IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DORDT COLLEGE and CORNERSTONE UNIVERSITY,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al.*,

Defendants.

No. 5:13-cv-04100-MWB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

Dordt College and Cornerstone University ("the Schools) are religious institutions that were created for religious reasons, hold religious beliefs, are comprised of religious people, and pursue religious objectives. Complaint, ECF No. 1, ¶¶ 2, 9, 10, 20-27, 43-49. Among those religious beliefs is the conviction that human beings are uniquely created in the image of God, and thus have special dignity and are entitled to special protection. Compl., ¶¶ 30-32, 52-54. The Schools believe, as a matter of religious commitment, that this dignity and entitlement to special protection arises at the moment of conception. Compl., ¶¶ 31, 54. They believe that violating the special dignity of God's unique image bearers is a grave sin that disrupts their relationship with God Himself and risks God's judgment. Compl., ¶¶ 30-32, 53-54.

Those beliefs translate into both positive actions as well as the avoidance of certain behaviors. First, positive actions: they draw the members of their communities from among those who hold and live out their shared religious convictions. Compl., ¶¶ 25-27, 47-49. These communities include students, faculty, and staff. The communities hold a collective desire to glorify God through all they believe, say, and do. The Schools nurture and foster their communities, encouraging obedience to their understandings of God's laws and responding to disobedience to those same laws. The Schools draw their administrators, faculty, and staff from among those who share their beliefs about the sanctity of life. Compl., ¶ 26, 47. The Schools strive to ensure that their students, faculty, and staff embrace, maintain, and live out their shared religious commitment to the sanctity of human life.

Second, avoidance of certain behaviors: the Schools seek to avoid participation in or facilitation of transgressions of their understanding of God's law, including that regarding the dignity and value of human life. Among other things, they structure their employee and student health insurance plans to avoid participating in violations of their religious convictions and to foster behavior among members of their communities that is consistent with the Schools' religious values. Compl., ¶¶ 38-39, 41, 65, 67.

The HHS Mandate dramatically undermines the Schools' freedom to live out their religious beliefs in these two ways: avoiding violations of their religious convictions, and fostering community commitment to those convictions. The Schools believe that compliance with the Mandate would constitute facilitation of immoral behavior and would thus be sinful and immoral in itself. And compliance with the Mandate would undermine their freedom to foster communities that share and strive to live out a set of foundational and definitional religious commitments. Obeying the Mandate would seriously undermine their religiously-based educational missions and encourage disobedience to shared religious convictions.

The government is imposing enormous pressure on the Schools to comply with the Mandate and thus violate their religious convictions and undermine their fostering of their religious communities. The price for non-compliance is enormous and unsustainable. If the Schools continue their present course of action once the Mandate goes into effect (*i.e.*, offer health insurance that excludes abortifacients), they will face fines of $100 per employee per day. *See* 26 U.S.C. § 4980D(b). For Dordt, this would be $6,533,500 annually. For Cornerstone, the yearly fine would be $9,782,000. If they avoided the Mandate by dropping employee health insurance altogether, they would face fines of $2000 per employee per year, minus 30. *See* 26 U.S.C. § 4980H(a), (c)(1). This would be $298,000 annually for Dordt, and $476,000 for Cornerstone. In both scenarios, they would also face liability under ERISA. The Schools believe that they have a religious obligation to provide for the well-being of their employees by providing health insurance, Compl. ¶ 33, 57; forcing the Schools to drop employee health insurance would undermine their religious exercise as well. The Mandate substantially burdens the Schools' religious exercise, and thus is a prima facie violation of their rights under the Religious Freedom Restoration Act.

Forcing the Schools to comply with the Mandate is not the least restrictive means of furthering any compelling governmental interest. The government claims that the Mandate furthers public health (specifically, the negative health events allegedly caused by the unintended nature of a pregnancy) and equality of the sexes. No court reaching the question whether the

Mandate satisfies strict scrutiny has answered in the affirmative. RFRA, the Free Exercise Clause, and their interpretive case law indicate that this Court should analyze not only whether "public health" and "women's equality" are "compelling" interests in the abstract, but also whether requiring the Schools to facilitate access to abortifacients advances these goals to such a degree that the interests might be said to be compelling. The answer is no. Defendants, remarkably, ignore the relatively narrow scope of the Schools' objection, arguing as if they object to providing or facilitating access to all the drugs, devices, and services required by the HHS Mandate. Yet, the Schools are willing to include in their employee and student health plans virtually everything required by Defendants, including "conventional" birth control pills, sterilization, and related counseling. They simply object to emergency contraceptives that can act as abortifacients by preventing implantation of the very young human in the uterine wall.[1] The narrow scope of their objection, among other things, fatally undermines the government's contention that applying the Mandate to the Schools furthers any compelling interest. All the alleged benefits of (a) the broader mandate to provide a wide range of preventive services without cost sharing and (b) the Mandate to provide conventional contraceptives and sterilization – on which the government exclusively relies to justify its burden on the Schools – are irrelevant. The question is whether forcing them to facilitate free access to abortifacients to their employees and students sufficiently advances some compelling interest to justify the burden on the Schools' religious exercise.

Again, the answer is no. According to the government, the Mandate is designed to reduce the incidence of unintended pregnancy and thereby reduce the frequency of adverse health events that allegedly are caused by the unintended nature of some pregnancies. The questions, then, are (a) whether (and to what extent) free access to abortifacients, particularly emergency contraceptives, reduces the incidence of unintended pregnancy in general; and (b)

[1] The ongoing semantic debate about whether "pregnancy" begins at conception or implantation is utterly irrelevant to this Court's assessment of the substantiality of the burden on the Schools' religious exercise, where Plaintiffs believes that human life begins at conception and that such life deserves protection from that moment forward. In short, the outcome of the semantic debate does not dictate the answer to the moral question.

whether (and to what extent) forcing the Schools to facilitate free access to abortifacients will reduce unintended pregnancies among their employees and students. Studies prove that free access to emergency contraceptives does *not* reduce the incidence of unintended pregnancy (and thus the adverse health events allegedly associated with those pregnancies).[2]

Forcing the Schools to facilitate access to abortifacients is particularly unjustified in light of the nature of their workforces. The Schools draw members of their communities from among those who share their religious commitments, including their religious belief in the dignity of human life, the sinfulness of using abortifacients, and the immorality of premarital and extramarital sexual behavior (which are more likely to produce "unintended" pregnancies). The government cannot plausibly argue it has any interest in encouraging disobedience to these norms by the Schools' employees and students. Women with reproductive capacity at the Schools are far less likely to experience unintended pregnancies – the primary evil the Mandate claims to reduce – and thus any power the government's arguments about the justifications for the Mandate more generally might have is greatly diminished.

The government's equality argument rests in part on the assertion that women tend to pay more for preventive health care than do men. The relevant question in this case is not whether the Section 1001(a)(4) of the Affordable Care Act "evens out" preventive care expenses in general, but rather whether the inability of female employees and students at the Schools to obtain abortifacients for free through their Schools seriously undermines their ability to participate equally in the economic realm. The answer is plainly no. First, as discussed above, it is comparatively unlikely that these women will find themselves in situations where the use of an emergency contraceptive is indicated. Second, it can hardly be said that the equal status of female beneficiaries of the Schools' insurance plans hinges upon whether they can avoid paying, at most, about $55 for a box of ella or Plan B[3] – an expense that is customarily incurred, if ever,

[2] James Trussell & Elizabeth G. Raymond, *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy*, available at http://ec.princeton.edu/questions/ec-review.pdf, at 15 (last visited Oct. 11, 2013) ("no published study has yet demonstrated that increasing access to ECPs [emergency contraceptives] reduces pregnancy or abortion rates in a population").

[3] http://ec.princeton.edu/locator/concerned-about-cost.html (last visited Nov. 17, 2013).

only once or twice in a lifetime. And, if it is truly necessary for the government to make abortifacient drugs available "for free" to School employees and students, there are other ways it could accomplish this objective that are less burdensome to the Schools' religious exercise.

To make matters worse, the government's refusal to extend the religious exemption to the Schools is, given the stated rationale for that exemption, indefensible. The extraordinarily narrow religious exemption – which is far stingier than the exemptions in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(3) and 34 C.F.R. § 106.12(a); the judicially established exemption from the National Labor Relations Act, *see NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (holding that church-operated schools are exempt from the NLRA); virtually all state law bans on religious and sexual orientation discrimination in employment, *see, e.g.*, Iowa Code § 216.6(6)(d); and the overwhelming majority of state contraceptive mandates, *see, e.g.*, 745 Ill. Comp. Stat. 70/2 (1998) (protecting the right of conscience for those who believe the provision of certain health services is morally unacceptable) – is available only to "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code." 45 C.F.R. § 147.131(a). Those Code sections refer to "churches, their integrated auxiliaries,[4] and conventions or associations or churches" and "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A)(i) and (iii). Congress devised this category of organizations in a context utterly unrelated to the one here; these entities are exempt from filing with the IRS the informational returns (Form 990s) that most non-profits must file. The government rationalizes this narrow exemption as follows:

> The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental

[4] 26 C.F.R. § 1.6033-2(a), (g), and (h). For an entity to be an integrated auxiliary, it must be "[a]ffiliated with a church or a convention or association of churches" and be "[i]nternally supported." *Id*. § 1.6033-2(h)(ii) and (iii). The Schools are apparently ineligible for integrated auxiliary status, and thus for the Mandate's exemption, primarily because they receive the majority of their revenue from "external" sources (*i.e.*, tuition paid by students and their families) rather than an "internal" one (*i.e.*, an affiliated church).

> interests furthered by the contraceptive coverage requirement. Houses 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, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under the plan.

"Coverage of Certain Preventive Services Under the Affordable Care Act," 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). In essence, the government is conceding that the Mandate does *not* advance any compelling interest when applied to employers who employ employees who share their religious convictions – a category that includes the Schools.[5] Denying them the exemption is thus arbitrary, capricious, irrational, unjustified, and discriminatory. They are denied the exemption's protection simply because they are not structured as integrated auxiliaries to a denomination or convention or association of churches. Discriminating against them because of incidental religious structural choices cannot survive scrutiny under either the Establishment Clause or the Administrative Procedure Act.

ARGUMENT

I. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON—THE SCHOOLS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM.

The Religious Freedom Restoration Act (RFRA) forbids the federal government from substantially burdening a person's exercise of religion unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.

[5] It bears noting that the Schools are not unique in this regard. The over 100 United States members of the Council for Christian Colleges and Universities all draw their faculty and staff from among those who share their religious convictions. *See* http://www.cccu.org/about/profile (last visited Feb. 6, 2014). Yet, upon information and belief, none of them are "integrated auxiliaries" of denominations, and are thus denied the protection of the exemption, despite possessing the very attribute that the government itself says justifies the exemption. The Council submitted a comment on the Notice of Proposed Rulemaking making this very point, as did numerous others. *See* http://www.cccu.org/news/articles/2013/CCCU-Responds-to-NPRM-Continues-Constitutional-Objection-to-HHS-Contraceptive-Mandate (last visited Feb. 6, 2014). The government apparently ignored or was unmoved by these comments, refusing to make the exemption "fit" the government's own stated rationale.

§ 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006).

Multiple federal courts have considered whether the Mandate violates the RFRA rights of non-profit religious organizations to whom the so-called "accommodation" is available. The overwhelming majority of them have held that it does, concluding that Defendants have substantially burdened religious exercise without adequate justification. *See Catholic Archdiocese of N.Y. v. Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (granting summary judgment); *Catholic Diocese of Beaumont v. Sebelius*, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (granting permanent injunction); *Persico v. Sebelius*, 2013 WL 6922024 (W.D. Pa. Dec. 20, 2013) (same); *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (granting preliminary injunction); *Roman Catholic Diocese of Ft. Worth v. Sebelius*, No. 12-314 (N.D. Tex. Dec. 31, 2013) (same); *Ave Maria Found. v. Sebelius*, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (same); *Diocese of Ft. Wayne v. Sebelius*, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013)(same); *Geneva Coll. v. Sebelius*, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Legatus v. Sebelius*, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Reaching Souls Int'l v. Sebelius*, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Southern Nazarene Univ. v. Sebelius*, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *East Texas Baptist Univ. v. Sebelius*, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013); *Grace Schs. v. Sebelius*, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *Sharpe Holdings, Inc. v. Sebelius*, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Roman Catholic Archbishop of Washington v. Sebelius*, 2013 WL 6729515 (D.D.C. Dec. 20, 2013) (same). *See also Little Sisters of the Poor Home for the Aged v. Sebelius*, 2014 WL 272207 (U.S. Jan. 24, 2014) (enjoining application of Mandate pending appeal) *Catholic Diocese of Nashville v. Sebelius*, No. 13-6640 (6th Cir. Dec. 31, 2013) (same); *Michigan Catholic Conference v. Sebelius*, No. 13-2723 (6th Cir. Dec. 31, 2013) (same); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir. Dec. 31, 2013) (same).

The Schools contend that all these courts were correct, and respectfully urge this Court to deny Defendants' motion to dismiss their RFRA claim.

A. The Mandate Substantially Burdens the Schools' Religious Exercise.

In assessing whether the Mandate substantially burdens the Schools' religious exercise, thereby triggering strict scrutiny, it is essential to: (1) identify the religious exercise in question; and (2) identify exactly what the government is doing with respect to that exercise. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc).

1. *The religious exercise(s) in question*

Three "exercises of religion" are at the heart of this case. Two are affirmative pursuits of religious objectives; the third is avoidance of conduct contrary to the Schools' beliefs. First, the Schools affirmatively live out their religious beliefs in the dignity of human life by making available to their workforces health insurance coverage that reflects the Schools communities' shared pro-life beliefs. Second, they create and foster academic communities that encourage their members (faculty, staff, and students) to grow in spiritual maturity through obedience to God's commands, including His commands about the value of human life. Third, the Schools seek to avoid facilitating sinful behavior, thereby engaging in immoral conduct themselves. Defendants do not dispute that the Schools are exercising religion in the health insurance context and that the Mandate affects that religious exercise.

2. *What the government is doing with respect to those "exercises"*

Through the Mandate, Defendants interfere with each of these three "exercises of religion." First, Defendants have made it untenable, to put it mildly, for the Schools to provide employee health insurance that correlates with their pro-life beliefs. Left free to exercise their religion in the health insurance context, the Schools' plans would ensure access to everything the Affordable Care Act and the HHS Mandate require (including non-abortifacient contraceptives) other than abortifacients like ella and Plan B. Participation in their plans would not trigger the "free" availability of embryo-destroying drugs and devices to School employees and their dependents. Because of the Mandate, however, an insurance issuer will sell the Schools a plan

that either (a) *expressly* includes abortifacients; or (b) *functionally* includes abortifacients by guaranteeing separate payments for them upon the Schools' execution of a "self-certification." If the Schools were to purchase an employee health plan that did not facilitate access to abortifacients in one of these two ways, they would face fines of $100 per beneficiary per day. For Dordt, this would be $6,533,500 annually; for Cornerstone, $9,782,000.

Defendants have also made it impossible, as a practical matter, for the Schools to avoid facilitating the use of abortifacients by dropping employee health insurance altogether (something that would transgress the Schools' religious convictions in its own right). The financial penalty for such a move is $2,000 per employee per year after the first 30 employees. This would be $298,000 annually for Dordt, and $476,000 for Cornerstone.

Because Defendants have left the Schools without the option of fulfilling their religious convictions by providing health insurance that does not facilitate access to abortifacients (or of dropping employee health insurance altogether), they are forced to provide health insurance that *does* facilitate that access. This significantly interferes with the Schools' other two "exercises of religion." First, it directly and significantly interferes with their ability to make and enforce religiously-rooted rules of conduct applicable to their employees, all of whom voluntarily joined the School communities. It directly and significantly interferes with the Schools' ability effectively to communicate their pro-life message to students, faculty, staff, and the broader community. It directly and significantly interferes with their pursuit of their missions to grow the spiritual maturity of members of their communities by fostering obedience to and love for God's laws, as the Schools understand them.

Second, it forces the Schools to engage in behavior that violates their religious convictions. Either complying with the Mandate as originally written or complying with it by executing a self-certification that ensures the same result (*i.e.*, free access for employees to abortifacients as a consequence of their employment with the School) is, in the eyes of the Schools, sinful and immoral. The Schools believe that sin adversely affects their relationships

with God. Although the shape and magnitude of this adverse effect cannot be predicted or calculated, the Schools nonetheless believe it is quite real, and to be avoided.

3. *Defendants misunderstand and thus mischaracterize the Schools' religious exercise(s) and the Mandate's impact on those exercises.*

On their way to arguing that the Mandate does not "substantially burden" the Schools' religious exercise, Defendants express a deeply erroneous understanding of both (a) the identity of the Schools' religious exercise; and (b) how the Mandate affects that exercise.

Regarding the identity of the Schools' exercises of religion, Defendants focus exclusively on the question whether they are forcing the Schools to do something forbidden by their religious beliefs, not comprehending that the Schools also "exercise religion" by creating and sustaining academic communities committed to certain shared religious convictions, including convictions about the morality of abortifacient use. In short, Defendants fail to understand that RFRA protects not only "freedom from," but also "freedom to." Of course, their failure in this regard means that they do not even discuss how the Mandate burdens the Schools' "freedom to" shape their communities and transform the spiritual lives of their members – except, apparently, to deny the existence or impugn the exercise of such a freedom. (Defendants' Memorandum in Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, [hereinafter "Defs.' Br."] at 16).

Defendants also have a remarkably cramped vision of how their actions pressure the Schools to undertake actions that transgress their religious convictions. Again, they focus exclusively on the act of executing the self-certification under the government's "accommodation." Defs.' Br. at 11. (And they identify things the Schools are allegedly *not* required to do, as if identifying arguably worse things renders the thing in question unobjectionable. *Id.*) They ignore the context of the self-certification; the Schools must either provide insurance to their employees or face enormous fines. The Schools' decisions to provide employee health insurance inevitably cause the provision of free abortifacients to their employees. Every time the Schools hire an individual, they know that the individual (and

perhaps his or her family as well) will gain access to abortifacients, because of his or her status as a School employee. And that access will be provided by the School's own insurer or third-party administrator.

4. *How the Mandate* actually *burdens the Schools' religious exercise(s)*

As noted above, the Mandate burdens the Schools' religious exercise by coercing them to take action they believe to be sinful and immoral, and by interfering with their freedom to foster voluntary communities that encourage spiritual maturity through compliance with shared ethical commitments rooted in religious conviction.

As to the first of these ways Defendants burden the Schools' religious exercise, the Schools will transgress their understanding of God's laws by providing health insurance to their employees and students that gives them guaranteed payments for drugs and devices that take human life. In short, by complying, they will sin. And non-compliance, either through dropping employee coverage, or by continuing their current coverage (which excludes abortifacients), is not possible, either financially, ethically, or both.

As discussed above, the Schools not only want to avoid committing sin, but also want to foster the spiritual maturity of members of their communities, faculty, staff, and students alike. Christian conviction—including respect for the dignity and worth of human life from the moment of conception—is a qualification for participation in the Schools' workforces. And, it bears noting, administrators, faculty, and staff all voluntarily join the Schools' communities. Indeed, the School communities are comprised of individuals who affirmatively want to be part of a community that reflects and reinforces their Christian commitments, including their respect for unborn human life. As educational institutions, they explicitly aim to transform the lives of their students. This objective is pursued, in part, through faculty and staff modeling behaviors consistent with the Schools' religious convictions.

Foisting unwanted access to free abortifacients upon the Schools' employees and their families tangibly interferes with this key component of the Schools' missions. Facilitating free

access to abortifacients while simultaneously trying to foster a pro-life ethic lacks integrity; and doing the former undermines the latter. The "fig leaf" of the accommodation is just that; a cosmetic, but ultimately unsuccessful, effort to cover over the underlying ethical problem. An institution cannot out of one side of its mouth "condemn the wanton or arbitrary destruction of any human being at any stage of its development from the point of conception to the point of death" (Compl., ¶ 31) and then out of the other side say "the health insurance we are providing you as compensation for your services gives you free access to abortifacients." It is wrong and unjust for the government to interfere in this manner with the Schools' religious educational missions; in the language of the Religious Freedom Restoration Act, this interference "substantially burdens" the Schools' religious exercise.

5. *The burden is "substantial" under RFRA.*

When sincerity is not dispute, RFRA's "substantial burden" requirement involves a two-part inquiry. A court must first "identify the religious belief" at issue, and then determine "whether the government [has] place[d] substantial pressure"—i.e., a substantial burden—on the claimant to take or refrain from action in violation of that belief. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140 (10th Cir. 2013) (en banc). In other HHS Mandate challenges, the government has disputed this test. Three federal courts of appeals have rejected Defendants' effort to alter the inquiry.

In *Gilardi v. U.S. Department of Health and Human Services*, the D.C. Circuit held that the Mandate substantially burdens the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 733 F.3d 1208, 1216-19 (D.C. Cir. 2013). The court rejected the government's argument that the interposition of the corporate form between the Gilardis and their employees rendered the Gilardis' participation "too remote and too attenuated" to constitute a substantial burden. *Id.* at 1217. As the D.C. Circuit explained, "'[c]ourts are not arbiters of scriptural interpretation,'" *id.* at 1216-17 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450

U.S. 707, 716 (1981)); thus, "[w]hen even attenuated participation may be construed as a sin, it is not for courts to decide that the corporate veil severs the owner's moral responsibility," *id.* at 1215 (citation omitted). Instead, the court held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 1216 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), *Thomas*, 450 U.S. at 718). The Mandate, therefore, imposed a substantial burden on the Gilardis because they are forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit in a grave moral wrong. If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id.* at 1218.

Likewise, in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Seventh Circuit held that the Mandate substantially burdens the religious exercise of two corporations and their Catholic owners by requiring those corporations to include contraceptive coverage in their employee health plans. The court rejected the government's contention that the actions required by the Mandate were too "insubstantial" or too "attenuated" to impose a substantial burden on the plaintiffs. Id. at 683-85. As the Seventh Circuit explained, the government's argument was not only factually incorrect but also legally flawed, because "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id.* at 683. "It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Id.* The Mandate, therefore, imposes a substantial burden on the *Korte* plaintiffs' religious exercise because it forces them to act contrary to their religious beliefs by taking actions that they deem to be impermissible facilitation of contraception. By threatening fines of "$100 per day per employee," the government "placed enormous pressure on the plaintiffs to violate their religious beliefs." *Id.*

The same is true here. The Schools have a sincere religious objection to providing or facilitating "coverage for [abortifacients] in their employee health-care plans." *Id.* at 667. The Mandate's "accommodation" does not change the analysis, because the Schools continue to have

"an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religion." *Id.* at 683. The only relevant question under the "substantial burden" test is whether the Mandate imposes "substantial pressure" on the Schools to violate those beliefs. *Gilardi*, 733 F.3d at 1218. It makes no difference whether the government believes the accommodation is adequate to dispel the Schools' religious objections. What matters is that the Schools themselves "have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do." *Korte*, 735 F.3d at 685. It is undisputed that, even with the accommodation, the Mandate forces each School to choose between (1) "abid[ing] by the sacred tenets of [its] faith, pay[ing] a [massive] penalty . . . , and crippl[ing] [their ministries]," or else (2) "becom[ing] complicit in a grave moral wrong." *Gilardi*, 733 F.3d at 1218. Therefore, there can be no question that the Mandate imposes a substantial burden on the Schools' exercise of religion. *Id.*; *Hobby Lobby*, 723 F.3d at 1137.

Defendants' argument that the Mandate's burden on the Schools' religious exercise is not "substantial" turns mostly on their misunderstanding or mischaracterization of (a) the Schools' religious exercise; and (b) the identity and character of the burden. Accordingly, accurately identifying the Schools' exercises of religion and the character of the Mandate's interference with those exercises goes a long way towards addressing the government's contentions. However, there are a few aspects of Defendants' argument that merit a further response.

First, Defendants observe that the self-certification "should take plaintiffs a matter of minutes." (Defs. Br. at 14). Of course, the Schools do not disagree; yet, the number of minutes it takes to execute an action hardly is the sole (or even main) criterion for assessing whether the government is substantially burdening religious exercise. The Schools' ethical position is that sponsoring a health plan that grants access to abortifacients is sinful. Many sins can be committed quickly. That hardly means government is free to coerce the commission of such sins. Instead, a government regulation that "put[s] substantial pressure on an adherent to modify

his behavior and violate his beliefs" substantially burdens his religious exercise. *Thomas v. Review Bd.*, 450 U.S. at 716-18. *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Multiple courts have squarely rejected Defendants' argument. In *Zubik v. Sebelius*, "[t]he Government acknowledge[d] that the act of self-certification will require the Plaintiff-entities to sign the self-certification and supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling." 2013 WL 6118696, at *24. Defendants conceded that the plaintiffs there, like the Schools here, sincerely believed that life is sacred from the moment of conception and that "the facilitation of evil is as morally odious as the proliferation of evil." *Id*. "Given these concessions," the *Zubik* court "disagree[d] with the Government that Plaintiffs' ability or inability to 'merely sign a piece of paper,' and thus comport with the 'accommodation,' is all that is at issue here." *Id*. In other words, the question is not whether executing the self-certification is time-consuming or expensive, but rather whether Defendants are substantially pressuring religious employers like the Schools to violate their religious convictions. Without question, they are.[6]

Similarly, in *Roman Catholic Archdiocese of New York*, the court held the Defendants' argument "finds no support in the case law." 2013 WL 6579764, at *13. It declared, "where a law places substantial pressure on a plaintiff to perform affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*." *Id*. (citing *United States v. Lee*, 455 U.S. 252 (1982), and *Yoder*, 406 U.S. 205). The court also concluded that the Government had failed to explain how its proposed test would work: "beyond its repeated insistence that this is an 'objective' inquiry, the Government provides no framework for how a court could determine whether an act that concededly violates a plaintiff's religious beliefs is actually only '*de minimis.*'" *Id*. at 24-25. As the Tenth Circuit

[6] In *Priests for Life v. United States Department of Health and Human Services*, the plaintiffs there had no religious objection to completing the self-certification. Civ. No. 13-1261, ECF No. 36, Slip Op. at 3-4 (D.D.C. Dec. 19, 2013). Of course, the Schools *do* hold that completing the self-certification *would* transgress their religious obligations.

stated in *Hobby Lobby*, "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." 723 F.3d at 1142.

The court also highlighted the constitutional difficulties with Defendants' proposed approach:

> Inquiring into the relative importance of a particular act to a particular plaintiff would necessarily place the court in the unacceptable 'business of evaluating the relative merits of differing religious claims. *Lee*, 455 U.S. at 263 n. 2 (Stevens, J. concurring). There is no way that a court can, or should, determine that a coerced violation of conscience is of insufficient quantum to merit constitutional protection.

Roman Catholic Archdiocese, at *13.

The government's reading of RFRA—that a substantial burden exists only where the government requires the claimant to engage in "significant" conduct—is plainly contrary to the statutory text. RFRA protects "*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) (emphasis added). RFRA contains no requirement that the actions required of claimants be "significant" or "substantial." *Id.* Here, because the Schools' refusal to facilitate access to abortifacients clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a protected exercise of religion for purposes of RFRA.

Defendants argue that this understanding of RFRA deprives the statutory word "substantial" of any significance. Defs.' Br. at 23-25. As is plain from the statutory text, however, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather the type of pressure imposed by the government —*i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion."). It requires courts to assess the pressure the government exerts on a plaintiff to violate his religious beliefs, not the nature of the religious exercise.

Thus, 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*." Defs.' Br. at 10. 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*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory that used the sheet metal for producing tank turrets caused increased expenditures time or effort. 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 abortifacients.

Defendants' reading of RFRA also impermissibly "cast[s] the Judiciary in a role that [it was] never intended to play." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Rather than evaluating whether the pressure placed on the Schools to violate their beliefs is "substantial," Defendants would have this Court determine whether compliance with the Mandate is a "substantial" violation of Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. But the judiciary has no competence to determine the significance of a particular religious act; "[i]t is not within the judicial ken to question the centrality of particular . . . practices to a faith."

Hernandez v. Comm'r, 490 U.S. 680, 699 (1989). Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is significant or meaningful is self-evident. On Defendants' theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de minimis*" act. Defs.' Br. at 10 . An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] [him] to do next to nothing." *Id.* at 22. No "principle of law or logic" equips a court to decide the significance or "meaning[]" of these acts. *Smith*, 494 U.S. at 887. What may be "no big deal" to the government may be a very big deal to a believer.

Defendants also contend that a law or regulation's burden on religious exercise is "substantial" for RFRA purposes *only* if the regulation pressures claimants to "modify their behavior." Defs.' Br. at 22. And they claim that the Mandate does *not* require the Schools to change their conduct. They declare that the Schools end up doing essentially the same thing *after* the Mandate as they did *before*—telling their issuer or third-party administrators that they does not wish to cover abortifacients. Defs.' Br. at 22.

Yet, the Mandate *does* require the Schools to modify their behavior. Defendants' theory—that the schools' pre- and post-Mandate communications with their insurers/TPAs are "the same"—works only if the intended and foreseeable consequences of actions are irrelevant in assessing whether they are the same or different. This is a remarkable contention. Defendants are essentially arguing that the moral significance of an act is completely detached from the consequences of that act. To Defendants, it matters not that the consequence of the Schools' prior practices (telling their insurers/TPAs not to provide abortifacients) was *members of their communities not obtaining access to life-destroying drugs and devices*, whereas the consequence of executing the self-certification is *exactly the opposite*. To contend that these two actions are the same, particularly when the claim is that the coerced conduct violates conscience, is

astonishing.[7] That the two actions might be said, in a willfully truncated assessment of their significance, to bear some superficial resemblance hardly means that Defendants have not coerced the Schools into "modifying their behavior."

It is unsurprising that courts addressing this contention have summarily rejected it. In *Zubik*, the court embraced an analogy offered by the plaintiffs there:

> Plaintiffs liken this result by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

2013 WL 6118696, at *25. The *Zubik* court thus held that the Mandate, even with the "accommodation," "still substantially burdens [the plaintiffs'] sincerely-held religious beliefs." *Id*.

In *Roman Catholic Archdiocese of New York*, the court deemed "unpersuasive" the Government's argument that the Mandate, with the accommodation, required no change in the plaintiffs' conduct. 2103 WL 6579764, at *14. The court held that even if Defendants were correct that the Mandate did not require the plaintiffs to modify their behavior,

> the self-certification would still transform a voluntary act that plaintiffs believe to be consistent with the religious beliefs into a compelled act that they believe forbidden. Clearly, plaintiffs view the latter as having vastly different religious significance than the former. The Court cannot say that "the line [plaintiffs] drew was an unreasonable one."

Id. at 27 (footnote omitted) (quoting *Thomas*, 450 U.S. at 715). *See also Geneva Coll. v. Sebelius*, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (holding that then-proposed accommodation would not remove Mandate's substantial burden on religious exercise).

Defendants ascribe to the Schools a conception of "substantial burden" they do not hold. They claim that the Schools' argument "rests on an unprecedented and sweeping theory of what

[7] In the New Testament, Jesus and His followers often greeted one another with a kiss, as was the custom at the time. *See, e.g.*, Rom. 16:16. It is reasonable to assume that, at some point, Judas Iscariot greeted Jesus with such a kiss. Later, of course, Judas betrayed Jesus with a kiss, identifying for the armed crowd sent by the chief priests and the elders of the people the man they ought to arrest. Matt. 26:47-50. Could one plausibly contend that these two superficially identical acts bore the same moral significance?

it means for religious exercise to be burdened" under which "plaintiffs would . . . prevent *anyone else* from providing such coverage to their employees . . . ."[8] This overstates the Schools' position. To be sure, they would object to any scheme that conscripts them into serving as an essential cog in the government's mechanism. But they do not believe that RFRA prevents the government from giving their employees and students free abortifacients *under a scheme that does not involve the Schools*; if the Schools are not involved, their religious exercise is not burdened.

To illustrate the point, suppose that the government gave all religious employers, including the Schools, an exemption from the Mandate. Employers need not apply for the exemption or otherwise inform the government that they object to providing morally objectionable drugs, devices, procedures, and services. Like the religious exemption from Title VII's ban on religious discrimination, individual entities determine for themselves whether they possess the exemption, running the risk a court or other adjudicator will disagree. Suppose further that the U.S. Department of Health and Human Services, under this scenario, learns that the Schools consider themselves exempt and therefore have declined to include abortifacients in their employee and student plans. The Department then undertakes an effort to identify the Schools' employees and students and offer them free abortifacients. The "substantial burden" argument the Schools are making does not require the Court to conclude that the Department would be substantially burdening religious exercise in the hypothetical.

Relatedly, the government seems to be convinced that the *only* way it can enhance access to abortifacients for the Schools' employees is to somehow conscript the Schools into its scheme.

[8] The remainder of the quoted sentence asserts that the Schools' employees "might not subscribe to plaintiffs' religious beliefs." (Defs.' Br. at 12.) This is incorrect; sharing the Schools' religious convictions is a pre-requisite to initial and continuing employment. Defendants plainly misunderstand both the nature of the Schools' religious communities and the scope of the Schools' freedom to foster the religious character of its community. Later in their brief, Defendants indignantly declare that "an employer has no right to control the choices of its employees, who may not share its religious beliefs, when making use of their benefits." (Defs' Br. at 16.) Aside from the factual inaccuracy of the government's assumption about the Schools' employees, it is false as a matter of law to contend that religious employers may not impose religiously-rooted behavioral expectations on the employees who voluntarily join their religious communities. *See, e.g.*, 42 U.S.C. § 2000e-1(a); *id.* at § 2000e-2(e)(2) (exempting religious employers from Title VII's ban on religious discrimination in employment).

(Defs.' Br. at 13.) However, Defendants fail to explain why this must be so. There is no reason why abortifacients *must* be provided in connection with employer-based health plans; governments provide benefits without involving beneficiaries' employers all the time. Administrative convenience hardly justifies conscripting unwilling employers into the government's scheme, where involvement in that scheme violates their consciences and undermines their religious educational communities.

B. The Mandate Is Not the Least Restrictive Means of Advancing Any Compelling Governmental Interest.

Courts applying strict scrutiny to the Mandate are unanimous: it fails. *See Korte*, 735 F.3d at 685-87; *Gilardi*, 733 F.3d at 1219-22; *Hobby Lobby*, 723 F.3d at 1143-44; *Beckwith Elec. Co. v. Sebelius*, 2013 WL 3297498, at *16-18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *6-8 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756, slip op. at 1 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012); *Catholic Archdiocese of N.Y.*, 2013 WL 6579764, at *16-19; *Catholic Diocese of Beaumont*, 2014 WL 31652, at *8; *Zubik*, 2013 WL 6118696, at *28-32; *Ave Maria Found.*, 2014 WL 117425, at *6-7; *Diocese of Ft. Wayne*, 2013 WL 6843012, at *15-17; *Geneva Coll.*, 2013 WL 6835094, at *14; *Legatus*, 2013 WL 6768607, at *8-11; *Reaching Souls Int'l*, 2013 WL 6804259, at *6; *Southern Nazarene Univ.*, 2013 WL 6804265, at *9-10; *East Texas Baptist Univ.*, 2013 WL 6838893, at *23-24; *Grace Schs.*, 2013 WL 6842772, at *14-16; *Roman Catholic Archbishop of Washington*, 2013 WL 6729515, at *24. Forcing the Schools to facilitate access to abortifacients for their employees and their families is not the least restrictive means of advancing any compelling interest. Accordingly, the Mandate violates RFRA, and the Schools' RFRA claim should not be dismissed.

In *Korte*, the Seventh Circuit held that the Mandate almost certainly[9] is not the least restrictive means of advancing a compelling governmental interest. 735 F.3d at 685-87. There, Defendants invoked the same interests asserted here—"public health" and "gender equality"—claiming that they were "compelling." The court resoundingly disagreed:

> This argument seriously misunderstands strict scrutiny. By stating the public interests so generally, the government guarantees that the mandate will flunk the test. Strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest. Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty.

Id. at *25.

The court acknowledged that broadening access to free contraception and sterilization so that women might achieve greater control over their reproductive health was a "legitimate governmental interest." *Id*. Yet, the court was unwilling to accept the government's claim that this interest was *compelling*. *Id*. at *25-26. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d at 1143-44 (government's asserted interests in public health and gender equality "do not satisfy the Supreme Court's compelling interest standards"); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 2013 WL 5854246, at *10-13; *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *9-10; *Newland v. Sebelius*, 881 F. Supp. 2d at 1298.

In explaining the rationale for the religious exemption from the Mandate, Defendants concede that forcing employers whose employees are likely to share their religious convictions does not advance the Mandate's stated interests.[10] (Defs.' Br. at 23-24; 78 Fed. Reg. 39,874.)

[9] The Seventh Circuit was reviewing the district court's denial of the claimant's motions for preliminary injunction and was thus assessing their likelihood of success on the merits. Nonetheless, nothing in the court's opinion suggests that its assessment of the merits might change based on discovery or other subsequent events in the district court.

[10] By exempting even a narrow category of religious employers, Defendants cast serious doubt on their contention (Defs.' Br. at 16-18) that the Mandate substantially burdens *no one's* religious exercise (whether "accommodated" or not) because the connection between the employer's role and the use of morally objectionable drugs, devices, and services is "too attenuated." In other words, if Defendants themselves took such a contention seriously, they would not have exempted anyone, even churches and religious orders.

Dordt College and Cornerstone University are such employers. Their employees share their religious convictions, including their convictions regarding the dignity of human life and the immorality of abortifacient use.

That the Schools' employees are unlikely to use the abortifacients to which the Schools objects—conclusively proves by itself that Defendants have no interest in imposing the Mandate on the Schools, even if they might have an interest in imposing the Mandate upon other employers. And 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).[11] *See also O Centro*, 546 U.S. at 430-31; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d at 125-29. For this reason alone, Defendants cannot satisfy strict scrutiny, and therefore Defendants' motion to dismiss the Schools' RFRA claim should be denied.

Additional reasons reveal that applying the Mandate to the Schools is not the least restrictive means of furthering a compelling governmental interest. Defendants invoke the alleged benefits of preventive services in general and of making access to those services cost-free. (Defs. Br. at 19-21.) However, the Schools are not objecting to "preventive services" *in general*. Indeed, they are not even objecting to "conventional" birth control pills or sterilization, free access to which Defendants contend will reduce the rate of unintended pregnancy and thus the adverse health effects associated with such pregnancies. Instead, they object to a relatively small sub-class of drugs and devices the Food and Drug Administration has labeled "contraceptives" but that can act abortifaciently by destroying very young human life in the womb.

Given this, the relevant question is whether making abortifacients available to the Schools' employees and their families sufficiently advances the stated goal of reducing the adverse health events allegedly caused by the unintended nature of some pregnancies. The

[11] The Supreme Court has thus repeatedly reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules," which can be "'applied in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

answer is no. Princeton University maintains an Office of Population Research. Dr. James Trussell, a Professor of Economics and Public Affairs at Princeton and Director of the Office of Population Research published a paper entitled "Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy."[12] The paper's conclusion is unambiguous: "no published study has yet demonstrated that increasing access to ECPs [emergency contraceptives like the morning-after and week-after pills] reduces pregnancy or abortion rates in a population." *Id*. at 15. Dr. Trussell similarly concludes: "it is unlikely that expanding access [to emergency contraceptives] will have a major impact on reducing the rate of unintended pregnancy." *Id*. The extent to which free access to "conventional" contraceptives might affect unintended pregnancy rates and thus the associated adverse health effects is irrelevant to this case, which is focused on emergency contraceptives that can function abortifaciently. Thus, the government's heavy emphasis on the alleged benefits of free contraceptives is beside the point.

Making the imposition of the Mandate on the Schools even more unjustified, there is scant evidence that providing cost-free access even to *conventional* contraceptives reduces unintended pregnancies. The Institute of Medicine report on which HHS relied in crafting the Mandate fails to demonstrate that forcing employers to cover FDA-approved contraceptives will actually reduce the number and percentage of unintended pregnancies — and thus the adverse health events that may (or may not) be attributable to the unintended nature of the pregnancy. The IOM report observes that private health insurance coverage of contraceptives had increased since the 1990s. IOM Report at 109. If insurance coverage of contraceptives were truly the key to reducing unintended pregnancies — as the Mandate presupposes — then one would have expected the rate of such pregnancies to decline as insurance coverage rose. But it did not.[13]

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[12] James Trussell & Elizabeth G. Raymond, *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy*, available at http://ec.princeton.edu/questions/ec-review.pdf, at 15 (last visited Oct. 11, 2013).

[13] *See, e.g.*, Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION at 478–85 (2011) ; Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Unplanned Pregnancy in the United States*, http://www.thenationalcampaign.org/resources/pdf/briefly-unplanned-in-the-united-states.pdf (last visited Nov. 17, 2013).

The IOM report nonetheless claims that forcing employers to cover contraceptives without cost sharing will reduce unintended pregnancies. It cites a particular "policy brief" for the proposition that "cost-sharing requirements, such as deductibles and copayments, can pose barriers to care and result in reduced use of preventive and primary care services." *Id.* (citing Julie Hudman & Molly O'Malley, Kaiser Comm'n on Medicaid & the Uninsured, *Health Insurance Premiums and Cost-Sharing: Findings from the Research on Low-Income Populations* (Mar. 2003). Yet this policy brief simply does not support the contention that forcing employers like the Schools to cover abortifacients (or, for that matter, contraceptives) will reduce unintended pregnancies.

Most significantly, the paper focuses exclusively upon low-income participants in publicly-financed health programs like Medicaid. One cannot legitimately draw broad inferences from studies focused on this population; the IOM report itself acknowledges that low-income women have much higher rates of unintended pregnancy. IOM Report at 102. One certainly cannot assume that the impact of co-payments and deductibles on health care utilization on relatively well-compensated employees of employers like the Schools is the same as it is on Medicaid participants. Second, the policy brief itself acknowledges that the effect of cost-sharing varies with the type of health services in question. Third, and relatedly, the studies the paper surveys (with a single 30 year-old exception) do not examine the impact of cost-sharing upon the use of contraceptives, much less the impact on the unintended pregnancy rate or the incidence of the adverse health effects that correlate with unintended pregnancy.

In addition to the failure of the IOM report adequately to support the contention that free access to abortifacients will reduce unintended pregnancies, other evidence contradicts it outright. First, as discussed below, survey data reveals that cost plays a small role, if any, in decisions about birth control. Second, as also discussed below, state-specific research data conclusively prove that contraceptive mandates do not solve the unintended pregnancy problem. Indeed, the evidence reveals no apparent correlation between the existence of such mandates and unintended pregnancy rates. In fact, as shown *infra*, states *with* contraception mandates have

higher rates of unintended pregnancy than states without them. Thus, the Mandate almost certainly will not advance the government's interest in reducing unintended pregnancies. Forcing religious institutions like the Schools to facilitate access to abortifacients as a means of advancing this interest is indefensible.

Strategic Pharma Solutions recently conducted what it characterizes as a "comprehensive landmark survey of American women's attitudes toward and experience with contraception." The survey is entitled *Contraception in America: Unmet Needs Survey*.[14] The executive summary of the survey results reaffirms that "[a]ccidental pregnancies remain common despite readily available contraception." *Contraception in America* at 2. Over 40% of the survey respondents were not trying to get pregnant but were also not currently using any method of birth control. *Id*. at 14. When asked why they were not using any method of birth control, only 2.3% of this group stated that birth control was too expensive. *Id*. This reason was dead last among the nine reasons offered by respondents. *Id*. Of the women who were using birth control, only 1.3% reported that they chose a particular method because of its affordability. *Id*. at 16. This reason was second-to-last among the 19 offered by survey respondents. *Id*. Given this data, it is difficult to accept the government's assertion that its Mandate will advance its interest in reducing unintended pregnancies.

State-specific research data conclusively proves that contraceptive mandates do not substantially ameliorate the unintended pregnancy problem. Over two dozen states have adopted laws requiring group health plans to include contraceptives.[15] Yet these states experience rates of unintended pregnancy that are actually *higher* than in the states without such mandates. In the states with mandates, the average rate of unintended pregnancies in 2006 was 52.58%; the

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[14] Strategic Pharma Solutions, *Contraception in America: Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf (last visited Nov. 17, 2013) [hereinafter *Contraception in America*].

[15] *See* Nat'l Conference of State Legislatures, *Insurance Coverage for Contraception Laws*, http://www ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Nov. 17, 2013); Guttmacher Inst., *Insurance Coverage of Contraceptives*, http://www ncsl.org/Issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Nov. 17, 2013).

average rate in states without mandates in 2006 was 50.38%.[16] Data showing the unintended pregnancy rates both before and after the adoption of a state mandate is available for seven states. In five of those states (Arkansas, New Mexico, Oregon, Washington, and West Virginia), the unintended pregnancy rate actually *increased* following the adoption of a contraceptive mandate.[17] Plainly, contraceptive mandates are not an effective means of noticeably diminishing unintended pregnancies.

Therefore, even if reducing unintended pregnancies and the corollary adverse health events might be deemed a "compelling interest" (which is denied) for purposes of the Religious Freedom Restoration Act (and the First Amendment), the Mandate is simply not an effectual way to advance that interest.

Imposing the Mandate on the Schools also will not advance Defendants' stated interest in equalizing preventive care expenditures between the sexes. The Schools already include conventional birth control pills and sterilization in their health care plans, and will comply with Mandate's directive to eliminate cost-sharing for those items. As noted above, it is highly unlikely that the Schools' employees will ever use abortifacients, and, in the event they do, the cost of those items is not prohibitive.

In sum, imposing the Mandate on the Schools is not the least restrictive means of advancing a compelling governmental interest. Accordingly, this Court should deny Defendants' motion to dismiss the Schools' RFRA claim or grant them summary judgment on that claim.

[16] The Guttmacher Institute maintains and publishes a "reproductive health profile" for each of the 50 states. *See* Guttmacher Inst., State Data Center, http://www.guttmacher.org/datacenter/profile.jsp (last visited Oct. 11, 2013). Each state's profile includes the percentage of pregnancies in 2006 that were unintended. *See also* Kathryn Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2002, 2004, 2006 and 2008 (Guttmacher Institute, September 2013).

[17] Kost, Unintended Pregnancy Rates.

II. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON—THE SCHOOLS' FREE EXERCISE CLAUSE CLAIM.

In addition to violating RFRA, the Mandate violates the Free Exercise Clause. The Mandate it is not "neutral [or] generally applicable." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) (citing *Smith*, 494 U.S. at 880). As a result the Mandate is subject to strict scrutiny, *Lukumi*, at 546.[18] As discussed above, it cannot meet that standard. Accordingly, Defendants' motion to dismiss Count II of the Complaint must be denied.

A. The Mandate is Not Generally Applicable.

The Mandate is not generally applicable under the Free Exercise Clause. A law is not generally applicable if it regulates religiously-motivated conduct, yet refrains from regulating similar secular conduct. *See, e.g., Lukumi*, 508 U.S. at 544–45. Laws may lack general applicability when they are underinclusive, *id*. at 543, involve the granting of discretionary exemptions, *id.* at 537, *see also Smith*, 494 U.S. at 884, or involve categorical exemptions that burden religious practice, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) (citing *Lukumi*, 508 U.S. at 542). "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43 (internal quotation marks and citation omitted). The underinclusiveness of the statute at issue in *Lukumi* rendered it not generally applicable where it "fail[ed] to prohibit nonreligious conduct that endangers . . . interests [in public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id*. at 543.

[18] Neutrality and general applicability overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531; *see also id.* (noting that "[n]eutrality and general applicability are interrelated"); *id.* at 557 (Scalia, J., concurring) (observing that the concepts "substantially overlap"). Still, each merits separate analysis, and "strict scrutiny will be triggered" if the law at issue "fails to meet *either* requirement." *Rader v. Johnston*, 924 F. Supp. 1540, 1551 (D. Neb. 1996) (emphasis supplied) (citing *Lukumi*, 508 U.S. at 531-33, 544-46).

The Mandate exempts organizations that employ tens of millions of women on a variety of grounds, primarily including employees and plan participants who will be exempt because their plans will be grandfathered,[19] yet the government refuses to exempt the Schools based on their religious objections. The grandfathering exemption is not based on any scientific rationale that those employees and covered persons are physiologically different than the people who work for religious-minded employers such as the Schools, such that birth control does not give them the same allegedly compelling benefits. Yet the government is content to withhold its Mandate from tens of millions of women enrolled in grandfathered plans that the government's regulations give a "right" to persist indefinitely.

The government has further undermined the applicability of its Mandate by refusing an exemption to the Schools but at the same time fully exempting "religious employers" that are churches, integrated auxiliaries of churches, conventions of churches, or the exclusively religious activities of religious orders. *See* 78 Fed. Reg. at 39874 ("simplifying" and "clarifying" the religious employer exemption by restricting it to only those non-profits referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii)). Defendants' explicit rationale for this exemption is 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, and who would therefore be less likely than other people to use contraceptive services." 78 Fed. Reg. at 39,874. Meanwhile, employees of entities such as the Schools "may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers to share such religious objections of the [Plaintiff]." 78 Fed. Reg. 8,456, 8,461–62. But there is no rational basis for the government to declare that integrated auxiliaries of churches—which are often schools and often automatically include seminaries—are "more likely than" the thoroughly religious entities in this case "to employ people of the same faith who

[19] HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.ct.gov/oha/cwp/view.asp?Q=461560&A=11 (last accessed Oct. 9, 2013) (estimating in 2010 that 55% of 113 million large-employer plan participants, and 34% of 43 million small-employer plan participants, will be covered by grandfathered plans as far out as the data is projected by the end of 2013).

share the same objection" to abortifacients. Defendants have presented no data about the beliefs of employees at the thousands of various integrated auxiliaries of churches around the country, it has no data about the beliefs of the Schools (except the verified facts indicating how deeply devout its activities are), and it has no rational grounds upon which to compare those nonexistent data sets and conclude that the former are worthy of an exemption but not the latter.

Thus the government has decided that some seriously religious non-profit entities can be exempt from the Mandate but not others, based on speculation about the beliefs of the entities' employees. This is a quintessential example of the government "fail[ing] to prohibit [] conduct that endangers . . . interests [of the Mandate] in a similar or greater degree than [Plaintiff's exemption request] does." *Lukumi*, 508 U.S. at 542–43. If the Mandate's interests are not endangered by exempting "religious employers," on the basis of the government's speculation about the beliefs of employees, the government cannot deny an exemption to the Schools without rendering its Mandate not generally applicable.

Defendants have also chosen not to apply some crucial penalties associated with this Mandate to small employers: they can drop employee coverage altogether (including this Mandate) without being fined under the Affordable Care Act, but larger employers such as the Schools cannot.[20] This leaves many employees without abortifacient coverage *delivered through their employers and their employers' insurers*—those employees will have to receive the Mandate's alleged benefits somewhere else. Yet the government claims it has a compelling interest in forcing that same mandated coverage to come to the Schools' employees through their own insurer or third-party administrator. Defendants have no basis for distinguishing between employees of large and small entities and deciding that the latter need not receive the Mandate from their employers' insurers but the former must. This is not a generally applicable rule. In addition, the government has decided not to apply the Mandate to religious sects opposed to

[20] *See* 26 U.S.C. § 4980H(c)(2) (employers are not subject to penalty for not providing health insurance coverage if they have less than 50 full-time employees).

insurance altogether, or to "health care sharing ministries" that it has deemed not to be insurance and therefore not to need to cover Mandated items.[21]

The Mandate is also not generally applicable because the Affordable Care Act itself awards Defendants unlimited discretion to shape its scope. The Defendant Department of Health and Human Services "*may* establish exemptions" for religious objectors, 45 C.F.R. § 147.130 (emphasis added), or it may choose not to. And pursuant to 42 U.S.C. § 300gg-13, Defendants' discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46,623 (asserting that § 300gg-13 grants the Department of Health and Human Services and its Health Resources and Services Administration (HRSA) the "authority to develop comprehensive guideless" under which the Government believes "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers"). Section 300gg-13 has no criteria in it limiting the discretion of Defendants in deciding who should get an exemption, or why, or what kind. Using their unfettered discretion, Defendants have continually changed its exemptions and accommodations since August of 2011. This has led to numerous proposals and versions of the rule in the Federal Register, and multiple versions of a "safe harbor" Guidance that the Defendants have issued *in addition to* the regulations. The stated reasons behind why the government exempted "religious employers" but not the Schools—that employees of the latter are somehow "less likely" to share their beliefs—illustrates the government's unrestrained exercise of discretion as it created and changed its rule without criteria that is required to be objective and to eliminate arbitrary, discriminatory decision-making. This exercise itself has amounted to "individualized … assessment of the reasons for the relevant conduct"—reasons related to non-existent data about employee beliefs at different non-profit entities—which deprives the Mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

As the court said in *Fraternal Order of Police*:

[21] 26 U.S.C. § 5000A(d)(2)(a)–(b).

> The concern [about the government's deciding that secular motivations are more important than religious ones] is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

170 F.3d at 365. The grandfathering exemption of tens of millions of women exists for the "secular" reason that to get enough votes to pass the Affordable Care Act, "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[22] Defendants also assert post hoc logistical reasons for the grandfathering provision, but all of those reasons are likewise secular, yet they deny tens of millions of women the alleged benefits of the Mandate while refusing to exempt similarly situated employers such as the Schools. In *Fraternal Order of Police*, the Third Circuit found a lack of general applicability when a police department's no-beard policy allowed a medical exemption but refused religious exemptions. "[T]he medical exemption raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id*. at 366. *See also Blackhawk v. Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches).

Defendants' many exemptions here span the gamut of reasons while still refusing a religious exemption to the Schools. The grandfathering provision gives plans a "right" to avoid the Mandate indefinitely for secular reasons; the "religious employer" exemption relies on secular tax code distinctions regarding which entities must file a 990 tax form, and on the government's unfounded claim that employees at religious non-profit entities such as the Schools

[22] HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans," *available at* http://web.archive.org/web/20130620171510/http://www healthcare.gov/news/factsheets /2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Oct. 10, 2013).

do not sufficiently share their employers' mission-oriented beliefs as do schools and seminaries that the IRS deems "integrated auxiliaries." The small employer provision that allows them to dump health insurance coverage altogether without penalty serves secular and economic purposes under which the government is content to not have this Mandate flow to employees from their employers' or those employers' insurers, while the government would heavily penalize the Schools if it dropped coverage. These sorts of categorical exemptions led the court to deem the law not generally applicable in *Fraternal Order of Police*, 170 F.3d at 365. *See generally Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.").

B. The Mandate is Not Neutral.

The Mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not neutral; it discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of neutrality. *See, e.g.*, *Lukumi*, 508 U.S. at 532 (explaining that "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"). As discussed above, the "religious employer" exemption protects the religious exercise of only *certain* religious employers, specifically distinguishing integrated auxiliaries of churches with regard to whether or not they are required to file an annual tax return, but without any objective basis to distinguish between employers like the Schools and those entities *for the purposes of deciding who must comply with this Mandate*. *See* 78 Fed. Reg. at 39874 (aligning the "religious employer" definition with 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), which concerns the filing of tax returns). Defendants' explicit rationale for superimposing this tax code distinction onto a requirement of birth control coverage is its unsupported claim that "integrated auxiliary" schools and seminaries have employees who share their employers' beliefs to some significantly greater extent than the employees of entities like the Schools. *See* 78 Fed. Reg. at 39,874; 78 Fed. Reg. at 8,461–62.

This unfounded criterion engages in religious gerrymandering. *See Lukumi*, 508 U.S. at 534. Defendants made their own subjective decision about which religious employers to exempt. It is a mystery how Defendants determined that non-profit religious employers who are not exempt from filing a Form 990 each year would not possess the same values and generally employ the same sympathetic-minded individuals as exempt non-profit religious employers, even if both kinds of entities are schools.[23] Some schools are integrated auxiliaries of churches, and some are not, based on factors having absolutely nothing to do with the beliefs of the employees or their desire for abortifacient coverage in health insurance. The § 6033 distinction borrowed for this Mandate has no relationship to birth control or employee beliefs at all. It simply pertains to whether the IRS seeks to specifically examine the *donation* activities of a non-profit entity as would be reported on a Form 990, or whether that examination is not necessary because of the entity's relationship with a church. Thus there is no "neutrality" in using the § 6033 criteria for this Mandate, because the criteria have no articulated or evidence-based relationship with the Mandate, much less a rational connection to the delivery of abortifacient coverage to some employees but not others.[24] *See Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *see also Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (noting that "[i]f the purpose or effect of a law is to impede the observance of one or all religions

[23] Applying the § 6033 filing exceptions to the Mandate would falsely divide religious employers into two categories based on distinctions in a church conventions and the level of financial support from a church to an employer, which may depend on a church denomination's governance structure or even the affluence of its members. *See* comment by Church Alliance dated April 8, 2013, *available at* http://www.church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf (last visited Oct. 9, 2013); *cf. Larson v. Valente*, 456 U.S. 228, 246, fn. 23 (1982) (striking down a law on Establishment Clause grounds that distinguished between different religious organizations and had the effect of discriminating between well established churches and newer churches, based on the primary source of the organization's funds (i.e., members versus public solicitation)).

[24] *See* Edward McGlynn Gaffney, Jr., *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church"*, 25 VAL. U.L. REV. 203, 211-16 (1991), *available at* http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2152&context=vulr (last visited Oct. 9, 2013) (describing the original purpose of the differential treatment of churches and other non-profits under 26 U.S.C. § 6033 as relating to preventing tax fraud but not wanting to submit churches to financial oversight, detailing the development of different, changing and confusing religious terms used by Congress for various exemptions throughout that period and finally concluding that the language settled on in § 6033 for those organizations exempt from filling a From 990 "did not come into the tax code as one laden with meaning either in church history or legal history.")

or is to discriminate invidiously between religious, that law is constitutionally invalid even though the burden may be characterized as being only indirect.").

Lukumi warns that "[t]he neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation." 508 U.S. at 539. In light of the unsupported distinction made by Defendants between the two types of employees (those working for exempt integrated auxiliaries of churches that are schools or seminaries, and those working for non-exempt religious employers that are schools or seminaries), there is no basis for the government to claim that direct harm will be avoided if the Schools are *refused* an exemption while integrated auxiliaries are *given* one. The government has essentially conceded that exempting integrated auxiliaries is entirely tolerable in the context of this Mandate. Refusing the same exemption to the Schools violates the requirement of neutrality.

Consequently, failing the requirements both of neutrality and of general applicability, the Mandate is subject to strict scrutiny. As discussed above, the Mandate fails. Therefore, Defendants' motion to dismiss the Free Exercise Clause claim should be denied, as should their motion for summary judgment on that claim.

III. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON-THE SCHOOLS' ESTABLISHMENT CLAUSE CLAIM.

Defendants' unwillingness to extend their religious exemption[25] to the Schools violates the First Amendment's Establishment Clause. The Clause prohibits unjustified differential treatment of similarly situated religious organizations. *Larson v. Valente*, 456 U.S. 228, 246 & n. 23 (1982); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008). *See also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990). The Schools are similarly situated to exempt organizations, as all their employees share their religious convictions regarding the

[25] 45 C.F.R. § 147.131(a) (an exempt "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii).

sanctity of life.[26] But the Schools are denied the exemption, simply because they lack an "integrated auxiliary" relationship with a church or denomination. This is precisely the sort of unjustified differential treatment the Establishment Clause forbids. Accordingly, this Court should deny Defendants' motion to dismiss Count III of the Complaint.

In *Larson*, the Supreme Court struck down, under the Establishment Clause, Minnesota charitable registration and disclosure rules that distinguished among similarly situated religious organizations. The rules were "designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions for purportedly charitable purposes." 456 U.S. at 231. The rules exempted religious organizations that received fifty percent or more of their contributions from members or affiliated organizations. *Id*. at 230-31. Minnesota attempted to justify the exemption; in other words, it tried to explain how the exemption did not undermine the stated purpose of the rules. After all, both exempt and non-exempt organizations were religious non-profits that solicited charitable contributions from the general public.

Minnesota failed. *Id*. at 248-51. The Court "conclude[d] that [the state defendants] have failed to demonstrate that the fifty per cent rule . . . is 'closely fitted' to further a 'compelling governmental interest.'" *Id*. at 251. Determining enforceability based on a charity's source of income simply made no sense; Minnesota failed to prove that an organization was more likely to commit fraud if over half its donors were non-members. The Court thus held that the differential treatment of similarly situated religious organizations violated the Establishment Clause. *Id*. at 255.

In *Colorado Christian University*, the Tenth Circuit similarly struck down a state's differential treatment of substantially identical religious organizations. The State of Colorado offered tuition assistance to college students. 534 U.S. at 1250. It denied aid to students

[26] The government's stated rationale for exempting churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of religious orders is that these entities "are 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." 78 Fed. Reg. 39870, 39874 (Jul. 2, 2013).

attending "pervasively sectarian" schools. *Id*. at 1250-51. Less "sectarian" schools and their students were eligible for the assistance programs. The Tenth Circuit found that the ineligible "pervasively sectarian" schools were, with reference to the programs' purposes, substantially identical to other (eligible) religious schools. *Id*. at 1257-59. Accordingly, the disparate treatment of the different sorts of religious schools violated the Establishment Clause. *Id*. at 1269.

In the instant case, Defendants do not even *attempt* to explain any "fit" among the exemption, its stated rationale, and broader purposes of the Mandate. They have not even tried to justify why they deny the exemption to institutions like the Schools that fit its stated rationale, *i.e.*, that employ co-religionists.[27] Exempt organizations are exempt because they hire co-religionists. The Schools also hire only co-religionists, but are not exempt. One will search the government's brief in vain for a defense of this disparate treatment.

The unconstitutionality of denying the Schools the exemption is even more obvious when one considers exactly *why* Dordt College in particular is not exempt. Dordt is not exempt because of the primary source of its revenue—just like the successful plaintiffs in *Larson*. The College *would* be exempt if it were an "integrated auxiliary" of the Christian Reformed Church of North America (CRCNA). Whether an entity is an "integrated auxiliary" under 26 U.S.C. § 6033(a)(3)(A) is determined by criteria set forth in 26 C.F.R. § 1.6033–2. The rule asks whether an entity is "affiliated" and "internally supported" by a church or convention of churches. An organization is not "internally supported" if it "[n]ormally receive[] more than 50 percent of its support from" non-church sources. Dordt receives more than 50 per cent of its revenue from student tuition payments, and thus cannot be an integrated auxiliary of the CRCNA.[28]

[27] The root problem is that the government made unjustified assumptions, possibly rooted in ignorance, about the employment practices of many religious organizations. They assumed that most employers exempt from filing informational tax returns under 26 U.S.C. § 6033(a)(3)(A) hire only co-religionists, and that all other religious organizations do not. They were mistaken. The government never explains why it plucked an utterly unrelated provision out of the tax code and employed it a completely different context. Perhaps Defendants do not attempt such an explanation because no explanation exists.

[28] Amplifying the absurdity of using 26 U.S.C. § 6033(a)(3)(A) to determine eligibility for the HHS Mandate exemption, seminaries are explicitly exempt from that section's "fifty percent rule." 26 C.F.R. § 1.6033–2(h)(5).

Accordingly, it does not qualify for the "religious employer" exemption to the Mandate, solely because of financial issues having nothing to do with the likelihood that its employees would utilize insurance coverage of abortifacients. Thus, *Larson* practically compels a ruling in the Schools' favor on its Establishment Clause claim and a denial of Defendants' motions.

IV. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON—THE SCHOOLS' FREE SPEECH CLAUSE CLAIM.

The Mandate additionally violates the First Amendment by coercing the Schools to facilitate speech that is contrary to their 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. State 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, 573 (1995) (internal quotation marks 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 to 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 the Schools to communicate a message they find morally objectionable. It does so in two ways. First, the Mandate includes required coverage not only for abortifacients but also for "education and counseling" related to the same. Education and counseling are speech. The coverage of that speech includes speech in favor of abortifacient items, since by its terms the coverage includes any such education and counseling, and since if a doctor prescribes emergency contraception the information and counseling associated with that prescription will necessarily be supportive of using such items (otherwise

the doctor would not be prescribing it). As discussed above, the Mandate and its "accommodation" coerce the Schools to provide a health plan that acts as the conduit for coverage of such "education and counseling," in the form of promised payments for such education and counseling by the Schools' insurer or third-party administrator.

The conduct required by the Mandate, facilitating access to educational programs for abortifacients and the products themselves that Plaintiffs strongly object to on religious grounds, and explicitly contracting and arranging for coverage of objectionable items, is coercive speech that violates Plaintiffs' freedom under the First Amendment. This speech, and the conduct Plaintiffs must engage in to facilitate this speech, is "inherently expressive," in two ways. First the Mandate requires Plaintiffs 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. The self-insurance certification, in turn, is itself a written form of speech, and it explicitly designates a third party to obtain coverage of items to which the self-insured entity objects. Hiring someone, in writing, to do a religiously objectionable thing is inherently expressive.

Second, the Mandate requires the Schools to fund an insurance plan that, under the accommodation, triggers objectionable coverage in the form of speech. 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).

The Court should deny Defendants' motion to dismiss the Free Speech Clause claim, as well as their motion for summary judgment on that claim.

V. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON-THE SCHOOLS' DUE PROCESS CLAUSE CLAIM.

The Mandate violates the Due Process Clause of the Fifth Amendment because it creates a blank check for Defendants to discriminatorily create and enforce its "religious" exemptions and accommodations. HHS's Health Resources and Services Administration is tasked with determining, under the ACA, what groups are sufficiently "religious" to qualify for an exemption, and which ones are not; this unbridled discretion is impermissible under 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 Affordable Care Act provision underlying the Mandate authorizes Defendants to exempt religious employers, directing the agencies to determine the scope of the exemption. 42 U.S.C. § 300gg-13; *see also* 76 Fed. Reg. at 46,623. 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, 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.

The government has decided to take plain requirements of the Affordable Care Act and issue unilateral waivers, delays, and exemptions from those requirements without the authority of the Act or Congress. (*See, e.g.*, the one year delay in reporting requirements for large employers to provide health coverage to their employees, IRS Notice 2013-45, Jul. 9, 2013, available at http://www.irs.gov/pub/irs-drop/n-13-45.pdf, and the declaration that Congress will not be ejected from the subsidies provided in the Federal Employees' Health Benefits Program as the Affordable Care Act requires, IRS Notice 2013-45, Jul. 9, 2013, available at http://www.irs.gov/pub/irs-drop/n-13-45.pdf; OPM BAL 13-207, Sep. 30, 2013, available at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-207.pdf; ACA § 1312(d)(3)(D), 42 U.S.C. § 18032(d)(3)(D)). The Executive Branch's picking and choosing which parts of the Affordable Care Act to enforce, while refusing to give exemptions from this Mandate to the Schools, constitute an exercise of unfettered and illegal discretion under the Due Process Clause.

VI. THIS COURT SHOULD NEITHER DISMISS—NOR GRANT DEFENDANTS SUMMARY JUDGMENT ON—THE SCHOOLS' ADMINISTRATIVE PROCEDURE ACT CLAIMS.

A. Defendants Refused Meaningfully To Consider Objections Before the Mandate Was Finalized.

The Mandate violates the Administrative Procedure Act (APA) because the agencies failed meaningfully to consider submitted comments. Defendants cannot meaningfully consider comments where, before the comment period even began in 2011, the government argued that the Mandate must exist in final form as of that date in order to deliver free contraceptives to college women by 2012. Defendants essentially admitted that they never had any intention of seriously considering any comments submitted in the comment periods following August 2011. After adopting that 2011 rule "without change" in 2012, the government went on to propose changes that were exactly the subject of comments they were supposed to have considered in 2011. If the government had meaningfully considered comments from the August 2011 interim final rule comment period, it would not have changed the rule from its August 2011 form, and not acted—as it still does today—as if the rule were final in August 2011.

B. 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 the Schools, in light of its exemption of integrated auxiliaries, 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 the Schools. Therefore, the refusal to exempt the Schools is unjustified.

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 abortifacient coverage in violation of the employer's religious beliefs. Using that language in this context is no less arbitrary than if Defendants randomly selected a distinction in the criminal code and superimposed it as a reason to exempt some religious entities from the Mandate but not others.

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 the

Schools 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. Defendants' own evidence reveals that there is no causal connection between lacking contraceptive coverage and suffering health consequences. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct 2729, 2738-39 (2011).

C. 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 Amendment. Defendants fail to acknowledge this aspect of the Schools' claims, alleging only that the regulations do not violate federal restrictions regarding abortion, including the ACA, the Weldon Amendment, the Church Amendment.

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 the Schools' plans will *not* include the abortifacient coverage, while purporting to force their insurer/third-party administrator to provide payments for Mandated items "separate" from the Schools' plans. 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 separate from the Schools' health plan, and Defendants' "attenuation" arguments are untenable. The ACA is not a blank check for the executive branch to do whatever it wants in connection to health insurance without regard to what the statute actually says. And 42 U.S.C. § 300gg-13 does not give Defendants roving authority to force entities to provide abortifacient coverage or payments outside of an employer's plan.

CONCLUSION

For the foregoing reasons, the Schools respectfully request that this Court deny Defendants' motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted, this 7th day of February, 2014.

/s/ Gregory S. Baylor
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Gregory S. Baylor

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DORDT COLLEGE and CORNERSTONE UNIVERSITY,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. 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.

No. 5:13-cv-04100- MWB

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 56(b)(2), Plaintiffs Dordt College and Cornerstone University, by and through their undersigned attorneys, submit the following objections and responses to Defendants' Statement of Material Facts in Support of their Motion for Summary Judgment.

1. Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), AR at 317-18, 407.

RESPONSE: Disputed and unsupported. To the extent Defendants refer to preventive services generally, this statement is immaterial, as Plaintiffs challenge only the aspects of the preventive service requirements regarding a subset (abortifacients and related counseling) of "FDA-approved contraceptive methods and contraceptive counseling." To the extent that Defendants are suggesting that "preventive services," in the context of their assertion, include abortifacient drugs

and devices, or even "contraceptive services" more generally, the pages of the IOM Report Defendants cite do not support their assertion.

The only related statement in these pages is a single survey "indicat[ing] that less than half of women are up to date with recommended preventive care screenings and services (Robertson and Collins, 2011)." IOM REP. at 20. That survey, however, did not consider contraceptive coverage to be "preventive care." Rather, "[t]he survey asked women whether they had received a set of recommended preventive screening tests: blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens." *See* Robertson & Collins, *Women at risk: Why increasing numbers of women are failing to get the health care they need and how the Affordable Care Act will help*, in *Realizing Health Reform's Potential* (2011), at 8-9. Similarly, the only study referenced in the cited IOM pages actually relating to contraception does not discuss rates of women's use of contraceptive services; rather, it analyzes women who already use some type of contraception, but decided to switch to another type. *See* IOM REP. at 119.

2. Section 1001 of the ACA requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

RESPONSE: Undisputed that the quoted text appears in Section 1001 of the ACA, but Section 1001 of the ACA is a provision of law, not a statement of fact.

3. Because there were no existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) tasked the Institute of Medicine (IOM) with developing recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women. IOM REP. at 2, AR at 300.

RESPONSE: Disputed. Plaintiffs do not dispute that HHS tasked IOM with developing recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women, but dispute the propriety of HHS delegating its authority for creating preventive care guidelines to IOM, the impartiality of the IOM committee

that was formulated to recommend preventive care guidelines, the methods the IOM committee employed to take on this task, and the recommendations the IOM offered. Specifically, HHS outsourced its deliberations to the IOM, which in turn created a "Committee on Preventive Services for Women" that invited presentations from several "pro-choice" groups, such as Planned Parenthood and the Guttmacher Institute (named for a former president of Planned Parenthood), without inviting any input from groups that oppose government-mandated coverage for abortion, contraception, and sterilization. *See* IOM REP. at 218-19.

In addition, "[t]he Report acknowledges" that it suffered from an "unacceptably short time frame for the [ ] committee to conduct or solicit meaningful reviews of the evidence associated with the preventive nature of the services considered," IOM Rep. at 231-32. Further, "the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* at 232. Ultimately, "the committee erred [in] their zeal to recommend something despite the time constraints and a far from perfect methodology" and "failed to demonstrate [transparency and strict objectivity] in the Report." *Id.* at 232-33. The "evidence evaluation process [was] a fatal flaw of the Report." *Id.* at 233.

4. After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id*. at 10-12, AR at 308-10.

RESPONSE: Undisputed that the quoted text appears in the IOM Report, but disputed that the IOM's review was "extensive" and "science-based." *See* Response to Paragraph 3, above. Plaintiffs incorporate herein their response to Paragraph 3, *supra.*

5. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id*. at 105, AR at 403.

RESPONSE: Undisputed, but incomplete. FDA-approved contraceptive methods

also include, *inter alia*, sterilization. *See* IOM REP. at 104-05. Further, as stated in Plaintiffs' response to paragraph 60 *infra*, emergency contraceptives (such as Plan B and ella) can also act as abortifacients.

6. Coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id*. at 102-03, AR at 400-01.

RESPONSE: Disputed and unsupported. The pages of the IOM Report that Defendants cite do not support this assertion. The only related points in these pages are references to (1) another IOM report observing, without citation, that "[p]rogress in reducing unintended pregnancies will require not only making contraceptive methods more available, accessible, and acceptable through improved services, but also the development of new methods that meet additional needs," *see* Inst. of Med., Women's Health Research: Progress, Pitfalls, and Promise (2010), at 147; and (2) two studies that observed that increased rates of contraceptive use by unmarried women and adolescents, respectively, were associated with decreased rates of unintended pregnancies. IOM REP. at 105. Neither the referenced IOM report nor the cited studies discussed coverage of contraception (much less the abortifacients to which Plaintiffs object) without cost sharing at all, let alone that coverage without cost-sharing is necessary for increasing access to these services and thereby reducing the rate of unintended pregnancies and promoting healthy birth spacing, or that requiring religious organizations to provide such coverage is a necessary means to either of those ends.

7. On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, encompassing all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84.

RESPONSE: Undisputed.

8. To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
> (2) the organization primarily employs persons who share the religious tenets of the organization;
> (3) the organization serves primarily persons who share the religious tenets of the organization; and
> (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), AR at 220.

RESPONSE: Undisputed, but this is a provision of law, not a statement of fact.

9. Group health plans established or maintained by religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84; 45 C.F.R. § 147.131(a).

RESPONSE: This is a disputed proposition of law, not a statement of fact

10. In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14.

RESPONSE: Undisputed.

11. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id*. at 8728, AR at 215.

RESPONSE: Undisputed that the government undertook new rulemaking, but disputed that the new rulemaking in fact accommodated non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services.

12. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,870, AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186-93; 78 Fed. Reg. 8456 (Feb. 6, 2013) (Notice of Proposed Rulemaking (NPRM)), AR at 165-85.

RESPONSE: Undisputed, but Plaintiffs incorporate herein their response to Paragraph 11, *supra*, with respect to what "that process" is.

13. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a).

RESPONSE: This is an undisputed proposition of law, not a statement of fact.

14. The changes made to the definition of religious employer in the 2013 final rules ensure "that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. at 39,874, AR at 6.

RESPONSE: Undisputed that the quoted text appears in the 2013 final rules, but the statement itself is disputed. The "religious employer" exemption for groups that are "referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code" includes only (i) "churches, their integrated auxiliaries, and conventions or associations of churches," and (iii) "the exclusively religious activities of any religious order." 78 Fed. Reg. at 39,871. To qualify as an exempt "integrated auxiliary," an entity must be "internally supported." *See* Rev. Proc. 86-23, 1986-20 I.R.B. 17 (1986); T.D. 8640 (Dec. 20, 1995). One aspect of the "internally supported" test includes determining if an organization offers admissions, services, or products for sale to the general public, *i.e.*, non-Christians. *See* Treas. Reg. § 1.6033-2(h)(7), Example 3, in App. Thus, serving people of different faiths can remove an organization's status as an exempt religious employer. Further, Defendants rationalize the distinction they draw between entities qualifying as "religious employers" and non-exempt religious organizations based on speculation that "religious employers" employ people of the same faith: "With respect to the religious employer exemption, houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people who are of the same faith." 78 Fed. Reg. at 39,887.

15. The 2013 final rules establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id*. at 39,875-80, AR at 7-12; 45 C.F.R. § 147.131(b)

RESPONSE: This is a disputed proposition of law, not a statement of material fact.

While Defendants purport to have established an "accommodation" regarding contraceptive coverage for certain religious "eligible organizations," that so-called "accommodation" does not resolve Plaintiffs' religious objections and still requires Plaintiffs to facilitate access to products and services the use of which is antithetical to Plaintiffs' mission and beliefs.

16. An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
> (2) The organization is organized and operates as a nonprofit entity.
> (3) The organization holds itself out as a religious organization.
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75, AR at 6-7.

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

17. Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. The Affordable Care Act compels Plaintiffs to provide their employees a health insurance plan that "provide[s] coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." Affordable Care Act, § 2713(a)(4), codified at 42 U.S.C. § 300gg-13(a)(4). The Health Resources and Services Administration deemed that contraceptives – including the abortifacients to which Plaintiffs object – were among the "additional preventive care" which group health plans must "provide coverage for." Plaintiffs must either include objectionable abortifacients within their group health plans or invoke the so-called "accommodation" described in Defendants' July 2,

2013 final rule. In order to invoke the "accommodation," an employer must certify that it opposes providing coverage for some or all required contraceptive services, that it is organized and operates as a nonprofit entity, and that it holds itself out as a religious organization. It must then deliver that certification to the issuer of its employee health plan. The issuer will then provide to beneficiaries of the employer's plan "separate payments" for the drugs, devices, and services to which the employer objects. Under this mechanism, Plaintiffs, at a minimum, "arrange" or "refer for" coverage of abortifacients. Plaintiffs' employees would receive access to the mandated payments only by virtue of their participation in the health plans Plaintiffs choose to offer. *See* 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B) (indicating that payments are available only "so long as" Plaintiffs' employees remain on Plaintiffs' insurance plans).

18. To be relieved of any such obligations, the 2013 final rules require only that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its issuer or third party administrator (TPA). *Id*. at 39,878-79, AR at 10-11.

RESPONSE: This paragraph is argumentative, and is a disputed proposition of law, not a statement of material fact. Plaintiffs incorporate herein their response to Paragraph 17, *supra.*

19. Its participants and beneficiaries, however, will still benefit from separate payments for contraceptive services made by the issuer or TPA, without cost sharing or other charge. *Id*. at 39,874, AR at 6.

RESPONSE: Disputed. Plaintiffs do not dispute that the 2013 final rules anticipate that health plan participants and beneficiaries will receive separate payments for abortifacient services made by the issuer or TPA without cost sharing or other charge. But Plaintiffs dispute that abortifacient services are a "benefit"; Plaintiffs believe they are immoral.

20. In the case of an organization with an insured group health plan, the organization's health insurance issuer, upon receipt of the self-certification, must provide separate payments for contraceptive services to plan participants and beneficiaries for contraceptive services without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id*. at 39,879-80, AR at 7-9.

RESPONSE: This is an incomplete proposition of law, not a statement of material

fact. Plaintiffs incorporates herein their responses to Paragraph 17, *supra* and 21, *infra.* The 2013 final rules allow third party administrators to "decide not to enter into, or remain in, a contractual relationship with the eligible organization to provide administrative services for the plan." 78 Fed. Reg. at 39,879.

21. In the case if an organization with a self-insured group health plan, the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to eligible organization or its plan. *See id*. At 39,879-80, AR at 12-12

RESPONSE: This is an incomplete proposition of law, not a statement of material fact. Plaintiffs incorporates herein their responses to Paragraph 17, *supra.* The 2013 final rules allow third party administrators to "decide not to enter into, or remain in, a contractual relationship with the eligible organization to provide administrative services for the plan." 78 Fed. Reg. at 39,879.

22. Any costs incurred by TPAs will reimbursed through an adjustment to Federally-facilitates Exchange (FFE) user fees. *See id*. at 39,880, AR at 12.

RESPONSE: Plaintiffs do not dispute that the cited regulation provides for such reimbursements.

23. The 2013 final rules generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, *see id*. at 39,872, AR at 4, except the amendments to the religious employer exemption apply to group health plans and group health insurance issuers for plan years beginning on or after August 1, 2013, *see id*. at 39,871, AR at 3.

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

24. The primary predicted benefit of the preventive services coverage regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010), AR at 233; *see also* 77 Fed. Reg. at 8728, AR at 215; 78 Fed. Reg. at 39,872, 39,887, AR at 4, 19.

RESPONSE: This not a statement of fact, but unsupported speculation. Defendants' regulations are not evidence of the fact asserted, namely, that "individuals will experience

improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." In addition, abortifacient services, unlike other mandated "preventive services," do not "prevent" disease.

25. "By expanding coverage and eliminating cost sharing for recommended preventive services, [the regulations are] expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733, AR at 233; *see also* 78 Fed. Reg. at 39,873 ("Research [ ] shows that cost sharing can be a significant barrier to access to contraception." (citation omitted)), AR at 5.

RESPONSE: Undisputed that the quoted text appears in the 2013 final rules, but the statement itself is disputed, unsupported, and speculative. Defendants' regulations are not evidence of the fact asserted, namely, that "expanding coverage and eliminating cost sharing for recommended preventive services, [will] increase access to and utilization of these services, which are not used at optimal levels today." In addition, the cited page of the Administrative Record in turn cites a study entitled "A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change," which analyzes changes in contraceptive use after the Kaiser Foundation Health Plan in California changed its coverage policy to include universal coverage for contraception. *See* Postlethwaite, D., et al, 76 Contraception 360 (2007). But, this study provides no support for the government's assertion that cost sharing is a barrier to contraception. In any event, the sole purpose of the study was to evaluate whether eliminating cost sharing for contraceptive coverage "would lead to a change in the mix of contraceptive methods prescribed and purchased by a large health plan and whether those changes could theoretically result in averting a greater number of unintended pregnancies." *Id*. Ultimately, the study concluded that removing cost for contraception "may" result in increased use, not of contraception generally, but of what the study deemed more effective forms of contraception—that is, whether women would switch to a more expensive but perhaps more effective *type* of contraception if cost were not a concern. *Id*.

Further, Plaintiffs' sincerely held Christian beliefs provide that there are no "optimal levels" of the use of abortifacients.

26. Although a majority of employers cover FDA-approved contraceptives, *see* IOM

REP. at 109, AR at 407, many women forgo preventive services because of cost-sharing imposed by their health plans, *see id*. at 19-20, 109, AR at 317-18, 407.

RESPONSE: Disputed, unsupported, and immaterial. The pages of the IOM Report that Defendants cite do not support this assertion. The only related points in these pages are references to studies regarding preventive services *other than* contraceptive services. *See* IOM REP. at 19 (discussing women's use of preventive care, including cancer screenings, dental examinations, mammograms, and Pap smears); *id.* at 20 (referencing study asking women whether they had received a set of recommended preventive screening tests that did not include contraceptive services: blood pressure, cholesterol, cervical cancer, colon cancer (for ages 50 to 64) and breast cancer (for ages 50 to 64) screens); *id.* at 109 (mentioning research on preventive and primary care services in general). The one study mentioned that touches on contraceptive services examined women who were already taking contraception and the likelihood that they would switch to another method in light of reduced or eliminated out-of-pocket costs.

In fact, more than 89 percent of insurance plans "cover[ed] contraceptive methods in 2002." IOM REP. at 109. Further, 89% of women trying to avoid pregnancy are already practicing contraception. *See* Guttmacher Institute, "Fact Sheet: Contraceptive Use in the United States," (Aug. 2010), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html. Among the other 11%, lack of access is not a statistically significant reason why they do not use contraceptives. Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf. Even among the most at-risk populations, cost is not the reason those women do not use contraceptives. *See* R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," Perspectives on Sexual and Reproductive Health 34 (Nov/Dec 2002): 294–303 (Perspectives is a publication of the Guttmacher Institute); *see also* CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly

Report 61(02);25-29 (Jan. 20, 2012), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6102a1.htm?s_cid=mm6102a1_e, (2012 CDC study showed that even among those most at risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception).

Moreover, Defendants have admitted that "85 percent of employer-sponsored health insurance plans cover[] preventive services," and that they do so "without [beneficiaries] having to meet a deductible," 75 Fed. Reg. at 41,732—in other words, without a significant form of cost sharing.

27. Unintended pregnancies have proven in many cases to have negative health consequences for women and developing fetuses. *See* 78 Fed. Reg. at 39,872, AR at 4.

RESPONSE: Disputed and unsupported. Defendants' regulations are not evidence of the fact asserted. Plaintiffs incorporates herein their response to Paragraph 24, *supra*.

28. Unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103-04, AR at 318, 401-02.

RESPONSE: Undisputed, but incomplete. Plaintiffs incorporate herein their response to Paragraph 24, *supra*.

29. Contraceptive coverage further helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id*. at 103, AR at 401; *see also* 78 Fed. Reg. at 39,872 ("Short interpregnancy intervals in particular have been associated with low birth weight, prematurity, and small-for-gestational age births.") (citing studies), AR at 4.

RESPONSE: Disputed and unsupported. The pages of the IOM Report that Defendants cite do not support their assertion. Also, Defendants' regulations are not evidence of the fact asserted. Furthermore, the quoted text does not bear on whether contraceptive coverage, much less abortifacient coverage, has any impact on the incidence of the referenced negative consequences of short interpregnancy intervals. In addition, Plaintiffs incorporate herein their response to Paragraph 24, *supra*.

30. Contraceptives also have medical benefits for women who are contraindicated for pregnancy, and there are demonstrative preventive health benefits from contraceptives relating to conditions other than pregnancy (for example, prevention of certain cancers, menstrual disorders,

and acne)." 78 Fed. Reg. at 39,872, AR at 4; *see also* IOM REP. at 103-04 ("[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome."), AR at 401-02.

RESPONSE: Undisputed that the quoted text appears in the 2013 final rules, but the statement itself is disputed, unsupported, and immaterial. Defendants' regulations are not evidence of the fact asserted. Furthermore, "contraceptive methods have both risks and benefits," negative consequences of which range from "side effects" to death. IOM REP. at 105-06. And, "[f]or women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated." *Id.* at 105. Plaintiffs also incorporate herein their response to Paragraph 24, *supra*. In addition, Plaintiffs have no objection to (and this case is not about) the use of conventional, non-abortifacient contraceptives.

31. "[W]omen have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 19, AR at 317.

RESPONSE: Undisputed that the quoted text appears in the Congressional Record, but the statement itself is disputed and unsupported. Defendants' self-serving selection of the legislative history of the statute, individual Congresspersons' statements, or Defendants' own regulations do not provide evidentiary support for the underlying factual statement.

The statement also has no bearing on the utilization of contraceptive services, much less abortifacient services at all. Likewise, Defendants' citation to the IOM Report provides support only for the general proposition that some women have significant health care expenses, including paying for prescriptions for themselves and their families and paying for screening and preventive services entirely unrelated to abortifacients. *See* IOM REP. at 19.

32. These costs result in women often forgoing preventive care and place women in the workforce at a disadvantage compared to their male coworkers. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); 78 Fed. Reg. at 39,887, AR at 19; IOM REP. at 20, AR at 318.

RESPONSE: Disputed and unsupported. Defendants' self-serving selection of the legislative history of the statute, individual Congresspersons' statements, or Defendants'

regulations does not provide evidentiary support for the underlying factual statement.

The statement also has no bearing on the utilization of abortifacient services at all. Additionally, Defendants' citation to the IOM Report provides support only for the general proposition that some women have difficulty paying medical bills and for screening and preventive services unrelated to abortifacients, while also noting that women are more likely than men to be dependents on a health care plan, which is irrelevant to their participation in the workforce. *See* IOM REP. at 20.

33. The grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140.

RESPONSE: This is an incomplete statement of law, not a statement of material fact. While the grandfathering provisions may not be specifically limited to excluding the ACA's preventive services coverage requirements, Defendants themselves highlighted in the regulations that grandfathered health plans are not subject to the preventive services coverage requirements. Specifically, Defendants' model disclosure to plan beneficiaries provides that "[b]eing a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing." 45 C.F.R. § 147.140(a)(2)(ii). In other words, grandfathered health plans are exempt from the preventive services coverage regulations regardless of whether that is the only provision of the ACA for which they can avoid compliance.

34. The effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. *See* 78 Fed. Reg. at 39,887 n.49, App. at 19.

RESPONSE: Disputed, unsupported, and speculative. Defendants' regulations are not evidence of the fact asserted. At any rate, Defendants have acknowledged in their own regulations that grandfathered health plans are "exempt" from provisions of the ACA, including

the preventive services coverage provision. *See, e.g.*, 75 Fed. Reg. 70,114, 70,117 (Nov. 15, 2010) ("Because grandfathered health plans are exempt from many of [the provisions of the Affordable Care Act] while group health plans and group and individual health insurance coverage that are not grandfathered health plans must comply with them, it was critical for plans and issuers to receive clear guidance as to whether they were so exempt as soon as possible"); 75 Fed. Reg. 34,538, 34,545 (June 17, 2010) ("Grandfathered health plans are exempt from many of these provisions while group health plans and group and individual health insurance coverage that are not grandfathered health plans must comply with them."); HHS, *Grandfathered Plans, available at* http://www.hhs.gov/healthcare/insurance/grandfather/, ("The Affordable Care Act exempts most plans that existed on March 23, 2010 — the day the law was enacted — from some of the law's consumer protections.").

In addition, the predicted "majority of group health plans [that] will lose their grandfathered status by the end of 2013" is a bare majority, leaving 49% still possessing grandfathered status. 75 Fed. Reg. at 34,553. Defendants' data further estimates that a majority of "large employer" group health plans will still possess grandfathered status by the end of 2013. *Id*. Because 49% of total group health plans and 55% of large employer group health plans are predicted to maintain grandfathered status through the end of 2013, and because twice as many people are in large group health plans as are in small ones, Defendants' data predicts that a majority of total persons covered by group health plans (large and small) will be in grandfathered health plans through the end of 2013. 75 Fed. Reg. at 34,550, 34,553. And, as Defendants' own estimates acknowledge, "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today," *i.e.*, will retain grandfathered health coverage. HHS, *U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans under the Affordable Care Act, available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html (June 14, 2010).

Further, the grandfathering exclusion has no sunset provision; a health plan has a "right" to keep its grandfathered status. 75 Fed. Reg. at 34,540, 34,558, 34,562, 34,566. A health plan

can maintain its grandfathered status indefinitely while increasing costs to employees if it stays within the parameters of Defendants' regulations for grandfathered plans. 75 Fed. Reg. at 34,538. Indeed, Defendants' assertion contradicts the President's promise that "if you like your plan, you can keep it."

35. Even under the grandfather provision, more group health plans will transition to the requirements under the regulations as time goes on. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010); *see also* Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190 (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011), AR at 663-64, 846.

RESPONSE: Disputed and unsupported. Plaintiffs incorporate herein their response to Paragraph 33, *supra*.

36. 26 U.S.C. § 4980H(c)(2) does not exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 78 Fed. Reg. at 39,887 n.49, AR at 19.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. While small employers are technically required to provide coverage for recommended preventive services, Defendants have permanently exempted them from some of the Mandate's enforcement mechanisms. *See, e.g.,* 26 U.S.C. §§ 4980H(a), 4980H(c)(2)(A). These small employer plans cover about 20 to 40 million employees and dependents. *See* U.S. Census Bureau, Employment Size of Firms, www.census.gov/econ/smallbus.html,

37. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2015, such employers are not subject to the possibility of assessable payments if they do not provide health coverage to their full-time employees and their dependents. *See* 26 U.S.C. § 4980H(c)(2).

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Plaintiffs incorporate herein their response to Paragraph 36, *supra*.

38. Small businesses that do offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing. 78 Fed. Reg. at 39,887 n.49, AR at 19.

RESPONSE: This is an incomplete statement of a proposition of law, not a statement

of material fact. While small employers are technically required to provide coverage for recommended preventive services, Defendants have permanently exempted them from some of the Mandate's enforcement mechanisms. *See, e.g.*, 26 U.S.C. §§ 4980H(a), 4980H(c)(2)(A). These small employer plans cover about 20 to 40 million employees and dependents. *See* U.S. Census Bureau, Employment Size of Firms, www.census.gov/econ/smallbus.html,

39. The ACA provides tax incentives for small businesses to encourage the purchase of health insurance. *See* 26 U.S.C. § 45R.

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

40. Even if a small business were to choose not to offer health coverage, employees of such business could get health insurance coverage that is facilitated by other ACA provisions—primarily those establishing both small group market and individual market health insurance exchanges and those establishing tax credits to make the purchase of coverage through such exchanges more affordable—and the coverage they receive through such exchanges will include coverage of all recommended preventive services, including contraception. *See* 78 Fed. Reg. at 39,887 n.49, AR at 19.

RESPONSE: Undisputed.

41. The only exemption from the preventive services coverage regulations is the exemption for the group health plans of religious employers. 45 C.F.R. § 147.131 (a).

RESPONSE: This is a disputed proposition of law, not a statement of material fact. As set forth in above, grandfathered health plans are exempt from the preventive service coverage requirements of the ACA, and small employers are exempt from some of the Mandate's enforcement mechanisms.

42. Houses 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, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan. *See* 78 Fed. Reg. at 39,874, AR at 6.

RESPONSE: Disputed and unsupported. Defendants' regulations are not evidence of the fact asserted, and this statement is pure speculation. In addition, there is no evidentiary basis for the conclusion that individuals who work for entities like the Schools are more likely not to

object to the use of abortifacients and therefore are more likely to use abortifacients.

43. Congress did not adopt a single (government) payer system financed through taxes and instead opted to build on the existing system of employment-based coverage. *See* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010).

RESPONSE: Undisputed.

44. Defendants are constrained by statute from adopting the alternative administrative schemes proposed by plaintiffs. *See* 78 Fed. Reg. at 39,888, AR at 20

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted.

45. Plaintiffs' proposed alternatives are not feasible because they would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See* 78 Fed. Reg. at 39,888, AR at 20.

RESPONSE: This is disputed proposition of law, not a statement of material fact. Defendants' regulations are not evidence of the fact asserted.

46. Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See* 78 Fed. Reg. at 39,888, AR at 20.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted.

47. Plaintiffs' alternatives would require establishing entirely new government programs and infrastructures or fundamentally altering an existing one, and would require women to take burdensome steps to find out about the availability of and sign up for a new benefit, thereby ensuring that fewer women would take advantage of it. *See* 78 Fed. Reg. at 39,888, AR at 20.

RESPONSE: This is argumentative and a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted

48. The regulations explicitly prohibit issuers and TPAs from imposing any cost-sharing, premium, fee, or other charge on plaintiffs or their plan with respect to the separate payments for contraceptive services made by the issuer. *See* 78 Fed. Reg. at 39,880, AR at 12.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted.

49. The regulations simply require coverage of "education and counseling for women with reproductive capacity." HRSA Guidelines, AR at 130-31.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted.

50. Defendants issued the ANPRM on March 21, 2012 and solicited comments on it. 77 Fed. Reg. at 16,501, AR at 186.

RESPONSE: Undisputed.

51. Defendants then considered those comments and issued the NPRM on February 6, 2013, requesting comments on the proposals contained in it. 78 Fed. Reg. at 8457, AR at 166.

RESPONSE: Disputed regarding the extent to which Defendants "considered those comments."

52. Defendants received over 400,000 comments, and the preamble to the 2013 final rules contains a detailed discussion both of the comments defendants received and of defendants' responses to those comments. *See* 78 Fed. Reg. at 39,871-39,888, AR at 3-20.

RESPONSE: Disputed as to whether Defendants' discussion of the comments and their response thereto is "detailed."

53. The ACA requires only that there be a minimum interval of not less than one year between the date on which a recommendation or guideline is issued and the plan year for which the coverage of the services included in that recommendation or guideline must take effect. *See* 42 U.S.C. § 300gg-13(b); 75 Fed. Reg. at 41,729, AR at 229.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are also not evidence of the fact asserted.

54. The HRSA Guidelines were published on August 1, 2011, and these regulations apply for plan years beginning on or after January 1, 2014. HRSA Guidelines, AR 283-84; 78 Fed. Reg. at 39,870, AR at 2.

RESPONSE: Undisputed as to when the HRSA Guidelines were posted on its website. The remainder is a disputed proposition of law, not a statement of fact.

55. Section 1303(b)(1) of the ACA provides that "nothing in this title . . . shall be construed to require a qualified health plan to provide coverage of [abortion services]." 42 U.S.C. § 18023(b)(1)(A)(i).

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

56. A "qualified health plan," within the meaning of this provision, is a health plan that has been certified by the health insurance exchange "through which such plan is offered" and that is offered by a health insurance issuer. 42 U.S.C. § 18021(a)(1).

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

57. Plaintiffs are neither health insurance issuers nor purchasers of qualified health plans.

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

58. The Weldon Amendment denies funds made available in the Consolidated Appropriations Act of 2012 to any federal, state, or local agency, program, or government that "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." Pub. L. No. 112-74, §§ 506, 507, 125 Stat. 786, 1111-12 (Dec. 23, 2011).

RESPONSE: This is an incomplete statement of a proposition of law, not a statement of material fact. The Weldon Amendment defines the term "health care entity" to include "a health insurance plan." *See* Pub. L. No. 112-74, § 507(d)(2) (2011), in App

59. The Church Amendment protects individuals from being required to "perform or assist in the performance of any part of a health service program or research activity funded . . . by the Secretary of Health and Human Services if his performance or assistance . . . would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d).

RESPONSE: This is an undisputed proposition of law, not a statement of material fact.

60. The preventive services covered by the regulations "do not include abortifacient drugs." HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), *available at* http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html (last visited Sept. 27, 2013); *see also* IOM REP. at 22 (recognizing that abortion services are outside the scope of recommendations), AR at 320.

RESPONSE: This is a disputed proposition of law, not a statement of material fact. Defendants' regulations are not evidence of the fact asserted. Further, Ulipristal (trade name "ella") is a close analogue to the abortion drug RU-486, with the same biological effect—that is, it can induce an abortion even after implantation. There is no authoritative agency interpretation of the term "abortion" in the context of the Weldon Amendment, the Government cites no statutory definition, no medical definition, and no case interpreting the term in that context.

Stedman's Medical Dictionary, for example, defines "abortion" as the "[e]xpulsion from the uterus of *an embryo* or fetus [before] viability." STEDMAN'S MEDICAL DICTIONARY 4 (27th ed. 2000) (emphasis added). On this definition, some of the Mandate's covered services clearly qualify as "abortion."

Further, Defendants' definition of pregnancy and when an abortion occurs is contradictory with the College's beliefs on the subject.

61. The list of FDA-approved contraceptives includes emergency contraceptives such as Plan B. *See* IOM REP. at 105, AR at 403.

RESPONSE: Undisputed that the list of FDA-approved contraceptive includes emergency contraceptives such as Plan B, but, as stated in Plaintiffs' response to paragraph 60, which is incorporated herein, emergency contraceptives (such as Plan B and ella) can also act as abortifacients.

62. The basis for the inclusion of such drugs among safe and effective means of contraception dates back to 1997, when the FDA first explained why Plan B and similar drugs act as contraceptives rather than abortifacients. *See* Prescription Drug Products; Certain Combined Oral Contra for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) (noting that "emergency contraceptive pills are not effective if the woman is pregnant" and that there is "no evidence that [emergency contraception] will have an adverse effect on an established pregnancy"); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery.").

RESPONSE: Disputed and unsupported. The cited regulation does not support this assertion. Namely, it does not describe "[t]he basis for the inclusion of [emergency contraceptives] among safe and effective means of contraception." In addition, Defendants' regulations are not evidence of the fact asserted.

63. In light of this conclusion by the FDA, HHS informed Title X grantees, which are required to offer a range of acceptable and effective family planning methods—and, except under limited circumstances, may not offer abortion—that they "should consider the availability of emergency contraception the same as any other method which has been established as safe and effective." Office of Population Affairs, Memorandum (Apr. 23, 1997), http://www.hhs.gov/opa/pdfs/opa-97-02.pdf (last visited Sept. 27, 2013); *see also* 42 U.S.C. §§ 300, 300a-6.

RESPONSE: Undisputed that the HHS so informed Title X grantees, but the truth of

the underlying assertions is disputed.

64. Representative Weldon, the sponsor of the Weldon Amendment, did not consider the word "abortion" in the statute to include FDA-approved emergency contraceptives. *See* 148 Cong. Rec. H6566, H6580 (daily ed. Sept. 25, 2002) ("The provision of contraceptive services has never been defined as abortion in Federal statute, nor has emergency contraception, what has commonly been interpreted as the morning-after pill. . . . [U]nder the current FDA policy[,] that is considered contraception, and it is not affected at all by this statute.").

RESPONSE: Disputed and unsupported. Defendants' self-serving selection of the legislative history of the statute or individual Congresspersons' statements does not provide evidentiary support for the underlying factual statement. "What motivate[d] one legislator to make a speech about a statute [in 2002] is not necessarily what motivate[d] scores of others to enact it" in 2012. *United States v. O'Brien,* 391 U.S. 367, 384 (1968); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 457 n.15 (2002) (rejecting reliance on floor statements); Further, as stated in Plaintiffs' response to paragraph 60, incorporated herein, emergency contraceptives (such as Plan B and ella) can also act as abortifacients.

Respectfully submitted, this 7th day of February, 2014.

/s/ Gregory S. Baylor

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CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs, Gregory S. Baylor, hereby certifies that counsel for Defendants were served with the preceding document by the Court's electronic filing system.

/s/ Gregory S. Baylor
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