IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AVE MARIA SCHOOL OF LAW,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;

THOMAS PEREZ, in his official capacity as Secretary of the United States Department of Labor;

JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

UNITED STATES DEPARTMENT OF LABOR; and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 2:13-cv-00795-SPC-DNF

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Plaintiff Ave Maria School of Law, by and through undersigned counsel, respectfully files its Cross-Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment. Ave Maria moves this Honorable Court for summary judgment with regard to its claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* (2012), provisions of the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* (2012), stating in support thereof as follows:

LEGAL STANDARD

Summary judgment is appropriate if Ave Maria "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Ave Maria has met this burden, and is therefore entitled to judgment as a matter of law.

In order to survive a motion to dismiss for failure to state a claim under Federal Rule 12(b)(6), Ave Maria need only "state a claim for relief that is plausible on its face." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 19450 (2009)). With regard to factual assertions, "the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged by in the complaint as true." *Id.* at 1260. While it is

true that, with regard to legal conclusions, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable, *id*. (citing *Iqbal*, 129 S. Ct. at 1949 (2009)), Ave Maria has alleged far more than mere conclusory statements, and amply meets the standards of its causes of action. Ave Maria has far exceeded the burden required to withstand Defendants' motion to dismiss under Rule 12(b)(6).

Defendants further move, under Rule 12(b)(1), to dismiss for lack of subject matter jurisdiction as to Ave Maria's Administrative Procedure Act contrary to law claim. *See* Gov't Br. sections VI(B) & VI (D). A "facial attack" on subject matter jurisdiction, as Defendants have here alleged, "require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (internal citations omitted). In a facial attack on jurisdiction, "the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss . . . is raised." *McElmurray v. Consol. Govt., Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (internal citations omitted). "Accordingly, the court must consider the allegations in the plaintiff's complaint as true." *Id*. (internal citations omitted).

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Ave Maria School of Law's religious beliefs.[1]

Ave Maria School of Law was founded as an institution of Catholic higher education. VC ¶ 25. Ave Maria's mission is to "offer an outstanding legal education in fidelity to the Catholic Faith, as expressed through sacred tradition, sacred Scripture, and the teaching authority of the Church," with a purpose to train and equip legal professionals to bring the truths of the Catholic faith and teaching into all areas of culture. VC ¶ 26-27. The School pursues this mission and purpose through adherence to the letter and spirit of the Apostolic Constitution *Ex corde Ecclesiae* of Pope John Paul II, which is the relevant law of the Church for Catholic colleges and universities. VC ¶ 28.

Ave Maria's Articles of Incorporation and Bylaws state that: "The essential character of Ave Maria School of Law shall at all times be maintained as a Catholic institution of higher learning which operates consistently with *Ex Corde Ecclesiae*. It is the stated intention and desire of the Governors of the Ave Maria School of Law that the School of Law shall retain in perpetuity its identity as such an institution." VC ¶ 30. Members of the Board of Governors of Ave Maria are required to be practicing Catholics. VC ¶ 31.

[1] The facts are set forth in the Verified Complaint ("VC"), which is a sworn affidavit and serves as evidence in support of Plaintiff's motion for summary judgment. The facts are summarized here, with specific references to the complaint as applicable.

Ave Maria requires all faculty to "explore moral and ethical issues and to expose students to Catholic moral and social teachings where those teachings are relevant to the subject matter." VC ¶ 35. Furthermore, "[i]n their performance of teaching, scholarship, and service functions, Catholic faculty are required to act in fidelity to Catholic doctrine and morals; non-Catholic faculty are expected to respect Catholic doctrine and morals in their discharge of these functions." *Id*. Approximately 90% of Ave Maria's tenured or tenure-track faculty are practicing Catholics, and a large majority of Ave Maria's full-time employees are practicing Catholics. VC ¶ 37-38. All of Ave Maria's employees, whether Catholic or non-Catholic, choose to work at Ave Maria because they wish to help Ave Maria further its religious mission. VC ¶ 47. All full-time employees of Ave Maria, whether Catholic or not, are committed to its Catholic mission. VC ¶ 38.

Ave Maria believes in and teaches the inherent dignity of every human based on their creation in the image and likeness of God. VC ¶ 40. Based on this religious conviction, Ave Maria believes and teaches that all human life is sacred from the moment of conception and that abortion is a grave sin that ends a human life. *Id*. In accordance with Pope Paul VI's *Humanae Vitae*, Ave Maria believes and teaches that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or a means," including contraception or sterilization, is a grave sin. VC ¶ 41.

In accordance with Catholic teaching, which emphasizes the dignity of the worker and the requirement of just compensation, Ave Maria provides generous health insurance for its employees. VC ¶ 43. Based on its sincere religious convictions, Ave Maria has consistently ensured that its health insurance plans do not cover abortifacient drugs,[2] contraception, or sterilization. VC ¶ 44. If it were to provide health insurance coverage of such items, Ave Maria would violate its deeply held religious beliefs, and contradict its religious commitment to publicly conveying and defending Catholic teaching as it relates to the sanctity and inherent dignity of all human life. VC ¶ 45. Ave Maria cannot participate in any scheme to facilitate access to abortifacient drugs, contraception, sterilization, and education and counseling related to the same, without violating its sincerely held religious convictions concerning the sanctity and inherent dignity of all human life. VC ¶ 46.

B. The preventive services Mandate of the Affordable Care Act.

In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act (ACA). Pub. L. No. 111-148, 124 Stat. 119 (2010). The ACA requires *all* health plans (including "grandfathered"ones) to abide by multiple rules benefitting patients, such as the requirement that plans cover

[2] Ave Maria believes that any drugs which can cause post-fertilization effects, including, for example, drugs such as Plan B and ella which prevent a fertilized egg from implanting in the uterus, are abortifacient. Hereinafter, drugs with post-fertilization effects will be referred to as "abortifacients."

dependents until age 26. 42 U.S.C. § 18011(3)-(4). The Mandate challenged in this case is not one of those universal requirements.

The ACA requires that only *some* health plans (non-grandfathered ones) cover preventive care and screenings, including women's preventive services. 42 U.S.C. § 300gg-13(a)(4). Congress did not require that contraception, abortifacients, or sterilization be included in the Mandate. *Id*. To define this category, Defendant Department of Health and Human Services adopted guidelines formulated by the private Institute of Medicine. HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 27, 2014). The guidelines from the IOM—and therefore Defendants' guidelines—require that all FDA-approved contraceptives, sterilization procedures, and related counseling be included in the women's preventive services mandate. *See* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109–10 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 9, 2014); *see also* 29 C.F.R. § 2590.715–2713 (referencing 45 CFR 147.131(a)); 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012). Collectively, the ACA and administrative adoption of these guidelines, and the attendant penalties for their violation, form "the Mandate" being challenged here.

In addition to not requiring contraceptives and abortifacients to be in the Mandate in the first place, Congress empowered Defendants to enact

"comprehensive" guidelines, including exemptions to the Mandate, providing no guidance as to what should be included or excluded from the exemptions. *See* 42 U.S.C. § 300gg-13(a)(4); 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). But Defendants decided to exempt only churches and their integrated auxiliaries from the Mandate. *See* 45 C.F.R. § 147.131 (2013); *see generally* 78 Fed. Reg. 39,870 (July 2, 2013). They did so based on the rationale that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,887. Defendants offered no evidence for this speculation, and refused to extend an exemption to religious non-profit entities such as Ave Maria School of Law even though Ave Maria's employees' beliefs are congruent with the beliefs of Ave Maria. *Id.*

Furthermore, Defendants refrained from imposing penalties on the plan administrators of certain self-insured non-profit entities that are exempt from ERISA because they are in a "church plan." *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691 (filed Jan. 3, 2014) (stating that church plans are "exempt from regulation" under ERISA). Defendants withheld their enforcement mechanism even though those entities themselves are not churches, and in fact many are Christian colleges. Defendants therefore concluded that those entities' employees need to receive contraceptive coverage through the

accommodation, rather than being exempt *See* 78 Fed. Reg. at 39,887. And yet by withholding penalties on their plan administrators, Defendants decided not to follow through on that perceived need. However, Defendants refused to withhold their penalties from Ave Maria's fully insured plan, even if they are identically situated to non-profit entities in non-ERISA "church plans."

C. Defendants force Ave Maria to provide or contract for abortifacients, contraceptive, and sterilization coverage in their own health plan.

To coerce non-profit, non-church, ERISA-governed plans such as Ave Maria's plan to cover abortifacients, contraceptives, and sterilization, Defendants created an "accommodation" (not an exemption, and not a withholding of penalties). *See generally* 78 Fed. Reg. 39,870. An organization is eligible for the "accommodation" if it: (1) [o]pposes providing coverage for some or all of the contraceptive services required,"; (2) is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39,874. Apart from its unwillingness to execute and deliver the self-certification, Ave Maria is eligible for the accommodation. VC ¶ 133.

Under the "accommodation," Ave Maria has four basic options for offering health coverage insurance to its employees. First, it would have the "option" of violating its sincerely held religious beliefs by taking specific action to comply fully with the Mandate, and including coverage of abortifacients, contraceptives, and sterilization in its plan. 29 C.F.R. § 2590.715–2713 (referencing 45 C.F.R. §

147.131(a)).

Second, Ave Maria could sign the "certification" form and deliver it to its insurer. EBSA Form 700, Dep't of Labor, *available at* http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (last visited Mar. 31, 2014). The form expresses a religious objection to contraceptive coverage. *Id.* at 1. Under the "accommodation," Ave Maria's mandatory provision of its health insurance plan, and its delivery of its self-certification to its insurer, would trigger the insurer's obligation to offer and make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39875-76. These payments constitute coverage of the drugs, items, and services to which Ave Maria objects, *see, e.g., id*. at 39,872 ("the regulations provide women with access to contraceptive coverage"), and are treated as coverage under consumer protection requirements of the Public Health Service Act and ERISA. *Id*. at 39876. This coverage will not be contained in any insurance policy separate from Ave Maria's plan. *See id*. This option requires Ave Maria to serve as the conduit for the objectionable coverage; without Ave Maria's insurance plan, such coverage would be unavailable to its employees.

Ave Maria's third "option" under the accommodation would be to continue providing its employees with generous health insurance which does not cover abortifacients, contraceptives, or sterilization, in violation of the Mandate. This

"option" would trigger the Mandate's harsh penalties. Employers that violate the Mandate face government lawsuits under ERISA, and fines up to $100 per day per plan participant. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. Because Ave Maria has approximately 68 employees who have elected to be covered by its insurance plan, VC ¶ 49, the penalty is estimated to amount to over $2.4 million per year. Ave Maria's fourth "option" would be to forego providing health insurance altogether. This option would violate Ave Maria's religious beliefs regarding the dignity of Ave Maria's employees and the requirement of just compensation. VC ¶ 43. Failure to provide health insurance would also subject Ave Maria to an annual fine of $2,000 per full time employee after the first thirty employees. *See* 26 U.S.C. §§4980H(a), (c)(1).

The Mandate applies to the first health insurance plan-year beginning after December 31, 2013. Ave Maria's next plan year for employee health insurance begins November 1, 2014. VC ¶ 165. The Mandate will thus apply to Ave Maria's health plan beginning on that date. *Id*. As a result, Ave Maria will face a choice leading up to that date: it can either (1) transgress its religious commitments and its employees' desires by including abortifacient drugs, contraception, and sterilization in its plan, or by triggering its insurance issuer to provide the exact same services by providing the self-certification; or (2) Ave Maria can drop its employee health insurance plan altogether in order to avoid being complicit in the provision of

abortifacient drugs, contraception, and sterilization, thereby incurring massive fines, harm to its employees who rely on that insurance, a severe impact on Ave Maria's ability to recruit and keep good employees, and a consequent need to increase employee compensation substantially so they can buy insurance for their families. *Id.*

D. Congress refrains from applying the Mandate to tens of millions of women.

Despite Defendants' refusal to exempt Ave Maria from the Mandate, they and Congress decided that the preventive services requirement need not be applied to plans across the board. In addition to the religious exemptions and non-penalties listed above, the ACA withholds the Mandate from grandfathered plans (those that have made minimal changes since 2010). 42 U.S.C. § 18011; 76 Fed. Reg. 46,621, 46,623 & n.4 (Aug. 3, 2011). The government's data projects that these plans, even as they reduce in number, will cover tens of millions of women. 75 Fed. Reg. 34,538, 34,540–53 & tbl. 3 (June 17, 2010). The ACA declares that these employers have a "right to maintain existing coverage" falling short of the Mandate, 42 U.S.C. § 18011, even if they make certain changes that raise employees' costs. *See generally* 75 Fed. Reg. 34,538. Ave Maria's health insurance plan does not qualify for grandfathered status. VC ¶ 50-59. The Mandate also does not reach members of certain Anabaptist congregations or participants in health sharing ministries. 26 U.S.C. § 5000A(d)(2)(A) & (B). Employers with fewer than fifty employees also may avoid the Mandate by dropping coverage without suffering the annual $2000 per

employee fine. 26 U.S.C § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d).

E. The Mandate forces Ave Maria to violate its beliefs or pay massive fines.

This Court is Ave Maria's only recourse from the Mandate's infringement of its religious freedom. Ave Maria's health plan does not qualify for the variety of secular or religious exemptions Defendants and federal law have chosen to provide from the Mandate. Ave Maria is instead subject to the "accommodation" for non-profit religious entities, forcing it to contract and arrange for its insurer to provide the same objectionable abortifacients, contraception, and sterilization payments and deliver them through operation of Ave Maria's same health plan. The "accommodation" therefore changes nothing for Ave Maria. It has no adequate remedy at law. Unless this Court grants relief to Ave Maria before November 1, 2014, so as to prevent the Mandate's applicability to it, Ave Maria will suffer irreparable harm by Defendants' coercion. The Mandate blatantly violates longstanding religious conscience protections found in federal statute and the Constitution.

ARGUMENT

I. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS RELIGIOUS FREEDOM RESTORATION ACT CLAIM.

The Religious Freedom Restoration Act (RFRA) provides that the "[g]overnment shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1 (2012).

The government may substantially burden the exercise of religion only if the burden: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id*. at (b).

The Tenth Circuit established a framework for analyzing RFRA claims in *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), cert. granted, 134 S. Ct. 678 (2013) (argued Mar. 25, 2014), a case involving the same Mandate here at issue. *See also Korte v. Sebelius*, 735 F.3d 654, 671-73 (7th Cir. 2013) (same); *Gilardi v. U.S. Dep't of Health and Human Servs.,* 733 F.3d 1208, 1216, 1219-24 (D.C. Cir. 2013) (same). The initial inquiry requires the court to (1) "identify the religious belief in th[e] case," (2) "determine whether th[e] belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer." *Hobby Lobby,* 723 F.3d at 1140. If there is such substantial pressure, the government will then bear the burden of demonstrating that the challenged action meets strict scrutiny. *See Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000); 42 U.S.C § 2000bb-1.

A. The sincere religious belief at issue.

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the

particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Nor does the Court assess whether a religious objection is "acceptable, logical, consistent, or comprehensible." *Id.* at 714. The judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)).

Here, the government does not argue that Ave Maria's objection is not the exercise of a sincere religious belief. Instead it argues about whether the burden on that sincere exercise is substantial, or whether it can pass strict scrutiny. There can be no doubt that Ave Maria's refusal to facilitate access to abortifacients, contraception, sterilization, and related education and counseling in support thereof is religious exercise under RFRA. *See Korte*, 735 F.3d at 677-82 (7th Cir. 2013) (holding that for-profit company exercises religion when it excludes morally objectionable items from its employee health plan). "Plaintiffs' religious objection is not only to the use of contraceptives, but also being required to actively participate in a scheme to provide such services." *Roman Catholic Archdiocese of New York v. Sebelius,* No. 1:12-cv-2542, 2013 WL 6579764, at *14 (E.D.N.Y. Dec. 16, 2013).

B. The Mandate substantially burdens Ave Maria's religious exercise.

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). Here, the Mandate imposes a substantial burden on Ave Maria's religious exercise by forcing it to do precisely what its religion forbids: facilitate access to abortifacients, contraceptives, and sterilization.

A law substantially burdens the exercise of religion firstly when it compels one "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). A substantial burden also exists where a law places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). "To exceed the 'substantial' burden threshold, the governmental action must 'significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.'" *Gibson v. Babbitt*, 72 F. Supp. 2d 1356, 1359 (S.D. Fla. 1999) (internal brackets omitted) (citing *Werner v. McCotter*, 49 F.3d 1476, 1489 (10th Cir. 1995)), *aff'd* 223 F.3d 1256 (11th Cir. 2000).

Under the regulations promulgated pursuant to the Patient Protection and Affordable Care Act of 2010, group health plans or health insurance issuers are required to provide preventive care and screening, including the coverage of all FDA-approved contraceptives and related education and counseling, without cost-sharing. 45 C.F.R. § 147.130. In June 2013, the Department of Health and Human Services issued final regulations containing an accommodation for religious employers, which exempts certain religious employers from the requirement that the insurance itself provide coverage for contraception in their own healthcare plans. *See* 45 C.F.R. § 147.131. In order to be eligible for this accommodation, an employer must "oppose providing coverage for some or all of any contraceptive services required to be covered under [the Mandate] on account of religious objection," must operate as a non-profit entity, and must hold itself out as a religious organization. *Id*. at. (b). However, if one insured under such plans wishes to utilize the contraception coverage, the religious employer's insurance issuer must provide the covered services without-cost sharing. *Id*. at (c).

Thus the Mandate is a substantial burden under the first definition: it requires activity in violation of Ave Maria's beliefs, by refusing to exempt Ave Maria from the Mandate. Refusing to comply will subject Ave Maria to potentially fatal fines of $100 per day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Ave Maria ceased providing employee health insurance altogether, it would be subject to an annual fine

of $2,000 per full time employee after the first thirty employees. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Such costs and penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA. In the face of such pressure, the Tenth Circuit held in *Hobby Lobby* that a for-profit organization challenging the Mandate was likely to succeed on the merits of its RFRA claim, emphasizing that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [Plaintiffs] enable access to contraceptives that [they] deem morally problematic." 723 F.3d at 1141; *see also Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. Nov. 8, 2013); *Gilardi v. Sebelius* No. 13-5069, 2013 WL 5854246, at *8 (D.C. Cir. Nov. 1, 2013); *Southern Nazarene Univ. v. Sebelius*, No. 13-cv-1015-F, 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013) ("The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial."). The same is true here.

In the 21 cases where a similar non-profit plaintiff or group of plaintiffs has sought an injunction against this mandate, 20 cases have led to preliminary injunctive relief from the District Court for the plaintiffs or an injunction pending appeal.[3] The one case the government cites to the contrary, *Univ. of Notre Dame v.*

[3] *See Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314 (N.D. Tex. Dec. 31, 2013) (granting relief to the University of Dallas); *Sharpe Holdings, Inc. v. United States Dep't of Health &*

Sebelius, 743 F.3d 547 (7th Cir. 2014), denied relief to a self-insured university, not a fully insured entity like Ave Maria. Each fully insured nonprofit entity has obtained an injunction.[4]

The government's argument against the substantiality of Ave Maria's burden centers on the "accommodation." But that accommodation does nothing to resolve the conflict with Ave Maria's beliefs. For purposes of this Court's analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious beliefs. *See Hobby Lobby*, 723 F.3d at 1137 ("Our only task is to

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Human Srvs., No. 2:12-cv-92 (E.D. Mo. Dec. 30, 2013) (granting relief to religious non-profit parties CNS International Ministries and Heartland Christian College); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 5:13-cv-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Southern Nazarene*, 2013 WL 6804265; *E. Texas Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893 (N.D. Tex. Dec. 27, 2013); *Grace Schools v. Sebelius*, No. 3:12-CV-459 (N.D. Ind. Dec. 27, 2013); *Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-cv-159 (N.D. Ind. Dec. 27, 2013); *Geneva College v. Sebelius*, No. 2:12-cv-0027 (W.D. Pa. Dec. 23, 2013); *Legatus v. Sebelius*, No. 2:12-cv-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Persico v. Sebelius*, No. 2:13-cv-00303, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Zubik v. Sebelius*, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709-RC (E.D. Tex. Dec. 31, 2013);) *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y (N.D. Tex. Dec. 31, 2013); *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691, 2013 WL 683990 (S. Ct. Jan. 24, 2014); *The Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489-WSD (N.D. of GA Mar. 26, 2014); *see also Ave Maria Foundation v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order to religious non-profits because the regulations "likely substantially burden" their religious exercise); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *but see Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

[4] *See supra* note 3, citing cases where entities with fully insured plans received injunctions, including: *Grace Schools* (Biola University); *Southern Nazarene* (Oklahoma Wesleyan University and Oklahoma Baptist University); *Diocese of Fort Wayne-S. Bend* (Franciscan Alliance has 2 fully insured plans); *Geneva College* (Geneva College); *Legatus* (Legatus); *Priests for Life* (Priests for Life); *Roman Catholic Archbishop of Washington* (Catholic University of America); *Catholic Diocese of Nashville* (Catholic Diocese of Nashville, Catholic Charities, Camp Marymount, MQA, St. Mary Villa, Dominican Sisters, Aquinas College).

determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). Ave Maria believes that it is sinful and immoral to facilitate a healthcare plan, participation in which entitles a plan beneficiary to access insurance coverage of abortifacients, contraception, and sterilization. The Mandate requires Ave Maria to serve as a conduit for such coverage. The coverage will come to Ave Maria's *own* employees, from Ave Maria's *own, paid* insurer, *in connection with* Ave Maria's plan, *because* Ave Maria has *this* plan and delivers *this* insurer the *mandated* certification form.

Defendants assert that the accommodation requires Ave Maria "to do no more than what it otherwise would have done," and therefore cannot be a substantial burden. Gov't Br. 11. This is not true. The form that the government requires Ave Maria to execute and deliver is *sui generis*—Ave Maria would not execute it absent the substantial pressure imposed by the government's penalties. That form is, "in effect, a permission slip." *Southern Nazarene*, 2013 WL 6804265, at *8. The government's claim that Ave Maria's objection to signing the form is "legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage" is "simply another variation of a proposition rejected by the [Tenth Circuit] in *Hobby Lobby.*" *Reaching Souls Int'l, Inc. v. Sebelius,* No. 5:13-cv-1092, 2013 WL 6804259, at *7 (W.D. Okla. Dec. 20, 2013). Here, Ave Maria is not independently asserting to its insurance company that it does not wish to provide

contraceptive coverage, but is instead coerced to give permission to a third party to provide that coverage to its employees through its insurance plan.

In the *Little Sisters* order, albeit in a nonprecedential fashion, the Supreme Court implicitly recognized the difference between merely telling someone you religious object, and doing so through a mandated form that triggers the effects you object to causing. *Little Sisters*, No. 13A691, 2013 WL 683990 (S. Ct. Jan. 24, 2014). In that case the Court said if all the government wants is a religious objection, the Little Sisters may express their objection their own way and receive a complete exemption, while not delivering its form. By objecting to that arrangement here and in *Little Sisters*, the government proves that its form is *more* than a mere religious objection, but is an essential cog in its scheme of delivering the coverage Ave Maria objects to delivering.

The actions required are not activities entirely of a third party, as Defendants argue. *See* Gov't Br. 13–15. Ave Maria believes that completing the self-certification form itself constitutes forbidden complicity with the government's scheme, because "the regulations still require plaintiff[] to take actions they believe are contrary to their religion." *Roman Catholic Archdiocese of New York,* 2013 WL 6579764, at *7; *E. Texas Baptist Univ. v. Sebelius,* No. 4:12-cv-3009, 2013 WL 6838893, at *20 (S.D. Tex. Dec. 27, 2013) (the Mandate compels plaintiffs "to engage in an affirmative act and that they find this act–their own act–to be religiously offensive. That act is

completing and providing to their insurer or TPA the self-certification forms."). This burden is not "attenuated," Gov't Br. 17–18, but is what Ave Maria objects to doing.

C. The Mandate cannot survive strict scrutiny.

i. The Mandate does not serve a compelling government interest.

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). "[B]roadly formulated" or sweeping interests are inadequate. *Id.* at 431. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *O Centro,* 546 U.S. at 430-31.

Here, Defendants allege compelling governmental interests in public health and gender equality. *See* Gov't Br. 20-25. But in order to justify the Mandate, the government must "specifically identify an 'actual problem' in need of solving" and demonstrate that coercing conscientious objectors to provide contraceptives in contravention to their religious beliefs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted). In

Hobby Lobby, the Tenth Circuit considered the government's asserted interests in promoting "public health" and "gender equality" and concluded that those interests failed to satisfy strict scrutiny because they were too "broadly formulated" to justify denying "specific exemptions to particular religious claimants." *Hobby Lobby,* 723 F.3d at 1143 (quoting *O Cento*, 546 U.S. at 431).

The vast scheme of exemptions to the Mandate also compels the conclusion that Defendants' alleged interests are not compelling. "A law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "highest order" where the Mandate already exempts tens of millions of women—through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," the failure to impose penalties on other Christian universities if they are in "church plans," and the enforcement exceptions for small employers. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *see also Newland*, 881 F. Supp. 2d at 1298; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013).

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown*, 131 S. Ct. at 2741. The Government acknowledges that contraceptives are widely available at free and reduced cost and are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal citations omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

ii. The Mandate is not the least restrictive means of achieving a compelling government interest.

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[a] statute or regulation is the least restrictive means if no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (internal citations omitted). The government, moreover, cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious,

good faith consideration of workable . . . alternatives" to achieve the government's goal) (internal quotation marks and citation omitted).

The Government has myriad ways to achieve its asserted interests without conscripting Ave Maria to violate its religious beliefs. Ave Maria in no way recommends these alternatives, and, indeed, might oppose many of them as a matter of policy. But the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide abortifacients, contraceptive, and sterilization services to the few individuals who do not receive them under their health plans; (ii) offer grants to entities that already provide abortifacients, contraceptive, and sterilization services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for abortifacients, contraceptive, and sterilization services; (iv) grant tax credits or deductions to women who purchase abortifacients, contraceptive, and sterilization services; or (v) allow employees at objecting religious entities to enroll in state exchange plans (covering contraception) and receive a federal subsidy for that plan, without fining Ave Maria in the process.[5] In light of these alternatives, there is no

[5] *See, e.g., Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d.1328, 1349 n.16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, 931 F. Supp. 2d. 794, 808 (E.D. Mich. Mar. 14, 2013) ("[T]he Government has not established its means as necessarily being the least restrictive."); *Newland*, 881 F. Supp. 2d at

possible justification for forcing Ave Maria to violate its religious beliefs. *See Grote*, 708 F.3d at 855 (government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means" of advancing its stated interests).

Defendants' allege that such alternatives are "unsatisfactory" and "not feasible." Gov't Br. 25, 27. But the Government already provides for or subsidizes contraceptives distributed through its Title XIX-Medicaid Program, demonstrating that such an alternative is in fact feasible. And it already lets employees at small employers enter exchange plans and receive subsidies without fining the small employers in the process. Such alternatives would not require Ave Maria to facilitate coverage for contraceptives and abortifacients in violation of its sincerely held religious beliefs, and would strike an appropriate balance between the alleged government interest and Ave Maria's religious beliefs, as required by RFRA.

II. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS ESTABLISHMENT CLAUSE CLAIM.

The Mandate also violates the Establishment Clause of the First Amendment. A set of rules that "makes explicit and deliberate distinctions between different religious organizations" in order to burden some and not others violates the Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 260 (1982) "By their 'very nature,' the distinctions [among religious organizations] 'engender a risk of

1299 (Mandate not narrowly tailored in light of "the existence of government programs similar to Plaintiffs' proposed alternative")

politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* at 253 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970)). The Establishment Clause "guard[s] against" government distinctions "inviting undue fragmentation" among religious groups who "inevitably represent certain points of view . . . in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." *Id.* at 252-253 (quoting *Walz*, 397 U.S. at 695). The Establishment Clause "prohibits denominational preferences, including those created by discriminatory or selective application of a facially neutral statute against a particular denomination." *Powell v. United States*, 945 F.2d 374, 378 (11th Cir. 1991). The government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (internal citations omitted).

The government's exemptions, "accommodations," and non-enforcement choices create exactly the kind of discriminatory caste system of religious groups that the Establishment Clause prohibits. (1) First, despite the "comprehensive" discretion Congress provided to exempt all religious objectors, s*ee* 76 Fed. Reg. at 46,623; 45 C.F.R 147.131, the government decided that only churches and their integrated auxiliaries count as "religious employers" entitled to an actual "exemption" from the Mandate, 45 C.F.R. § 147.131. The government's rationale for denying this exemption to other groups such as Ave Maria was that only such entities have

employees committed to the organization's beliefs on contraception. *See* 78 Fed. Reg. at 39,887. Defendants contend that this rationale warrants only a narrow religious employer exemption as opposed to exempting Ave Maria, and similar organizations, *see* Gov't Br. 24, even though Ave Maria employs "people of the same faith who share the same objection, and would therefore be less likely than other people to use contraceptive services even if such service were covered under their plan." *Id.* (citing 78 Fed. Reg. at 39,874). Approximately 90% of Ave Maria's tenured or tenure-track faculty are practicing Catholics, and a large majority of Ave Maria's full-time employees are practicing Catholics, VC ¶ 37-38. Further, Ave Maria's non-Catholic employees are committed to Ave Maria's Catholic mission. VC ¶ 38. The government's rationale for such a narrow religious employer exemption is factually unsupported, and demonstrably false in this case as well as with other thoroughly Christian organizations.

(2) Second, the exemption includes not just churches but their "integrated auxiliaries." 45 C.F.R. § 147.131. Thus, if a church runs a school and does not separately incorporate it, the school is likely exempt; but if a diocese has a separately incorporated religious school, it is not exempt. Likewise, Ave Maria lacks the exemption in this respect because Ave Maria is not organized as an operation of the Catholic Church. The rule defining integrated auxiliaries is similar to one rejected by *Larson* as an unconstitutional basis to distinguish between religious organizations.

IRS rules define integrated auxiliaries in part based on the percentage of income they receive from a church. 26 CFR § 1.6033-2(h) ("[n]ormally receives more than 50 percent of its support from" outside sources). The Court declared in *Larson*, 456 U.S. at 249, that "we find no substantial support . . . in the record" for the government's distinguishing between religious organizations on that basis.

(3) Third, the government subjected non-exempt religious organizations to a multi-tiered "accommodation" that attempts to decide what will satisfy each organization's conscience. Under the rule, Ave Maria is forced to either provide abortifacient, contraceptive, and sterilization coverage itself, 45 C.F.R. § 147.131, or inform the insurer that it must provide such coverage by delivering to the insurer a copy of the self-certification form, 78 Fed. Reg. at 39,895. The government improperly donned the role of theological arbiter to deem this arrangement satisfactory to Ave Maria's conscience. Such a rule imposes "intrusive judgments regarding contested questions of religious belief or practice" in violation of the First Amendment. *Weaver*, 534 F.3d at 1261.

Another kind of non-exempt religious organization is treated differently. The government chose not to impose its penalties on the plan administrators of non-profit religious entities even if they are non-exempt just like Ave Maria, and have self-insured plans (not fully insured plans such as that of Ave Maria), but those plans are "church plans" exempt from ERISA. *See* Resp't Memo. in Opp. at 3, *Little Sisters*, S.

Ct. No. 13A691. In this respect, Ave Maria's coerced designation form triggers penalties on its insurer for not providing abortifacients, contraceptive, and sterilization coverage, merely because Ave Maria does not happen to be enrolled in a self-insured plan that is a "church plan" exempt from ERISA. The government actually contradicted its rationale in making this distinction. When it refused to "exempt" both Ave Maria and "church plan" self-insured non-exempt religious groups, the government did so on the basis that all such groups' employees need to receive contraceptive coverage through the accommodation, rather than being exempt. *See* 78 Fed. Reg. at 39,887. But under the "church plan" loophole, the government withheld the principal penalty it chose to use to deliver that exact coverage. The government therefore undermined the premise that any such organization's employees need to receive the coverage.

(4) Fourth, the government deemed religious people in for-profit corporations to not have any claim to religious conscience at all, and therefore to be entitled to neither the exemption nor the accommodation. *See Hobby Lobby*. (5) Fifth, however, the government chose to withhold the mandate from tens of millions of women who are in grandfathered health plans. Ave Maria, because of several changes made to its insurance plan, does not possess grandfathered status. VC ¶¶ 50-59. Instead, Ave Maria must comply with the Mandate or obligate abortifacient, contraceptive, and sterilization coverage in its own plan while the government has deemed tens of

millions of women at thousands of employers as unworthy of receiving that same coverage.

(6) Sixth, the government exempted "health sharing ministries" and their members from the Mandate, if they have been in existence since December 31, 1999. 26 U.S.C. § 5000A(d)(2)(B). The choice of that date is arbitrary. Upon information and belief, the only ministries that meet this qualification are three Evangelical Protestant groups: Samaritan Ministries, Medi-Share, and Christian Healthcare Ministries. Catholic or other religious denominations that wish to establish health sharing ministries are prohibited by the rule from doing so. *Larson* found an Establishment Clause violation in the context of a scheme that similarly had the effect of denominational discrimination. 456 U.S. at 252–55.

(7) Seventh, the ACA exempts from the individual mandate to obtain insurance—and therefore refrains from delivering abortifacient, contraceptive, and sterilization coverage to—members of certain historic Anabaptist congregations which, *inter alia*, oppose the acceptance of insurance and have been in existence at all times since December 31, 1950. *See* 26 U.S.C. § 5000A(d)(2)(A) (referencing 26 U.S.C. § 1402(g)(1)). This adds to the government's patchwork exemption scheme, which nevertheless refuses to offer an exemption from the Mandate to Ave Maria.

Such "religious gerrymandering" of religious believers and organizations is unconstitutional. *Larson*, 456 U.S. at 255 (quoting *Gillette v. United States*, 401 U.S.

437, 452 (1971)). In *Weaver*, the Tenth Circuit held unconstitutional a policy of discrimination among religions that is very similar to the Mandate. The policy in that case attempted to treat "pervasively sectarian" educational institutions differently than other religious institutions. 534 F.3d at 1250–51. As set out above, the Mandate here likewise improperly discriminates among religious organizations. Moreover, the government explicitly refused to extend its church exemption to entities such as Ave Maria based on the incorrect judgment that churches have a greater coherence of beliefs with their employees. That judgment is of the same brand as a "pervasively sectarian" rule. The Tenth Circuit called such line drawing "puzzling and wholly artificial," even when the government contended, as it does here, that it was merely "distinguish[ing] not between types of religions, but between types of institutions." *Id.* at 1259. The Court held that "animus" towards religion is not required to find a First Amendment violation in the presence of such facial demarcations of discrimination. *Id.* at 1260. Under *Weaver*, therefore, discrimination between different types of religious organizations and their religious exercise violates the Constitution. *Id*. at 1256, 1259. This segregation among religious groups is not only discriminatory, it is largely arbitrary and irrational. It violates the neutrality and non-entanglement requirements of the Establishment Clause.

III. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS FREE EXERCISE CLAIM.

The Mandate violates the Free Exercise Clause of the First Amendment because it is neither religiously neutral nor generally applicable, and as discussed above, it fails strict scrutiny. "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." *Lukumi*, 508 U.S. at 532. Ave Maria exercises religion in its objection to the Mandate. *Smith* established that burdens on religiously-motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Both are missing here.

A. The Mandate is selective, not generally applicable.

Unlike *Smith*, which involved an "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 884, the Mandate here falls far short of general applicability. The ACA creates a vast system of categorical exemptions that frees thousands of employers from the Mandate's scope. As discussed above, these include the grandfathering exception, exemptions for churches, and non-penalties for non-profits in "church plans," among others. Despite all of these exemptions and non-applications of the Mandate and its penalties, however, the government refuses to exempt non-profit religious groups such as Ave Maria.

Such "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. The Supreme Court has "confirmed that the government violates Free Exercise rights when it selectively imposes burdens on religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (citing *Lukumi*, 508 U.S. 520). Indeed, "categorical" exclusions exacerbate concerns regarding the discriminatory potential of "'individualized exemptions.'" *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-365 (3d Cir. 1999); *see also Lukumi*, 508 U.S. at 543 (noting a lack of general applicability when a regulation "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree"). The government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Id.* at 537 (quotation omitted); *Smith*, 494 U.S. at 884 (quotation omitted). The First Amendment "protects religious observers against [such] unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation and alteration omitted).

B. The Mandate is not neutral towards religion.

The Mandate is not neutral because it distinguishes among religious objectors, as well as between secular and religious objectors. A neutral law "does not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania,* 381 F.3d 202, 209 (3d Cir. 2004); *see also Fowler v. Rhode Island*, 345

U.S. 67, 69 (1953) (holding that the city violated the Free Exercise Clause by enforcing an ordinance banning meetings in park against Jehovah's Witnesses but exempting other religious groups); *Midrash Sephardi*, 366 F.3d at 1232-33 (holding that a city zoning ordinance prohibiting churches and synagogues in seven of the eight zoning districts was neither neutral nor generally applicable where city "treat[ed] religious assemblies differently than secular assemblies by excluding religious assemblies from the business district."). The "government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 169 (3rd Cir. 2002). "The Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Id.* at 165.

Refusing to exempt Ave Maria from the Mandate in the face of numerous exceptions "devalues [its] religious reasons" for objecting to assisting in the destruction of embryonic life. *See Lukumi*, 508 U.S. at 537. Providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Order of Police*, 170 F.3d at 365; *see also Fowler*, 345 U.S. at 69 (noting the dangers inherent in "the state preferring some religious groups over this one").

The government exempted churches and their integrated auxiliaries on the

premise that their employees are likely to share their anti-contraception beliefs, without any evidence to suggest that the same is not equally true at Ave Maria. And the government chose not to impose penalties on plan administrators to ensure that employees at Christian Colleges receive contraception coverage if they are enrolled in a "church plan," but the government insists on enforcing contraceptive coverage penalties to require Ave Maria's insurer to deliver this coverage. By engaging in such arbitrary line drawing between religious people and organizations, and by offering secular exemptions that encompass tens of millions of women, the government has failed to pursue its proffered objectives "with respect to analogous non-religious conduct," as well as to identical conduct by other religious actors. *See Lukumi*, 508 U.S. at 546. The "risks" caused by existing exemptions from the Mandate "are the same" as those posed by the exemption requested here. *See id.* at 544. The First Amendment prevents Ave Maria from "being singled out for discriminatory treatment" by the government's refusal to grant them an exemption that would have no different effects than those already approved. *Id.*at 538.

Finally, it is noteworthy that under the Free Exercise Clause, Ave Maria need not show that the Mandate imposes a "substantial" burden on its free exercise rights at all: strict scrutiny applies to a non-generally applicable or non-neutral law. *See Lukumi*, 508 U.S. at 546; *Blackhawk*, 381 F.3d at 209; *accord Hartmann v. Stone*, 68

F.3d 973, 979 n.3 (6th Cir. 1995), and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994).

IV. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS FREE SPEECH CLAUSE CLAIM.

The Mandate also additionally violates the First Amendment by coercing Ave Maria to provide for and facilitate speech that is contrary to its religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 558 (1995) (internal citations omitted). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Here, the Mandate unconstitutionally coerces Ave Maria to speak a message it finds morally objectionable. It does so in two ways. First, it explicitly requires Ave

Maria, as a fully insured entity, to submit a self-certification stating that it: (1) "[o]pposes providing coverage for some or all of the contraceptives required"; (2) "is organized and operates as a nonprofit entity"; and (3) "holds itself out as a religious organization." 78 Fed. Reg. 39,874. "This certification is an instrument under which the plan is operated." EBSA Form at 2. The certification form is, by definition, speech. The government explained that, by means of this speech, Ave Maria creates legal obligations in its insurance issuer to provide the precise coverage to which Ave Maria objects to arranging and contracting for, within its own plan. 78 Fed. Reg. 39,875-79. The government also explained that those legal obligations occur *only* if Ave Maria itself speaks this message. *Id*. By this coerced speech, Ave Maria is forced to arrange and contract for its insurance issuer to provide the exact coverage that the government falsely declares Ave Maria does not arrange and contract for. Thus, the self-certification requirement constitutes impermissible compelled speech.

Second, the Mandate includes required coverage not only for abortifacients, contraceptives, and sterilization, but also for "education and counseling" related to the same. Education and counseling are speech. This speech, and the actions Ave Maria must engage in to facilitate this speech, is "inherently expressive," because the Mandate requires Ave Maria to cover "education and counseling" in favor of items to which they object. Education and counseling are, by definition, kinds of expression, and they include counseling in favor of an item that a doctor has just

prescribed as good for the patient. Such regulations do not govern mere "conduct," Gov't Br. 34, but instead regulate speech and expressive conduct, both of which are protected by the First Amendment.

The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest/least restrictive means test. *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012). Here there is no "mandated association" because the government omits many employers from the Mandate, and the Mandate violates the compelling interest test. Allowing the Mandate in light of *Knox* would be like allowing half of a company's employees to not join a union, but still forcing speech-objectors to pay the union's full dues. These factors, and because the Mandate is not a condition on government funding, distinguish this situation from *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*).

V. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS FIFTH AMENDMENT CLAIMS.

A. The Mandate is a violation of the Fifth Amendment guarantee to due process.

The Mandate violates Ave Maria's rights under the Due Process Clause of the Fifth Amendment because it creates a standardless blank check for Defendants to discriminatorily enforce the "religious" exemption. Section 2713 of the ACA gives HRSA the authority to determine which groups are sufficiently "religious" to qualify for an exemption and which groups are not, and to refrain from penalizing some but not others. This sort of unbridled discretion is forbidden by the Due Process Clause.

A law that is so "standardless that it authorizes or encourages seriously discriminatory enforcement" does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304. The ACA provision underlying the Mandate authorizes Defendants to exempt religious employers, directing the agencies to determine the scope of the exemption. Public Health Service Act § 2713 (codified at 42 U.S.C. § 300gg-13); *see also* 76 Fed. Reg. at 46623. This statutory authority is unfettered, as HRSA is tasked with determining the entire scope of the religious exemption, without any statutory guidance, and has the authority to determine the "level of religiosity" required to satisfy an exemption.

Furthermore, there is absolutely no limit on HRSA deciding whether or not contraception, abortifacients, sterilization, related education and counseling, and other services are preventive in the first place—the statute itself does not define what qualifies as "preventive service." Section 2713 of the ACA contains no standards regarding these decisions, and offers absolutely no guidance as to who counts as "religious" for purposes of the exemption and what kind of accommodation such objectors could receive, despite the fact that such an exemption implicates constitutional rights.

Section 2713 is therefore a quintessential law so "standardless that it authorizes or encourages seriously discriminatory enforcement." The statute practically invites discriminatory and unconstitutional enforcement—which is exactly what Defendants have done in this case.

B. The Mandate violates the Fifth Amendment guarantee of equal protection.

The Due Process Clause of the Fifth Amendment requires that government actors such as Defendants treat equally all persons similarly situated. *See Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985). The Mandate's narrow "religious employer" exemption exempts certain religious organizations that object, based on their sincerely held religious beliefs, to providing contraceptive coverage, but refuses to exempt other conscientious objectors such as Ave Maria. This results in

impermissible differential treatment of similarly situated groups. The Mandate must therefore fail as a violation of the Equal Protection Clause.

The Government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Weaver*, 534 F.3d at 1257 (internal citations omitted). "[T]o deny equal treatment to a church or synagogue on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the…Equal Protection Clause[]." *Midrash Sephardi*, 366 F.3d at 1239. The narrow religious employer exemption applies only to institutional churches, their integrated auxiliaries, "conventions or associations of churches," and "the exclusively religious activities of any religious order." *See* 78 Fed. Reg. at 39,871. Ave Maria, while not meeting the formal requirements for the exemption, is a religious institution, and objects, on the basis of strongly held religious beliefs, to facilitating access to contraception and related education and counseling. The only difference between Ave Maria and the groups exempted is a simple distinction in the tax code, but the religious beliefs remain consistent between non-exempt Ave Maria and similar exempt organizations.

The Mandate discriminates among religious groups, subjecting similarly situated groups to differential treatment in contravention of the Equal Protection Clause, and is therefore subject to strict scrutiny. "[S]tatutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to

heightened scrutiny…" *Weaver*, 534 F.3d at 1266. As previously discussed, Defendants cannot meet this burden. The Mandate therefore violates the Equal Protection Clause as a matter of law.

VI. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS EXPRESSIVE ASSOCIATION CLAIM.

The Supreme Court has observed that "implicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Boys Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Furthermore, "[a]n individuals' freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622. Freedom of association is "an indispensable means of preserving other individual liberties" such as the exercise of religion and speech. *Id.* at 618; *see also Gary v. City or Warner Robins*, 311 F.3d 1334, 1338 (11th Cir. 2002) (internal citations omitted) (recognizing that expressive association is a fundamental right). Even indirect restraints on expressive association violate the Constitution by, *inter alia*, burdening an organization's ability to associate "in any significant manner." *Lyng v. Int'l Union*, 485 U.S. 360, 366 n. 5 (1988).

Ave Maria associates for the purpose of expressing and inculcating its students and faculty with its religious views, consistent with Catholic teachings, including the Church's views regarding the sanctity of human life and procreation, which includes advocating against the use of abortifacients, contraception, and sterilization. The Mandate directly and substantially threatens the ability of Ave Maria to associate as an expressive organization, in violation of the First Amendment. *See Rumsfeld v. Forum for Academic & Institutional Rights* ("*FAIR*"), 547 U.S. 47, 68 (2006) ("If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."). It does so in a variety of ways: (1) by forcing Ave Maria to cooperate with and engage in behavior that promotes the use of abortifacients, contraceptives, and sterilization in contravention of the beliefs of Ave Maria; (2) by forcing Ave Maria to choose between potential economic harm and civil liability for failure to comply with a Mandate in order to advocate its viewpoint against the use of abortifacients, contraceptives, and sterilization, or to comply and espouse a message with which Ave Maria sincerely disagrees by providing objectionable coverage; (3) by forcing Ave Maria to engage in speech and expression which is contradictory to the purpose and mission of Ave Maria; and (4) by forcing economic and moral strain on the relationship between Ave Maria and its employees, which adversely affects Ave Maria as an effective organization.

In *Lyng*, the Supreme Court noted that "[e]xposing the members of an association to…economic reprisals or to civil liability merely because of their membership in that group poses a much greater danger to the exercise of associational freedoms…" 485 U.S. at 367 n.5. The Mandate burdens the expressive association of Ave Maria both by subjecting Ave Maria to economic harm (in the form of government fines) for failure to comply and subjecting Ave Maria to potential civil liability under ERISA if Ave Maria chooses not to comply with the Mandate. In *Abood,* the Supreme Court held that a union cannot spend funds "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" where the expenditures were financed by an employee which objects to such ideological and political views. 431 U.S. at 235. "Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who *do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of [their] employment.*" *Id*. at 235-36 (emphasis added). Similarly, Ave Maria cannot be coerced into espousing a view with which it sincerely disagrees.

This case can be distinguished from *FAIR*, where the Supreme Court held that requiring a law school to permit military recruiters on campus did not violate the right to expressive association. *FAIR* found that, under the Solomon Amendment,

"law schools must allow military recruiters on campus," but the "recruiters are not part of the law school … [they] are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." 547 U.S. at 69. Unlike in *FAIR*, Ave Maria's cooperation in the coerced speech happens through its own insurance company, with which it must contract and arrange in a scheme that delivers objectionable coverage.

This subjects the Mandate to strict scrutiny, *Dale*, 530 U.S. at 648, which, as discussed previously, it cannot satisfy.

VII. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS ADMINISTRATIVE PROCEDURE ACT CLAIM.

A. The Mandate is arbitrary and capricious.

The Mandate violates the APA for being "arbitrary and capricious" under 5 U.S.C. § 706(2)(A), *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), for: (1) failing to sufficiently consider the objection that the requirement to provide abortifacients, contraceptives, and sterilization would violate the religious beliefs of employers subject to the Mandate; and (2) subjecting nearly identical religious organizations to differential treatment under the narrow religious exemption to the Mandate.

In the Eleventh Circuit, the arbitrary and capricious standard of review is defined as follows:

> To determine whether an agency decision was arbitrary and capricious, the reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one. Along the standard of review continuum, the arbitrary and capricious standard gives an appellate court the least latitude in finding grounds for reversal; [a]dministrative decisions should be set aside in this context … only for substantial procedural or substantive reasons as mandated by statute, … not simply because the court is unhappy with the result reached. The agency must use its best judgment in balancing the substantive issues. The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action.

N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538-39 (11th Cir. 1990) (footnotes, quotation marks, and citations omitted). Ave Maria satisfies this standard.

Defendants failed to respond to comments that the Mandate would violate entities' religious beliefs. Defendants asserted, without evidence, that churches and integrated auxiliaries (including schools) may be exempt because their employees are likely to share the church's anti-contraception views. But Defendants refused an exemption to Ave Maria and similar entities where in fact employees share a high convergence of religious views. Defendants then drafted rules declaring that non-exempt colleges need to be subject to the accommodation to deliver contraceptive coverage to their employees, but it failed to apply its penalty to colleges that are not exempt but happen to be in "church plans." Yet Defendants insist on applying that penalty to insurers of entities like Ave Maria, even though no distinction can be

made between the government's "need" to cause contraceptive coverage to such similar entities.

Some commenters on the August 2011 interim final rules raised concerns "about paying for such [contraceptive] services and stated that doing so would be contrary to their religious beliefs," and that "the narrower scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act." *See, e.g.,* 78 Fed. Reg. at 39,886-88. However, Defendants responded only with conclusory statements that the Mandate and its accommodation do not substantially burden religious exercise and pass the strict scrutiny test. *Id*. As described above, these arguments are severely wrong as a matter of law. Defendants ignore the fact that Ave Maria objects not merely to "paying" but to facilitating objectionable coverage through the accommodation. Defendants falsely offer the idea that "multiple degrees of separation" and "attenuation" exist between what Ave Maria objects to and its religious beliefs, when the "substantial burden" test does not and legally cannot render that sort of theological judgment. *See Thomas*, 450 U.S. at 715 (rejecting the idea that being "sufficiently insulated" from evil undermines a plaintiff's substantial burden, because "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . .").

Defendants ignored altogether the fact that fully insured entities are required to deliver the self-certification form evidencing the entity's objection to its insurer, and falsifies as a matter of fact that self-certification "simply confirms that an eligible organization is a nonprofit religious organization with religious objections." 78 Fed. Reg. at 39,887. Defendants' contention that its Mandate is supported by a compelling interest disregards the fact that generic "health" interests cannot, by definition, be compelling because they are too broadly formulated, and also fails to address the mere correlation and lack of causal connection or evidence between mandating coverage on the one hand, and then the items increasing usage, that usage decreasing unintended pregnancy, and that decrease necessarily reducing adverse effects to a compelling degree. *Id.*

This irrational activity renders the Mandate's exemption scheme arbitrary under the APA. Thus, the agency utterly failed to "cogently explain why it has exercised its discretion in a given matter." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983).

B. The Mandate is contrary to law.

i. The Mandate violates the ACA.

The Mandate is contrary to the provision of the ACA that states that nothing in Title I of the ACA, which includes the provision governing "preventive services," "shall be construed to require a qualified health plan to provide coverage of [abortion] services…as part of its essential health benefits for any plan year." Section

1303(b)(1)(A) (codified at 42 U.S.C. § 18023). The Mandate requires coverage of certain "FDA-approved contraceptives" which act as abortifacients, in that they cause the demise of human embryos after conception and before and/or after implantation in the uterus. Destroying a human embryo that is in a woman's body constitutes an action that is abortifacient, that destroys a new human life, and that terminates a pregnancy.[6] Accordingly, the Mandate contradicts the requirements of the ACA itself, in violation of the APA.

ii. The Mandate is contrary to the Weldon Amendment.

The Mandate is contrary to the provisions of the Weldon Amendment to the Consolidated Appropriations Act of 2012, Public Law 112-74, § 507(d)(1), 125 Stat 786, 1111 (Dec. 23, 2011), which provides that none of the funds made available in the Act for appropriations for Defendants Department of Labor and Health and Human Services "may be made available to a Federal agency or program…if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

[6] *See* Dorland's Illustrated Medical Dictionary 31st Ed. (2007) ("Pregnancy" is "The condition of having a developing embryo or fetus in the body, after union of an ovum and spermatozoon.); Mosby's Medical Dictionary 7th Ed. (2006) ("Pregnancy" is "The gestational process, comprising the growth and development within a woman of a new individual from conception through the embryonic and fetal periods to birth."; "Conception" is "1. the beginning of pregnancy, usually taken to be the instant that a spermatozoon enters an ovum and forms a viable zygote 2. the act or process of fertilization."); Stedman's Medical Dictionary 28th Ed. (2006) ("Pregnancy" is "The state of a female after conception and until the termination of the gestation."; "Conception" is "Fertilization of oocyte by a sperm").

The Mandate was enacted and enforced by the Defendant Labor and HHS Departments. Those Defendants are using funds appropriated under the 2012 and previous Appropriations Acts to subject Ave Maria to discrimination due to its refusal to cover abortifacient drugs and devices. The Mandate is therefore contrary to the Weldon Amendment.

iii. The Mandate is contrary to the Church Amendment.

The Mandate also violates the provisions of the Church Amendment, which provides that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d). The Mandate unquestionably requires individuals to participate in and fund activity which they find objectionable on the basis of sincerely-held religious beliefs, in violation of the Church Amendment; this is impermissible under the APA.

iv. There is no statutory authority to enforce the accommodation.

Finally, the Mandate is contrary to law because no statutory authority exists in the ACA or elsewhere to coerce insurance companies or third party administrators to offer payments for contraception or sterilization to enrollees in a health plan

sponsored by a religious organization ("Church plans") where those payments are "separate" from the health plan itself and the health plan ostensibly excludes that coverage. If the coverage is really separate, it can't be mandated. If it isn't separate, the government cannot be correct that the substantial burden here is "attenuated."

For all of these reasons, the Mandate is invalid under the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, Plaintiff Ave Maria respectfully requests that this Court grant its motion for summary judgment.[7]

[7] Ave Maria reasserts its opposition the American Civil Liberties Union's motion to file amicus brief for the reasons stated in its opposition to the motion. *See* ECF No. 37.

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s/Matthew S. Bowman

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed a copy of the foregoing brief. Notice of this filing will be sent via email to all parties and registered users by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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