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

VITA NUOVA Inc.,	)	
	)	
Plaintiff,	)	Case No. 4:19-cv-00532-O
	)	
v.	)	
	)	
ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services *et al*.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

The Plaintiff in this action, Vita Nuova Inc., challenges a provision of the Church Amendments, 42 U.S.C. § 300a-7(c), first enacted in 1973, that prohibits organizations receiving funds under various federal statutes from discriminating in employment based on religious beliefs or moral convictions regarding sterilization procedures, abortion, or, more generally, health services or research activities. The discrimination proscribed by Section 300a-7(c) includes discrimination based on an individual's performance of (or assistance in) such a procedure or activity, an individual's refusal to perform (or assist in) such a procedure or activity, and an individual's religious beliefs or moral convictions about such procedures more generally.

Plaintiff alleges it intends to apply for one type of federal funding to which Section 300a-7(c) applies, Title X funding, "at the next available opportunity in November 2020." First Am. Compl. ¶ 31, ECF No. 16 ("Am. Compl.") According to Plaintiff, it "requires all of its employees to respect the sanctity of human life at all times, both on and off the job," and it "will not allow its doctors to perform elective abortions, nor will it allow its employees to assist in elective abortions." *Id.* ¶ 53. Plaintiff contends that, because the non-discrimination requirement in Section 300a-7(c) applies to Title X funds, Section 300a-7(c) violates the Religious Freedom Restoration Act ("RFRA") as applied to Plaintiff by allegedly preventing it from applying to participate in the Title X program. *Id.* ¶ 54. Plaintiff now seeks to certify a class consisting of "[e]very present and future health-care provider in the United States that opposes abortion for sincere religious reasons." *See* Br. in Supp. of Mot. for Class Cert. at 1, ECF No. 33-1 ("Mot.").

The Court should deny Plaintiff's motion for class certification. The proposed class is not adequately defined or clearly ascertainable. Because the term "health-care provider" is

undefined, it will be impossible to determine the scope and extent of the class. The proposed class definition also sweeps too broadly, encompassing many individuals and entities who cannot plausibly claim injury traceable to Section 300a-7(c) because there is no indication that they are—or will be—recipients of the federal funds to which Section 300a-7(c) applies, that they may seek to receive federal funds to which Section 300a-7(c) applies, or that they would be unwilling to hire physicians or other health care personnel who perform (or assist in performing) abortions or have done so in the past. Moreover, the class definition is flawed because it is premised on subjective states of mind rather than objective criteria, and because Plaintiff has failed to identify any means for the Court to determine at some point during these proceedings whether any individual or entity falls within the scope of this broadly defined class.

Plaintiff also cannot establish commonality or typicality because the alleged RFRA claims of the proposed class members would require individualized assessments that are not suitable for resolution on a class-wide basis. Plaintiff has failed to show that all members of its sweepingly broad proposed class share a similar religious objection to Section 300a-7(c), and thus, that Plaintiff's claim has the same essential characteristics as those of the putative class. Furthermore, class-wide resolution is not appropriate because the challenged requirement applies to many different federal programs or funding streams, and the Court would therefore be required to conduct RFRA's compelling interest and least restrictive means analysis in a broad array of contexts, not just with respect to the Title X program.

Because Plaintiff cannot satisfy the applicable requirements of Rule 23, the Court should deny Plaintiff's motion for class certification.

ARGUMENT

"The class-action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Therefore, "[a] district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class." *Stirman v. Exxon Corp*., 280 F.3d 554, 561 (5th Cir. 2002). *See also Steering Comm. v. Exxon Mobil Corp*., 461 F.3d 598, 601 (5th Cir. 2006); *Unger v. Amedisys Inc*., 401 F.3d 316, 320 (5th Cir. 2005); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 421 (5th Cir. 2004). "To make a determination on class certification, a district court must conduct an intense factual investigation." *Robinson*, 387 F.3d at 420. "[G]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Unger*, 401 F.3d at 321. The Fifth Circuit has repeatedly "stress[ed] that it is the party seeking certification who bears the burden of establishing that the requirements of Rule 23 have been met." *Bell Atl. Corp. v. AT & T Corp*., 339 F.3d 294, 301 (5th Cir. 2003).

To proceed as a class, Plaintiff must show that an ascertainable class exists and meets all four requirements set forth in Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation. If Plaintiff can satisfy all these criteria, it must also show that the action is maintainable as a class action under one of Rule 23(b)'s subsections. *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 265 (5th Cir. 2000). Here, Plaintiff has moved to certify a non-opt-out class under Fed. R. Civ. P. 23(b)(2). Therefore, Plaintiff also must demonstrate that Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As explained below, class

certification should be denied because Plaintiff has not satisfied Rule 23's test for ascertainability, commonality, typicality, or adequacy.

I. Plaintiff Has Failed to Demonstrate That an Identifiable Class Exists.

The Fifth Circuit requires that, "[t]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (citations omitted); *see also John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "An identifiable class exists if its members can be ascertained by reference to objective criteria (ascertainability)." *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326, 328 (N.D. Tex. 2012). This requirement of a definable and ascertainable class protects absent plaintiffs "by defining who is entitled to relief" and protects defendants "by enabling a final judgment that clearly identifies who is bound by it." *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 317 F.R.D. 675, 679 (N.D. Ga. 2016) (quoting 1 William B. Rubenstein, *Newberg on Class Actions* § 3:1 (5th ed. 2011) ("*Newberg*")).

Plaintiff offers the following definition of the class to be certified: "Every present and future health-care provider in the United States that opposes abortion for sincere religious reasons." Mot. at 1. For several reasons, the class sought to be represented is not adequately defined or clearly ascertainable.

First, neither the complaint nor Plaintiff's class certification motion defines the term "health-care provider." The absence of such a definition is fatal because without knowing who is and is not a "health-care provider," it is impossible to know the scope of the class. Thus, in *DeBremaecker*, the Fifth Circuit affirmed the dismissal of a proposed Rule 23(b)(2) class of

"residents of this State active in the 'peace movement,'" because of the "patent uncertainty of the meaning of 'peace movement' in view of the broad spectrum of positions and activities which could conceivably be lumped under that term." 433 F.2d at 734; *see also John*, 501 F.3d at 445 n.3. ("[A] class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'") (citation omitted); *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 358 (W.D. Wis. 2000) (no ascertainable class because of the "uncertainty of what transactions would be included" within the term "copper or metals dealer"). Similarly, here, it is unclear whether the term "health-care provider" would include, for example, health insurance organizations; health insurance plans; health maintenance organizations; provider-sponsored organizations; entities that provide health care but also other services (including services for which they receive federal funding); and persons or entities in non-MD fields (such as nurse-midwives, registered nurses, or physician assistants). Because of the uncertainty of the meaning of the term "health-care provider," members of the proposed class cannot be ascertained by reference to objective criteria.

Second, the proposed class definition is overbroad in comparison with Plaintiff's substantive claim. "[T]he court's task at certification is to ensure that the class is not 'defined so broadly as to include *a great number* of members who for some reason *could not have been harmed* by the defendant's allegedly unlawful conduct.'" *Newberg* § 2:3 (quoting *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012) (emphasis in *Newberg*)); *see also Camp v. Allstate Ins. Co.*, 100 F.3d 953 (5th Cir. 1996) (unpublished) (affirming dismissal of complaint seeking certification of class including members who "might" be injured, due to lack of standing); *Lee v. Am. Airlines, Inc.*, No. 3:01-CV-1179-P, 2002 WL 31230803, at *4 (N.D. Tex. Sept. 30, 2002) (explaining that "the class must not be defined so broadly that it

encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative") (citing Charles A. Wright & Arthur R. Miller, 7A *Federal Practice & Procedure* § 1760 (2d ed. 1986)).[1]

The proposed class definition consists of all health-care providers who "oppose[] abortion for sincere religious reasons." But Section 300a-7(c) does not prohibit health-care providers from opposing abortion. Instead, it requires only that (1) a recipient of certain federal funds (2) not discriminate in the hiring or employment of physicians or other health care personnel who perform (or assist in performing) abortions. The proposed class definition sweeps far too broadly because not all health-care providers (however defined) who oppose abortion for religious reasons are either current recipients of applicable federal funds or plan to apply for such funding. And it does not follow that a provider who opposes abortion for religious reasons will

[1] It is an unresolved question in the Fifth Circuit how courts are to evaluate standing in the class certification context. *See In re Deepwater Horizon*, 739 F.3d 790, 799 (5th Cir. 2014). The Fifth Circuit in *Deepwater* observed that the federal circuits have split on the issue, adopting one of two approaches. One approach examines only the standing of the "named plaintiffs" or "class representatives." *Id.* at 800 (citing test articulated in *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009)). The second approach, articulated in *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006), does not require each class member to submit individual evidence of standing but mandates that "no class may be certified that contains members lacking Article III standing." *Deepwater*, 739 F.3d at 801. The Fifth Circuit in *Deepwater* did not resolve this impasse because it found that the proposed class definition satisfied either approach. *See id.* at 803; *see also In re Deepwater Horizon*, 756 F.3d 320, 320-25 (5th Cir. 2014) (Clement, Jolly, Jones, JJ., dissenting from denial of en banc rehearing). The leading treatise on class actions explains that "[a]pproaching the 'absent class member injury' issue as a Rule 23 class definition problem is preferable to approaching it as an issue of Article III standing" for a number of reasons, but emphasizes that "the court's task at certification is to ensure that the class is not defined so broadly as to include a *great number of members* who for some reason *could not have been* harmed by the defendant's allegedly unlawful conduct." *Newberg* § 2:3 (citation omitted). Thus, as explained in the text, regardless of whether the issue is characterized as an ascertainability or standing issue, the class cannot be certified because it is defined far too broadly.

necessarily not wish to hire or employ physicians or other health care personnel who perform abortions (or assist in their performance) or have done so in the past. For example, a person may sincerely oppose abortion for religious reasons but also believe that hiring or promotion decisions regarding third parties do not impinge on his or her personal religious beliefs, or that hiring or promoting a person who performed abortions in the past but who has changed perspective on abortion does not infringe on his or her religious beliefs. While, as the Court has observed, "Vita Nuova attests that it has policies that run against § 300a-7(c), and it will never agree to change those policies as a condition of receiving federal funds," Mem. Op. and Order at 18, ECF No. 28, Plaintiff does not attest that other entities or individuals encompassed by the broad class definition have adopted such policies or, if they have, have religious objections to changing them to comply with Section 300a-7(c). Given that "unsupported allegations that the case satisfies the requirements of Rule 23 are an insufficient basis for certifying a class action," *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 833 (5th Cir. 1983), Plaintiff's unsupported suppositions are fatal to its motion.

Consequently, the proposed class is defined so broadly as to include a great number of health-care providers who could not have suffered Article III injury because there is no indication that they are recipients of, or intended future applicants for, applicable federal funds *and* do not wish, because of their religious beliefs, to hire health care personnel who perform (or assist in performing) abortions or who have done so in the past. By contrast, Plaintiff has alleged that it "intends to apply for Title X funds at the next available opportunity in November 2020." Am. Compl. ¶ 31; *see also id.* ¶ 49 (alleging that Plaintiff "wishes to participate in the Title X program, and . . . is preparing to apply for Title X grants at the next available opportunity"). No

such allegations have been pleaded on behalf of absent class members. The proposed class thus cannot be certified because it is overbroad.

Nor do Plaintiff's arguments regarding Catholic health-care providers in the United States, *see* Mot. at 1-2, advance its case. While Plaintiff notes that the Catholic Church has long opposed the practice of abortion, *see id*., the relevant issue is not whether a Catholic health-care provider opposes abortion but, rather, whether the proposed class member has a sincerely held belief that it may not hire health care personnel who perform abortions or has done so in the past. And because "[d]iffering beliefs and practices are not uncommon among followers of a particular creed," *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991), identifying the tenets of a particular religion is not the same as demonstrating that any given practitioner of that religion *necessarily* holds a particular sincerely held belief. Moreover, Plaintiff relies on a set of directives issued by the U.S. Conference of Catholic Bishops, *see* Mot. at 2,[2] which state that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation." ERDs at 18. But the document does not provide direction on whether the hiring of health care personnel who perform (or assist in performing) abortions constitutes "material cooperation." *Id*. at 24. And, in any event, that directive is insufficient to establish any particular practitioner's sincerely held religious beliefs. Plaintiff cannot establish that all Catholic health-care providers hold the sincerely held religious belief that they may not employ physicians or other health care personnel who perform abortions simply by identifying these directives.

[2] Citing U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (6th ed. 2018), http://www.uscc.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf ("ERDs").

Third, "[a] class definition that depends on subjective criteria, such as class members' state of mind, will fail for lack of definiteness." *Newberg* § 3:3. "So-called mental state classes may . . . frustrate fundamental due process tenets of class action litigation by making it difficult for a court to determine with any certainty who should receive notice, who will be bound by the judgment, and who should receive any relief obtained from the defendant." *Id.* § 3:5. This includes proposed classes that depend on the specific religious beliefs of class members. *See, e.g.*, *Russell v. Pallito*, No. 5:15-CV-126-GWC-JMC, 2019 WL 2125101, at *29 (D. Vt. Jan. 7, 2019), *report and recommendation adopted*, 2019 WL 2125523 (D. Vt. May 15, 2019) (proposed Religious Land Use and Institutionalized Persons Act ("RLUIPA") class consisting of inmates who considered the content of their meals to conflict with their sincerely held religious dietary beliefs was not ascertainable "because the Court would be required to engage in numerous distinct fact-intensive inquiries to determine class membership"); *Lindh v. Dir., Fed. Bureau of Prisons*, No. 2:14-CV-151-JMS-WGH, 2015 WL 179793, at *4 (S.D. Ind. Jan. 14, 2015) (proposed RFRA class of all male Muslim prisoners with sincerely held religious beliefs requiring them not to wear pants above the ankle was not sufficiently definite "because class membership would be based on a putative class member's state of mind" and there was no evidence that class members "would be ascertainable by reference to objective criteria—*i.e.*, that male Muslim prisoners ever specifically disclose to the [defendant] their position as to whether their understanding of Islam requires them to wear their pants above their ankles"); *Cejas v. Brown*, No. 3:18-cv-00543-WQH-JLB, 2018 WL 3532964, at *4 (S.D. Cal. July 20, 2018) (denying permissive joinder in case alleging that prison's implementation of religious policies violated free-exercise rights because "determining whether each individual plaintiff's right under the First Amendment and the RLUIPA have been violated will require an individualized

consideration of the facts regarding the specific burdens Defendants allegedly placed on each of their sincerely held religious beliefs and/or practices"); *Tatum v. Misner*, No. 13-CV-44-WMC, 2017 WL 4271657, at *8 (W.D. Wis. Sept. 26, 2017) (declining to reconsider denial of class certification in case asserting free-exercise claim because, *inter alia*, liability and remedy findings were "very much based on the individualized inquiry" into "the sincerity of [plaintiff's] religious beliefs," an inquiry that is "not amenable to class treatment").

Like these cases, the proposed class definition here lacks definiteness because it is premised on a health-care provider's (as noted above, an undefined and indefinite term) subjective "oppos[ition to] abortion for sincere religious reasons." Defendants are mindful that in *DeOtte v. Azar*, 332 F.R.D. 188 (N.D. Tex. 2019), this Court found ascertainable two proposed classes consisting of employers with sincerely held religious objections to providing coverage of contraceptive services, and individuals with similar objections who would be willing to purchase health insurance without such coverage. *See id*. at 196-97. But the *DeOtte* plaintiffs specifically alleged that the putative class members' "objections to the [Affordable Care Act's] Contraceptive Mandate lead to specific *actions* that are easily ascertained," in that "[e]ach of the objecting employers. . . will refuse to arrange for contraceptive coverage in the health insurance that they offer to their employees" and "[t]he objecting individuals will seek out or obtain health insurance that excludes contraceptive coverage." Reply Br. in Supp. of Mot. for Class Cert. at 2, *DeOtte v. Azar*, No 4:18-cv-00825-O, ECF No. 31. By contrast, here, Plaintiffs do not allege any specific relevant actions that will necessarily follow from the putative class members' subjective beliefs (opposition to abortion for sincerely held reasons). And a specific decision not to hire or employ a physician who performs (or assists in performing) abortions—an essential

element of Plaintiff's claims[3]—will not necessarily result from such beliefs because, as explained above, Plaintiff has failed to demonstrate a necessary connection between a health-care provider's opposition to abortion and a decision not to hire such health care personnel. Moreover, *DeOtte* specifically noted that the federal defendant agencies in that case had promulgated a rule creating an exemption to the ACA's contraceptive-coverage mandate, the scope of which paralleled the proposed classes sought to be certified. *See DeOtte*, 332 F.R.D. at 191 ("Notably, the Government Defendants involved in promulgating the rules expressly noted these exceptions were compelled by [RFRA]."") (citation omitted). Because those circumstances are not presented here, *DeOtte* is distinguishable from the present case.

Fourth, the class definition is phrased so broadly that it will not be possible for the Court to determine class membership. In this Circuit, "ascertainability requires . . . that the court be able to identify class members at some stage of the proceeding." *Frey v. First Nat. Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015) (quoting *Newberg* § 3:3); *accord Seeligson v. Devon Energy Prod. Co., L.P.*, 753 F. App'x 225, 230 (5th Cir. 2018); *see also Morrow v. Washington*, 277 F.R.D. 172, 187 (E.D. Tex. 2011) ("The proposed class must be clearly defined so that it is administratively feasible for the Court to determine whether a particular individual is a member.") (citations omitted).

The proposed class encompasses "[e]very present and future health-care provider in the United States that opposes abortion for sincere religious reasons." It is not currently possible for the Court to identify whether any particular individual or entity is a member of this broad

[3] In fact, this Court relied on Plaintiff's attestations "that it has policies that run against § 300a-7(c), and it will never agree to change those policies as a condition of receiving federal funds," in denying Defendants' motion to dismiss as it relates to Section 300a-7. Mem. Op. and Order at 18, ECF No. 28.

category, and Plaintiff has failed to identify any way that the Court will be able to do so at some future stage of this case. This failure warrants the denial of Plaintiffs' motion. *See Seeligson*, 753 F. App'x at 230 (ascertainability found where Plaintiff "provide[d] sufficient objective criteria from which to identify class members"); *Frey*, 602 F. App'x at 168 (class was ascertainable where class members could be identified from account numbers and bank identification numbers associated with ATM transactions). Difficulties in identifying class members create problems not only for the Court, but for Defendants as well. Without a way to ascertain potential class members, Defendants cannot evaluate whether certain defenses—such as the relevant statute of limitations, 28 U.S.C. § 1658(a)—are available with respect to individual members of the proposed class. Moreover, if the Court were to enter injunctive relief as to the proposed class, Defendants would have no means of determining whether particular individuals or entities are protected by the injunction or not, placing Defendants at risk of contempt.

In sum, Plaintiff's proposed class definition is too broad, amorphous, and fact-intensive to encompass a manageable class. Accordingly, Plaintiff has failed to demonstrate that it represents a readily identifiable class, and its motion should be denied.

II. Plaintiff Cannot Establish Commonality or Typicality.

Rule 23 also requires that a party moving for class certification establish that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement "demands that the putative class members' claims 'must depend upon a common contention' that 'must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Yates v. Collier*, 868 F.3d 354, 361 (5th Cir. 2017)

(quoting *Wal-Mart*, 564 U.S. at 350). "Thus, what matters for Rule 23(a) 'is not the raising of common questions—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.'" *Yates*, 868 F.3d at 361. It does not suffice "that plaintiffs 'have all suffered a violation of the same provision of law' because laws can be violated in different ways, and so suffering a violation of the same provision of law 'gives no cause to believe that all [the plaintiffs'] claims can productively be litigated at once.'" *Id*. Rather, "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50 (citation omitted).

Here, Plaintiff cannot show commonality, because claims brought under RFRA must be assessed by the Court on a case-by-case basis and are not suitable for class determination. RFRA states that courts must consider "application of the [religious] burden *to the person*." 42 U.S.C. § 2000bb-1(b) (emphasis added). Such a consideration requires, among other things, an individualized assessment of each individual's or entity's sincerely held religious beliefs. As the Fifth Circuit has explained, in making "the threshold inquiry into a person's beliefs" under RFRA, "each case turns on its particular facts." *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (citation omitted); *see also Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014) ("The sincerity of a person's religious belief is a question of fact unique to each case."). "The specific religious practice must be examined rather than the general scope of applicable religious tenets, and the plaintiff's 'sincerity' in espousing that practice is largely a matter of individual credibility." *Tagore*, 735 F.3d at 328 (citation omitted). Though "the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged" and "claims of sincere religious belief in a particular practice have been accepted on little more than plaintiff's credible assertions," *id.*, that does not eliminate the individualized nature of the court's inquiry.

For similar reasons, Plaintiff cannot demonstrate typicality. To satisfy the typicality requirement, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[T]he critical inquiry [for typicality] is whether the class representative's claims have the same essential characteristics of those of the putative class." *Stirman*, 280 F.3d at 562 (citation omitted). The Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge" because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart*, 564 U.S. at 349 n.5 (citation and internal punctuation omitted). "However, typicality will be defeated if the court must make a highly individualized factual determination to assess the defendant's liability." *Willis v. Behar*, No. 4:13-CV-3375, 2015 WL 12942481, at *9 (S.D. Tex. Dec. 14, 2015) (citing 5 *Moore's Federal Practice* § 23.24[4]); *see also Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 905 (5th Cir. 1987) (commonality and typicality not met because "[t]he necessity for individualized proof indicates that a class action is not an economical or efficient way of processing the complaints of the proposed class") (citation omitted); *Martin v. Home Depot, U.S.A., Inc.*, 225 F.R.D. 198, 201 (W.D. Tex. 2004) ("[B]ecause the proof of Plaintiffs' claims and defenses thereto will be dominated by individual evidence, Plaintiffs' certification motion does not satisfy Rule 23(a)(3)'s typicality requirement.").

Here, as discussed above, the proposed class members do not necessarily share the same sincerely held religious belief, and therefore dissimilarities within the proposed class would "'impede the generation of common answers.'" *Stukenberg v. Perry*, 675 F.3d 832, 843 (5th Cir.

2012) (quoting *Wal-Mart*, 564 U.S. at 351). Plaintiff seeks to certify an extremely broad proposed class consisting of "[e]very present and future health-care provider in the United States that opposes abortion for sincere religious reasons." *See* Mot. at 1. It does not necessarily follow, however, that a health-care provider that opposes abortion would also have a sincere religious objection to refraining from "discriminat[ing] in the employment, promotion, or termination of employment of any physician or other health care personnel" who performs or assists in the performance of abortions, as required by the challenged statute, 42 U.S.C. § 300a-7(c)(1). Moreover, certain health-care providers that would fall within Plaintiff's proposed class may object to non-discrimination only in certain circumstances, such as when the physician or other health care personnel continues to perform or assist in the performance of abortions, as opposed to having done so only in the past.

Plaintiff cannot avoid the need for individualized determinations by relying on the directives issued by the U.S. Conference of Catholic Bishops. *See* Mot. at 2 (citing Affidavit of E. Christian Brugger ¶¶ 15-17, ECF No. 33-3 ("Brugger Affidavit")). As an initial matter, Plaintiff's proposed class encompasses all "present and future health-care provider[s] in the United States that oppose[] abortion for sincere religious reasons," and is not limited to those who follow the teachings of the Catholic Church. Therefore, even accepting Dr. Brugger's testimony that "the Catholic Church prohibits its healthcare facilities from *all* cooperation, material or otherwise," with respect to abortion, *id.* ¶ 17, the Court would still need to determine whether individual members of the proposed class have a sincere religious objection to the challenged provision. That need is only reinforced by RFRA's text, which looks to the religious burden "to the person," 42 U.S.C. § 2000bb-1(b). *See LaFevers*, 936 F.2d at 1119. And it is further reinforced by the fact that the restrictions in Section 300a-7(c) have been in place since

1973 and have gone largely unchallenged. Many Catholic healthcare providers have, in the meantime, been the recipients of federal funding, subject to the challenged conditions in Section 300a-7(c), which raises the possibility that some members of the proposed class may not, in fact, share Plaintiff's objection.[4]

For these reasons, this case is readily distinguishable from *DeOtte*, where this Court found that commonality and typicality were met because the challenged regulations in that case allegedly required all class members "to do something to which they are opposed due to their sincerely held religious beliefs." 332 F.R.D. at 200. Here, members of the proposed class may not object *at all* to the requirements of Section 300a-7(c), or may object to only *part* of the requirements. As a result, the named plaintiff's claim cannot be said to have the "same essential characteristics as those of the putative class." *Stirman*, 280 F.3d at 562. And this case is more akin to *Stukenberg*, where the proposed class members' claims required an individualized inquiry. 675 F.3d at 843.

This case also presents more complicated and individualized determinations than *DeOtte* because the non-discrimination requirement in Section 300a-7(c) applies broadly to any "grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act." Unlike in *DeOtte*, where the plaintiffs alleged a RFRA violation with respect to a single context (*i.e.*, contraceptive coverage), if the proposed class were certified here, the Court would likely need to evaluate whether Section 300a-7(c) is supported by a compelling governmental interest and is the least restrictive means of achieving that interest in a variety of different applications,

[4] Given that the restrictions in Section 300a-7(c) are longstanding, members of the proposed class may also be differently situated if the relevant statute of limitations in 28 U.S.C. § 1658 precludes them from maintaining an action under RFRA.

depending on the specific grant, contract, or loan guarantee at issue. *Compare DeOtte*, 332 F.R.D. at 198 (highlighting that "Plaintiffs here challenge only one specific regulatory requirement—the contraceptive mandate").

Because of the need for individualized assessments, courts have declined to certify class actions in cases such as this one. For example, *Lindh* found that commonality and typicality did not exist with respect to a proposed class of male Muslim prisoners alleging that a prison policy of requiring them to wear pants above the ankle violated their sincerely held religious beliefs. As the court explained, "[t]he superficial common question of law that Mr. Lindh proposes—whether Defendant's policy regarding the length of Muslim prisoners' pants violates RFRA—is insufficient because he seeks to represent all male Muslim prisoners housed by the [defendant] and the undisputed evidence in the record is that not all male Muslim prisoners share his religious belief on this issue." 2015 WL 179793, at *6. The court also determined that typicality was lacking, explaining that "[a]nalyzing individualized factors to determine the parameters of individual claims is the antithesis of typicality." *Id*. (citing authority).

In addition, in *McCoy v. Aramark Correctional Services*, No. 16-3027, 2018 WL 1366267, at *1 (D. Kan. Mar. 16, 2018), an inmate alleged that his prison's decision to stop serving kosher meals violated the Free Exercise Clause, and sought to certify a class of inmates affected by the prison's decision. The court found that commonality was not satisfied because, *inter alia*, the inmate did not "address the fact that the claims he asserts address individual plaintiffs' sincerely held religious beliefs and require individual plaintiffs to show that his or her beliefs were substantially burdened by the government." *Id*. at *10. *See also Haliye v. Celestica Corp*., No. 06-CV-4769(PJS/JJG), 2009 WL 1653528, at *8 (D. Minn. June 10, 2009) (putative class of Muslim employees alleging that employer failed to accommodate their duty to pray

during the day lacked commonality because the outcome of a religious-accommodation claim "is highly dependent on the specific facts of the claim" and "[e]stablishing a prima facie case requires an individualized inquiry into whether the plaintiff has a bona fide religious belief").[5]

Because Plaintiff cannot satisfy the commonality or typicality requirements of Rule 23(a), class certification is not appropriate.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiff's motion for class certification.

Dated: July 30, 2020

Respectfully submitted,

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[5] Rule 23(a)'s "adequacy-of-representation requirement tends to merge with the commonality and typicality criteria . . . , which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997); *see also, e.g.*, *In re BP, PLC Sec. Litig.*, 758 F. Supp. 2d 428, 437-39 (S.D. Tex. 2010) (discussing typicality and adequacy requirements in tandem, because of the relatedness of the inquiries). For the same reasons that Plaintiff has not satisfied the commonality and typicality requirements, it has failed to demonstrate adequacy of representation.

CERTIFICATE OF SERVICE

On July 30, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) or the local rules.

/s/ Daniel Riess
DANIEL RIESS