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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

By requiring Ave Maria School of Law to facilitate access to contraceptives as part of the preventive services Mandate, Defendants have substantially burdened the religious exercise of Ave Maria, in violation of the Religious Freedom Restoration Act. The Mandate requires Ave Maria to execute a self-certification which serves as the conduit to coverage of contraceptives to which Ave Maria objects to providing on the basis of its sincerely held religious beliefs. Failure to comply subjects it to massive fines. Ave Maria is coerced to trigger the duties of an insurance issuer to provide contraceptives to Ave Maria's own employees--the very contraceptives to which Ave Maria objects to helping provide. The Mandate further violates both the First and Fifth Amendments to the United States Constitution, as well as the Administrative Procedure Act. Ave Maria is therefore entitled to judgment as a matter of law.

ARGUMENT

I. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS RFRA CLAIM.

a. The Mandate substantially burdens Plaintiff's religious exercise.

There can be no doubt that Ave Maria's refusal to facilitate access to contraceptives and related education and counseling in support thereof is religious exercise under RFRA. *See, e.g., Korte v. Sebelius*, 735 F.3d 654, 677-82 (7th Cir. 2013) (holding that for-profit company exercises religion when it excludes morally objectionable items from its health plan); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d

1114, 1129 (10th Cir. 2013) (same). The Mandate substantially burdens Ave Maria's religious beliefs by requiring activity directly contradictory to those beliefs—namely, the facilitation of access to contraceptives—and subjecting it to potentially fatal fines for refusing to comply or choosing to cease providing health insurance. *See* 26 U.S.C. § 4980D(b); 26 U.S.C. §§ 4980H(a), (c)(1). Such penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA. *See Hobby Lobby*, 723 F.3d at 1141; *Korte*, 735 F.3d at 683; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1217-18 (D.C. Cir. 2013); *Southern Nazarene Univ. v. Sebelius*, No. 13-cv-1015-F, 2013 WL 6804265, at *9 (W.D. Okla. Dec. 23, 2013).

Defendants do not challenge the contention that Ave Maria is engaging in sincere religious exercise, but they deny the substantiality of the burden. Defendants argue that the accommodation requires Ave Maria to "only do what it did prior to the promulgation of the regulations that it challenges." RFRA. Defs.' Opp. 5. This is false. Ave Maria, free of the compulsion of the Mandate, would simply exclude all contraceptive coverage from its health plan. Instead, as part of the government scheme, Ave Maria must execute a self-certification, "in effect, a permission slip," *Southern Nazarene*, 2013 WL 6804265, at *8, the purpose of which is to facilitate access to the same coverage to which Ave Maria refuses to provide on its own as a result of its sincerely held religious beliefs. These actions are inherently different. 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).

The substantiality of this burden is being overwhelmingly recognized in similar cases. The government's recently filed supplemental authority from *Diocese of Cheyenne v. Sebelius*, No. 2:14-cv-21-SWS (D. Wyo. May 13, 2014), only serves to illustrate the extreme minority view of its position. Since Ave Maria's last brief was filed on April 4, 2014, three additional injunctions were awarded to non-profit religious organizations, in contrast to the government's one new case in its favor. *See Dobson v. Sebelius*, No. 1:13-cv-03326-REB-CBS (D. Colo. Apr. 17, 2014); *Fellowship of Catholic University Students v. Sebelius*, No. 1:13-cv-03263-MSK-KMT (D. Colo. Apr. 23, 2014); *Dordt College v. Sebelius*, No. 5:13-cv-04100-MWB (N.D. Iowa May 21, 2014). Added to the 21 cases discussed in Ave Maria's opening brief, this makes 23 injunctions granted—either by the district court or pending appeal—out of the 25 non-profit lawsuits having received a ruling on this Mandate.

For all practical purposes, the Mandate as applied to the non-profit Ave Maria is indistinguishable from the requirements on for-profit companies invalidated by the en banc Tenth Circuit in *Hobby Lobby*, 723 F.3d at 1145, the D.C. Circuit in *Gilardi*, 733 F.3d at 1222-24, and the Seventh Circuit in *Korte*, 735 F.3d at 682-87. In those

cases, a private employer's decision to offer a group health plan automatically resulted in coverage for the objectionable drugs and devices through the employer's own insurer. So too here, Ave Maria's decision to offer a group health plan automatically results in coverage for the objectionable preventive services through Ave Maria's insurer. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the benefits are directly tied to the employers' insurance policies: they are available only "so long as [employees] are enrolled in [the organization's] health plan," 29 C.F.R. § 2590.715-2713A, they must be provided "in a manner consistent" with the provision of explicitly covered health benefits, 78 Fed. Reg. at 39,876–77, and they will be offered only to individuals the organization identifies as its employees.

Defendants argue that the Mandate imposes only a *de minimis* or attenuated burden on Ave Maria's exercise of religion. Defs.' Opp. 2-9. This contention was rejected in *Korte*, where the Seventh Circuit correctly perceived that the government, by making this argument, was essentially second-guessing the claimants' moral judgment that the alleged "steps" or "distance" between themselves and the use of contraceptives did not eliminate their complicity in immoral acts. 735 F.3d at 684. The accommodation's supposed addition of slightly more "distance" between Ave Maria and contraceptive use is utterly irrelevant, given Ave Maria's indisputably sincere belief that facilitating coverage of contraceptives is morally impermissible.

Defendants' desired approach to the "substantial burden" inquiry is fundamentally flawed because "substantiality" is not a measure of morality or theology at all. It is a measure of a "burden": the pressure that the government puts on an entity to do what it insists is religiously unacceptable. Ave Maria's pressure is not only substantial, it is direct: either execute a form in violation of its beliefs, or provide objectionable coverage in violation of its beliefs, or face massive fines. The government's redefinition of "substantial burden" is false at the outset because it looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs," and instead to the theology of "attenuation." *Hobby Lobby*, 723 F.3d at 1137. Instead, after identifying a sincerely-held religious belief, a court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant to violate that belief." *Id.* Here, the burden is substantial because obeying its religious beliefs subjects Ave Maria to crippling fines. By nonetheless arguing that the actions required of Ave Maria are too attenuated to merit relief, Defendants have misinterpreted RFRA to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on Ave Maria's exercise of religion. The unfortunate core of this dispute seems to be that the promoters of the Mandate wish to trivialize or denigrate the sincerely held belief that facilitating the use of contraceptives is morally wrong.

In evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of

the coercion employed by the government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh-day Adventist plaintiff of working on Saturday was "*de minimis*." Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to for[]go [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404.

Likewise, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory producing tank turrets with the sheet steel required him to change "in any significant way." Defs.' Opp. 9. Rather, the Court evaluated the "coercive impact" of the state's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18. Defendants' attempt here to focus on how much time or effort is involved in the self-certification process misses the proper analytical point. The burden is the impact to the individual's religious beliefs by becoming a participant in the delivery of contraceptives.

Despite the Mandate's clear pressure on Ave Maria to modify its conduct, Defendants are wrong to suggest that RFRA's protections are limited to laws that require plaintiffs to modify their conduct in a way only the government considers significant. Defs.' Opp. 3. The touchstone of the substantial burden analysis, rather, is whether claimants are compelled or pressured to act in violation of their religious beliefs. *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry begins with an assessment of whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 403-04 (same). The fact that a claimant's actions do not require much physical effort is unimportant to the analysis. If a public school required students to sign a document containing the pledge of allegiance instead of reciting it orally, the fact that signing a piece of a paper is an allegedly minimalistic activity would make the requirement no less a burden on the religious exercise of a person whose faith prohibited making such a pledge.

In any event, the Mandate *does* force Ave Maria to modify its behavior. The Mandate directly compels Ave Maria to either execute a form it would not otherwise execute because of its religious objection, provide contraceptive coverage it would not otherwise provide because of its religious objection, or suffer the pressure of massive fines. In the past, Ave Maria has sought to enter into health insurance contracts that would *not* result in the provision of contraceptive coverage to its employees. Under the Mandate, the Schools must now enter into contracts that *will*

facilitate provision of contraceptives. They are, moreover, required to take numerous additional steps as part of the overall scheme. Furthermore, by now agreeing to a plan that provides contraceptives, Ave Maria is forced to offer its tacit permission for wrongful acts. Accordingly, even under Defendants' erroneous understanding of the law, Ave Maria is required to modify its behavior in a way that runs directly contrary to its sincerely held religious beliefs, and thus undoubtedly suffers a substantial burden on its religious exercise.

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. This is a substantial burden.

b. The Mandate cannot survive strict scrutiny.

A substantial burden on the exercise of religion can only be sustained if it: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b). The government cannot meet this demanding standard, as discussed in further detail in Ave Maria's opening memorandum. Pl.'s Mem. 22-26.

The vast scheme of exemptions to the Mandate compels the conclusion that Defendants' alleged interests are not compelling. The Mandate contains myriad exemptions from its terms, including "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 from the entire ACA for some religious sects and small employers. While Defendants argue that the grandfathering provisions are not "permanent," Defs.' Opp. at 13, they contain no sunset provision, and Defendants give those plans a "right" to continue indefinitely. As a categorical matter separate even from the exemption's breadth and duration, Defendants themselves in their grandfathering regulation declared some provisions of the ACA are "particularly significant protections" that will be imposed on grandfathered plans, while other provisions will not, including this very Mandate. 75 Fed. Reg. at 34,540. The Mandate cannot possibly be an interest "of the highest order" while it is also, by Defendants' own admission, not "particularly significant." Indeed, "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 (emphasis added). This scheme undermines any argument that Defendants' interests are compelling, and the Mandate fails strict scrutiny.

That Ave Maria's employees are unlikely to use at least some, if not all, of the items to which Ave Maria, as a Catholic institution, objects—conclusively proves that Defendants have no interest in imposing the Mandate on Plaintiff. RFRA requires the government to prove that the "application of the burden *to the person*" satisfies strict scrutiny. 42 U.S.C. § 2000bb-1(b) (emphasis added). Defendants argue that the Mandate "promote[s] [their] interests even with respect to plaintiff's . . . employees who have elected to be covered by its insurance plan . . ." Defs.' Opp. 11. However, as detailed previously, Ave Maria is a Catholic institution, and all faculty, whether Catholic or otherwise, are committed to the Catholic mission of the school. Pl.'s Mem. 5. In this sense, the government cannot possibly further its compelling interest where many, if not all, of those covered employees will forego the provisions of the Mandate because of their disagreement with the usage of contraceptives. The government in this Mandate has conceded that when a non-profit institution is "more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan," that institution is entitled to a *full exemption* and is not to be subject to the accommodation process. 78 Fed. Reg. at 39,874 (exempting churches). Therefore the government cannot claim it has a compelling interest in refusing to exempt a self-consciously

devout Catholic institution publicly committed to the Church's teaching on contraception.

Defendants further fail to demonstrate that the Mandate "is the least restrictive means of furthering [their] compelling governmental interest." *See* 42 U.S.C. § 2000bb-1(b). There are ample less restrictive means available, as detailed in Ave Maria's initial brief, Pl.'s Mem. 24-26, the presence of which independently causes the Mandate to fail strict scrutiny. To name just one, the government could quite easily declare that any employee at a religiously objecting institution such as Ave Maria, that wants contraceptive coverage, could buy a plan on the state exchange and receive subsidies for that plan, and Ave Maria would not be fined for offering its plan without contraception. That exchange-delivery method is what the government has deemed adequate for providing contraceptive coverage for millions of people on the exchanges. The government cannot deny that such a method would be adequate for serving its interests without involving or penalizing Ave Maria in the process.

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

The government contravenes the Establishment Clause by favoring certain religious denominations and groups over others. The Mandate is thus subject to strict scrutiny. *See Larson v. Valente*, 456 U.S. 228, 246 (1982). While Defendants would focus on the distinction between denominations and organizations, this is a red herring. The Court in *Larson* looked not only at the effect of the law favoring certain

denominations over new or untraditional denominations, but also at *how* it did so, namely by making "distinctions between different religious organizations." Pls.' Mem. 26-27; *see Larson*, 456 U.S. at 246 n. 23. This Mandate and its implementation are rife with distinctions between organizations. The central distinction—between integrated auxiliaries and other religious non-profits—rests upon exactly the sort of criteria deemed constitutionally suspect in *Larson*: a "fifty percent rule" governing the sources of an organization's funding. *Id.* at 246–49; 26 CFR § 1.6033-2(h)(4). Importantly, the lack of rationality or relevance to its interest for exempting integrated auxiliaries and participants of self-insured church plans bolsters the Schools' Establishment Clause claim. *See Gillette v. U.S.*, 401 U.S. 437, 452 (1971) ("[T]he Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses.") (internal quotations and citations omitted).

Defendants too readily dismiss *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Though the court there faced an Establishment Clause challenge to a law that favored less sectarian religious institutions over more sectarian ones, it did not, as Defendants argue, limit itself to "laws that facially regulate religious issues." *Id.* at 1257 (internal citations omitted). Instead, it discussed discrimination "among religious *institutions*." *Id.* at 1258 (emphasis added). The court rejected the government's argument that the law distinguished

"not between types of religions, but between types of institutions," *id*. at 1259, noting that the government could offer "no reason to think that [it] may discriminate between 'types of institution[s]' on the basis of the nature of the religious practice these institutions are moved to engage in." *Id*. As in *Weaver*, the Mandate uses incidental criteria to exempt some religious institutions (integrated auxiliaries, participants in self-insured church plans) but not ones like Ave Maria. Under *Weaver*, this sort of religious discrimination violates the Constitution. 534 F.3d at 1256, 1259.

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

The Mandate also violates the Free Exercise Clause of the First Amendment because it is neither generally applicable nor neutral. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993). As a result it is subject to strict scrutiny, which it cannot meet. *See supra* § I.b.

As discussed in Ave Maria's opening memorandum, the Mandate is not generally applicable under the Free Exercise Clause because it is underinclusive, grants categorical exemptions, and involves an unfettered amount of individualized discretion to the government in crafting religious exemptions and "accommodations." Pls.' Mem. 33-34. The Mandate's various exceptions, accommodations and exclusions, which withhold the alleged benefits of the preventive services Mandate from tens of millions of women, implicate the major concern of *Lukumi*: a law that "fail[s] to prohibit nonreligious conduct that

endangers [the interests underlying the law] in a similar or greater degree than [religious conduct] does." 508 U.S. at 543.

In the course of other lawsuits against the Mandate, Defendants have conceded yet another significant exclusion from the Mandate, one that exacerbates the discrimination against Ave Maria. In two similar lawsuits, Defendants admitted that the Mandate's penalties cannot be imposed upon self-insured "church plans" that are exempt from ERISA.[1] These plans do not involve only churches: they can involve universities, hospitals, and other religious non-profits wholly indistinguishable from Ave Maria. No rational grounds exist for Defendants' differential treatment of substantially similar entities. Where secular exemptions, even categorical ones, undermine the government's general interests while a religious exemption is denied, strict scrutiny is triggered. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (finding that the non-religious exemptions for the bear-keeping prohibition undercut the stated interests of the law at least to the same extent as the type of religious exemption the plaintiff sought).

[1] *See* Defendants' Response at 2–3 n.1, *Reaching Souls International, Inc. v. Sebelius*, No. 5:13-cv-1092-D, Doc. No. 19 (W.D. Okla. filed Oct. 31, 2013) ("TPAs" of self-insured church plans "are not required to make the separate payments for contraceptive services for their employees under the accommodation"); Defendants' Opposition at 5, *Roman Catholic Diocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, Doc. No. 99 (E.D.N.Y. filed Nov. 1, 2013) ("ERISA enforcement authority is not available with respect to the TPAs of self-insured church plans under the accommodation, and the government cannot compel such TPAs under such authority to provide contraceptive coverage to self-insured church plan participants beneficiaries [sic] under the accommodation.") (internal citations omitted).

The Mandate is also not neutral; it discriminates on its face. Those who might object to the Mandate on religious grounds fall into multiple categories: churches (fully exempt); members of certain Anabaptist congregations or participants in health sharing ministries (fully exempt); integrated auxiliaries of churches that can be set up very similarly to other religious non-profits (also exempt); certain religious non-profits ("accommodated"); other religious non-profits participating in self-insured church plans (functionally exempt); and all other religious objectors (not exempt and subject to ruinous fines). The chosen criteria for putting entities in these categories are neither neutral nor sensible. *See* Pls.' Mem. 34-37. There is no reason simultaneously to deem integrated auxiliaries exempt because of their alleged likelihood to employ co-believers while withholding an exemption from Ave Maria, which draw its employees from among those who have agreed to further its religious purpose. The government has not even attempted to justify exempting self-insured church plan participants that are substantively indistinguishable from Ave Maria. The Mandate creates arbitrary classes of religious objectors, and treats them unequally based on irrelevant criteria. This violates the Free Exercise Clause. *See Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

The government also violates the Free Exercise Clause by not imposing the Mandate's requirements in a religiously neutral manner. *See Tenafly Eruv Ass'n, Inc. v.*

Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002) (holding that a facially neutral statute was not in fact neutral where the government had "granted exemptions from the ordinance's unyielding language for various secular and religious [groups]" but would not grant the Orthodox Jewish plaintiffs an exemption). "[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference." *Colorado Christian Univ. v. Weaver*, 534 F. 3d 1245, 1257 (10th Cir. 2008). The government's chosen criteria and application of those criteria *do* discriminate among religious institutions.

Additionally, the government has decided that certain secular criteria (*e.g.*, small businesses choosing not to provide insurance and grandfathered plans) are sufficient for a categorical exemption, but when it comes to granting a religious exemption, only some religious organizations are eligible. Giving preference to secular over religious reasons for an exemption is no less a violation of the neutrality requirement than discriminating *amongst* religions. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (1999) (noting that where "the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."); *see Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

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

The Mandate violates Ave Maria's rights guaranteed by the Free Speech Clause in two ways. First, Ave Maria is explicitly compelled by Defendants' regulations to speak a pre-written statement to its insurance issuer to legally require it to obtain contraceptive payments. Second, Ave Maria is required to cause coverage of speech—education and counseling—in favor of contraceptive items.

The self-certification process literally requires speech: the written words of the self-certification form. The required speech does not merely "favor" access to and use of contraceptives, but is an indispensable step in the mechanism through which payments for contraceptives are obtained. Ave Maria, as a fully-insured entity, is required 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 700 at 2, *available at* http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf (last accessed May 15, 2014). The Mandate's accommodation forces fully-insured employers to certify its religious objection to providing contraceptive coverage on the self-certification form, which explicitly triggers the objectionable coverage. This is impermissible compelled speech.

The Mandate further forces Ave Maria to facilitate government-dictated education and counseling concerning contraception and abortion that directly conflicts with its religious beliefs and teachings. Defendants contend that there is no requirement that the "education and counseling" favor any particular contraceptive service or contraception in general. *See* Defs.' Opp. 26. Whether all women will receive education in favor of contraceptives or not, education in favor of contraceptives is *covered* by the Mandate.[2] The Institute of Medicine Report specifies that when it recommends "patient education and counseling" to be included in the Mandate, it is talking about patient education and counseling, "that are provided to prevent unintended pregnancies."[3] All of the covered contraception under the Mandate is "as prescribed."[4] By definition, a doctor prescribing contraceptives believes them to be medically indicated, and her counseling and education regarding those items will be supportive of their use. As Ave Maria previously argued, "education and counseling" is inherently expressive, and forcing it to facilitate such expression constitutes compelled speech. *See* Pls.' Mem. 38.

[2]HRSA, "Women's Preventive Services Guidelines," available at http://www.hrsa.gov/womensguidelines/ (coverage must include "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.").

[3] Defendants' non sequitur that Plaintiff's argument necessarily extends to "all interactions between an employee and her health care provider," Defs.' Opp. 26, and is thus outside the protections of the First Amendment, *id.*, either misunderstands the coverage to which Plaintiff objects or is just an attempt to confuse the issues.

[4] HRSA Guidelines, *supra* n.4.

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

a. The Mandate violates the Due Process Clause.

The government's argument that Plaintiffs are unable to "identify a source of vagueness or confusion in the regulations" at issue, Defs.' Opp. 29, reflects its misunderstanding of Ave Maria's Due Process Clause claim. The claim is that the discretion granted to HRSA by 42 U.S.C. § 300gg-13 to promulgate a religious exemption, or an accommodation, or whatever else Defendants have conjured up in this process, is itself impermissibly vague and standardless: it gives zero guidance about whose religious convictions can be recognized and whose can be ignored. That violates the Due Process Clause, because the Mandate's exemptions and accommodations are a product of this impermissibly unfettered discretion.

Defendants admit that the Affordable Care Act provision at issue, 42 U.S.C § 300gg-13, not only lets Defendants decide whether or not contraceptives are "preventive" of a disease, but permits them to decide which religious objectors are exempt and which must comply with the Mandate (and in what way). 76 Fed. Reg. at 46,623. Though the provision implicates the free exercise of religion and freedom of speech, there are no parameters in § 300gg-13 that govern Defendants' exercise of discretion. It is therefore so "standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

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

It is without question that the Government "must treat individual religions and religious institutions 'without discrimination or preference.'" *Weaver*, 534 F.3d at 1257 (internal citations omitted). The Mandate's narrow "religious employer" exemption exempts certain limited religious organizations that object to the Mandate's requirements to provide contraceptives, but refuses to exempt other conscientious objectors such as Ave Maria, resulting in impermissible differential treatment among similarly situated groups. The regulations permit only 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, to claim a religious employer exemption from the Mandate. In turn, the Mandate denies to organizations such as Ave Maria who, while not meeting the formal requirements for the exemption, are religious institutions, and object to facilitating access to contraception and related education and counseling.

The government's stated rationale for the religious employer exemption is the unsupported speculation that those entities' employees are "more likely" to oppose contraception than other entities' employees—even though Ave Maria's devout Catholic mission places it in the same category. 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. Because of this differential treatment, the Mandate is subject to strict scrutiny, *see Weaver*, 534 F.3d at 1266. Defendants cannot meet this burden.

And as discussed above, the Mandate also engages in unequal treatment between Ave Maria and religious colleges in ERISA-exempt "church plans," on whose third party plan administrators the government has chosen not to impose a duty or a penalty at all, even while the government imposes duties on Ave Maria's own insurer. There is no rationale that serves the government's alleged interest in contraceptive coverage for the government to exempt churches and integrated auxiliaries, and not to coerce third party administrators for other religious colleges, but to impose its Mandate on Ave Maria and its insurer. This irrationality violates the Equal Protection Clause.

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

The Mandate further violates Ave Maria's right to expressive association, as detailed in Ave Maria's opening memorandum, Pl.'s Mem. 43-46. 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 contraceptives. 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.") Defendants argue that Ave Maria is "free to associate to voice their disapproval of the use of contraception," Defs.' Opp. 28, but this ignores the fact that the forced inclusion of contraceptives in Ave Maria's health plans seriously undermines any message it speaks related to its disapproval of contraceptives. Ave Maria cannot speak out of one side of its mouth by stating that it disapproves the use of contraceptives and then provide those exact products in its health plan while maintaining effective religious association. Because the Mandate impinges on the right of expressive association, it is subject to strict scrutiny, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), which the government cannot satisfy.

VII. AVE MARIA IS ENTITLED TO SUMMARY JUDGMENT ON ITS APA CLAIM.

a. The Mandate is arbitrary and capricious.

The Mandate is "arbitrary" and "capricious" under 5 U.S.C. § 706(2)(A) and thus violates the APA. The Mandate's unwillingness to exempt entities like Ave Maria, in light of its exemption of integrated auxiliaries, and its non-coercion of religious colleges' plan administrators in ERISA-exempt "church plans," is arbitrary and capricious. The Mandate's rationale for doing so—that integrated auxiliaries are likely to employ people of the same faith—applies no less to Ave Maria. And the

government insists that non-profit non-integrated-auxiliary religious colleges are not exempt, but it refused to impose coercion on the plan administrators of those in church plans, while it did impose the coercion in Ave Maria's case. This picking and choosing of whom to impose its Mandate on has no connection to the Mandate's stated rationales. The refusal to exempt Ave Maria is unjustified.

Defendants insist that "[i]t can hardly be irrational or arbitrary for the government to rely on such a longstanding statutory distinction" relating to integrated auxiliaries. Defs'. Opp. 32 n.13. But Ave Maria is challenging the importation of that language into an utterly unrelated context, not to its use in the tax code. The statutory language that Defendants lifted from the tax code relates merely to which non-profit entities must file informational returns with the IRS. That language and the reason it exists has nothing whatsoever to do with whether an entity's employees should or should not receive contraceptive coverage in violation of the employer's religious beliefs. There is nothing longstanding about deciding that the percentage of a religious entity's receipt of funds from a church somehow mysteriously correlates with the need of its employees to receive contraceptive coverage.

A classification such as the one at issue fails to operate "so that all persons similarly circumstanced . . . be treated alike." *Nazareth Hosp. v. Sebelius*, 938 F.Supp.2d 521, 535 (E.D. Pa. 2013) (citing *Medora v. Colautti*, 602 F.2d 1149, 1152

(3d Cir. 1979)). The government's recent decision not to impose penalties on religious non-profits that participate in self-insured "church plans" exacerbates the Mandate's arbitrary character. Some colleges participate in such plans and are thus exempt. They are substantively indistinguishable from Ave Maria. Yet they are exempt, whereas Ave Maria is not. There is no rational justification for this differential treatment.

The Mandate also fails to "articulate a satisfactory explanation for [their] action" in dismissing the comments reflecting religious liberty concerns. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Defendants ignored the fact that Ave Maria and thousands of other similar organizations object not merely to paying for, contracting for, or arranging for the coverage, but also to facilitating objectionable coverage under accommodation. In addition, Defendants ignored the requirement that there be "compelling" evidence "of causation" and not merely "correlation" between the government's objective and the means chosen to achieve it. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct 2729, 2738-39 (2011). Defendants' own evidence reveals that there is no causal connection between lacking contraceptive coverage and suffering health consequences.

b. The Mandate is contrary to law.

The APA forbids agency action from being contrary to law and constitutional right. 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401

U.S. 402, 415-17 (1971). As discussed above, the Mandate violates RFRA and the First and Fifth Amendments. Defendants fail to acknowledge this aspect of Plaintiff's claims, alleging only that the regulations do not violate federal restrictions regarding abortion, including the ACA, the Weldon Amendment, and the Church Amendment. Defs.' Opp. 32-34.

The Mandate violates the ACA itself by being without statutory authorization. 42 U.S.C. § 300gg-13 only authorizes preventive services coverage through an entity's insurance plan. But Defendants' "accommodation" insists that Plaintiff's "plan" will *not* include the contraceptive coverage (it will be "separate"), while purporting to force Plaintiff's insurance issuer to provide payments for Mandated items anyway. If the payments are truly separate, 42 U.S.C. § 300gg-13 does not authorize Defendants to require them. If § 300gg-13 authorizes the requirement, they are not truly separate from Plaintiff's health plans, and therefore the government's entire attenuation argument in the substantial burden discussion above is nullified. 42 U.S.C. § 300gg-13 does not give Defendants roving authority to force entities to provide contraceptive coverage or payments outside of an employer's plan.

CONCLUSION

For the foregoing reasons, Plaintiff Ave Maria School of Law respectfully requests that this Court grant its motion for summary judgment.

Respectfully submitted this 23rd day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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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