGAL STANDARD

"Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Pueblo of Jemez v. United States*, 63 F.4th 881, 897 (10th Cir. 2023) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)). Rather, reconsideration is appropriate under circumstances including "(1) an intervening change in the

2. As this discussion indicates, the Individual Plaintiffs have not sought reconsideration of the portions of the July 14, 2023, MOO pertaining to the motion to dismiss. *See generally* Doc. 44. As a result, the following analysis focuses only on the portions of the July 14, 2023, MOO addressing the motion for preliminary injunction.

controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018). This Court possesses considerable discretion in deciding whether to grant a motion to reconsider. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996).

ANALYSIS

I. Threshold Jurisdictional and Federalism Issues

Before the Court can reach the merits of the preliminary injunction issue, it must address OSI's concerns attendant to jurisdiction and comity. Specifically, OSI argues that the Individual Plaintiffs' appeal of the July 14, 2023, MOO to the Tenth Circuit Court of Appeals divests this Court of jurisdiction to reconsider the issues in that order. Doc. 46 at 1-2. Additionally, OSI contends that even if this Court has jurisdiction, it should refrain from ruling in a manner that would interfere with the state court TRO. *Id.* at 4-5.

The Court looks first to OSI's argument about appellate jurisdiction. Critically, after OSI filed its response, the Tenth Circuit ruled the appeal would be held in abeyance pending this Court's decision on Individual Plaintiffs' motion to reconsider. *See* Doc. 53 (filed August 30, 2023). That guidance is dispositive and binding on this Court. Further, Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it

disposes of [a motion to alter or amend the judgment under Rule 59]—the notice becomes effective . . . when the order disposing of the . . . motion is entered." That is, the notice of appeal becomes effective at the appellate level after the district court rules on the motion for reconsideration. Accordingly, the Court possesses jurisdiction to address the matters raised by Individual Plaintiffs in their motion for reconsideration.

Invoking the *Rooker-Feldman* doctrine, OSI also asserts a decision from this Court on Individual Plaintiffs' request for a preliminary injunction would improperly interfere with Judge Mathew's ruling and corresponding issuance of a temporary restraining order. Doc. 46 at 4-5. But as OSI concedes, the *Rooker-Feldman* doctrine does not squarely apply to the instant matter. "Generally, the *Rooker-Feldman* doctrine precludes lower federal courts 'from effectively exercising appellate jurisdiction over claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment.'" *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1193 (10th Cir. 2010) (quoting *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006)). The *sine qua non* of the doctrine is to prevent state-court losers from "complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)). Although it serves as a jurisdictional bar, the *Rooker-Feldman* doctrine has limited scope: it "does not apply 'simply because a party attempts to

litigate in federal court a matter previously litigated in state court.'" *Mo's Express, LLC*, 441 F.3d at 1237 (quoting *Exxon Mobil Corp.*, 544 U.S. at 282). It also "does not bar a suit by a federal-court plaintiff who was not a party in the state court litigation, nor does it bar a claim that does not seek to modify or set aside a state court judgment." *Bruce v. City & Cty. of Denver*, 57 F.4th 738, 746 (10th Cir. 2023).

Here, the present federal action is concurrent with the state court action and the Individual Plaintiffs are only involved in the federal action, which distinguishes the present circumstances considerably from those giving rise to the *Rooker-Feldman* doctrine. While cognizant of the need to avoid inappropriately stepping on the toes of the state court, this Court has a duty to resolve questions properly before it. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012) (citing *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821)). Therefore, the Court may not refrain from deciding this motion based on principles of comity.

Having determined that it must address the motion to reconsider, the Court turns to the question of whether reconsideration is proper. Individual Plaintiffs argue that the Court should grant the motion based on new evidence previously unavailable: at the time of the Court's previous order, the state court had not yet ruled on whether to restrain Gospel Light from operating in New Mexico. Doc. 44 at 3-4. Since then, the state court has issued a temporary restraining order requiring Gospel Light

to cease operations for sixty days.[3] *See generally* Doc. 51-1. The Court agrees with the Individual Plaintiffs and finds that the state court decision constitutes new evidence previously unavailable. Therefore, the Court turns to the substance of Individual Plaintiffs' request for a preliminary injunction.

II. Preliminary Injunction

To obtain a preliminary injunction, the movant must show "(1) a substantial likelihood of success on the merits, (2) irreparable injury in the absence of the injunction, (3) its threatened injury outweighs the harm to the opposing party under the injunction, and (4) the injunction is not adverse to the public interest." *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1139 n.2 (10th Cir. 2017). The burden is on the movant, and "the right to relief must be clear and unequivocal" due to the extraordinary nature of preliminary injunctions as a remedy. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003).

3. OSI responds that this new evidence is immaterial because the Individual Plaintiffs have not provided any evidence that the temporary restraining order will impede their exercise of religion. Doc. 46 at 3-4. OSI's argument goes to the merits of the preliminary injunction, not the threshold question of whether reconsideration is proper.

A. Individual Plaintiffs fail to demonstrate a likelihood of success on the merits of their free exercise claims.

The Tenth Circuit has held that the preliminary injunction factors affect each other, and specifically, that the likelihood of success on the merits can "color[]" a court's conclusions on the other prongs. *Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1121 (10th Cir. 2014). This observation has particular import in this case because Individual Plaintiffs' allegations of irreparable harm are directly related to their likelihood of success on the merits. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005) ("[The plaintiff] has failed to demonstrate the requisite likelihood of success on his free speech and academic freedom claims. As a result, he is not entitled to a presumption of irreparable injury."); *see also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737 n.11 (8th Cir. 2008) ("[W]ithout a showing that it will likely prevail on its claim that physicians will be compelled to deliver an ideological message, [the plaintiff's] asserted threat of irreparable harm is correspondingly weakened[.]"). Simply put, if Individual Plaintiffs cannot demonstrate a likely constitutional violation, then they are also unlikely to demonstrate irreparable harm warranting injunctive relief. *See Logan v. Pub. Emps. Ret. Ass'n*, 163 F. Supp. 3d 1007, 1030 (D.N.M. 2016) ("[A] plaintiff who cannot demonstrate a substantial likelihood of success is not entitled to a presumption of irreparable harm."); *Hartman v. Acton*, 613 F. Supp. 3d 1015, 1025 (S.D. Ohio 2020) ("Where a Plaintiff fails to show a likelihood of success on the merits of their claim that their constitutional rights were violated, a finding

of irreparable harm is not warranted."). For this reason, the Court first considers Individual Plaintiffs' likelihood of success on the merits.

"Under [Supreme Court] precedent[], a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22, 213 L. Ed. 2d 755 (2022) (internal quotation marks omitted).[4] Pointing to this decisional authority, Individual Plaintiffs assert the New Mexico Insurance Code (hereinafter the "Insurance Code") is not generally applicable, because, in their view, it exempts fraternal benefit societies, which are secular organizations, but not HCSMs, which are religious.[5] Doc. 51 at 9; *see also* NMSA

4. Individual Plaintiffs argue that the case from which this standard originally derives, *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), has been "effectively overruled," citing to Justices Alito's and Gorsuch's concurrences in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021). Doc. 51 at 9. This position is inconsistent with existing law. The majority opinion in *Fulton* explicitly stated that the Court "need not revisit [*Smith*] here" despite being asked to overrule it by one of the parties; the Court found that "[t]his case falls outside *Smith*" because the policy in question was not neutral or generally applicable. 141 S. Ct. at 1877. That concurring opinions have criticized *Smith* does not undermine the validity of its holding. *Smith* remains (at the time of filing) binding precedent.

5. Significantly, Individual Plaintiffs do not point to a specific provision of the Insurance Code as legally infirm; rather, they argue that the Insurance Code writ large should not apply to Gospel Light.

1978, § 59A-1-15(A) (1985). Additionally, in their previous briefing—briefing which the Court here reconsiders—Individual Plaintiffs argued that OSI's actions were not neutral and motivated by hostility towards Gospel Light. Doc. 28 at 38. The Court addresses these issues in turn.

1. General applicability

The Insurance Code provides that "[n]o person or entity shall sell or issue, or cause to be sold or issued, a health benefits plan that is unlicensed or unapproved for sale or delivery in the state." NMSA 1978, § 59A-16-21.2(A) (2019). That same statute defines a "health benefits plan" as "a policy or agreement entered into, offered or issued by a health insurance carrier to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services," § 59A-16-21.2(C)(1), and a characterizes a "health insurance carrier" as, inter alia, an entity that "enters into enters into agreements to provide, deliver, arrange for, pay for or reimburse any costs of health care services . . . in this state." § 59A-16-21.2(C)(2). Although Gospel Light's cost-sharing model falls squarely within the ambit of this statutory authority, Individual Plaintiffs claim that application of the Insurance Code to Gospel Light's operations subjects the corporation to disparate treatment. The crux of Individual Plaintiffs' argument is that secular fraternal benefit societies go unfettered by the strictures of the Insurance Code while Gospel Light must comply with New Mexico insurance law. *See* Doc. 17 at 12. This argument fails to acknowledge several dispositive facts.

Appendix B

Section 59A-1-15(A) generally exempts fraternal benefit societies from the Insurance Code.[6] However, many of the Insurance Code's provisions apply to fraternal benefit societies, including Articles 1, 2, 4, 16C, 18, 19, 20, 22, 24A, and 41 in their entireties, along with several portions of other articles. *See* NMSA 1978, § 59A-44-41(F) (2001). So, although it is true that certain provisions of the Insurance Code do not apply to fraternal benefit societies, many still do. Further, as discussed in the July 14, 2023, MOO, "[f]raternal benefit societies can be religious in nature, such as the Knights of Columbus (a Catholic organization), or they can be secular, such as the Croatian Fraternal Union of America (an organization supporting Croatian heritage)." Doc. 38 at 18.

But that is not the only distinction. As the New Mexico Attorney General's Office has explained, any insurance provided by fraternal benefit societies is ancillary to the organization's purpose:

> The fraternal benefit societies and the insurance available to a member of such fraternal society is contemplated in the law to be an incidental

6. The Insurance Code does not allow for individualized exemptions subject to governmental discretion—if it did, it would plainly run afoul of Supreme Court precedent. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879, 210 L. Ed. 2d 137 (2021) ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude.") (internal quotation marks and brackets omitted).

> part of the operation of a lodge or fraternal organization. It is not contemplated that a lodge or fraternal organization set itself up with the sole purpose of insuring members. This would be in direct contravention of the statutes relating to the fraternal benefit societies and lodges, which organizations and lodges frequently provide insurance for the members of that organization as an additional service to the members.

1953 Op. Att'y Gen. No. 53-5671. By contrast, Gospel Light exists expressly for the purpose of collecting dues to be dispersed for members' medical costs. *See* Doc. 1-4 at 1 (Gospel Light's articles of incorporation stating that "[t]he purpose for the formation of this Corporation is to enable followers of Christ to bear each other's burdens and . . . [t]o associate within the community of the Christian faith for discipleship, *medical-sharing, physical needs-sharing, financial stewardship*, and evangelical purposes. . . .") (emphasis added). Thus, where Gospel Light and fraternal benefit societies are treated differently under the law, it is without regard to religious beliefs. They are different entities with distinct purposes and the provision of health insurance serves a different role for each—a peripheral benefit for fraternal benefit society members and the core purpose for Gospel Light and other similarly situated corporations.[7]

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7. This difference distinguishes the present circumstances from the Supreme Court's ruling in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021). In *Tandon*, the Supreme Court granted a preliminary injunction striking down California's

2. Neutrality or hostility towards religious beliefs

Separate from the question of general applicability is the question of neutrality.[8] In their post-hearing brief, Individual Plaintiffs argue that the Superintendent's March 26, 2020, press release, Doc. 1-8—which cautions consumers about HCSMs and stating that these plans are unauthorized insurance products—is not neutral because it "sends a signal of official disapproval" of Individual Plaintiffs' religious beliefs. Doc. 28 at 38. The Court disagrees. The press release states, in relevant part,

> [A] HCSM plan is an unauthorized insurance product that likely will not provide the protections of an authorized, regulated, and ACA compliant major medical plan.

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restrictions on at-home worship gatherings during the COVID-19 pandemic. *See generally id.* The Supreme Court reasoned that the law restricting such gatherings was not neutral and generally applicable because it treated some comparable secular activities, such as gatherings at hair salons and indoor restaurants, more favorably than religious ones: individuals from more than three households could gather in certain secular locations when they were not permitted to gather for religious purposes. *Id.* at 1297. Those facts stand in stark contrast to those presented here. The Insurance Code does not contain specific prohibitions on religious conduct, and it does not apply a more exacting set of regulations to religious activities.

8. Although Individual Plaintiffs do not raise the issue in their motion to reconsider, earlier briefing made this argument, which the Court addresses for completeness.

> . . .
>
> Members may also be subject to religious or moral restrictions from the sharing ministry, which may leave members responsible for the full costs of health care that result from an activity the ministry does not agree with.
>
> . . .
>
> "I urge consumers not to purchase health insurance other than an ACA compliant plan. A consumer's best source for individual and family health plan coverage is to shop affordable major medical coverage with your broker or agent or with BeWellNM.com. . . ." said Superintendent of Insurance Russell Toal.

Doc. 1-8 at 1. As the text indicates, this correspondence merely clarifies that HCSMs are not equivalent to Affordable Care Act ("ACA") compliant plans, outlines areas in which HCSMs may not provide coverage, and communicates that HCSMs do not comply with applicable state insurance laws—all of which are accurate statements.[9] The Plaintiffs' attempt to recast the press

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9. Individual Plaintiffs' arguments that the state court is "disinterest[ed] in protecting Gospel Light's members from religious harm" because it "compar[ed] efforts to engage in health care sharing to a white supremacist arguing that their beliefs were based on religion rather than racism" mischaracterizes Judge Mathew's comments. Doc. 51 at 4. During the TRO hearing, Gospel Light's counsel stated that "it's not sufficient to say that a religious

release as a manifestation of religious animus falls flat. Doc. 28 at 38. Nothing in the press release demonstrates (or even suggests) that the Superintendent is hostile towards religion.

In sum, Individual Plaintiffs have failed to demonstrate that the Insurance Code violates the principles of neutrality or general applicability. *See Kennedy*, 142 S. Ct. at 2421-22 (employing standard from *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879-81, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). Nor have they shown that "official expressions of hostility" have taken place. *See id.* at 2422 n.1. Accordingly, rational basis review applies to the Court's analysis of this claim. *See Harmon v. City of Norman, Okla.*, 61 F.4th 779, 793 (10th Cir. 2023).

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organization has to comply with any local rules or regulations, because the next step of that analysis is that if the local rule or regulation prevents them or even minimally burdens carrying out that religious practice, then they have the freedom to do so." Doc. 51-2 at 16:16-22. Judge Mathew's comment was a response to Gospel Light's assertion that, essentially, faithful individuals may exercise their religious beliefs notwithstanding any law that "even minimally burdens" religious practice with the example of invidious discrimination. *Id* at 16:21. Judge Mathew asked, "But can't the law prohibit someone from discriminating even if their religious belief is that [people of other races are] inferior to them?" *Id.* at 16:25-17:1-4. He clarified shortly afterward that invidious discrimination is "not the issue entirely" in the present case; rather, his aim was plainly to discuss the extent to which neutral and generally applicable state laws, such as anti-discrimination laws, could constitutionally burden religious exercise. *Id.* at 17:20-22.

3. Rational basis review

Under rational basis review, the Court must determine whether the regulation "rationally relates to a legitimate government interest." *Id.* at 794 (brackets omitted). The standard is a deferential one. "State actions subject to rational-basis review are 'presumed constitutional,' and courts uphold the actions 'if there is any reasonably conceivable state of facts that could provide a rational basis for' them." *Valdez v. Grisham*, No. 21-2105, 2022 U.S. App. LEXIS 16330, 2022 WL 2129071, at *14 (10th Cir. June 14, 2022) (quoting *Petrella v. Brownback*, 787 F.3d 1242, 1266 (10th Cir. 2015). "A party challenging a law under rational-basis review must 'negative every conceivable basis which might support it.'" *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 767 (10th Cir. 2023) (quoting *Fcc v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).

With this legal authority as a backdrop, the Court has little difficulty concluding that state laws mandating compliance with the Insurance Code constitute a legitimate area of governmental concern. *See Hunter v. Hirsig*, 660 F. App'x 711, 717 (10th Cir. 2016) (explaining that "the regulation and licensure of insurance producers" constitutes an important state interest). "The state long has regulated the business of insurance pursuant to its police powers," and "it is beyond peradventure that protection of consumers from unsafe and unsound insurance companies is a substantial state interest." *N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, ¶ 33, 111 N.M. 750, 809 P.2d 1278. The Insurance Code itself emphasizes that

the New Mexico legislature's purpose is to protect state residents and businesses against unauthorized business practices in this area:

> The legislature declares that it is concerned with the protection of residents of this state against acts by insurers not authorized to do an insurance business in this state, by the maintenance of fair and honest insurance markets, by protecting authorized insurers which are subject to regulation from unfair competition by unauthorized insurers, and by protecting against the evasion of the insurance regulatory laws of this state.

NMSA 1978, § 59A-15-1 (1984). A later section adds, "The legislature finds that insurance fraud is pervasive and expensive, and has the potential for increasing premium rates, placing businesses at risk, reducing the ability of consumers to raise their standard of living and decreasing the economic vitality of the state." NMSA 1978, § 59A-16C-2(A) (1998). As these legislative pronouncements demonstrate, the regulation of insurance is a legitimate sphere of government interest. OSI's exercise of powers, which were conferred by the New Mexico legislature, safeguard a legitimate government interest in regulating the insurance industry.[10]

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10. The Court's doubts about Individual Plaintiffs' likelihood of success on the merits receives support from other state laws. Some jurisdictions have created "safe harbor" statutes that exempt HCSMs from regulatory oversight but require compliance with the minimum criteria necessary to satisfy the relevant ACA provisions;

B. Because Individual Plaintiffs have not demonstrated a violation of their constitutional rights, they are unable to demonstrate irreparable harm.

Individual Plaintiffs are unlikely to prove that their free exercise rights have been violated, and for that reason they have also not proven that they are suffering an irreparable constitutional injury. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) (affirming denial of preliminary injunction and noting that because plaintiff "does not have a likelihood of success on the merits . . . his argument that he is irreparably harmed by the deprivation of his First Amendment rights also fails"); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (holding that because the Plaintiff was unable "to demonstrate that he has a cognizable constitutional claim . . . his argument that he

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some have exempted HCSMs but imposed conditions more onerous than the minimum imposed by the ACA; and many, like New Mexico, have not enacted any legislation shielding HSCMs from regulatory oversight. *See* Doc. 37 at 204-05; *see, e.g.*, Wash. Rev. Code § 48.43.009 (2011) (safe harbor provision requiring compliance with ACA provisions); N.H. Rev. Stat. Ann. § 126-V:1 (2012) (exempting HCSMs but imposing additional conditions, including disclaimer, annual audit, and distribution of monthly written statement to members accounting for money requested by members and money actually shared). Whatever regulatory scheme is employed, "states are free to regulate [HCSMs] as they choose." Doc. 37 at 198:16-17. Indeed, former Florida Insurance Commissioner Kevin McCarty, who testified as Gospel Light's insurance expert, repeatedly emphasized that states possessed authority to regulate these entities. *See id.* at 195:14-25-196:1-16, 198:10-20, 207:1-12.

is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit"); *see also Goldstein v. Hochul*, No. 22-CV-8300, 2023 U.S. Dist. LEXIS 111124, 2023 WL 4236164, at *9 (S.D.N.Y. June 28, 2023) (applying similar logic). The result is a bitter pill to swallow given the allegations in a complaint pertain to fundamental rights, which the Court views with particular solicitude. But Individual Plaintiffs have not shown a likelihood of success on the merits of their First Amendment claims; there is only the incidental burden that *Smith* accepts as a necessity when a neutral and generally applicable law brushes up against religious exercise. Without a constitutional violation, under the facts presented, Individual Plaintiffs have not demonstrated irreparable harm.

C. The balance of equities and public interest weigh against a preliminary injunction.

The third and fourth preliminary injunction factors are whether "(3) [the movant's] threatened injury outweighs the harm to the opposing party under the injunction, and (4) the injunction is not adverse to the public interest." *First W. Capital Mgmt. Co.*, 874 F.3d at 1139 n.2. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418,435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

As discussed above, the public has an important interest in a well-regulated insurance industry. Meanwhile, Individual Plaintiffs' interest in participating in a cost-sharing plan, because it does not have a constitutional

dimension, is legally no different from the interest of any individual in purchasing an unlicensed insurance product. This interest is minimal when compared to the public health and safety concerns implicated by the question of insurance regulation. Public safety is an important consideration in the preliminary injunction analysis. *See Aposhian v. Barr*, 958 F.3d 969, 991 (10th Cir. 2020) (finding strong public interest in "banning the possession and transfer of machine guns" based on safety, including safety of law enforcement and first responders); *Martinez v. City of Rio Rancho*, No. 1:14-cv-00841, 2015 WL 13650058, at *5-6 (D.N.M. June 10, 2015) (finding public interest in avoiding driver distraction on roadways). Accordingly, the Court finds that Individual Plaintiffs fail to demonstrate that the balance of harms favors them or that an injunction would not be adverse to the public interest.

D. The factors, weighed together, do not warrant the extraordinary relief of a preliminary injunction.

As discussed above, the first two factors—likelihood of success on the merits and irreparable injury—are the most important. The Court finds Individual Plaintiffs fail to satisfy either of these prongs, and they have not met their burden on the balance of harms and public interest factors. Considering all factors together, the Court finds that a preliminary injunction is not warranted and therefore (again) denies Individual Plaintiffs' request for injunctive relief.

Appendix B

CONCLUSION

For the foregoing reasons, the Court grants the motion for reconsideration to the extent it has identified new evidence. Doc. 44. However, having reviewed the new evidence, the Court finds that its original ruling on the motion for preliminary injunction remains accurate and therefore denies the motion for reconsideration to the extent it seeks a different ruling on the July 14, 2023, MOO.

It is so ordered.

/s/ Matthew L. Garcia
UNITED STATES
DISTRICT JUDGE
MATTHEW L. GARCIA

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED JULY 14, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. 1:23-cv-00276-MLG-KK

GOSPEL LIGHT MENNONITE CHURCH MEDICAL AID PLAN D/B/A LIBERTY HEALTHSHARE, BREANNA RENTERIA, LAURA SMITH, AND TAMMY WATERS,

Plaintiffs,

v.

NEW MEXICO OFFICE OF THE SUPERINTENDENT OF INSURANCE, AND JENNIFER A. CATECHIS, INTERIM SUPERINTENDENT OF INSURANCE, IN HER OFFICIAL CAPACITY,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART MOTION TO DISMISS AND DENYING MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Defendants' Motion to Dismiss in Lieu of Answer, filed April 25, 2023

(Doc. 8) and Plaintiffs' Motion for Preliminary Injunction, filed March 31, 2023 (Doc. 3). Having reviewed the parties' submissions and the applicable law, and having held a hearing on June 2, 2023, the Court grants the motion to dismiss in part and denies the motion for preliminary injunction.

BACKGROUND

A. Gospel Light's cost-sharing arrangement

Plaintiff Gospel Light Mennonite Church Medical Aid Plan d/b/a Liberty HealthShare ("Gospel Light") is a foreign corporation that incorporated in Virginia on June 24, 2014. Doc. 1-3. Gospel Light functions as a healthcare sharing ministry ("HCSM"), which it defines as "a religious ministry grounded in Biblical teaching . . . by which religiously like-minded members voluntarily share each other's health care costs."[1] Doc. 1 at 2. The purpose of the organization is "to coordinate voluntary contributions for the sharing of qualifying health care costs between members based on shared ethical and religious beliefs." Doc. 3 at 4. To effectuate this goal, Gospel Light "Sharing Members" contribute a "monthly share amount" to be used for the medical needs of others. Doc. 1-10 at 35. How much money should be contributed

1. This definition generally conforms to the statutory definition of a HCSM. *See* 26 U.S.C. § 5000A (defining HCSM as an organization whose "members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed").

as part of a member's "monthly share amount" is "determined by majority vote of the Board of Directors" who look to various factors including the "amount of bills," "the amount needed to administer the [p]rogram," and "the number of participating members." *Id.* at 9. Gospel Light also collects membership enrollment dues, annual dues, and administrative fees from its members to "defray administrative costs" and address overhead. *Id.* at 11. The collected monies are then shared among members in a manner "suggested and coordinated" by Gospel Light administrators. *Id.* at 21. Certain exceptions exist to this cost-sharing (e.g., certain job-related injuries), and members are expected "to pursue payment from any other responsible payer" including private insurance, Medicare, Medicaid, and worker's compensation. *Id.* at 13.

Gospel Light's cost-sharing arrangement is not without risk to program participants. Gospel Light bears no responsibility or obligation to pay for any healthcare bill. As the legal disclaimer incorporated into Gospel Light's informational materials explains:

> This program is not an insurance company nor is it offered through an insurance company. The program does not guarantee or promise that your medical bills will be paid or assigned to others for payment. Whether anyone chooses to pay your medical bills will be totally voluntary. As such, this program should never be considered as a substitute for an insurance policy. Whether you receive any payments for medical expenses and whether or not this

> program continues to operate, you are always liable for any unpaid bills.

Doc. 1-10 at 36. *See also* Doc. 1 at 21 ("[Gospel Light] expressly, consistently, and persistently disclaims any assumption of risk, promise to pay, and other customary legal incidents of insurance."); *id.* ("No sharing is guaranteed.").

B. OSI takes administrative enforcement action against Gospel Light

Gospel Light began offering cost-sharing in New Mexico in 2014, Doc. 3 at 2, and its operations have previously gone unfettered by regulation from the New Mexico Office of the Superintendent of Insurance ("OSI"). That changed when two people lodged consumer complaints against the corporation. Doc. 8 at 2. Following these reports, the superintendent of insurance ("Superintendent") initiated an "administrative enforcement action" culminating in an Order to Cease and Desist and Order to Show Cause ("Order to Show Cause"). Doc. 3-3. That order found that Gospel Light fell within the state definition of a "health insurance carrier" and was operating without the requisite certificate of authority. Doc. 3-3 at 4-5, 7. Gospel Light requested a hearing on the matter, which occurred and proceeded under the authority of an OSI hearing officer. Doc. 3-4 at 2. For reasons hewing closely to those articulated in the Order to Show Cause, the hearing officer found that Gospel Light was a health benefits plan under New Mexico law and that the Superintendent therefore possessed the authority to

> require [Gospel Light] to cease and desist from soliciting, offering to sell, selling, collecting membership fees or monthly share amounts, or servicing, HCSMs in New Mexico, unless and until [Gospel Light] obtains a certificate of authority to operate as a health insurer in this state, and its plans are approved by the Superintendent for sale in this state.

Id. at 2, 96-97. The hearing officer recommended that the Superintendent levy a $10,000 fine for each of the 502 unauthorized membership plans Gospel Light issued in New Mexico—a total recommended fine of over $10,000,000. The Superintendent ultimately adopted all the hearing officer's factual findings and legal conclusions. Doc. 1-11 at 7. Gospel Light was ordered to cease operating as an HCSM in New Mexico and to pay a (reduced but nonetheless substantial) fine of $2,510,000.00. *Id.* at 23; Doc. 13-2.

Gospel Light appealed the Superintendent's final order to state district court. *See* NMSA 1978, § 59A-4-20(A) (2011) (providing for appeal of Superintendent decision to the state district court). It requested that OSI stay any administrative action pending the state court proceedings. OSI did not concur with this request. Instead, the Superintendent required Gospel Light to execute a bond of twice the value of the fine ($5,020,000.00) and cease operating in New Mexico except to process medical expenses submitted on or before April 24, 2023. Doc. 13-3 at 4. Gospel Light subsequently sought the state district court's review of that decision. Both the

substantive appeal and the request for stay are currently pending; the matter is set for hearing in state court later this summer.

C. Federal proceedings

Gospel Light filed the present action alleging a variety of federal and New Mexico constitutional violations, federal preemption, and violations of the New Mexico Religious Freedom Restoration Act. *See generally* Doc. 1 (complaint). Gospel Light also filed a motion for preliminary injunction, and OSI has filed a motion to dismiss the case on a variety of jurisdictional grounds. Docs. 3, 8. The Court held a hearing on these motions after they were fully briefed. Doc. 23 (clerk's minutes). Gospel Light and OSI filed closing briefs shortly thereafter. Docs. 27, 28. With leave of the Court, the Alliance of Health Care Sharing Ministries submitted a brief as amicus curiae. Doc. 29 (granting leave); Doc. 25-1 (amicus brief). Finally, Gospel Light filed a notice of supplemental authority. Doc. 36. Having reviewed this substantial briefing record, the Court rules on the issues as described below.

ANALYSIS

I. OSI's Motion to Dismiss

OSI's motion to dismiss raises three jurisdictional arguments and also invokes abstention pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.

2d 669 (1971).[2] Jurisdictional matters present a threshold question, so the Court addresses those issues first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (internal brackets, quotations, and citations omitted)). The Court then considers the application of *Younger* to these proceedings and parties.

A. Standing of individual Plaintiffs

Under Article III of the United States Constitution, a plaintiff must have standing to bring their claims. *McCombs v. Delta Grp. Elecs., Inc.*, Case No. 1:22-cv-00662, 2023 U.S. Dist. LEXIS 100632, 2023 WL 3934666, at *2 (D.N.M. June 9, 2023). To demonstrate Article III standing, a plaintiff must establish three elements.

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2. The Tenth Circuit has clarified that *Younger* is an abstention doctrine and not a jurisdictional matter. *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1230 n.8 (10th Cir. 2013) ("In denying Osguthorpe's motion, the federal district court suggested that the *Younger* doctrine is jurisdictional. This is not precisely correct. *Younger* is a doctrine of abstention. An abstention doctrine is one 'under which a District Court may decline to exercise or postpone the exercise of its jurisdiction.' This differs from a case in which the district court is barred at the outset from exercising its jurisdiction.") (citations omitted). However, the Tenth Circuit also acknowledged that "once a court has properly determined that *Younger* abstention applies, 'there is no discretion to grant injunctive relief.'" *Id.* (citation omitted).

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The plaintiff "bears the burden of establishing these elements," which at the pleading stage means the plaintiff must "allege facts demonstrating each element." *Id.* at 3 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (citations omitted)).

OSI argues that there is no injury in fact, and therefore no standing, because the individual Plaintiffs have not alleged a specific religious belief that mandates them to participate in a healthcare sharing plan. Doc. 8 at 14. While true, the individual Plaintiffs do allege that sharing healthcare costs through an HCSM is a means through which they practice their faith. *See* Doc. 37 at 85-87. They further assert that the inability to share healthcare costs would prevent them from engaging in

their sincerely held religious beliefs.[3] Doc. 1 at 52. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (The "exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons." (internal quotation marks and citations omitted)).

These claimed restrictions are sufficient to confer standing. At the pleading stage, the Plaintiffs need only make some plausible "show[ing] that [their] good-faith religious beliefs are hampered[.]" *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2100, 204 L. Ed. 2d 452 (2019) (Gorsuch, J., concurring in the judgment) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 615, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) (Brennan, J., concurring and dissenting)). Whether those asserted harms give rise to a constitutional violation is a merits issue to be determined after the claims and attendant facts have been fleshed out. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) ("For purposes of the standing inquiry, the question is not whether the alleged injury rises to the level of a constitutional violation. That is the issue on the merits. For standing purposes, the court asks only if there was an injury in fact, caused by the challenged action and redressable in court.") (free speech context). For now, the Plaintiffs have sufficiently pleaded an injury in fact, caused by OSI, and redressable by this Court.

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3. The Alliance of Health Care Sharing Ministries' amicus brief further discusses the role of spiritual support and prayer in HCSMs. Doc. 25-1 at 3-4.

The preceding analysis also disposes of OSI's claim that the individual Plaintiffs lack prudential standing. Doc. 8 at 14-15. Prudential standing examines whether a plaintiff is asserting "its own rights, rather than those belonging to third parties" and forbids assertions of "generalized grievance[s] shared in substantially equal measure by all or a large class of citizens." *Citizens' Committee to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1026 (10th Cir. 2002)*; see also Wilderness Soc'y v. Kane Cty.*, 632 F.3d 1162, 1174 (10th Cir. 2011) ("[P]rudential standing moves beyond injury in fact and addresses whether a plaintiff is asserting its own legal rights rather than resting on the rights or interests of third parties."). As explained above, the individual Plaintiffs are participants in Gospel Light's healthcare sharing plan who aver that their personal religious practices are impeded by OSI's administrative actions. They are not merely asserting rights on behalf of other HCSM members or on behalf of Gospel Light. Because the individual Plaintiffs have a stake in the litigation in the form of their own religious exercise, the Court is satisfied that they meet the requirements of prudential standing.

B. Eleventh Amendment immunity

OSI argues the Court should dismiss Gospel Light's claims for violation of the New Mexico Civil Rights Act ("NMCRA"), NMSA 1978, § 41-4A-1 *et seq.*, and the New Mexico Religious Freedom Restoration Act ("NM RFRA"), NMSA 1978, § 28-22-1 *et seq.*, because New Mexico has not waived Eleventh Amendment immunity to allow for federal court proceedings. Doc. 8 at 7-8; Doc.

18 at 6, 8-10; Doc. 27 at 3. To assess this claim, the Court looks first to the NMCRA's text.

The statute's venue provision, codified at NMSA 1978, Section 41-4A-3(B) (2021), does not specifically address whether the waiver of immunity extends to suits brought in federal court. It states only that a person deprived of a right contained in the New Mexico Constitution's bill of rights "may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court." *Id.* Gospel Light equates silence with consent. It reasons that because the waiver of sovereign immunity does not explicitly limit itself to state court, it must necessarily extend to federal courts also. Doc. 28 at 16.

That New Mexico has waived immunity to be sued in its own courts does not mean, ipso facto, that it has consented to suit in federal court. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999). "A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, and thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." (emphasis in original) (internal citations, quotation marks, and brackets omitted)). That is not the case here. The NMCRA contains no express waiver to suit in a federal forum, and for this reason the Court agrees with OSI that sovereign immunity bars adjudication of that claim.[4]

4. Because it finds that New Mexico has not waived sovereign immunity, the Court does not reach the issue OSI raises regarding

The same reasoning and conclusion apply to Gospel Light's NM RFRA claims. NMSA 1978, § 28-22-4 (2000) of that legislation grants a waiver of immunity for injunctive and declaratory relief, but it contains no provision consenting to suit in federal court.[5] Again, the statute is silent on the matter, and again, this omission is dispositive. *See Port Auth. Trans-Hudson Corp.*, 495 U.S. at 306.[6] Because the state has not expressly consented to be sued in federal court for claimed NM RFRA violations, Gospel Light cannot pursue its claims for relief in this litigation. *See Sossamon*, 563 U.S. at 284 (explaining that a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign") (internal quotation marks and citations omitted).

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the NMCRA's coverage of "persons" as applied to organizational plaintiffs. *See* Doc. 18 at 7.

5. Plaintiffs' NM RFRA claims are limited to injunctive and declaratory relief. Doc. 1 at 77 ¶ 404.

6. Gospel Light points to the decision in *Ross v. The Board of Regents of the University of New Mexico*, 599 F.3d 1114 (10th Cir. 2010), claiming that it serves as "a guidepost for this Court's analysis of whether the [NMCRA] and [NM RFRA] waivers of sovereign immunity apply in the federal courts." Doc. 28 at 18. However, Gospel Light's brief omits a key fact; in *Ross*, the state defendants removed the matter to federal court. "Removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Trant v. Okla.*, 754 F.3d 1158, 1172 (10th Cir. 2014) (quoting *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)).

C. Timeliness

OSI next claims that that Gospel Light failed to timely appeal the hearing officer's findings. Doc. 8 at 4. Rule 1-074(E) NMRA and NMSA 1978, § 39-3-1.1(C) (1999) provide for appeals from agency decisions to the district court but require that a notice of appeal be submitted "within thirty days of the date of filing of the final decision." Whatever relevance these rules might have to the state court proceedings, they are of little import to this federal court litigation. Gospel Light is not required to exhaust the administrative appeal process before filing Section 1983 claims in this Court. *See Carrete v. N.M. Racing Comm'n*, No. 21-cv-0678, 2021 U.S. Dist. LEXIS 244844, 2021 WL 6072581, at *9 (D.N.M. Dec. 23, 2021) (citing *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 519 (10th Cir. 1998) (stating that a plaintiff's "failure to seek judicial review in state court [did not] preclude[] his procedural due process claim" and that "[i]t is beyond dispute that a plaintiff need not exhaust state administrative remedies before filing suit in federal court under § 1983")); *McNulty v. Sandoval County*, No. CIV 05-221, 2005 U.S. Dist. LEXIS 59716, 2005 WL 8163566, at *3 n.3 (D.N.M. Aug. 15, 2005) (stating that exhaustion of state law remedies did not bar the plaintiff's Section 1983 post-termination due process claim). And the state mechanisms providing for appeal—along with the concomitant deadlines included in those procedural rules—of an administrative agency to state district courts do not preclude Gospel Light from seeking separate relief pursuant to federal law in a

federal court.[7] Accordingly, any state appeals deadlines are inapplicable to this federal case.[8]

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7. OSI's suggestion that the *Carrete* decision requires a different result misconstrues the nature of the claims at issue in that case. Doc. 8 at 5 (citing *Carrete*, 2021 U.S. Dist. LEXIS 244844, 2021 WL 6072581). In *Carrete*, the plaintiff was disqualified from horse racing because his horse had illegal substances in its system, and the plaintiff (untimely) appealed the administrative decision to the state district court, bringing several Section 1983 due process claims and a New Mexico Declaratory Judgment Act ("NMDJA") claim. 2021 U.S. Dist. LEXIS 244844, [WL] at *1-2. The New Mexico Racing Commission removed the case to federal court, then moved to dismiss arguing, inter alia, that the administrative appeal was untimely under Rule 1-075 NMRA. The court dismissed the Section 1983 claims for separate reasons. 2021 U.S. Dist. LEXIS 244844, [WL] at *4. As for the timeliness issue, the court clarified that the Section 1983 claims would not have been subject to the thirty-day appeal period in Rule 1-075. *Id.* However, the NMDJA claim was subject to Rule 1-075 specifically because the plaintiff had initiated the administrative review process and was now, in effect, stuck with its deadlines. 2021 U.S. Dist. LEXIS 244844, [WL] at *5-6. Therefore, because the plaintiff had not filed the declaratory judgment claim within the administrative appeal period, the court dismissed the NMDJA claim without prejudice. Here, the federal case is not an appeal from a state administrative action; in fact, the appeal from the state administrative action is currently, separately, pending in state court.

8. Additionally, the Court notes that the individual Plaintiffs were not parties to the state administrative proceeding, and therefore, the deadlines associated with that proceeding cannot apply to their claims.

D. *Younger* abstention generally

Finally, the Court looks to *Younger* abstention—the thorniest issue raised in the motion to dismiss. *Younger* abstention requires a federal court to refrain "from deciding a case otherwise within the scope of its jurisdiction in certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Graff v. Aberdeen Enterprizes, II, Inc.*, 65 F.4th 500, 522 (10th Cir. 2023). The legal precept underlying the doctrine comports with notions of federalism and comity, *Younger*, 401 U.S. at 44, and precludes federal court interference "with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—when such relief could adequately be sought before the state court." *Schwab v. Kansas*, 691 F. App'x 511, 514 (10th Cir. 2017).

> To that end, a federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.

Id. (brackets omitted) (quoting *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999); *see also McDonald v. Eagle Cnty.*, 807 F. App'x 786, 790 (10th Cir. 2020) (same). Though the doctrine is to be sparingly applied, and only on the showing of exceptional circumstances, once the relevant factors have been met, the doctrine is "non-discretionary" and "the district court must abstain" from hearing the matter. *Courthouse News Serv. v. N.M. Admin. Off. Cts.*, 53 F.4th 1245, 1256 (10th Cir. 2022).

1. *Younger* abstention applies to Gospel Light's claims for relief

The Court begins by considering *Younger* abstention as applied to Gospel Light's claims for relief. Gospel Light does not dispute that there is an ongoing state judicial proceeding or that ongoing litigation in state court falls outside the types of actions to which *Younger* applies.[9] Doc. 15 at 6. Rather, Gospel Light questions whether the state court provides an adequate forum to address

9. The underlying civil enforcement proceeding, which OSI initiated to investigate and ultimately discipline Gospel Light, fits cleanly within the definition of a civil enforcement proceeding in the *Younger* context. *See Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 79, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013) (clarifying that civil enforcement proceedings are "akin to a criminal prosecution in important respects" because they are "characteristically initiated to sanction the federal plaintiff," typically involve a state actor that initiated the action, and often include an investigation that ultimately results in "the filing of a formal complaint or charges" (internal citations and quotation marks omitted)).

the claims it raises here (the second element necessary for *Younger* abstention) and denies the presence of an important state interest (the third element necessary for *Younger* abstention). Gospel Light also invokes two limited exceptions to abstention asserting that (1) OSI acted in bad faith and (2) Gospel Light will suffer irreparable injury if its claims are not addressed in this forum. The Court addresses these issues in turn.

Gospel Light concedes that the state court has jurisdiction to decide the pending constitutional issues but argues that the central questions are federal in nature and should therefore be heard by a federal court. *See* Doc. 15 at 7 ("That a New Mexico state court could decide the federal issues here is not enough to declare those courts an adequate forum."). But the mere fact that many of Gospel Light's claims require interpretation of the Federal Constitution is insufficient reason for this Court to intervene in the ongoing state court proceedings. The state court may address those matters, and the proposition that state courts are unfit for adjudication of federal civil rights claims is a postulate that the Supreme Court has "repeatedly and emphatically rejected." *Moore v. Sims*, 442 U.S. 415, 430, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979); *see also Morkel v. Davis*, 513 F. App'x 724, 728 (10th Cir. 2013) ("State courts are generally equally capable of enforcing federal constitutional rights as federal courts."); *Fisher v. Civil Serv. Comm'n*, 484 F.2d 1099, 1100 (10th Cir. 1973) ("[S]tate courts of general jurisdiction are competent to rule on federal constitutional claims."). Indeed, Supreme Court precedent directly addressing religious liberty claims attests to the adequacy of the state forum. *See Ohio*

Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 629, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986) ("[I]t is sufficient under [existing precedent] that constitutional claims may be raised in state-court judicial review of the administrative proceeding."). Gospel Light can raise, and has raised,[10] its constitutional concerns in the state proceedings. The state district court is well-equipped to address those legal questions.

Having determined that the state court provides an adequate forum for resolution of Gospel Light's claims, the Court turns to the question of whether an important state interest is at play. There is little doubt that the regulation of insurance meets this test. Both federal and state courts have repeatedly held so. *See Hunter v. Hirsig*, 660 F. App'x 711, 717 (10th Cir. 2016) (finding that the *Younger* state interest prong was met because "the regulation and licensure of insurance producers" constituted an important state interest); *N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, ¶ 33, 111 N.M. 750, 809 P.2d 1278 ("We have little trouble recognizing the substantial nature of this interest. The state long has regulated the business of insurance pursuant to its police powers. Indeed, it is beyond peradventure that protection of consumers from unsafe and unsound insurance companies is a substantial state interest."). Nevertheless, Gospel Light suggests that the state's regulatory authority is not controlling because "there is not an important state interest when there is a 'facially conclusive' claim of federal preemption." Doc. 15

10. The Court may take judicial notice of filings in other courts that relate to the matter at issue. *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

at 8 (citations omitted). Although Gospel Light's legal take is correct, *see New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989), no facially conclusive claim of federal preemption exists here.[11]

The Affordable Care Act ("ACA") permits individuals who are members of HCSMs that meet a particular set of requirements to avoid the penalty for failure to maintain minimum essential coverage. *See* Doc. 3 at 19 (citing 26 U.S.C. § 5000A(d)(2)(B)). That is, members of suitable HCSMs are exempt from the individual mandate and related penalties for noncompliance with that directive. But this fact, standing alone, does suggest that Congress intended to supersede a traditional state police power.[12]

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11. Preemption occurs when Congress forbids state regulation either expressly or impliedly. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77, 135 S. Ct. 1591, 191 L. Ed. 2d 511 (2015). One form of implied preemption is conflict preemption, in which "compliance with both state and federal law is impossible." *Id.* at 377. The Court interprets Gospel Light's argument that "Defendants' interpretation of the New Mexico Insurance Code results in an irreconcilable conflict with federal law and is preempted" to refer to conflict preemption. *See* Doc. 15 at 8.

12. Gospel Light claims that federal law trumps OSI's declaration that Gospel Light is engaging in the business of insurance. Specifically, it argues that the ACA requires HCSMs to be nonprofits, and the Internal Revenue Code does not allow nonprofits to engage in the business of insurance. Doc. 15 at 9. Therefore, it contends, federal law defines Gospel Light's actions as definitively *not* the business of insurance. This is not necessarily true: while the Court does not take a position on the matter because of its conclusion that abstention is required, it notes that an HCSM could, for example,

Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126, 1129 (10th Cir. 2007) ("Whatever its form, pre-emption analysis starts with the assumption that the historic police powers of the States are not to be superseded by [federal law] unless that is the clear and manifest purpose of Congress."). To the contrary, Gospel Light's expert, Kevin McCarty, a former Florida Insurance Commissioner, testified at the hearing on this matter that "states are free to regulate [HCSMs] as they choose."[13] Doc. 37 at 198. McCarty's opinion is consistent with the relevant federal and state laws at issue; the ACA defines and exempts HCSMs from the federally imposed individual mandate, while state statutes regulate HCSMs in various ways unrelated to the ACA's requirements. Simply put, states are free to regulate HCSMs, and the ACA did not cabin state oversight of HCSM operations. *Id.* at 203-05.

This observation is borne out through other states' experiences. Some have created "safe harbor" statutes that exempt HCSMs from regulatory oversight but require compliance with the minimum criteria necessary

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improperly engage in the business of insurance in violation of the requirements of its nonprofit status.

13. During the hearing on this matter, Gospel Light provided testimony from Kevin McCarty. McCarty spent about 27 years working for the Florida Department of Insurance and served as the Insurance Commissioner from 2003 through 2016. Doc. 37 at 159. He has a juris doctorate from the University of Florida, has served as an expert witness in state court, and has testified in administrative hearings and before Congress. *Id.* at 160-61. McCarty was offered, and accepted, as an expert in the "regulation of healthcare sharing ministries under the Affordable Care Act." *Id.* at 165-66.

to satisfy the relevant ACA provisions; some have exempted HCSMs but imposed conditions more onerous than the minimum imposed by the ACA; and some, like New Mexico, have not enacted any legislation that shields HSCMs from regulatory oversight. *See* Doc. 37 at 204-05; *see, e.g.*, Wash. Rev. Code § 48.43.009 (2011) (safe harbor provision requiring compliance with ACA provisions); N.H. Rev. Stat. Ann. § 126-V:1 (2012) (exempting HCSMs but imposing additional conditions, including disclaimer, annual audit, and distribution of monthly written statement to members accounting for money requested by members and money actually shared). As these varied approaches suggest, regulation of HCSMs is possible without defying federal law.

Gospel Light's second argument—that federal interests counsel against *Younger* abstention—is similarly unavailing. As discussed previously, the state court provides a sound forum for resolution of Gospel Light's legal claims, and those issues can be addressed in the pending legal proceedings. A different result is not required because many, but not all, of Gospel Light's claims address federal constitutional questions. The mere presence of a "substantial constitutional challenge to state action" is insufficient to avoid abstention. As the Supreme Court explained in *New Orleans Public Service, Inc.*:

> There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-

emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction. *See Younger*, 401 U.S., at 53, 91 S.Ct., at 755. That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the outcome of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State. In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in "carrying out the important and necessary task" of enforcing its criminal laws. *Id.*, at 51-52, 91 S.Ct., at 754. Similarly, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), we looked not to Ohio's specific concern with Dayton Christian Schools' firing of Linda Hoskinson, but to its more general interest in preventing employers from engaging in sex discrimination. *Id.*, at 628, 106 S.Ct., at 2723. Because pre-emption-based challenges merit a similar focus, the appropriate question here is not whether Louisiana has a substantial,

> legitimate interest in reducing [New Orleans Public Service, Inc.'s] retail rate below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates. It clearly does. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983).

491 U.S. at 365. The implication of important federal interests, such as constitutional claims under the First and Fourteenth Amendments, does not permit the federal court system to keep a case that also implicates important state interests, such as the regulation of insurance.

2. The record does not support Gospel Light's claims that OSI has acted in bad faith

Gospel Light also claims that *Younger* does not apply because OSI's actions were taken in bad faith based on animus toward Gospel Light's religious beliefs.[14] Doc. 15

14. In support of this argument, Gospel Light applies the holding in *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S. Ct. 674, 27 L. Ed. 2d 701 (1971). There, the Supreme Court ruled, "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Id.*

at 10. In support of this argument, Gospel Light holds up OSI's briefing as demonstrating animus because the agency suggested that cost sharing could be effectuated through private donations, charitable giving, or through GoFundMe pages. *Id.* However, the Court does not read the relevant briefing as "mocking Plaintiffs' religious practices"—OSI was simply raising the possibility that Gospel Light members could practice their religious obligation to bear each other's burdens in other ways that complied with the law. *See* Doc. 8 at 14.

Gospel Light further asserts that OSI described HCSMs as "scams," "low quality," and "bad plans." Doc. 15 at 10-11. That is not quite accurate. OSI did not make the blanket statements that Gospel Light attributes to it regarding the quality of HCSMs; it warned consumers about the possibility of scam health insurance programs, which could include HCSMs or other types of programs. *See* Doc. 1-15 at 1. HCSMs, just like secular healthcare payment structures, are not immune to abuse by bad actors. Such an observation does not demonstrate animus against religion.

Gospel Light also alleges disparate treatment by OSI because, it claims, secular organizations were permitted to offer noncompliant insurance products, while Gospel Light was not. This allegation, which is unsupported except by citation to Gospel Light's complaint, is not so extreme as to demonstrate that the entire state action was "undertaken by state officials in bad faith and without hope of obtaining a valid conviction," or in this case, a valid administrative penalty against Gospel Light. *See Perez*, 401 U.S. at

85. Further, the labor and fraternal organizations to which Gospel Light points are meaningfully different in character from HCSMs.

For example, NMSA 1978, § 59A-1-16(A) (2001), states that the insurance code shall not apply to "a labor organization that, incidental only to operations as a labor organization, issues benefit certificates to members or maintains funds to assist members and their families in times of illness, injury or need, and is not for profit[.]" As the statutory text indicates, this provision exempts a labor organization that, as an *incidental* part of its overall operations, maintains a pool of money to support members in need. *Id.* By contrast, one of an HCSM's core activities is to facilitate members' sharing of each other's healthcare burdens through financial support. *See* Doc. 1-4 (Gospel Light's articles of incorporation stating that "[t]he purpose for the formation of this Corporation is to enable followers of Christ to bear each other's burdens and . . . to associate within the community of the Christian faith for discipleship, *medical-sharing, physical needs-sharing, financial stewardship*, and evangelical purposes. . . .") (emphasis added). That the insurance code applies different standards to labor organizations, which only incidentally shares some limited funds, peripheral to its main reason for existing, and an organization whose primary purpose is to share the burdens of healthcare costs, is not indicative of animus.

Similarly, the provisions of the New Mexico insurance code exempting fraternal benefit societies do not support Gospel Light's argument that religious and non-religious

organizations are treated differently. NMSA 1978, § 59A-44-5 (1989) requires fraternal benefit societies to "operate for the benefit of members and their beneficiaries by . . . lawfully operating for one or more social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic *or religious purposes* for the benefit of its members, which may also be extended to member dependents." (emphasis added). Fraternal benefit societies can be religious in nature, such as the Knights of Columbus (a Catholic organization), or they can be secular, such as the Croatian Fraternal Union of America (an organization supporting Croatian heritage). The diversity of these organizations—including religious groups—undermine Gospel Light's claim that the OSI or state statutes exhibit an animus toward religion or impermissible and disparate treatment.

3. No irreparable injury

Gospel Light also argues that *Younger* abstention is inapplicable because abstention would result in irreparable injury, which it identifies as the impairment of its members to exercise their constitutional rights and the corresponding chilling effect resulting from OSI's enforcement actions. Doc. 15 at 11-12. But Gospel Light has not offered any evidence that members have left because of these proceedings. *See Citizen Ctr. v. Gessler*, 770 F.3d 900, 913 (10th Cir. 2014) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.") (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)). It provides no temporal

connection between OSI's enforcement actions and any members who opted out of Gospel Light's cost-sharing plan. As far as the Court can discern, there were 502 members when OSI initiated enforcement proceedings, and there are 490 members currently. *See* Doc. 1-11 (referring to 502 "violations of the New Mexico Insurance Code," i.e., 502 New Mexican Gospel Light members); Doc. 1 at 72 ¶ 376 (identifying approximately 490 New Mexican Gospel Light members, including the individual Plaintiffs, at the time the complaint was filed). Even assuming all twelve of these people left as a direct result of OSI's actions, those departures would be insufficient to establish the kind of injury warranting interference in ongoing state court litigation.

Moreover, *Younger* held that "in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is both great and immediate." 401 U.S. at 46. (Of course, *Younger* was later extended to include certain types of civil proceedings as well.) "Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id. Younger* also found the presence of a chilling effect, on its own, insufficient—"even in the area of First Amendment rights." *Id.* at 51. Testimony at the hearing on June 2, 2023, indicated that New Mexicans make up only a small fraction of Gospel Light's overall membership. *See* Doc. 37 at 155-56 (out of total 131,117 members nationwide, 490 are New Mexican). Therefore, the loss of these members—while it is an irreparable injury—is not sufficiently "great and immediate" to avoid *Younger*'s mandate to abstain.

Finally, Gospel Light adds for the first time in its post-hearing brief that because this case "seeks to remedy extraordinary circumstances that present a threat of immediate and irreparable injury to a constitutional right," abstention is improper. Doc. 28 at 8. Gospel Light relies heavily on *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 100 (4th Cir. 2022), but that case is inapposite. *McVey* involved a state proceeding against an organization, Air Evac, alleged to be selling insurance without a license. *Id.* at 94. A federal court contending with a preemption claim found that although *Younger* would normally apply, certain emails between the insurance commissioner and Air Evac's main in-state competitor indicated that the state had "prejudged the outcome of the state administrative proceeding" because of "favoritism" towards the competitor. *Id.* at 101. Additionally, the only record of any complaint against Air Evac was from the in-state competitor. *Id.* at 102. Because of these concerns of bias, the federal district court found that abstention was inappropriate, and the Fourth Circuit did not find an abuse of discretion. *Id.*

Gospel Light argues that OSI has similarly shown a bias here, asserting that OSI changed course to target HCSMs after previously acknowledging that HCSMs were not subject to insurance regulation, and complaining that the administrative hearing was conducted by an attorney from the OSI general counsel's office and presided over by another attorney from the same office. Doc. 28 at 9-10. However, these allegations do not mirror the evidence of bias from the *McVey* proceeding. OSI states that its investigation was in response to consumer

complaints, Doc. 37 at 32, and at this stage, Gospel Light has not alleged that those complaints were issued by competitors or otherwise suspect. Nor is there evidence of communication between OSI and any of Gospel Light's competitor organizations that would indicate that OSI was engaging in favoritism. *McVey* is therefore inapposite.

For all of the above reasons, the Court must abstain from hearing Gospel Light's federal case. All claims by Gospel Light, the corporate entity, are therefore dismissed without prejudice. *See Goings v. Sumner Cnty. Dist. Attorney's Office*, 571 F. App'x 634, 639 (10th Cir. 2014) (dismissals under *Younger* should be without prejudice).

4. *Younger* abstention does not apply to the individual Plaintiffs' claims for relief

The case does not end with Gospel Light; the corporate entity is not the only plaintiff. Three individuals—Breanna Renteria, Laura Smith, and Tammy Waters—have lodged claims for relief in the current action. OSI concedes that *Younger* abstention is inapplicable to the claims of the individual plaintiffs, who are not parties to the underlying state action and who bring their own claims of constitutional injury. Doc. 37 at 16 (counsel for OSI states, "I acknowledge that the Younger abstention policy doesn't apply to the three individual Plaintiffs."). Therefore, the individual Plaintiffs' claims remain viable and their request for a preliminary injunction must be considered.

II. Preliminary injunction

"Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show: (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013). Irreparable harm is the "single most important prerequisite." *N.M. Dep't of Game & Fish v. United States DOI*, 854 F.3d 1236, 1249 (10th Cir. 2017). This element is satisfied when a movant demonstrates "a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (citation and italics omitted). A preliminary injunction is only appropriate if this harm is likely to occur before a trial on the merits can take place. *Id.* at 1260.

Here, the individual Plaintiffs argue that the administrative order, "if enforced, will cause irreparable harm" because it will deprive them of their First Amendment right to practice their religion by sharing each other's burdens. Doc. 3 at 16. But according to counsel for Gospel Light, Liberty HealthShare is still operational in New Mexico and "[t]here has been no refusal to share or to pay those requests to share because of . . . the order of OSI." Doc. 37 at 64.

Conceding that they have not suffered any present injury, the individual Plaintiffs speculate about the

future. They argue that *if enforced*, the order will cause irreparable harm, and Gospel Light characterizes that outcome as almost inevitable. *See* Doc. 28 at 54 ("And the day is coming when the order will be effective."). But this fatalistic interpretation is far from certain. It is entirely possible that the state court will invalidate the hearing officer's order and resolve the question in Gospel Light's favor.[15] Regardless, the mere specter of injury, which is conditional on the outcome of a separate legal proceeding, is insufficient grounds to grant the relief sought.[16] The

15. Gospel Light and the individual Plaintiffs express concerns that the underlying state court proceedings could take years to resolve. Doc. 37 at 48 ("And waiting for the state court to hear an appeal which, unfortunately Your Honor, I'm not as optimistic as the Office of Superintendent of Insurance of how quickly that's going to move, being that there are months before the [state] Court will even hear our Motion to stay and even after that, there are potentially all types of appeals that will take -- could potentially take years."). This assessment underscores the uncertainty of the claimed harm. Gospel Light could be banned from operating, or it could not; a lengthy appeals process could ensue, or it could not; the request for a stay of the administrative order at the state level could be granted, or it could not.

16. Gospel Light cites to *Greater Yellowstone Coalition*, 321 F.3d at 1258 for the proposition that "a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative." Doc. 28 at 54. *Greater Yellowstone Coalition* involved a significant risk of harm to a bald eagle population, but the timing and extent of that harm was unclear because the bald eagles' behavior could not be predicted with certainty. 321 F.3d at 1259-60. The Court finds that the uncertainty inherent in environmental harms and animal behavior is not equivalent to the uncertainty in the present case, which involves an intervening event in any potential causal chain: a concurrent state legal proceeding that might resolve the entire dispute without any irreparable harm ever coming to pass.

Tenth Circuit has held that "to satisfy the irreparable harm factor, the [movant] must establish both that harm will occur, and that, when it does, such harm will be irreparable." *N.M. Dep't of Game & Fish*, 854 F.3d at 1251 (internal quotation marks omitted). Accordingly, because the alleged irreparable harm is too speculative, the individual Plaintiffs fail to satisfy the requirements for a preliminary injunction, and the Court need not reach the remaining factors. *See DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir. 2018). The Court therefore denies the motion. Doc. 3.

CONCLUSION

As outlined above, the Court grants OSI's motion to dismiss (Doc. 8) as it pertains to (1) all claims by Gospel Light, the organizational plaintiff, pursuant to the requirements of *Younger* abstention; (2) the NMCRA and NM RFRA claims by the individual Plaintiffs. In all other respects, OSI's motion to dismiss is denied.

As for the motion for preliminary injunction, the Court finds that the individual Plaintiffs have failed to show a likelihood of irreparable harm. The Court therefore denies the motion for preliminary injunction. Doc. 3.

It is so ordered.

/s/ Matthew L. Garcia
MATTHEW L. GARCIA
UNITED STATES
DISTRICT JUDGE

APPENDIX D — ORDER OF THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE, FILED FEBRUARY 22, 2023

BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE

Docket No. 2021-0085

IN THE MATTER OF

GOSPEL LIGHT MENNONITE CHURCH MEDICAL AID PLAN D/B/A LIBERTY HEALTHSHARE,

Respondent.

FINAL ORDER

THIS MATTER comes before the Interim New Mexico Superintendent of Insurance ("Superintendent") upon receipt of the Hearing Officer's Recommended Decision and Order Setting Deadline for Exceptions filed to the docket in this proceeding on January 20, 2023 and Liberty Healthshare's Exceptions to Hearing Officer's Recommended Decision filed in this proceeding on February 3, 2023. Having considered the record, the Hearing Officer's Recommended Decision and Respondent's Exceptions, and being fully informed in the premises,

THE SUPERINTENDENT FINDS AND CONCLUDES:

1. The Superintendent has jurisdiction over the subject matter and the parties;

2. The Superintendent initiated this proceeding by issuing an Order to Cease and Desist and Order to Show Cause ("Initial Order") directed to Respondent on November 23, 2021;

3. The Superintendent originally appointed Richard B. Word as the Hearing Officer to preside over this matter. Upon Hearing Officer Word's recusal due to his pending retirement, the Superintendent appointed R. Alfred Walker as the Hearing Officer to preside over this matter. The Hearing Officers conducted evidentiary hearings. The parties submitted written arguments and requested findings of fact and conclusions of law;

4. After considering the record, Hearing Officer R. Alfred Walker issued a Recommended Decision on January 20, 2023;

5. Respondent filed Exceptions to the Recommended Decision on February 3, 2023;

6. The Superintendent rules on the Exceptions as follows:

a. Exception 1: Burden of Proof. Overruled. No party requested a finding of fact or conclusion of law relating to burden of proof. Upon review of the record, the Superintendent determines that Petitioner met its burden of proving the allegations of the Initial Order by a preponderance of the evidence;

b. Exception 2: Standard of Proof. Overruled. No party requested a finding of fact or conclusion of law

relating to the standard of proof. Upon review of the record, the Superintendent determines that Petitioner met its burden of proving the allegations of the Initial Order by a preponderance of the evidence;

c. Exception 3: Hearing Officer's Findings of Fact 7 and 8. Overruled. Respondent describes the Hearing Officer's findings as "accurate" but appears to challenge the conclusion reached from the facts. The conclusion is that a contract was formed, and the facts support that conclusion. Respondent does not cite to any part of the record to challenge the findings, and these findings are supported by substantial evidence.

d. Exception 4: Hearing Officer's Finding of Fact 10. Overruled. The Superintendent need not concern herself with the application of the parole evidence rule in New Mexico or under what circumstances a written contract may be modified orally or by course of performance. The question addressed was whether a contract was formed, and performance by Respondent is evidence of the formation of a contract not the interpretation of the contract. This finding is supported by substantial evidence.

e. Exception 5: Hearing Officer's Finding of Fact 11. Overruled. Again, Respondent does not seem to challenge the finding as inaccurate but challenges the conclusion this fact supports. The conclusion is that a contract was formed, and the fact supports that conclusion. Respondent does not cite to any part of the record to challenge the finding, and this finding is supported by substantial evidence.

f. Exception 6: Hearing Officer's Finding of Fact 14. Overruled. Again, Respondent attacks the conclusion which this fact supports. The conclusion is that Respondent is an entity that reimburses any costs of health care services and is therefore a health insurance carrier. Respondent does not cite to any part of the record to challenge the finding, and this finding is supported by substantial evidence.

g. Exception 7: Hearing Officer's Finding of Fact 15. Overruled. Respondent relies on dictionary definitions of "coverage." Respondent ignores the evidence in the record that its own members described the Gospel Light Plan as providing coverage for or covering various medical costs. Respondent does not cite to any part of the record to challenge the finding, and this finding is supported by substantial evidence.

h. Exception 8: Hearing Officer's Finding of Fact 17. Overruled. Finding of Fact 17 is not contradicted by Finding of Fact 9. Finding of Fact 9 supports the conclusion that a contract was formed, because despite the disclaimer of any obligation, Respondent's performance of the obligation provided the mutuality of obligation for the formation of the contract. The performance of the obligation is the payment or reimbursement of loss. This finding is supported by substantial evidence.

i. Exception 9: Hearing Officer's Conclusion of Law 1. Overruled. Respondent did not propose findings of fact or conclusions of law on the issues of subject matter jurisdiction or personal jurisdiction. The Hearing Officer's

findings of fact are supported by substantial evidence, and his conclusions of subject matter jurisdiction and personal jurisdiction are supported by those findings and by the law.

j. Exception 10: Hearing Officer's Conclusion of Law 3. Overruled. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 3 is supported by those findings and by the law.

k. Exception 11: Hearing Officer's Conclusion of Law 4. Overruled. Even though the Hearing Officer did not make a finding specifically describing the Gospel Light Plan as a contract for a health benefits plan, the Hearing Officer found that the Gospel Light Plan is a contract. Finding of Fact 11 and Conclusion of Law 2. The Hearing Officer also found that Respondent provides coverage in this state for health benefits. Finding of Fact 15. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 4 is supported by those findings and by the law.

l. Exception 12: Hearing Officer's Conclusion of Law 5. Overruled. Respondent engages in the same circular reasoning that it accuses the Hearing Officer of engaging in. Respondent says that it cannot be a health insurance carrier because only a health insurance carrier can offer health benefits, and it cannot offer health benefits because it is not a health insurance carrier. The Hearing Officer is correct that the Legislature intended the Insurance Code to regulate both health benefits and anyone who offers health benefits. The Hearing Officer's findings of fact on

these issues are supported by substantial evidence, and his Conclusion of Law 5 is supported by those findings and by the law.

m. Exception 13: Hearing Officer's Conclusion of Law 6. Overruled. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 6 is supported by those findings and by the law.

n. Exception 14: Hearing Officer's Conclusion of Law 7. Overruled. As noted above, the Hearing Officer made findings that the Gospel Light Plan was a contract to provide health benefits. Respondent argues that the Hearing Officer did not make a finding that the contract was one of insurance. However, the Hearing Officer found that Respondent undertakes to pay or indemnify its members as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies. Finding of Fact 17. That language comes from the statutory definition of insurance. Since the question of what constitutes insurance is a question of law, it was appropriate for the Hearing Officer to describe the contract as one of insurance in his conclusions, rather than in his findings. Respondent reiterates its arguments about why the Gospel Light Plan is not insurance, but the Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 7 is supported by those findings and by the law.

o. Exception 15: Hearing Officer's Conclusion of Law 8. Overruled. The Hearing Officer's findings of fact

are supported by substantial evidence, and his Conclusion of Law 8 is supported by those findings and by the law.

p. Exception 16: Hearing Officer's Conclusion of Law 9. Overruled. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 9 is supported by those findings and by the law.

q. Exception 17: Hearing Officer's Conclusion of Law 10. Overruled. Respondent reiterates its arguments about why the New Mexico Insurance Code is an unconstitutional burden on its and its members free exercise rights, but the Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 10 is supported by those findings and by the law.

r. Exception 18: Hearing Officer's Conclusion of Law 11. Overruled. Respondent reiterates its arguments about why the Superintendent's public statements are evidence of religious animus and bias against Respondent. Respondent also asserts that is was error for the Hearing Officer to quash Respondent's subpoena of the Superintendent, which prevented Respondent from creating a record of animus and bias. However, without evidence of animus and bias in the record, it was appropriate for the Hearing Officer to prevent the disqualification of the Superintendent as the final decisionmaker, which would have occurred if the Superintendent were called as a witness, in order for Respondent to attempt to get the Superintendent to say something disqualifying. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 11 is supported by those findings and by the law.

s. Exception 19: Hearing Officer's Conclusion of Law 12 and Recommended Decision B. Overruled. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 12 and Recommended Decision B are supported by those findings and by the law.

t. Exception 19: Hearing Officer's Conclusion of Law 13 and Recommended Decision C. Overruled. The Hearing Officer's findings of fact are supported by substantial evidence, and his Conclusion of Law 13 and Recommended Decision C are supported by those findings and by the law; and

7. The Hearing Officer's Recommended Decision is supported by substantial evidence in the record and is legally sound; and

IT IS THEREFORE ORDERED that:

A. Liberty Healthshare's Exceptions to the Recommended Decision are overruled.

B. The Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations are adopted as the Superintendent's own;

C. Respondent shall cease and desist from soliciting, offering to sell, selling, collecting membership fees or monthly share amounts, or servicing HSCMS in New Mexico until Respondent complies with the requirements of the New Mexico Insurance Code;

D. Under law, respondent could be fined up to $20,000 per violation under to NMSA 1978, Section 59A-1-18, Respondent is hereby fined five thousand dollars ($5,000) for each of its 502 violations of the New Mexico Insurance Code, for a total fine of two million five hundred ten thousand dollars ($2,510,000);

E. Respondent has the right to appeal this Final Order to district court pursuant to NMSA 1978, Section 39-3-1.1 (1999) and Rule 1-074 NMRA;

F. This Order is effective immediately;

G. Copies of this Order shall be sent to all persons listed as service recipients on OSI's eDocket; and

H. This docket is hereby closed.

DONE AND ORDERED under the Seal of the Office of Superintendent of Insurance at Santa Fe, New Mexico this 22nd day of February, 2023.

/s/ Jennifer A. Catechis
HON. JENNIFER A. CATECHIS
INTERIM SUPERINTENDENT OF INSURANCE

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-2123
(D.C. No. 1:23-CV-00276-MLG-KK) (D. N.M.)

BREANNA RENTERIA, *et al.*,

Plaintiffs-Appellants,

v.

NEW MEXICO OFFICE OF THE SUPERINTENDENT OF INSURANCE, *et al.*,

Defendants-Appellees,

and

GOSPEL LIGHT MENNONITE CHURCH MEDICAL AID PLAN, D/B/A LIBERTY HEALTHSHARE,

Plaintiff.

ORDER

Before **CARSON**, **ROSSMAN**, and **FEDERICO**, Circuit Judges

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active

service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Art. VI, cl 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XIV

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

26 USCS § 501(m)(1)

(m) Certain organizations providing commercial-type insurance not exempt from tax.

> **(1) Denial of tax exemption where providing commercial-type insurance is substantial part of activities.** An organization described in paragraph (3) or (4) of subsection (c) shall be exempt from tax under subsection (a) only if no substantial part of its activities consists of providing commercial-type insurance.

Appendix F

26 U.S.C.A. § 5000A

(a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.

(1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return. Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty. If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152 [26 USCS § 152]) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.

(1) In general. The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts. For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount. An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income. An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) [26 USCS § 6012(a)(1)] with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) Zero percent for taxable years beginning after 2015.

(3) Applicable dollar amount. For purposes of paragraph (1)—

(A) In general. Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $0.

(B) Phase in. The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18. If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(4) Terms relating to income and families. For purposes of this section—

(A) Family size. The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 [26 USCS § 151] (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income. The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 [26 USCS § 1] for the taxable year.

(C) Modified adjusted gross income. The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911 [26 USCS § 911], and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(d) Applicable individual. For purposes of this section—

(1) In general. The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.

(A) Religious conscience exemptions.

(i) In general. Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act [42 USCS § 18031(d)(4)(H)] which certifies that—

(I) such individual is a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and is adherent of established tenets or teachings of such sect or division as described in such section; or

(II) such individual is a member of a religious sect or division thereof which is not described in section 1402(g)(1) [26 USCS § 1402(g)(1)], who relies solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual.

(ii) Special rules.

(I) Medical health services defined. For purposes of this subparagraph, the term "medical health services" does not include routine dental, vision and hearing services, midwifery services, vaccinations, necessary medical services provided to children, services required by law or by a third party, and such other services as the Secretary of Health and Human Services may provide in implementing section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act [42 USCS § 18031(d)(4)(H)].

(II) Attestation required. Clause (i)(II) shall apply to an individual for months in a

taxable year only if the information provided by the individual under section 1411(b)(5)(A) of such Act [42 USCS § 18081(b)(5)(A)] includes an attestation that the individual has not received medical health services during the preceding taxable year.

(B) Health care sharing ministry.

(i) In general. Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry. The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and is exempt from taxation under section 501(a) [26 USCS § 501(a)],

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present. Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals. Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions. No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage.

(A) In general. Any applicable individual for any month if the applicable individual's required

contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 USCS § 18082(b)(1)(B)]. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution. For purposes of this paragraph, the term "required contribution" means—

> **(i)** in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or
>
> **(ii)** in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified

health plan through the Exchange), reduced by the amount of the credit allowable under section 36B [26 USCS § 36B] for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees. For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing. In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold. Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 USCS § 18082(b)(1)(B)] is less than the amount of gross income specified in section 6012(a)(1) [26 USCS § 6012(a)(1)] with respect to the taxpayer.

(3) Members of Indian tribes. Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6) [26 USCS § 45A(c)(6)]).

(4) Months during short coverage gaps.

(A) In general. Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules. For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the

collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships. Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) [26 USCS § 1311(d)(4)(H)] to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage. For purposes of this section—

(1) In general. The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs. Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act [42 USCS §§ 1395c et seq.],

(ii) the Medicaid program under title XIX of the Social Security Act [42 USCS §§ 1396 et seq.],

(iii) the CHIP program under title XXI of the Social Security Act [42 USCS §§ 1397aa et seq.] or under a qualified CHIP look-alike program (as defined in section 2107(g) of the

Social Security Act [42 USCS § 1397gg(g)]),

(iv) medical coverage under chapter 55 of title 10, United States Code [10 USCS §§ 1071 et seq.], including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code [38 USCS §§ 1701 et seq. or 1801 et seq.], as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan. Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market. Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan. Coverage under a grandfathered health plan.

(E) Other coverage. Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan. The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act [42 USCS § 300gg-91(d)(8)]), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage. The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act [42 USCS § 300gg-91]; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories. Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) [26 USCS § 911(d)(1)] which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a) [26 USCS § 937(a)]) for such month.

(5) Insurance-related terms. Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.

(1) In general. The penalty provided by this section shall be paid upon notice and demand by the Secretary,

and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 [26 USCS §§ 6671 et seq.].

(2) Special rules. Notwithstanding any other provision of law—

(A) Waiver of criminal penalties. In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies. The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

42 U.S.C.A. § 300gg-13

(a) In general. A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

N.M.S.A. § 59A-1-15

No provision of the Insurance Code shall apply to:

A. fraternal benefit societies, as identified in Chapter 59A, Article 44 NMSA 1978, except as stated in that article;

B. nonprofit health care plans, as identified in Chapter 59A, Article 47 NMSA 1978, except as stated in that article;

C. health maintenance organizations, as identified in Chapter 59A, Article 46 NMSA 1978, except as stated in that article;

D. prepaid dental plans, as identified in Chapter 59A, Article 48 NMSA 1978, except as stated in that article;

E. motor clubs, as identified in Chapter 59A, Article 50 NMSA 1978, except as stated in that article;

F. bail bondsmen, as identified in Chapter 59A, Article 51 NMSA 1978, except as stated in that article;

G. insurance premium finance companies, as identified in Chapter 59A, Article 45 NMSA 1978, except as stated in that article; and

H. title insurers and title insurance agents, as identified in Chapter 59A, Article 30 NMSA 1978, except as stated in that article.

N.M.S.A. § 59A-1-16

In addition to organizations and businesses otherwise exempt, the Insurance Code [59A-1-1 NMSA 1978] shall not apply to:

A. a labor organization that, incidental only to operations as a labor organization, issues benefit certificates to members or maintains funds to assist members and their families in times of illness, injury or need, and is not for profit;

B. the credit union share insurance corporation, as identified in Chapter 58, Article 12 NMSA 1978, and similar corporations and funds for protection of depositors, shareholders or creditors of financial institutions and businesses other than insurers; or

C. the risk management division of the general services department, the public school insurance authority, the retiree health care authority and any public school district or to insurance of public property

or public risks by any agency of government not otherwise engaged in the business of insurance, except the provisions of the Patient Protection Act [59A-57-1 NMSA 1978] and Sections 59A-2-9.2 [59A-16-21.1 NMSA 1978] and 59A-23E-18 NMSA 1978 shall apply to any entity required or authorized to purchase health care benefits pursuant to the Health Care Purchasing Act [13-7-1 NMSA 1978].

N.M.S.A. § 59A-15-16

Notwithstanding any other provision of law and except as provided in the Health Care Benefits Jurisdiction Act [59A-15-14 to 59A-15-19 NMSA 1978], any person who provides coverage in this state for health benefits, including coverage for medical, surgical, hospital, osteopathic, acupuncture and oriental medicine, chiropractic, physical therapy, speech pathology, audiology, professional mental health, dental or optometric expenses, whether such coverage is by direct payment, reimbursement or otherwise, shall be presumed to be subject to the provisions of the Insurance Code and the jurisdiction of the superintendent unless the person provides evidence satisfactory to the superintendent that he is subject exclusively to the jurisdiction of another agency of this state or the federal government.

Appendix F

N.M.S.A. § 59A-16-12

No insurer shall, on the basis of the race, color, religion or national origin of any individual or group of persons:

A. refuse to make insurance available to any applicant for insurance; or

B. treat any such applicant or insured differently than any other applicant or insured with respect to the terms, conditions, rates, benefits or requirements of any such insurance contract.

This section shall not apply to life insurance contracts or annuities entered into prior to the section's effective date. This section shall not be construed to affect criteria for acceptance into membership of any fraternal benefit society.

N.M.S.A § 59A-16-21.2

A. No person or entity shall sell or issue, or cause to be sold or issued, a health benefits plan that is unlicensed or unapproved for sale or delivery in the state.

B. No person or entity shall sell or issue, or cause to be sold or issued, health insurance coverage that is not permitted health insurance coverage.

C. As used in this section:

(1) "health benefits plan" means a policy or agreement entered into, offered or issued by a health insurance carrier to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services; and

(2) "health insurance carrier" means an entity subject to the insurance laws and regulations of this state, including a health insurance company, a health maintenance organization, a hospital and health services corporation, a provider service network, a nonprofit health care plan or any other entity that contracts or offers to contract, or enters into agreements to provide, deliver, arrange for, pay for or reimburse any costs of health care services, or that provides, offers or administers health benefits plans or managed health care plans in this state.

N.M.S.A. § 59A-22-42

A. Each individual and group health insurance policy, health care plan and certificate of health insurance delivered or issued for delivery in this state that provides a prescription drug benefit shall provide, at a minimum, the following coverage:

(1) at least one product or form of contraception in each of the contraceptive method categories identified by the federal food and drug administration;

(2) a sufficient number and assortment of oral

contraceptive pills to reflect the variety of oral contraceptives approved by the federal food and drug administration; and

(3) clinical services related to the provision or use of contraception, including consultations, examinations, procedures, ultrasound, anesthesia, patient education, counseling, device insertion and removal, follow-up care and side-effects management.

B. Except as provided in Subsection C of this section, the coverage required pursuant to this section shall not be subject to:

(1) cost sharing for insureds;

(2) utilization review;

(3) prior authorization or step-therapy requirements; or

(4) any other restrictions or delays on the coverage.

C. An insurer may discourage brand-name pharmacy drugs or items by applying cost sharing to brand-name drugs or items when at least one generic or therapeutic equivalent is covered within the same method of contraception without patient cost sharing; provided that when an insured's health care provider determines that a particular drug or item is medically necessary, the individual or group health insurance policy, health care plan or certificate of insurance shall cover the brand-name

pharmacy drug or item without cost sharing. Medical necessity may include considerations such as severity of side effects, differences in permanence or reversibility of contraceptives and ability to adhere to the appropriate use of the drug or item, as determined by the attending provider.

D. An insurer shall grant an insured an expedited hearing to appeal any adverse determination made relating to the provisions of this section. The process for requesting an expedited hearing pursuant to this subsection shall:

(1) be easily accessible, transparent, sufficiently expedient and not unduly burdensome on an insured, the insured's representative or the insured's health care provider;

(2) defer to the determination of the insured's health care provider; and

(3) provide for a determination of the claim according to a time frame and in a manner that takes into account the nature of the claim and the medical exigencies involved for a claim involving an urgent health care need.

E. An insurer shall not require a prescription for any drug, item or service that is available without a prescription.

F. An insurer shall provide coverage and shall reimburse a health care provider or dispensing entity on a per-unit basis for dispensing a six-month supply of contraceptives at

one time; provided that the contraceptives are prescribed and self-administered.

G. Nothing in this section shall be construed to:

(1) require a health care provider to prescribe six months of contraceptives at one time; or

(2) permit an insurer to limit coverage or impose cost sharing for an alternate method of contraception if an insured changes contraceptive methods before exhausting a previously dispensed supply.

H. The provisions of this section shall not apply to short-term travel, accident-only hospital-indemnity-only, limited-benefit or specified-disease policies.

I. The provisions of this section apply to individual and group health insurance policies, health care plans and certificates of insurance delivered or issued for delivery after January 1, 2020.

J. For the purposes of this section:

(1) "contraceptive method categories identified by the federal food and drug administration":

(a) means tubal ligation; sterilization implant; copper intrauterine device; intrauterine device with progestin; implantable rod; contraceptive shot or injection; combined oral contraceptives; extended or continuous use oral contraceptives;

progestin-only oral contraceptives; patch; vaginal ring; diaphragm with spermicide; sponge with spermicide; cervical cap with spermicide; male and female condoms; spermicide alone; vasectomy; ulipristal acetate; levonorgestrel emergency contraception; and any additional contraceptive method categories approved by the federal food and drug administration; and

(b) does not mean a product that has been recalled for safety reasons or withdrawn from the market;

(2) "cost sharing" means a deductible, copayment or coinsurance that an insured is required to pay in accordance with the terms of an individual or group health insurance policy, health care plan or certificate of insurance; and

(3) "health care provider" means an individual licensed to provide health care in the ordinary course of business.

K. A religious entity purchasing individual or group health insurance coverage may elect to exclude prescription contraceptive drugs or devices from the health coverage purchased.

N.M.S.A. § 59A-44-16

A. A society authorized to do business in this state may provide the following contractual benefits in any form:

(1) life insurance, endowment benefits and annuity benefits as defined in Section 59A-7-2 NMSA 1978;

(2) health insurance benefits as defined in Section 59A-7-3 NMSA 1978;

(3) monument or tombstone benefits to the memory of deceased members; and

(4) such other benefits as authorized for life, accident and health insurers and which are not inconsistent with Chapter 59A, Article 44 NMSA 1978, as approved by the superintendent.

B. A society shall specify in its rules those persons who may be issued, or covered by, the contractual benefits in Subsection A of this section, consistent with providing benefits to members and their dependents. A society may provide benefits on the lives of children under the minimum age for adult membership upon application of an adult person having an insurable interest as defined in Section 59A-18-4 NMSA 1978.

N.M.S.A. § 59A-44-23

Except as herein provided, societies shall be governed by Chapter 59A, Article 44 NMSA 1978 and shall be exempt from all other provisions of the insurance laws of this state unless they are expressly designated therein, or unless it is specifically made applicable by that article.

Appendix F

N.M.S.A. § 59A-44-40

A. Nothing contained in Chapter 59A, Article 44 NMSA 1978 shall be so construed as to effect or apply to:

(1) grand or subordinate lodges of societies, orders or associations now doing business in this state that provide benefits exclusively through local or subordinate lodges;

(2) orders, societies or associations that admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, insuring only their own members and their families and the ladies' societies or ladies' auxiliaries to such orders, societies or associations;

F. Societies exempted under the provisions of this section shall also be exempt from all other provisions of the general insurance laws of this state.