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

GRACE SCHOOLS and BIOLA UNIVERSITY, INC.	)	
Plaintiffs,	)	
	)	Case No. 3:12-cv-459 JD
v.	)	
KATHLEEN SEBELIUS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT

I. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR RFRA CLAIM.

The Seventh Circuit's November 8, 2013, decision in *Korte v. Sebelius*, 2013 WL 5960692, leaves no doubt that Defendants are violating the Religious Freedom Restoration Act. Most significantly, the Court of Appeals explicitly rejected Defendants' erroneous conception of "substantial burden." It also held that the Mandate is not the least restrictive means of advancing a compelling governmental interest. Accordingly, the Schools are entitled to summary judgment on their RFRA claim.

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

In their prior briefing, the Schools argued that the Mandate substantially burdened their religious exercise because it (1) pressured them to engage in conduct forbidden by their faith (*i.e.*, provide health insurance plans that give beneficiaries access to abortion-inducing drugs and devices); (2) made it impossible for them to continue providing for the physical and spiritual well-being of their employees and students by offering health insurance plans that would not guarantee access to abortifacients; and (3) undermined their efforts to foster obedience to God's laws by members of their respective communities. The Schools argued that these burdens were "substantial" for RFRA purposes under the Seventh Circuit's decision in *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997) ("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[1] of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.").

Defendants, in their preliminary injunction, dismissal, and summary judgment briefing, proposed a far narrower interpretation of RFRA's "substantial burden" requirement. They rejected the idea that a law substantially burdens religious exercise if it imposes significant pressure upon the claimant to either violate his beliefs or to forego religiously motivated conduct. *See, e.g.*, Defendants' Reply Memorandum in Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, and Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment, at 8-10 (ECF No. 76) [hereinafter "Defs.' Opp."]. Defendants contended, rather opaquely, that courts must also "examine the alleged burden imposed by the challenged regulation *as a legal matter* outside the context of plaintiffs' religious beliefs . . . that is, from the perspective of an objective observer." Defs.' Opp. at 10 (emphasis in original). Defendants also argued that any burden on the Schools' religious exercise was too "attenuated" to be substantial because of the "distance" or "steps" between the Schools and an employee's or student's use of abortifacients. *Id.* at 11-13. Defendants relied upon the district court decisions in *Korte v. Sebelius*, 912 F. Supp. 2d 735 (S.D. Ill. 2012), *Grote Indus. v. Sebelius*, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012), and Judge Rovner's dissent from the order granting an injunction pending appeal in *Grote*, 708 F.3d 850 (7th Cir. 2013).

One week ago, the Seventh Circuit agreed with the Schools' argument and rejected the government's. The Court of Appeals explicitly repudiated the government's key contentions regarding "substantial burden." It reversed the very district court decisions upon which Defendants relied. It embraced the Schools' understanding of RFRA, declaring that "[i]t is

[1] Congress subsequently amended RFRA's definition of "exercise of religion" to clarify that conduct need not manifest a *central* tenet of one's religion to enjoy RFRA's protection. *See* 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.")

enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Korte*, 2013 WL 5960692, at *22 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)). The court declared:

> [W]e agree with our colleagues in the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the 'intensity of the coercion applied by the government to act contrary to [religious] beliefs.' *Hobby Lobby*, 723 F.3d at 1137. Put another way, the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice . . . .

2013 WL 5960692, at *23 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)). The court also stated:

> [The claimants] have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Id. at *24.

Comparing this holding with Defendants' brief in this case shows how thoroughly and directly the Court of Appeals rejected the government's conception of "substantial burden":

> If plaintiffs' [sic] were correct that they only relevant question under RFRA is whether the challenged law imposes substantial pressure on the religious adherent, then one would expect court opinions in RFRA cases to focus primarily on the magnitude of the penalty imposed by the law. But they do not.

Defs.' Opp. at 8. Yet they *do*. More importantly, the Seventh Circuit did – in an opinion that controls this Court's approach to the pending motions. Applying its understanding of "substantial burden," the *Korte* court focused on the penalties the plaintiffs would incur if they continued to offer health insurance that excluded morally objectionable items. 2013 WL 596069, at *23. It continued:

> In short, the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines, essentially forcing the Kortes and Grotes to choose between saving their companies and following the moral teachings of their faith. This is at least as direct and

> substantial a burden as the denial of unemployment compensation benefits in *Sherbert [v. Verner*, 374 U.S. 398 (1963)] and *Thomas*, and the obligation to withhold and pay Social Security taxes in [*United States v.*] *Lee*[, 455 U.S. 252 (1982)].

Id.

Defendants contend that the Mandate requires the Schools to engage in almost no action, and therefore, cannot violate RFRA. Defs.' Opp. at 1-3, 5, 8-11. Nothing could be further from the truth. The Schools object not only to using abortion-inducing drugs and devices, but also to being forced to *facilitate* the provision of such items. The Mandate forces Grace and Biola to take concrete steps to that end. Among other things, if they will not, because of their beliefs, agree to offer these services directly in their employee insurance plans, they must either face huge fines or they must (1) in the case of a self-insured entity like Grace, designate a third-party administrator as a plan administrator for the provision of the morally problematic preventive services; (2) self-certify, triggering the facilitation of the objectionable preventive services; (3) provide the TPA with the names of employees of the non-exempt entities eligible to receive abortifacients; and (4) sponsor the plan whose insurance cards will be used to obtain abortifacients. (The mechanism works essentially the same for insured employers like Biola.) Plaintiffs cannot avoid these requirements without subjecting themselves to crippling fines and/or other negative consequences.

Indeed, for all practical purposes, the Mandate as applied to the Schools is indistinguishable from the requirements invalidated by the en banc Tenth Circuit in *Hobby Lobby* and the D.C. Circuit in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 2013 WL 5854246, at *10-13 (D.C. Cir. 2013). In those cases, a private employer's decision to offer a group health plan automatically resulted in coverage for the objectionable drugs and devices. So too here, the Schools' decision to offer a group health plan automatically results in coverage for the objectionable preventive services. 26 C.F.R. § 54.9815-2713A(b)-(c). In both scenarios, the benefits are directly tied to the employers' insurance policies: they are available only "so long as [employees] are enrolled in [the organization's] health plan," 29 C.F.R. § 2590.715-2713A, they

must be provided "in a manner consistent" with the provision of explicitly covered health benefits, 78 Fed. Reg. at 39,876–77, and they will be offered only to individuals the organization identifies as its employees.

Defendants are thus wrong to analogize this case to *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). Kaemmerling did not prevail because he failed to identify *a religious exercise*, not a *substantial burden*. *Id.* at 679. Here, in contrast, there is no dispute that the exercise of the Schools' Christian beliefs includes the refusal to take affirmative steps that facilitate access to abortifacients. Moreover, Kaemmerling objected only "to the government extracting DNA information from the specimen[s]" *already in the government's possession*, involving "no action" by Kaemmerling. *Id.* at 678–80. Here, the Schools object to the requirements the Mandate imposes on *them* to take actions that facilitate access to abortifacients. Indeed, even Defendants concede that the Mandate forces the Schools to participate at some level in their employees receiving abortifacient coverage. Defs.' Opp. at 1, 4, 5.

In any event, what matters under RFRA is that the Schools sincerely believe that the actions required by the Affordable Care Act and the Mandate violate their beliefs. By forcing them to take such actions, the Mandate "force[s Plaintiffs] to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

The government also argues that the Mandate imposes only a *de minimis* or attenuated burden on the Schools' exercise of religion. The Seventh Circuit rejected this contention in *Korte*. 2013 WL 5960692 at *23-24. The court correctly perceived that the government, by making this argument, was essentially second-guessing the claimants' moral judgment that the "steps" or "distance" between themselves and the use of contraceptives did not eliminate their complicity in immoral acts. *Id*. at *24. The accommodation's supposed addition of slightly more "distance" between the Schools and abortifacient use is utterly irrelevant, given the Schools' indisputably sincere belief that facilitating coverage of abortifacients is morally impermissible.

Defendants' desired approach to the "substantial burden" inquiry is fundamentally flawed because it looks beyond "*the intensity of the coercion* applied by the government to act contrary to those beliefs." *Hobby Lobby*, 723 F.3d at 1137. Instead, after identifying a sincerely-held religious belief, a court's "only task is to determine whether . . . the government has applied substantial pressure on the claimant to violate that belief." *Id.* Here, the burden is substantial because obeying their religious beliefs subjects the Schools to crippling fines.

By nonetheless arguing that the actions required of the Schools are *de minimis* and too attenuated to merit relief, Defendants have misinterpreted RFRA to require a "substantial" *exercise of religion* rather than a "substantial" *burden* on Plaintiffs' exercise of religion. The unfortunate core of this dispute seems to be that the promoters of the Mandate wish to trivialize or denigrate the sincerely held belief that enabling or facilitating the use of abortifacients is morally wrong. But, at the heart of RFRA and the First Amendment is the proposition that the Government or the majority cannot sweep aside the sincere religious beliefs of the minority – or dismiss them as out of date or unworthy of belief. Thus, Defendants' flawed understanding of the substantial burden test fails for two reasons.

As an initial matter, the government's reading is plainly contrary to the statutory text. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). RFRA contains no requirement that the actions required of claimants be "significant" or "substantial." *Id.* Here, because the Schools' refusal to facilitate access to abortifacients clearly involves the religiously-motivated "performance of (or abstention from) physical acts," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), it is a protected exercise of religion for purposes of RFRA.

Defendants argue that this understanding of RFRA deprives the statutory word "substantial" of any significance. Defs.' Opp. at 8-10. As is plain from the statutory text, however, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather the type of pressure imposed by the government —*i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of

religion."). It requires courts to assess the pressure the government exerts on a plaintiff to violate his religious beliefs, not the nature of the religious exercise.

Thus, in evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercion employed by the government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh-day Adventist plaintiff of working on Saturday was "*de minimis*." Defs.' Opp. at 1, 3, 5, 9. Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to for[]go [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404.

Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory producing tank turrets "require[d him] to change [his] behavior in a significant way." Defs.' Opp. at 1, 3-6. Rather, the Court evaluated the "coercive impact" of the state's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18. The central question did not turn on whether there was some added burden in time or effort between working in a factory that made turrets as compared with metal in a foundry. Defendants' attempt here to focus on how much time or effort is involved in the self-certification process misses the proper analytical point. The burden is the impact to the individual's religious beliefs by becoming a participant in the delivery of abortifacients.

Defendants are wrong to suggest that RFRA's protections are limited to laws that require plaintiffs to significantly modify their conduct. Defs.' Opp. at 1, 3-6. The touchstone of the substantial burden analysis, rather, is whether claimants are compelled to act in violation of their religious beliefs. *Thomas*, 450 U.S. at 717 (stating that the substantial burden inquiry "begin[s]"

with an assessment of whether a "law . . . compel[s] a violation of conscience"); *Sherbert*, 374 U.S. at 403-04 (same). The fact that a claimant's actions do not change or that not much physical effort is required is unimportant to the analysis. For example, an anesthesiologist would theoretically perform the same procedure for a knee surgery and an abortion. The government could not, however, compel a devout Christian anesthesiologist to perform that allegedly "identical" act to facilitate an abortion contrary to her beliefs, under threat of fines.

In any event, the Mandate *does* force the Schools to modify their behavior: in the past, the Schools have sought to enter into health insurance contracts that would *not* result in the provision of such coverage to their employees. Under the Mandate, the Schools must now enter into contracts that *will* facilitate provision of abortifacients. They are, moreover, required to take numerous additional steps as part of the overall scheme. Furthermore, by now agreeing to a plan that provides abortifacients, the Schools are forced to offer their tacit permission for wrongful acts. Accordingly, even under Defendants' erroneous understanding of the law, the Schools are required to modify their behavior in a way that runs directly contrary to their sincerely held religious beliefs, and thus undoubtedly suffer a substantial burden on their religious exercise.

Defendants' reading of RFRA also impermissibly "cast[s] the Judiciary in a role that [it was] never intended to play." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988). Rather than evaluating whether the pressure placed on the Schools to violate their beliefs is "substantial," Defendants would have this Court determine whether compliance with the Mandate is a "substantial" violation of Plaintiffs' religious beliefs. While the former analysis involves an exercise of *legal* judgment, the latter involves an inherently *religious* inquiry. But the judiciary has no competence to determine the significance of a particular religious act; "[i]t is not within the judicial ken to question the centrality of particular . . . practices to a faith." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Rather, it is left to plaintiffs to "dr[a]w a line" regarding the actions their religion deems permissible, and once that line is drawn, "it is not for [courts] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is significant or meaningful is self-evident. Defs.' Opp. at 2. On Defendants' theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de minimis*" act. Defs.' Opp. at 1, 3, 5, 9. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] virtually nothing of [him]." *Id.* at 3. No "principle of law or logic" equips a court to decide the significance or "meaning[]" of these acts. *Smith*, 494 U.S. at 887. What may be "no big deal" to the government may be a very big deal to a believer.

Defendants' arguments on "attenuat[ion]" further illustrate this point. Defs.' Opp. at 11-13. First, they argue that the Schools cannot obtain relief under RFRA because they are "separated from the use of contraception by a 'series of events' that must occur before the use of contraceptive services to which plaintiffs object would 'come into play.'" *Id.* at 11 (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414-15 (E.D. Pa. 2013)). This is not an evaluation of the pressure placed on the Schools to violate their beliefs, but is rather a particularly obvious invitation for the Court to assess whether the Schools' conduct is sufficiently remote from the use of contraceptives so as to absolve them from moral culpability for their actions. Courts, however, have no competence to make this religious determination. If the Schools interpret the creeds of Christianity to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699.

Thus, the Supreme Court did not ask whether working at a factory that manufactured tank turrets—as opposed to being handed a gun and sent off to war—was too attenuated a breach of pacifist convictions for a Jehovah's Witness. *Thomas*, 450 U.S. at 713–18. Rather, the Court credited the line the plaintiff drew. *Id.* at 715. And in *Lee*, the Court rejected the government's contention that payment of social security taxes was too indirect a violation of the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the plaintiffs' representation that "the payment of the taxes"

"violate[d] [their] religious beliefs." *Id.* at 257. "As the Supreme Court accepted the religious belief in *Lee* [and *Thomas*,] so we must accept [Plaintiffs'] beliefs." *Hobby Lobby*, 723 F.3d at 1141.

Likewise, Defendants' argument that there is no meaningful distinction between the payment of wages and the provision of access to abortifacient benefits, *see* Defs.' Opp. at 2, involves "impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). The moral distinction between wages used to purchase contraception and the Mandate is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Indeed, even if the line were "unreasonable," it would not be for a court to second-guess the Schools' line. *Thomas*, 450 U.S. at 715–16.

But in any case, the line here is eminently reasonable. Employees enjoy a large measure of freedom to use their paychecks however they wish. But when an employer complies with the Mandate, it ensures that its employees are furnished with a health plan "coupon" that can *only* be redeemed for abortifacients—as often as the employee chooses, and as long as the employment relationship lasts. The employer is thus a necessary part of, and complicit in, the purchase of abortifacients, making such action qualitatively different from leaving it to employees to use their paychecks as they see fit.

Finally, it is important to understand what Plaintiffs are not saying. The Schools do not contend that the "mere fact" they "claim" the Mandate "amount[s to] a substantial burden on their religious exercise" makes it so. Defs.' Opp. at 9. Far from it. This Court need only accept the Schools' description of their religious exercise. The Court must still conduct an independent assessment of whether the government is substantially pressuring the Schools to violate their religious beliefs. Here, that inquiry is simple, as Defendants impose crippling fines on the Schools if they refuse to comply with the Mandate.

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

The Seventh Circuit also held that the Mandate almost certainly[2] is not the least restrictive means of advancing a compelling governmental interest. 2013 WL 5960692, at *25-26. In *Korte*, Defendants invoked the same interests—"public health" and "gender equality"—asserting that they were "compelling." The court resoundingly disagreed:

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

Id. at *25.

The court acknowledged that broadening access to free contraception and sterilization so that women might achieve greater control over their reproductive health was a "legitimate governmental interest." *Id*. Yet, the court was unwilling to accept the government's claim that this interest was *compelling*. *Id*. at *25-26. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d at 1143-44 (government's asserted interests in public health and gender equality "do not satisfy the Supreme Court's compelling interest standards"); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 2013 WL 5854246, at *10-13; *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *9-10 (W.D. Pa. 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2013).

Defendants' argument is even weaker in the context of the instant case, where the Schools' employees and students share the Schools' religious convictions, do not desire to use abortifacients, and are forbidden by community standards from doing so. RFRA requires courts to consider whether application of the challenged regulation *to the claimant* advances a

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

compelling government interest. *See* 42 U.S.C. § 2000bb-1(b) (substantial burdens are permissible only if the government "demonstrates that application of the burden *to the person*" satisfies strict scrutiny); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) (courts must look "beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants"). Forcing the Schools to facilitate access to drugs and devices their employees and students do not want is not a compelling governmental interest.

The Seventh Circuit in *Korte* also found that the Mandate was hardly the least restrictive means of advancing the government's stated interests: "the government has not even come close to carrying its burden of demonstrating that it cannot achieve its policy goals in ways less damaging to religious-exercise rights." *Id*. at *26. There is no plausible basis for departing in this case from the Seventh Circuit's judgment on this point. *See also Hobby Lobby*, 723 F.3d at 1144 (holding that Mandate was not least restrictive means of advancing government's stated interests); *Gilardi*, 2013 WL 5854246, at *13.

Accordingly, the Schools are entitled to summary judgment on their RFRA claim.

II. THE SCHOOLS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FREE EXERCISE CLAUSE CLAIM.

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

A. The Mandate is Not Generally Applicable.

As discussed in the Schools' opening summary judgment memorandum (ECF No. 70) [hereinafter "Pls.' Mem."], the Mandate is not generally applicable under the Free Exercise Clause because it is underinclusive, granting categorical exemptions, and involves an unfettered

amount of individualized discretion to the government in crafting religious exemptions and "accommodations." Pls.' Mem. at 23-29.

The Mandate's various exceptions, accommodations and exclusions, which withhold the alleged benefits of the preventive services Mandate from tens of millions of women implicate the major concern of *Lukumi*: a law that "fail[s] to prohibit nonreligious conduct that endangers [the interests underlying the law] in a similar or greater degree than [religious conduct] does." 508 U.S. at 543.

Even as briefing on the cross-motions for summary judgment proceeded, Defendants have conceded yet another significant exclusion from the Mandate, one that exacerbates the discrimination against Grace and Biola. In two similar lawsuits, Defendants admitted that the Mandate's penalties cannot be imposed upon self-insured "church plans" that are exempt from ERISA.[3] These plans do not involve only churches: they can involve universities, hospitals, and other religious non-profits wholly indistinguishable from Grace and Biola. No rational grounds exist for Defendants' differential treatment of substantially similar entities.

Where secular exemptions, even categorical ones, undermine the government's general interests while a religious exemption is denied, strict scrutiny is triggered. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (finding that the non-religious exemptions for the bear-keeping prohibition undercut the stated interests of the law at least to the same extent as the type of religious exemption the plaintiff sought).[4]

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[3] *See* Defendants' Response at 2–3 n.1, *Reaching Souls International, Inc. v. Sebelius*, No. 5:13-cv-01092-D, Doc. No. 19 (W.D. Okla. filed Oct. 31, 2013) ("TPAs" of self-insured church plans "are not required to make the separate payments for contraceptive services for their employees under the accommodation"); Defendants' Opposition at 5, *Roman Catholic Diocese of New York v. Sebelius*, No. 1:12-cv-02542-BMC, Doc. No. 99 (E.D.N.Y. filed Nov. 1, 2013) ("ERISA enforcement authority is not available with respect to the TPAs of self-insured church plans under the accommodation, and the government cannot compel such TPAs under such authority to provide contraceptive coverage to self-insured church plan participants beneficiaries [sic] under the accommodation.") (internal citations omitted).

[4] Defendants claim that Plaintiffs' use of *Fraternal Order of Police* and *Blackhawk* is inapposite misunderstands the findings of each of those cases as it relates to general applicability. *See* Defs. Opp. at 19, fn. 5. It was not merely the lack of a religious exemption which gave the court pause in *Fraternal Order of Police*, but rather a categorical secular exemption that undermined the stated interests in the law. 170 F.3d at 366. Similarly, the court in

B. The Mandate is Not Neutral.

The Mandate is not neutral; it discriminates on its face. Those who might object to the Mandate on religious grounds fall into multiple categories: churches (fully exempt); integrated auxiliaries of churches that can be set up very similarly to other religious non-profits (also exempt); certain religious non-profits ("accommodated"); other religious non-profits participating in self-insured church plans (functionally exempt); and all other religious objectors (which have no recourse). The chosen criteria for putting entities in these categories are neither neutral nor sensible. *See* Pls.' Mem. at 29-30. There is no reason simultaneously to deem integrated auxiliaries exempt because of their alleged likelihood to employ co-believers while withholding an exemption from Grace and Biola, which draw their employees from among those who share their religious views. The government has not even attempted to justify exempting self-insured church plan participants that are substantively indistinguishable from Grace and Biola. The Mandate creates arbitrary classes of religious objectors, and treats them unequally based on irrelevant criteria. *See Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

The government is not imposing the Mandate's requirements in a religiously neutral manner. *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (holding that a facially neutral statute was not in fact neutral where the government had "granted exemptions from the ordinance's unyielding language for various secular and religious [groups]" but would not grant the Orthodox Jewish plaintiffs an exemption). "[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference." *Colorado Christian Univ. v. Weaver*, 534 F. 3d 1245, 1257 (10th Cir. 2008). As discussed in Plaintiffs' opening memorandum, the government's chosen criteria and application of those criteria *do* discriminate among religious institutions. *See* Pls.' Mem. at 31-34.

Blackhawk found that the challenged law lacked general applicability because it was "substantially 'underinclusive' with respect to its asserted goals," where circuses and zoos were categorically exempt from the law's fee requirement. 381 F.3d at 211.

Additionally, the government has decided that certain secular criteria (*e.g.*, small businesses choosing not to provide insurance and grandfathered plans) are sufficient for a categorical exemption, but when it comes to granting a religious exemption, only some religious organizations are eligible. Giving preference to secular over religious reasons for an exemption is no less concerning to the neutrality analysis than discriminating *amongst* religions. *See Fraternal Order of Police*, 170 F.3d at 366 (noting that where "the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.")[5]; *see Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

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

The government favors certain religious denominations and groups over others. The Mandate is thus subject to strict scrutiny. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen 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."). While Defendants would focus on the distinction, supposedly ignored by the Schools, between denominations and organizations, this is a red herring. As Plaintiffs discussed in their opening summary judgment memorandum, the Court in *Valente* looked not only at the effect of the law favoring certain denominations over new or untraditional denominations, *see*

[5] To the extent that Defendants suggest that specific discriminatory intent is critical to the "general applicability" analysis, *see* Defs.' Rep. Mem. at 19, fn. 5, this argument is misplaced. First, discriminatory motivation *may* be used to prove that governmental action is not neutral. *See Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (citing *Lukumi*, 508 U.S. at 533; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)). However, Free Exercise Clause claims are not confined to those based on explicit animus, as the clause has been applied numerous times where the government interfered with religious exercise not out of "hostility or prejudice, but for purely secular reasons." *Shrum*, 449 F.3d at 1144-45 (citing cases where the government interfered with religious exercise for reasons such as "saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, [and] protecting job opportunities.") (citations and footnotes omitted).

Pls.' Mem. at 33-34,[6] *see also id*. at n. 24, *id*. at n. 21, but also at *how* it did so, namely by making "distinctions between different religious organizations." Pls.' Mem. at 32-33; *see Larson*, 456 U.S. at 246 n. 23. As discussed above, this Mandate and its implementation are rife with distinctions between and among religious organizations. The central distinction—between integrated auxiliaries and other religious non-profits—rests upon exactly the sort of criteria deemed constitutionally suspect in *Valente*: a "fifty percent rule" governing the sources of an organization's funding. *Id.* at 246–49; 26 CFR § 1.6033-2(h)(4).

Defendants also argue that the exemption to the Mandate is "available on equal terms to employers of all denominations" and that because there is no legislative history indicating a desire to harm a particular denomination, there is no similar discrimination to the kind found in *Valente*. Defs.' Opp. at 22. But the Court in *Valente* did not rely on discriminatory intent to hold that the law granted denominational preferences, *see* 456 U.S. at 246 (holding that the challenged law granted denominational preference "of the sort consistently and firmly deprecated" in its precedents); *id.* at n. 23 (noting in support of its holding that the law at issue was "not simply a facially neutral statute," rather it made "explicit and deliberate distinctions between different religious organizations."). Instead, it discussed the evidence of discriminatory intent in the context of the law's *burden* on certain religious organizations. *See id*. at 253-55 (noting that "the principal effect of the [challenged Act] is to impose the registration and reporting requirements of the Act on some religious organizations but not on others," creating a "substantial advantage" for those organizations that are exempt and a burden for those that must comply).

Defendants too easily dismiss *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). Though the court there faced an Establishment Clause challenge to a law that

[6] Plaintiffs' opposition is not, as Defendants contend, aimed at the rationale behind the Treasury regulations. *See* Defs.' Rep. Mem. at n. 9. It instead points to the incongruence and irrationality of applying the concept and limitation of "integrated auxiliary" under those regulations to the scope of the religious exemption under this law. *See* Pls.' Mem. at 33-34; *id.* at n. 21. Defendants appear to have missed the thrust of this argument with the assertion that the term "integrated auxiliary of a church" has a "commonly understood meaning." *See* Defs.' Rep. Mem at n. 9.

favored less sectarian religious institutions over more sectarian ones, it did not, as Defendants argue, limit itself to "laws that facially regulate religious issues." *Id.* at 1257 (citing the New York Constitution of 1777, art. XXXVIII, *reprinted in* 5 *The Founders Constitution*, at 75 (Philip B. Kurland & Ralph Lerner, eds., 1987)). Instead, it discussed discrimination "among religious *institutions*." *Id.* at 1258 (emphasis added). The court recognized that the purpose of the challenged provisions of the law was to "exclude some but not all religious institutions on the basis of the stated criteria." *Id*. There too the government argued that the law distinguished "not between types of religions, but between types of institutions." *Id*. at 1259. The court rejected this argument, noting that the government could offer "no reason to think that [it] may discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in." *Id*.; *see also id.* n. 6 ("The issue is not whether the State can distinguish between sectarian and nonsectarian, or religious and secular, but whether it can distinguish *among* religious institutions.") (emphasis added). As in *Weaver*, the Mandate uses incidental criteria to exempt some religious institutions (integrated auxiliaries, participants in self-insured church plans) but not ones like Grace and Biola.

Finally, Plaintiffs explained in detail the absence of a "neutral, secular basis," for the lines the government has drawn. *See* Pls.' Mem. at 33-34; *id*. at n. 24-25; *id*. at n. 21; *id*. at 29-30 (discussing the absence of neutrality in the context of Plaintiffs' Free Exercise claim). The lack of rationality or relevance to its interest for exempting integrated auxiliaries and participants of self-insured church plans bolsters the Schools' Establishment Clause claim. *See Gillette v. U.S.*, 401 U.S. 437, 452 (1971) ("[T]he Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses.") (internal quotations and citations omitted).

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

The Mandate violates Plaintiffs' Free Speech Clause rights in three ways. First, Grace, being self-insured, is explicitly compelled by Defendants' regulations to speak a pre-written statement to their third party administrator to legally require it to obtain abortifacient payments. Second, Grace is explicitly prohibited from speaking to its third party administrator to persuade it of the moral wrongfulness of the administrator's coverage of abortifacients or to encourage it not to comply. Third, Grace and Biola both are required to cause coverage of speech—education and counseling—in favor of abortifacient items. [7]

The self-certification process literally requires speech. The required speech does not merely "favor" access to and use of abortifacients, but is an indispensable step in the mechanism through which payments for abortifacients are obtained, in direct violation of Grace's beliefs. The certification that self-insured entities like Grace must deliver to third party administrators requires that Grace not only declare its religious objections, but also designate that the "[o]bligations of the third party administrator" under ERISA include, by virtue of that designation, a fiduciary duty to provide promises of payments for the exact abortifacient items to which Grace objects. 78 Fed. Reg. at 39,894–95. The Mandate's accommodation forces objecting self-insured employers to explicitly designate, contract with and arrange for their third party administrators to provide the very payments to which the employers object. This is compelled speech in its purest form.

Moreover, the Mandate goes on to forbid Grace's contrary speech. It is literally censored from speaking its pro-life religious beliefs to its third party administrator to urge it not to provide payments for drugs or devices that can cause the death of very young human beings. "The eligible organization must not, directly or indirectly, seek to interfere with a third party

[7] To the extent that Defendants rely on the district court decisions cited in their original and reply memorandums, *see* Defs.' Mem. at 36 (citing cases); Defs.' Rep. Mem. at 23-25 (citing cases), these cases do not address how the accommodation applies to self-insured entities like Grace. The plaintiffs in those cases were all for-profit employers not entitled to the "accommodation." and its related "self-certification" requirement. *See MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, 2013 WL 1340719, *2 (E.D. Mich. Apr. 3, 2013); *Briscoe v. Sebelius*, 927 F. Supp. 2d 1109, 1113 (D. Colo. 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 400 (E.D. Pa. 2013); *Grote Industries, LLC v. Sebelius*, 914 F. Supp. 2d 914, 917 (S.D. Ind. 2012); *Autocam Corp. v. Sebelius*, 2012 WL 6845677, *1 (E.D. Mich. Dec. 24, 2012); *O'Brien v. U.S. Dept. of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1154 (E.D. Mo. 2012).

administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements." 78 Fed. Reg. at 39895. The Mandate explicitly gags Grace from even expressing its religious beliefs to its third party administrator in an attempt to convince it not to provide the promised payments. This violates the most fundamental protection of the First Amendment. *See Turner Broadcasting Sys., v. FCC*, 512 U.S. 622, 641 (1991) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); *see also id*. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

Finally, the Mandate forces Plaintiffs to facilitate government-dictated education and counseling concerning abortion that directly conflict with their religious beliefs and teachings. Defendants contend that there is no requirement that the "education and counseling" favor any particular contraceptive service or contraception in general. *See* Defs.' Opp. at 24. This hides the ball. Whether all women will receive education in favor of abortifacients or not, education in favor of abortifacients is *covered* by the Mandate. This is undisputed and indisputable.[8] The Institute of Medicine Report specifies that when it recommends "patient education and counseling" to be included in the Mandate, it is talking about patient education and counseling, "that are provided to prevent unintended pregnancies."[9] Defendants deny reality when they imply that the Mandate will not necessarily involve education and counseling in favor of abortifacients. All of the covered contraception under the Mandate is "as prescribed."[10] By

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

[9] Defendants' non sequitur that Plaintiffs' argument necessarily extends to "all interactions between an employee and her health care provider," Defs.' Opp. at 24, and is thus outside the protections of the First Amendment, *id*. at 25, either misunderstands the coverage to which Plaintiffs object or is just an attempt to confuse the issues.

[10] HRSA Guidelines, *supra* n.9.

definition, a doctor prescribing abortifacients believes them to be medically indicated, and her counseling and education regarding those items will be supportive of their use.

As the Schools previously argued, "education and counseling" is inherently expressive, and forcing them to facilitate it constitutes compelled speech. *See* Pls.' Mem. at 37. This situation is more like *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) than it is like *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006), because the pro-abortifacient message Plaintiffs are compelled to facilitate, to their own employees, runs directly contrary to their own message, which is at the heart of their educational mission and their relationship with those employees. *See Rumsfeld*, 547 U.S. at 63 (noting that "[t]he compelled-speech violation in [*Hurley* and other cases] . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate," whereas, "[i]n *FAIR*, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."); *see also Hurley*, 515 U.S. at 573 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.") (citation omitted).

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

The government's argument that Plaintiffs are unable to "identify a source of vagueness or confusion in the regulations" at issue, Defs.' Opp. at 27, reflects its misunderstanding of the Schools' Due Process Clause claim. The claim is that the discretion granted to HRSA by 42 U.S.C. § 300gg-13 to promulgate a religious exemption, or an accommodation, or whatever else Defendants have conjured up in this process, is itself impermissibly vague and standardless: it gives zero guidance about whose religious convictions can be recognized and whose can be

ignored. That violates the Due Process Clause, because the Mandate's exemptions and accommodations are a product of this impermissibly unfettered discretion.

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

This issue cannot be resolved under the non-delegation doctrine. Even if Congress has provided sufficient *guidance* to allow HHS—instead of Congress—to decide what counts as "preventive services" sufficient to comply with the non-delegation doctrine, that does not immunize the government from its *additional* duty, under the Due Process Clause, to refrain from making decisions as to *who must comply with the preventive services rule* when those decisions discriminate among religious objectors, and when the statutory guidance to make those decisions is "standardless." *Williams*, 553 U.S. at 304. Defendants have decided to enforce the Mandate against some religious objectors but not others. Yet the statutory authority for those decisions contains no criteria whatsoever, much less criteria to prevent discrimination among religious objectors. On the contrary, the Mandate, its exemptions, and its accommodations discriminate among religious objectors on their face. Due process requires Defendants to grant Plaintiffs the same exemption they offer to other religious objectors.

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

B. The Mandate is Arbitrary and Capricious.

The Mandate is "arbitrary and capricious" under 5 U.S.C. § 706(2)(A) and thus violates the APA. The Mandate's unwillingness to exempt entities like Grace and Biola, in light of its exemption of integrated auxiliaries, is arbitrary and capricious. The Mandate's rationale for doing so—that integrated auxiliaries are likely to employ people of the same faith—applies no less to Grace and Biola. Therefore, the refusal to exempt Grace and Biola is unjustified. Defendants insist that "[i]t can hardly be irrational or arbitrary for the government to rely on such a longstanding statutory distinction." Defs'. Opp. at 31 n.11. But the Schools are not challenging the statutory distinction as it applies in the taxation context; they are instead challenging the importation of that language into an utterly unrelated context. The statutory language that Defendants lifted from the tax code relates merely to which non-profit entities must file informational returns with the IRS. That language and the reason it exists has nothing whatsoever to do with whether an entity's employees should or should not receive abortifacient coverage in violation of the employer's religious beliefs. Using that language in this context is no less arbitrary than if Defendants randomly selected a distinction in the criminal code and superimposed it as a reason to exempt some religious entities from the Mandate but not others.

Free-standing seminaries are entitled to integrated auxiliary status and are thus exempt from the Mandate, yet seminaries operated by universities such as Grace and Biola are not entitled to the exemption. A classification such as the one at issue fails to operate "so that all persons similarly circumstanced . . . be treated alike." *Nazareth Hosp. v. Sebelius*, No. 10-3513, 2013 WL 1401778, at *9 (E.D. Pa. Apr. 8, 2013) (citing *Medora v. Colautti*, 602 F.2d 1149, 1152 (3d Cir. 1979)).

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

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

C. The Mandate is Contrary to Law.

The APA forbids agency action from being contrary to law and constitutional right. 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971). As discussed above, the Mandate violates RFRA and the First and Fifth Amendments. Defendants fail to acknowledge this aspect of Plaintiffs' claims, alleging only that

the regulations do not violate federal restrictions regarding abortion, including the ACA, the Weldon Amendment, the Church Amendment. Defs.' Opp. at 31-32.

The Mandate violates the ACA itself by being without statutory authorization. 42 U.S.C. § 300gg-13 only authorizes preventive services coverage through an entity's insurance plan. But Defendants' "accommodation" insists that Plaintiffs' plans will *not* include the abortifacient coverage, while purporting to force Plaintiffs' insurer, or third party administrator, to provide payments for Mandated items "separate" from Plaintiffs' plan. If the payments are truly separate, 42 U.S.C. § 300gg-13 does not authorize Defendants to require them. If § 300gg-13 authorizes the requirement, they are not separate from Plaintiffs' health plans, and Defendants' "attenuation" arguments are untenable. The ACA is not a blank check for the executive branch to do whatever it wants in connection to health insurance without regard to what the statute actually says. And 42 U.S.C. § 300gg-13 does not give Defendants roving authority to force entities to provide abortifacient coverage or payments outside of an employer's plan.

CONCLUSION

For the foregoing reasons, the Schools respectfully request that this Court grant their cross motion summary judgment.

Respectfully submitted this 15th day of November, 2013.

/s *Gregory S. Baylor*

Gregory S. Baylor (Texas Bar No. 01941500)
Matthew S. Bowman (DC Bar No. 993261)
ALLIANCE DEFENDING FREEDOM
801 G Street, NW, Suite 509
Washington, DC 20001
(202) 393-8690
(202) 347-3622 (facsimile)
gbaylor@alliancedefendingfreedom.org
mbowman@alliancedefendingfreedom.org

David A. Cortman (Georgia Bar No. 188810)
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road, NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)
dcortman@alliancedefendingfreedom.org

Kevin H. Theriot (Kansas Bar No. 21565)
ALLIANCE DEFENDING FREEDOM
15192 Rosewood
Leawood, KS 66224
(913) 685-8000
(913) 685-8001 (facsimile)
ktheriot@alliancedefendingfreedom.org

Jerry Mackey (California Bar No.90416)
13800 Biola Avenue
La Mirada, CA 90639
(562) 903-4777
(562) 903-4748 (facsimile)
university.legalcounsel@biola.edu

Jane Dall Wilson (Atty No. 24142-71A)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
(317) 237-0300
(317) 237-1000 (facsimile)
jane.wilson@faegrebd.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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