IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

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| GRACE SCHOOLS and BIOLA UNIVERSITY, INC.<br><br>*Plaintiffs,*<br><br>v.<br><br>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,<br><br>*Defendants.* | ) | Case No. 3:12-cv-459 JD |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTIONS FOR PRELIMINARY INJUNCTION AND SUMMARY MOTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

The Schools are religious institutions that were created for religious reasons, hold religious beliefs, are comprised of religious people, and pursue religious objectives. Am. Compl., DE 54, ¶ 21-23, 52-53. 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. Am. Compl., DE 54, ¶ 37, 65. The Schools believe, as a matter of religious commitment, that this dignity and entitlement to special protection arises at the moment of conception. Am. Compl., DE 54, ¶ 32, 65. They believe that violating the special dignity of God's unique image bearers is a grave sin that disrupts their communities' relationship with God Himself and risks God's judgment. Am. Compl., DE 54, ¶ 34, 66.

Those beliefs translate into positive actions and the avoidance of certain behaviors. First, positive actions: they draw the members of their community from among those who hold and live out their shared religious convictions. This community includes students, faculty, and staff. Am. Compl., DE 54, ¶ 28-29; *see also* Am. Compl., DE 54, ¶ 66-67. The community holds a collective desire to glorify God through all it believes, says, and does. The Schools nurture and foster this community, encouraging obedience to their understanding of God's laws and responding to disobedience to those same laws. The Schools draw their members from among those who share their beliefs about the sanctity of life. Am. Compl., DE 54, ¶ 36-37, 66-67. The Schools "enforce" those beliefs in a variety of ways. They strive to ensure that their students, faculty, and staff embrace, maintain, and live out their shared religious commitment to the sanctity of human life. Am. Compl., DE 54, ¶ 29, 36-37, 66-67.

Second, avoidance of certain behaviors: the Schools seek to avoid participation in or facilitation of transgressions of their understanding of God's law, including His law about the dignity and value of human life. Among other things, they structure their student and employee health insurance plans to avoid participating in violations of God's law of life and to foster

behavior among members of the community that is consistent with the community's religious values. Am. Compl., DE 54, ¶ 43, 46, 50, 68, 72-76.

The Mandate dramatically undermines the Schools' freedom to live out their religious beliefs in these two ways: avoiding violations of God's law, and fostering community commitment to and compliance with that law. The Schools believe that compliance with the Mandate would constitute sinful facilitation of immoral behavior and would thus be sinful and immoral in itself. And compliance with the Mandate would undermine their freedom to foster a community that shares and strives to live out a set of foundational and definitional religious commitments. Obeying the Mandate would seriously undermine their religiously-based educational mission 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 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 Biola, this would be $31,244,000, annually. *See* Am. Compl. , DE 54, ¶ 71. For Grace, this would be $16,680,500 annually. Am. Compl., DE 54, ¶ 31, 45. 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). For Biola, this would be $1,652,000 annually. For Grace, this would be $854,000 annually. In both scenarios, they would also face liability under ERISA. Regarding the student plans they facilitate, the Schools would be forced to choose between (a) compliance; (b) violation and fines; and (c) stopping the facilitation of a student plan. Given that the School believes that the facilitation of student health coverage is an exercise of its religious beliefs, options (a) and (c) are both unacceptable. Following their religious convictions (option (b)) would subject them to fines, thereby pressuring them to choose a course of action that contradicts their religious convictions.

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 adverse health consequences associated with unintended pregnancy) and equality of the sexes. 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 though the Schools 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 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 fatally undermines the government's contention that applying the Mandate to the Schools furthers any compelling interest. All the alleged benefits of (a) the preventive services mandate generally 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.

The answer is no. According to the government, the Mandate is designed to reduce the incidence of unintended pregnancy and thereby reduce the incidence of adverse health consequences that allegedly accompany pregnancies that are unintended. The questions, then, are (a) whether (and to what extent) free access to abortifacients, particularly emergency

[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 believe 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.

contraceptives, reduces the incidence of unintended pregnancy in general; and (b) whether (and to what extent) forcing the Schools to facilitate free access to abortifacients will reduce unintended pregnancies among the Schools' students and employees. 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 these Schools to facilitate access to abortifacients is particularly unjustified in light of the nature of their workforces and student bodies. Both 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). Members of the Schools' communities consistently obey these moral norms. And the government cannot plausibly argue it has any interest in encouraging disobedience to these norms among members of the Schools' communities. Women with reproductive capacity at the Schools are far less likely to experience unintended pregnancies – the primarily evil the Mandate claims to eliminate – 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 ACA "evens out" preventive care expenses in general, but rather whether the inability of female employees and students at Grace and Biola to obtain abortifacients for free 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, even if they did, these women have expressed their commitment to the

[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").

sanctity of human life and believe that the use of such drugs and devices is sinful. Declaration of Wanda Bollman, ¶¶ 6-7; Declaration of Tonya Lee Fawcett, ¶¶ 6-7; Declaration of Lisa Harman, ¶¶ 6-7; Declaration of Dee Anna Muraski, ¶¶ 6-7; Declaration of Arielle Peters, ¶¶ 6-7; Declaration of Sarah Prater, ¶¶ 6-7; Declaration of Alison Arcadi, ¶¶ 6-7; Declaration of Ketha Boespflug, ¶¶ 6-7; Declaration of Cynthia Cole, ¶¶ 6-7; Declaration of Alanna Godoy, ¶¶ 6-7; Declaration of Wendy Walker, ¶¶ 6-7. Accordingly, representative members of the Schools' communities have explicitly declared that they will not use and do not want coverage for these drugs and devices. Bowman Decl., ¶¶ 8-9; Declaration of Steve Carlson, ¶¶ 8-9; Fawcett Decl., ¶¶ 8-9; Declaration of John French, ¶ 8; Harman Decl., ¶¶ 8-9; Muraski Decl., ¶ 8; Peters Decl., ¶ 8; Prater Decl., ¶ 8; Declaration of David Swain, ¶ 8; Declaration of Peter Wolff, ¶ 8; Arcadi Decl., ¶¶ 8-9; Boespflug Decl., ¶ 8; Cole Decl., ¶ 8; Godoy Decl., ¶ 8; Declaration of Chris Grace, ¶¶ 8-9; Declaration of Ronald Mooradian, ¶ 7; Declaration of Scott Rae, ¶ 8; Walker Decl., ¶¶ 8-9. Third, it can hardly be said that the equal status of the Schools' women of reproductive capacity hinges upon whether they can avoid paying, at most, about $55 for a box of ella or Plan B – an expense that is customarily incurred, if ever, only once or twice in a lifetime. And, if it is truly necessary for the government to make abortifacient drugs available "for free" to members of the Schools' communities, 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, in light of the 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.*, Ind. Code § 22-9-1-3(h)(1)-(2) (2010) (exempting "(1) any nonprofit corporation or association organized exclusively for fraternal or

religious purposes; (2) any school, educational, or charitable religious institution owned or conducted by or affiliated with a church or religious institution" from the discrimination prohibitions in Indiana's Civil Rights Law); 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,[3] 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 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*

[3] Treas. Reg. § 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). Notably, the "internal support" requirement does not apply to seminaries. *Id.* § 1.6033-2(h)(5). Both Grace and Biola operate seminaries. If these seminaries were separate entities, they would be integrated auxiliaries (assuming the IRS deemed them sufficiently related to a church) and thus exempt from the HHS Mandate. It is arbitrary and irrational for the incidental decision of the Schools and their seminaries about their relational structure to determine the seminaries' eligibility for an exemption from the HHS Mandate.

advance any compelling interest when applied to employers who employ employees who share their religious conviction – a category that includes the Schools.[4] 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 denominations. Discriminating against them because of incidental religious structural choices cannot survive scrutiny under either the Establishment Clause or the Administrative Procedure Act.

**STANDARD OF REVIEW**

The Schools move for summary judgment and oppose Defendants' motion for summary judgment. A party is entitled to summary judgment where the evidence demonstrates "that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

This memorandum also constitutes the Schools' reply to Defendants' opposition to their motion for preliminary injunction. Parties seeking preliminary injunctions must establish that they have "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Once these threshold requirements are met, the court balances each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). These considerations operate on a sliding scale, where "the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted." *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).

[4] 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 Oct. 11, 2013). 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 the Schools and numerous others. *See* http://www.cccu.org/news/articles/2013/CCCU-Responds-to-NPRM-Continues-Constitutional-Objection-to-HHS-Contraceptive-Mandate (last visited Oct. 11, 2013). The government apparently ignored or was unmoved by these comments, refusing to make the exemption "fit" the government's own stated rationale.

Finally, the Schools oppose Defendants' motion to dismiss under Rule 12(b)(6) and 12(b)(1). For purposes of Rule 12(b)(6), the court must accept as true the factual allegations in the Schools' complaint. Under Rule 12(b)(1), "jurisdiction must be established as a threshold matter," *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998), and in making such a determination the court "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Id*. at 104.

## ARGUMENT

### I. THE SCHOOLS ARE ENTITLED TO A PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT ON THEIR RFRA CLAIM.

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

The Religious Freedom Restoration Act 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. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). 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*, No. 12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 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 their beliefs. First, the Schools affirmatively live out their religious belief in the dignity of human life by making available to members of their communities health insurance coverage that reflects the communities' shared pro-life beliefs. Second, they create and foster an academic community that encourages its 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. *See Korte v. Sebelius*, 2012 WL 6757353, at *3 (7th Cir. 2012) (holding that for-profit company exercises religion when it excludes morally objectionable items from its employee health plan); *Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013) (same).

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 and student health insurance that correlates with their pro-life beliefs. Left free to exercise their religion in the health insurance context, their 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 members of their communities. Because of the Mandate, however, insurance issuers will sell the Schools plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon the school's execution of a self-certification. Under the Mandate, the Schools may either (a) set up a self-insured plan that includes abortifacients; or (b) set up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them upon the school's execution of a self-certification. If they fail to do either of these, and instead create a self-insurance plan that does not facilitate the availability of abortifacients, they will face fines of $100 per beneficiary per day. In the case of Grace, this is $16,680,500 annually; for Biola, this is $31,244,000 each year.

Defendants have also made it impossible, as a practical matter, to avoid facilitating the use of abortifacients by dropping employee health insurance altogether (something that would transgress their 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 is $854,000 for Grace and $1,652,000 for Biola.

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 and students, all of whom

voluntarily joined their respective communities. It directly and significantly interferes with their ability effectively to communicate their pro-life message to their students, faculty, staff, and the broader community. It directly and significantly interferes with their pursuit of their mission to grow the spiritual maturity of members of their community by fostering obedience to and love for God's laws.

Second, it forces them 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 members of their community to abortifacients as a consequence of their employment with them) is, in the eyes of the School, sinful and immoral. The Schools believe that sin adversely affects their relationship 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 an academic community 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. (Defs.' Br. at 2) (indignantly suggesting that it is "extraordinary" for a religious School to want to avoid helping the co-

religionist members of its voluntary religious community to transgress religiously-based community ethical standards); (*id*. at 12).[5]

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. Defs.' Br. at 11-12. (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 the Schools' 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 Schools' own insurer or third-party administrator.

Defendants contend that executing the self-certification is essentially no different than actions the Schools took prior to the existence of the Mandate. Defs.' Br. at 11-12. More specifically, they observe that, prior to the existence of the Mandate, the Schools informed their insurer or third-party administrator that they did not want coverage of abortifacients, and claim that executing the self-certification is no 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 practice (telling their insurer or third-party administrator 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

[5] See section I.A.4 *infra* for a discussion of the Schools' freedom to set and enforce conduct standards for members of their voluntary religious communities and of the Mandate's interference with the exercise of that freedom.

conscience, is astonishing.[6] 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."

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. Professor Scott Rae, Dean of the Faculty and Professor of Christian Ethics at Biola's Talbot School of Theology, declared that complying with the Mandate, even with its so-called "accommodation," would be unethical "because it puts the university in the position of facilitating the provision of these medications, which, when taken as designed, produce an outcome that we believe constitutes sin. The university's complicity in this accommodation is just as problematic as providing these services ourselves."[7] Declaration of Scott Rae, ¶ 8. And non-compliance, either through dropping employee and/or student coverage, or by continuing their current coverages (which exclude abortifacients), is not possible, either financially or ethically.

[6] 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?

[7] The government's contention that the burden on the Schools' religious exercise is "too attenuated," Defs. Br. at 17-20, is, for all intents and purposes, simply a disguised rejection of the Schools' ethical determination that doing a sinful act, paying for a sinful act, and otherwise facilitating a sinful act are all on the wrong side of a religiously drawn moral line. The government seems to be suggesting that as long as it can identify something worse it *might* do to the Schools, the thing it is *actually* doing cannot be deemed a burden on their religious exercise.

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 entry into their communities. (Am. Compl., DE 54, ¶¶ 27, 28, 29, 56.) And, it bears noting, faculty, staff, and students all voluntarily join these communities. Indeed, the Biola and Grace 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. (Am. Compl., DE 54, ¶¶ 21, 22, 53, 55.) This objective is pursued, in part, through faculty and staff modeling behaviors that bring glory to God. (Am. Compl., DE 54, ¶¶ 23, 28, 36, 37, 55, 56, 58, 59, 66, 67.)

Foisting unwanted access to free abortifacients upon the Schools' employees, their families, and students tangibly interferes with this key component of the Schools' missions. "Biola believes that integrity and authenticity should be hallmarks of every believer." (Am. Compl., DE 54, ¶ 59.) 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 like Grace, for example, cannot out of one side of its mouth say "those who live and work at the institution . . . are expected to respect and uphold life-affirming practices" (Statement of Community Lifestyle, incorporated into applications for employment) 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 mission; in the language of the Religious Freedom Restoration Act, this interference "substantially burdens" the Schools' religious exercise.

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

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 is a few aspects of Defendants' argument that merits 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 liberty. The Schools' ethical conclusion is that sponsoring health plans that grant 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. 707, 716-18 (1981). *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

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

[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 with the Schools. As evidenced by the 21 declarations filed in support of Plaintiffs' Cross-Motion for Summary Judgment, the Schools' employees wholeheartedly share their pro-life beliefs and their objection to the government coercively attaching its scheme for facilitating abortifacient access to their employee health plans. Defendants plainly misunderstand both the nature of the Schools' religious communities and the scope of the freedom the Schools have to foster the religious character of those communities. 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." 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).

essential cog in the government's mechanism. But they do not believe that RFRA prevents the government from giving their employees and/or students free abortifacients; 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 Biola and Grace consider themselves exempt and therefore have declined to included 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 actually making does not require the Court to conclude that the Department is substantially burdening religious exercise in the imagined hypothetical.

Relatedly, the government seems to be convinced that the *only* way it can enhance access to abortifacients for the Schools' employees and students is to somehow conscript the Schools into their scheme. (Defs.' Br. at 14.) However, Defendants fail to explain why this must be so. There is no reason why abortifacients *must* be provided in connection with employer-based or school-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.

The Mandate undoubtedly imposes a "substantial burden" upon the Schools' religious exercise under the test set forth by the Seventh Circuit: "a substantial burden on the free exercise of religion, within the meaning of the [Religious Freedom Restoration] Act, is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains

conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). The Mandate does all these things to the Schools, and thus substantially burdens their religious exercise.

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

Forcing the Schools to facilitate access to abortifacients for their students, employees, and their families is not the least restrictive means of advancing any compelling interest. 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.[9] (Defs.' Br. at 26; 78 Fed. Reg. 39,874.) Grace and Biola are such employers. Their employees (and students) share their religious convictions, including their convictions regarding the dignity of human life and the immorality of abortifacient use. More concretely, multiple employees declared that they believe that the use of abortifacients is sinful and that they would not engage in such use. *See, e.g.*, Declaration of Alanna Godoy, ¶ 6, 7 ("I believe, as a matter of Christian conviction, that using abortifacient drugs and devices like ella and Plan B is sinful and immoral. I would not use abortifacients.") They further revealed that there is no detectible desire among their co-workers for free abortifacients. *See, e.g.*, Declaration of Alison Arcadi, ¶ 12 ("I am unaware of any instance in which a Biola employee or student ever complained that the employee or student plan excluded abortifacients."); Declaration of Dee Anna Muraski, ¶ 10 ("No employee or student has ever expressed to me a desire that these drugs and devices be added to Grace's plans."); Declaration of Sarah Prater, ¶ 13 ("I am not aware of a single employee that rejects [Grace College's] pro-life beliefs.")

[9] By exempting even a narrow category of religious employers, Defendants cast serious doubt on their contention (Defs.' Br. at 17-20) 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.

This undisputed reality—that the Schools' students and employees are unlikely to use the abortifacients to which the Schools object—conclusively proves by itself that Defendants have no interest in imposing the Mandate on Grace or Biola, 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).[10] *See also O Centro*, 546 U.S. at 430-31; *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *15 (D.D.C. Nov. 16, 2012). For this reason alone, Defendants cannot satisfy strict scrutiny, and therefore both a preliminary injunction and summary judgment in the Schools' favor is warranted.

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 benefits of preventive services in general and of making access to those services cost-free. (Defs. Br. at 20-22.) 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, their families, and students sufficiently advances the stated goal of reducing the adverse health effects associated with unintended pregnancies. The 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

[10] 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)).

Pregnancy."[11] 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 are besides 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 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.[12]

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

[11] 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)

[12] *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 Oct. 11, 2013).

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 Biola and Grace 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 this presupposition 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 proves 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 Grace and Biola to pay for 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*.[13] 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.[14] 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 average rate in states without mandates in 2006 was 50.38%.[15] Plainly, contraceptive mandates are not an effective means of noticeably diminishing unintended pregnancies. Therefore, even if

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[13] Strategic Pharma Solutions, *Contraception in America: Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf (last visited Oct. 11, 2013) [hereinafter *Contraception in America*].

[14] *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 Oct. 11, 2013); Guttmacher Inst., *Insurance Coverage of Contraceptives*, http://www.ncsl.org/Issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Oct. 11, 2013).

[15] 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.

reducing unintended pregnancies and the corollary adverse health events might be deemed a "compelling interest" (which is contested) 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 will not advance Defendants' stated interest in equalizing preventive care expenditures between the sexes. Grace and Biola 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 Grace or Biola employees or students will ever use abortifacients, and, in the event they do, the cost of those items is not prohibitive. *See, e.g.*, Declaration of Tonya Lee Fawcett, ¶ 13 ("Grace employees are sufficiently well-compensated to be able to bear the relatively modest cost of abortifacients like ella and Plan B in the unlikely event that an employee elected to use those drugs."); Am. Compl., DE 54, ¶ 109 (Plan B widely available for between $30 and $65; ella widely available for $55).

C. The Balance of the Equities Warrants Entry of a Preliminary Injunction on the Schools' RFRA Claim.

This Court should preliminarily enjoin Defendants from applying the Mandate to the Schools because they "will suffer irreparable harm if a preliminary injunction is denied" and have established (far more than) "some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). Plaintiffs have undeniably met these threshold requirements, and thus this Court should balance each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*,549 F.3d 1079, 1100 (7th Cir. 2008). The balance of the equities tips heavily in the Schools' favor.

Grace's next employee plan is scheduled to begin on January 1, 2014. The Mandate will apply to that plan in the absence of injunctive relief. Accordingly, Grace is right now facing an unenviable choice: either comply with the Mandate and transgress its duties to God, or drop its employee plan and face enormous penalties. Although Biola's employee plan begins a few

months later (April 1, 2014), there is no compelling reason to hold off on granting it preliminary injunctive relief as well.

On the other side of the ledger, granting injunctive relief will not undermine the government's stated interests. Defendants concede that there is no reason to impose the Mandate on employers whose employees share their religious convictions about abortifacients. Giving free access to abortifacients to the Schools' employees will neither reduce unintended pregnancies nor advance equality of the sexes. *See, e.g.*, Declaration of Wendy Walker, ¶ 15 ("I reject the contention that I must be given free access to abortifacients to experience equality based on sex.").

## II. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR 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 *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 880 (1990)). As a result the Mandate is subject to strict scrutiny, *Lukumi*, at 546.[16] As discussed above, it cannot meet that standard.

### 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*,

[16] 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).

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.

As explained above, the Mandate here exempts 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,[17] yet the government refuses to exempt Plaintiffs 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 Plaintiffs, 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 Plaintiffs 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)). The government's explicit rationale for this exemption is that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on

[17] 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).

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 Plaintiffs "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 [Plaintiffs]." 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 often schools and often automatically include seminaries—are "more likely than" the devoutly Christian Plaintiffs at Grace and Biola in this case "to employ people of the same faith who share the same objection" that the Plaintiffs share. The government has 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 Plaintiff entities (except the verified facts indicating how deeply devout their 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.

With respect to Grace Schools' seminary, the government's distinction is self-contradictory. Under tax regulations, seminaries are in general are automatically considered "integrated auxiliaries" of churches. *See* 26 C.F.R. § 1.6033-2(h)(5) (creating a "special rule" that "seminaries" will be considered integrated auxiliaries without needing to satisfy some of the ordinary criteria of the integrated auxiliary rule). But for reasons entirely incidental to this Mandate Grace's seminary is not an "integrated auxiliary." Grace Schools, Inc. consists of both Grace College and Grace Theological Seminary; Biola University operates the Talbot School of Theology. If Grace Theological Seminary were a separate entity, it would not need to satisfy the internal support test and could thus be considered an integrated auxiliary, and would therefore be exempt from the Mandate. The only difference between Grace Theological Seminary and a stand-alone seminary is simply that Grace's seminary is operated by Grace Schools, rather than being a separate entity. As a result Grace's seminary is denied an exemption for an arbitrary reason that has no relationship to advancing the purposes of the Mandate, while the Mandate

itself has adopted standards generally exempting seminaries even if they fail important parts of "integrated auxiliary" criteria under 26 C.F.R. § 1.6033-2(h).

Thus the government has decided that some devout religious non-profit entities can be exempt from the Mandate but not others, based on counter-factual 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 [Plaintiffs' 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 Plaintiffs without rendering its Mandate not generally applicable.

The government has 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 Plaintiffs cannot.[18] This leaves many employees without abortifacient coverage *delivered through their employers and their employers' insurers*—those employees will have to receive the Mandate's benefits somewhere else. Yet the government claims it has a compelling interest in forcing that same Mandated coverage to come to Plaintiffs' employees through Plaintiffs' own insurers and third party administrators. The government has 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. Also notably, the government has decided not to apply the Mandate to religious sects opposed to 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.[19]

[18] *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).

[19] 26 U.S.C. §§ 5000A(d)(2)(a)–(b).

The Mandate is also not generally applicable because PPACA itself awards the Government unlimited discretion to shape its scope. The Government "*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, the Government's discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46,623 (asserting that § 300gg-13 grants HHS/HRSA "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 assessments, the government has 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 Plaintiffs—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*:

> 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 PPACA, "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[20] The government also asserts post hoc logistical reasons for the grandfathering provision, but all of those reasons are likewise secular, yet they exempt tens of millions of women from the Mandate while refusing to exempt similarly situated employers such as Plaintiffs. 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).

The government's many exemptions here span the gamut of reasons while still refusing a religious exemption to Plaintiffs. 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 Plaintiffs 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

[20] 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).

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 Plaintiffs if they 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 Plaintiffs 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). The government's explicit rationale for superimposing this tax code distinction onto a requirement of birth control coverage is that the government claims, without explanation, that "integrated auxiliary" schools and seminaries have employees that share their employers' beliefs to some significantly greater extent than to the Plaintiffs in this case. *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. The Government made its own subjective decision about which religious employers to exempt and which not to. It is a mystery how the Government 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, or both are seminaries.[21] Some schools and seminaries 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.[22] The decision is instead a raw political decision, whereby government officials decided it could form a basis to win an election and public debate if it refused to exempt Plaintiffs, but not if it refused to exempt §6033(a)(3)(A)(i) or (iii) entities.[23] *See Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive

[21] 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)).

[22] *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 I.R.C. § 54(f) (§ 6033 under the current tax code) 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.")

[23] *See, e.g.*, Helene Cooper and Laurie Goodstein, "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/2012/02/11/health/policy/ obama-to-offer-accommodation-on-birth-control-rule-officials-say.html?pagewanted=all&_r=0 (last accessed October 10, 2012) (describing the proposal to offer a limited exemption as a political decision).

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 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 the government 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 Plaintiffs are refused an exemption but integrated auxiliaries are given an exemption. The government has essentially conceded that exempting integrated auxiliaries is entirely tolerable in the context of this Mandate. Refusing the same exemption to Plaintiffs violates neutrality towards their religious beliefs.

Consequently, the Mandate is subject to strict scrutiny failing the requirements both of neutrality and of general applicability. For these reasons, the Mandate violates the Free Exercise Clause, since as discussed above it cannot satisfy strict scrutiny.

## III. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ESTABLISHMENT CLAUSE CLAIM.

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption, as discussed above, sets forth the Government's notion of what "counts" as religion and what doesn't count for the purposes of who will be exempt under the Mandate. And in doing so it has exempted and refused to exempt entities that are substantially similar with respect to the Mandate: schools and seminaries that are integrated auxiliaries of churches receive an exemption, while other devoutly religious schools and

seminaries are not exempt. But the Government may not create a caste system of different religious organizations, belief-levels, and "accommodations" when it imposes a burden. Instead, "when we are presented with a [law] granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Valente*, 456 U.S. at 246; *see Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (stating that the Government "must treat individual religions and religious institutions 'without discrimination or preference.'"); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible government inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992). While the government may want the analysis to end where no specific reference is made to denomination in the statute, apparent facial neutrality cannot overcome making "deliberate distinctions between different religious organizations." *Valente*, 456 U.S. at 246, fn. 23.

In *Valente* the Court held that a state law governing the registration and disclosure rules for charitable organizations, which made a distinction based on whether or not a religious organization received fifty per cent of its contributions from members or affiliated organizations, violated the Establishment Clause. Despite the State's argument that the distinction in the statute was "eminently sensible," in light of its secular purpose, the apparent premises underlying the chosen distinction were without support. *Id.*, at 248–49. The Court instead found that the law made "explicit and deliberate distinctions between different religious organizations" and had the effect of distinguishing between "well-established churches that have achieved strong but not total financial support from their members, on the one hand, and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members, on the other hand." *Id.* at 246 n. 23.

Here the Government has used its discretion to impose almost exactly the same kind of 50% of income criteria to distinguish between exempt and non-exempt (but similar) entities as it imposed unconstitutionally in *Valente*. Integrated auxiliaries of a church under Internal Revenue Code § 6033(a)(3)(A)(i) can be schools and seminaries, but on the other hand, schools and seminaries like Plaintiffs can be devoutly religious and yet not considered integrated auxiliaries. Whether an entity is an "integrated auxiliary" is determined by various criteria summarized in 26 C.F.R. § 1.6033–2. In general, this criteria asks whether an entity is "affiliated" and "internally supported" by a church or convention of churches. Being "internally supported" means that if an entity "[o]ffers admissions" to the general public—as schools and seminaries do—it cannot also "[n]ormally receive[] more than 50 percent of its support from" contributions and other non-church sources. In other words, determining whether an entity is an integrated auxiliary is eerily similar to the fifty percent income source rule struck down in *Valente*. And like the *Valente* rule, the integrated auxiliary criteria here has no "eminently sensible" nexus to the application of that rule in the context of an abortifacient coverage Mandate. The government's stated reason for imposing the integrated auxiliary rule to exclude Plaintiffs is the unfounded theory that Plaintiffs' employees are less religiously devoted to Plaintiffs' beliefs than are the employees of integrated auxiliaries. But the beliefs of employees is a criterion found nowhere in 26 C.F.R. § 1.6033–2. Meanwhile a school can be considered an integrated auxiliary if it satisfies 26 C.F.R. § 1.6033–2, while Plaintiffs' schools are deprived an exemption solely because they don't satisfy that criteria, without the existence of any rationale in that criteria suggesting that they are less devout than integrated auxiliary schools. Moreover, seminaries are explicitly exempted from that section's "fifty percent rule," see 26 C.F.R. § 1.6033–2(h)(5), and yet Grace's seminary is not because it is a subdivision of a broader school non-profit entity instead of being a freestanding seminary separate from its devout sister school.

The government's decision to deny an exemption to devout Christian institutions of learning, based on unrelated and subjective criteria superimposed from IRS rules relating to filing tax returns, is an act of discrimination among religious entities that violates the

Establishment Clause. The Government's premise, however, has no support either in the record or in the history of the § 6033 definition and its previous iterations. Other religious organizations not included within § 6033(a)(3)(A)(i) or (iii) have been given exemptions by the IRS in other Code provisions, out of First Amendment concerns over subjecting them to financial oversight by the IRS.[24] Using a definition that is inadequate for encapsulating the breadth of religious doctrines, denominations and structures that inform everything along the continuum from houses of worship to non-exempt, non-profit religious employers practicing their beliefs through services to the public, the Government has made a judgment about what individual *employees* beliefs may or may not be depending on which employer they *choose* to work for.[25] There is no evidence that the Government has or can identify to justify its exemption of integrated auxiliaries but not Plaintiffs as non-profit religious entities on the basis of speculation about employee beliefs and institutional dedication to those beliefs. Instead, the Mandate's religious exemption draws an effectively random line that distinguishes between denominational or structural differences among various religious employers. Rather than treating all religious organizations and denominations equally, the Mandate is one of those regulations that "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents."

[24] *See* comment by Church Alliance, *supra*, at note 6 (listing groups such as educational organizations affiliated with a church or operated by a religious order described in § 170(b)(1)(A)(i), mission societies sponsored by or affiliated with one or more churches or church denominations that conduct or direct one-half or more of their activities towards persons in foreign countries, organizations described in § 6033(a)(3)(C) (which is a religious organization described in § 501(c)(3) other than a private foundation, the gross receipts of which in each taxable year are normally not more than $5,000) and organizations exempt from filing Form 990 under the authority of Revenue Procedure 96-10, 1996-1 C.B. 577). While some of these organizations may or may not qualify as integrated auxiliaries under § 6033(a)(3)(A)(i), the tortured history of the term "integrated auxiliaries" and the nebulous congressional intent behind it cut against the Government again, as it is impossible to say the term is moored in any objective criteria that help delineate how "religious" an organization is or is not. *See generally* Gaffney, *supra*, at note 7; comment by Church Alliance, *supra*, at note 6.

[25] It is worth noting that in the case of all non-exempt religious employers, including those contributing most visibly to society, such as religious hospitals, colleges, universities and charities, employees have chosen to work for these employers and implicitly agreed to the terms, conditions and benefits of employment. *See* comment by United States Conference of Catholic Bishops dated March 20, 2013, *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf (last visited Oct. 9, 2013).

*Valente*, 456 U.S. at 246. The similarities to *Valente* are fatal to the Government's argument. On this basis the rule should be invalidated for violating the Establishment Clause.[26]

## IV. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FREE SPEECH CLAUSE CLAIM.

The Mandate additionally violates the First Amendment by coercing Plaintiffs to provide for speech that is contrary to its religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. 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 Plaintiffs to speak 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 or an IUD 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

[26] As set forth above, the Government cannot meet the compelling governmental interest standard.

"accommodation" coerce the Plaintiffs 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 Plaintiffs' insurers or obtained by Plaintiffs' third party administrators. Second, in the case of self-insured entities such as Grace Schools, the Mandate explicitly compels the schools, if they want to religiously object to the Mandate, to engage in speech that designates their third party administrator to obtain coverage of abortifacients in favor of abortifacients. This coerced speech is contained in the specialized "certification" that self-insured entities "must" execute, which includes not only a religious objection to specific items, but also a declaration that "cite[s] 29 CFR 2510.3–16 and 26 CFR 54.9815– 2713A and 29 CFR 2590.715–2713A, which explain the obligations of the third party administrator." 78 Fed. Reg. at 39,879. This language is legally operative language that by definition is "a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* That designation requires the third party administrator, under ERISA section 3(16)(A)(i), to go out and obtain the contraceptive coverage to which the self-insured entity objects, as part of "a contractual relationship with the eligible organization." *Id*. at 39,879–80. Necessarily then, the required self-certification for self-insured entities such as Grace Schools includes a requirement that the school engage in legally operative speech designating a third party to obtain for its employees the coverage that the entity objects to arranging for. This component of the certification for self-insured entities belies the government's mantra that no entity such as Plaintiffs will have to "contract, arrange, pay or refer for" objectionable coverage. By definition, and by admission in the government's rule, a self-insured entity must specifically "arrange" and "contract" for its third party administrator to obtain the objectionable coverage when the entity specifically declares its "designation" of the third party administrator's duty to do so under ERISA. The government backhandedly concedes that it has violated its own no-contracting, no-arranging rule by saying that "*after* providing third party administrators with a copy of the self-certification," self-insured entities are not involved in contracting, arranging" etc. for contraceptive coverage. *Id.* (emphasis added). They don't

contract or arrange for it *after* the self-certification, because the government coerces them to do so *in* the self-certification.

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 Plaintiffs 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).

## V. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR DUE PROCESS CLAUSE CLAIM.

The Mandate violates the Due Process Clause of the Fifth Amendment because it creates a standardless blank check for Defendants to discriminatorily create and enforce its "religious" exemptions and accommodations. HRSA 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 PPACA provision underlying the Mandate authorizes Defendants to exempt religious employers, directing the agencies to determine the scope of the exemption. Public Health Service Act § 2713 (codified at 42 U.S.C. § 300gg-13); *see also* 76 Fed. Reg. at 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 PPACA and issue unilateral waivers, delays, and exemptions from those requirements without the authority of PPACA 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, July 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 PPACA requires, IRS Notice 2013-45, July 9, 2013, available at http://www.irs.gov/pub/irs-drop/n-13-45.pdf; OPM BAL 13-207, September 30, 2013, available at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-207.pdf; PPACA § 1312(d)(3)(D), 42 U.S.C. § 18032(d)(3)(D). The Executive Branch's unfettered discretion in picking and choosing which parts of PPACA to enforce, while refusing to give exemptions from this Mandate to the Plaintiffs in this case, constitute an exercise of unfettered and illegal discretion under the Due Process Clause.

## VI. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR 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 agency failed to meaningfully consider the comments solicited in promulgating the final rule. Section 706 of the APA provides that courts "shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The APA requires Defendants to follow the procedure found in § 553, which requires administrative agencies to: (1) publish notice of proposed rulemaking in the Federal

Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose. 5 U.S.C. § 553(b) & (c).

"An agency is required to provide a meaningful opportunity for comments, which means that *the agency's mind must be open to considering them*." *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) (internal citations omitted) (emphasis added). The agency's lack of meaningful consideration is highlighted by three facts: (1) the ACA prohibits the Mandate from going into effect until one year after its final form; (2) Defendants insisted, in August 2011, prior to the comment period, that they believed that the Mandate must exist in final form on August 1, 2011; and (3) After adopting the interim August 2011 final rule "without change" in February 2012, Defendants initiated a new regulatory process to accommodate the same objections offered in the 2011 comment period, and then impose that rule finally in August 2013, but made it applicable to plans starting merely six months later in January 2014.

These admissions confirm that the Defendants did not engage in meaningful consideration of comments for interim final rules. Defendants maintain two contradictory positions: that the Mandate can be imposed on Plaintiffs less than six months after its final August 2013 version, because it was *really* finalized in 2011 (or 2012); but, that the comment periods occurring prior to August 2013 did "meaningfully" consider those comments with an "open mind" to not imposing the original final rule, so that the rule *really* wasn't final until August 2013. Both positions cannot be true. If the rule was finalized in 2011 or 2012, the comment periods that happened thereafter were shams. If the comments were meaningfully considered, the rule wasn't really finalized until August 2013 and cannot be imposed on Plaintiffs until their health plans starting *after* August 2014.

The Mandate cannot go into effect until plan years following a one year waiting period after the Mandate is in its final, unchanged form under the ACA. 75 Fed. Reg. at 41,726; *see also* 76 Fed. Reg. at 46,624. Precisely because of this fact, Defendants published the Mandate as an

interim final rule—issued prior to the notice and comment period ordinarily required—on August 1, 2011, with a notice and comment period to follow afterwards. 76 Fed. Reg. 46,621-26. Defendants explain that their reason for the abbreviated regulatory process was that "[m]any college student policy years begin in August" so that if Defendants did not concretize their Mandate prior to the notice and comment period, "many students could not benefit from the new prevention coverage without cost sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year." *Id.* at 46,624. Put succinctly, Defendants desire to bypass normal regulatory procedure under the APA because female college students would be required to wait another year for free contraception, abortifacients, and sterilization if the Mandate was not promulgated in final form by August 1, 2011. By this assertion, the Defendants essentially admit that they never had any intention of meaningfully considering the solicited comments, including those by religious objectors, submitted post-August 1, 2011, because doing so would render Defendants enable to impose the Mandate in August 2012. Defendants never had any "open mind" about whether it is rational to, for example, exempt schools and seminaries that are "integrated auxiliaries" but not exempt the Plaintiffs here, despite that distinction bearing no relationship with birth control coverage.

Finally, Defendants have themselves proven that they were closed to meaningful consideration of the comments issued after August 2011. Defendants initiated a new rulemaking process ("ANPRM") in March 2012 to change the Mandate, *based on the same objections contained in the 200,000 comments that they had previously ignored when they finalized the 2011 Mandate*. The ANPRM and the final rulemaking process culminating in the August 2013 final rule was wholly unnecessary if Defendants actually considered those same objections prior to finalizing the August 2011 Mandate in February 2012.

The Defendants' disregard of the notice and comment process has led to palpable injury of Plaintiffs. The Mandate should have exempted them entirely due to the irrationality of exempting similar integrated auxiliaries and to the illegality of the Mandate under RFRA and the Constitution. Moreover, Plaintiffs must comply with the Mandate and its accommodation

starting as early as January 2014, instead of being allowed to wait as specified in the PPACA until the start of their plan years that begin more than a year after the August 2013 final rule. The Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Defendant agencies until they finalize a Mandate after "meaningful consideration" of objections.

B. The Mandate is Arbitrary and Capricious.

The Mandate violates the APA for being "arbitrary and capricious" under 5 U.S.C. § 706(2)(A), *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971), for: (1) failing to sufficiently consider the objection that the requirement to provide contraceptives which act as abortifacients would violate the religious beliefs of employers subject to the Mandate; and (2) subjecting nearly identical religious organizations to differential treatment under the narrow religious exemption to the Mandate.

Defendants failed to respond to comments that the Mandate would violate entities' religious beliefs. Many commenters raised concerns "about paying for such [contraceptive] services and stated that doing so would be contrary to their religious beliefs," and that "the narrower scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act. *See, e.g.*, 78 Fed. Reg. at 39,886–88. However, Defendants responded only with conclusory statements that the Mandate and its accommodation do not substantially burden religious exercise and pass the strict scrutiny test. *Id.* As described above, these arguments are severely wrong as a matter of law. Defendants ignore the fact that Plaintiffs object not merely to "paying" but to facilitating objectionable coverage through the accommodation. Defendants falsely offer the idea that "multiple degrees of separation" and "attenuation" exist between what Plaintiffs object to and their religious beliefs, when the "substantial burden" test does not and legally cannot render that sort of theological judgment. *See Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (rejecting the idea that being "sufficiently insulated" from evil undermines a plaintiff's "substantial burden,"

because "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . .").

Defendants ignored altogether the fact that self-insured entities are required to arrange and contract for their third party administrator to obtain objectionable coverage, and falsifies as a matter of fact that self-certification "simply confirms that an eligible organization is a nonprofit religious organization with religious objections." 78 Fed. Reg. at 39,887. Defendants' contention that its Mandate is supported by a compelling interest disregards the fact that generic "health" interests cannot, by definition, be compelling because they are too broadly formulated, and also fails to address the mere correlation and lack of causal connection or evidence between mandating coverage on the one hand, and then the items increasing usage, that usage decreasing unintended pregnancy, and that decrease necessarily reducing adverse effects to a compelling degree. *Id.* Defendants repeat without citing any rationale or evidence the assertion that it is legitimate to exempt integrated auxiliary schools and seminaries from this Mandate but not to exempt entities such as Plaintiffs. *Id.* This renders the Mandate's exemption scheme arbitrary under the APA. Thus, the agency utterly failed to "*cogently explain* why it has exercised its discretion in a given matter." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). The Defendants also defended the alleged violation of First Amendment freedoms with entirely conclusory statements that the Mandate is constitutional. *Id.*

"A classification such as this one must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that *all persons similarly circumstanced shall be treated alike*." *Nazareth Hosp. v. Sebelius* No. 10-3513, 2013 WL 1401778, at *9 (Apr. 8, 2013) (citing *Medora v. Colautti*, 602 F.2d 1149, 1152 (3d Cir. 1979)) (emphasis added). The invalidity of federal regulations promulgated by an agency which results in disparate treatment of similarly-situated organizations without sufficient justification is illustrated in *Nazareth Hospital*, which invalidated a regulation on APA and equal protection grounds that provided funding to some hospitals, but denied funding for identical services at other hospitals. *Id.* at *15. The Court held

that the distinctions made in the agency's rulemaking decisions did "not justify the disparate treatment of two groups of hospitals—hospitals in Pennsylvania that serve [certain non-Medicaid, low-income patients] versus hospitals in other states that also serve non-Medicaid-eligible, low-income patients under a . . . waiver." *Id*. at *9. The Court found that the government's reasons for the disparate treatment were "not supported by substantial evidence or *consistent with the public comments in the rulemaking record*." *Id*. at *7 (emphasis added).

The Mandate in this case is arbitrary and unsupported by evidence for similar reasons. It irrationally distinguishes between exempt integrated auxiliary schools and seminaries while refusing to exempt Plaintiffs' theological schools and seminary. This distinction is arbitrary with respect to the purposes of the Mandate and the integrated auxiliary rule, which on their face have no nexus to the beliefs of employees at different religious entities. The government has no basis for treating nearly identical institutions differently, simply because of a difference in structure under the internal revenue code as an "integrated auxiliary" of a church. This Mandate is inconsistent with the public comments which expressed concern that the Mandate would require religious employers to violate their sincerely-held beliefs, in violation of the APA.

C. The Mandate is Contrary to Law.

The APA forbids agency action from being "contrary to law" and "constitutional right" under 5 U.S.C. § 706(2)(A) & (B). *See Volpe*, 401 U.S. at 415–17. The Plaintiffs' claim is predicated on the fact that the Mandate violates several provisions of federal law. These include the provisions discussed above, such as RFRA and the First and Fifth Amendments. They also include provisions of the Affordable Care Act itself, the Weldon Amendment, and the Church Amendment, in violation of the APA.

1. *The Mandate is contrary to the ACA's ban on abortion mandates*.

The Mandate is contrary to the provision of the ACA that states that nothing in Title I of the ACA, which includes the provision governing "preventive services," "shall be construed to require a qualified health plan to provide coverage of [abortion] services…as part of its essential health benefits for any plan year." Section 1303(b)(1)(A) (codified at 42 U.S.C. § 18023). The

Mandate requires coverage of certain "FDA-approved contraceptives" which act as abortifacients,[27] in that they cause the demise of human embryos after conception and before and/or after implantation in the uterus. Destroying a human embryo that is in a woman's body constitutes an action that is abortifacient, that destroys a new human life, and that terminates a pregnancy.[28] Accordingly, the Mandate contradicts the requirements of the ACA itself, in violation of the APA.

2. *The Mandate is contrary to the Weldon Amendment*.

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

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

[27] The Mandate requires coverage of the morning after pill (Plan B), the week after pill (ella), and intrauterine devices, which can act as abortifacients by preventing implementation of a fertilized human embryo. Accordingly, the Mandate violates the Weldon Amendment, contrary to the APA.

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

3. *The Mandate is contrary to the Church Amendment.*

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

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

## CONCLUSION

For the foregoing reasons, the Schools respectfully request that this Court grant their motions for preliminary injunction and summary judgment, and deny Defendants' motions to dismiss and for summary judgment.

Respectfully submitted this 11th day of October, 2013.

/s *Gregory S. Baylor*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2013, 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*