IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

LOUISIANA COLLEGE, *Plaintiff,* v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	)	Case No. 1:12-cv-643 JUDGE: Dee D. Drell MAGISTRATE: James D. Kirk

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Louisiana College ("the College" or "LC") is a religious institution that was created for religious reasons, holds religious beliefs, is comprised of religious people, and pursues religious objectives. Second Amended Complaint, ECF No. 77, [hereinafter "Sec. Am. Compl.] ¶¶ 2, 10, 20-23, 26-31. 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. Sec. Am. Compl., ¶¶ 26-27. The College believes, as a matter of religious commitment, that this dignity and entitlement to special protection arises at the moment of conception. Sec. Am. Compl., ¶¶ 26, 28. It believes that violating the special dignity of God's unique image bearers is a grave sin that disrupts its relationship with God Himself and risks God's judgment. Sec. Am. Compl., ¶¶ 28-29.

Those beliefs translate into both positive actions as well as the avoidance of certain behaviors. First, positive actions: it draws the members of its community from among those who hold and live out its shared religious convictions. LC Christian Commitment Statement, Exhs. at 37-39.[1] This community includes students, faculty, and staff. The community holds a collective desire to glorify God through all it believes, says, and does. The College nurtures and fosters this community, encouraging obedience to its understanding of God's laws and responding to disobedience to those same laws. The College draws its administrators, faculty, and staff from among those who share its beliefs about the sanctity of life. LC Christian Commitment Statement, Exhs. at 37-39; LC Academic Catalog, Exhs. at 206. The College "enforces" those beliefs in a variety of ways. It strives to ensure that its students, faculty, and staff embrace, maintain, and live out their shared religious commitment to the sanctity of human life.

Second, avoidance of certain behaviors: the College seeks to avoid participation in or facilitation of transgressions of its understanding of God's law, including His law about the

[1] Accompanying Plaintiff's cross motion for summary judgment are exhibits A through V. The collective contents of those exhibits are consecutively paginated, 1 through 746. References to the exhibits will identify the page on which the particular reference is found. The designation will be "Exhs. at [page number]."

dignity and value of human life. Among other things, it structures its employee health insurance plan 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. Sec. Am. Compl., ¶¶ 33-35.

The HHS Mandate dramatically undermines the College's freedom to live out its religious beliefs in these two ways: avoiding violations of God's law, and fostering community commitment to and compliance with that law. The College believes 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 its 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 its religiously-based educational mission and encourage disobedience to shared religious convictions.

The government is imposing enormous pressure on the College to comply with the Mandate and thus violate its religious convictions and undermine its fostering of its religious community. The price for compliance is enormous and unsustainable. If the College continues its present course of action once the Mandate goes into effect (*i.e.*, offers health insurance that excludes abortifacients), it will face fines of $100 per employee per day. *See* 26 U.S.C. § 4980D(b). Given that the College has 180 full-time employees, Sec. Am. Compl., ¶ 25, this would be $6,570,000 annually. If it avoided the Mandate by dropping employee health insurance altogether, it would face fines of $2000 per employee per year, minus 30. *See* 26 U.S.C. § 4980H(a), (c)(1). This would be $300,000 annually. In both scenarios, it would also face liability under ERISA. The College believes that it has a religious obligation to provide for the well-being of its employees by providing health insurance, Sec. Am. Compl. ¶ 32; forcing the College to drop health insurance would undermine its religious exercise as well. The Mandate substantially burdens the College's religious exercise, and thus is a prima facie violation of its rights under the Religious Freedom Restoration Act.

Forcing the College 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. No court reaching the question whether the Mandate satisfies strict scrutiny has answered in the affirmative. RFRA, the Free Exercise Clause, and their interpretive case law indicate that this Court should analyze not only whether "public health" and "women's equality" are "compelling" interests in the abstract, but also whether requiring the College 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 College's objection, arguing as if it objects to providing or facilitating access to all the drugs, devices, and services required by the HHS Mandate. Yet, the College is willing to include in its employee health plan virtually everything required by Defendants, including "conventional" birth control pills, sterilization, and related counseling. It simply objects to emergency contraceptives that can act as abortifacients by preventing implantation of the very young human in the uterine wall.[2] The narrow scope of its objection fatally undermines the government's contention that applying the Mandate to the College 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 College – are irrelevant. The question is whether forcing it to facilitate free access to abortifacients to its employees sufficiently advances some compelling interest to justify the burden on LC's 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,

[2] 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 College's religious exercise, where Plaintiff believes that human life begins at conception and that such life deserves protection from that moment forward. In short, the outcome of the semantic debate does not dictate the answer to the moral question.

are (a) whether (and to what extent) free access to abortifacients, particularly emergency contraceptives, reduces the incidence of unintended pregnancy in general; and (b) whether (and to what extent) forcing the College to facilitate free access to abortifacients will reduce unintended pregnancies among its 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).[3]

Forcing the College to facilitate access to abortifacients is particularly unjustified in light of the nature of its workforce. The College draws members of its community from among those who share its religious commitments, including its 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 LC workforce consistently obey these moral norms. And the government cannot plausibly argue it has any interest in encouraging disobedience to these norms by LC employees. Women with reproductive capacity at the College are far less likely to experience unintended pregnancies – the primarily evil the Mandate claims to reduce – and thus any power the government's arguments about the justifications for the Mandate more generally might have is greatly diminished.

The government's equality argument rests in part on the assertion that women tend to pay more for preventive health care than do men. The relevant question in this case is not whether the Section 1001(a)(4) of the ACA "evens out" preventive care expenses in general, but rather whether the inability of female employees at Louisiana College 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

[3] 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"), Exhs. at 603.

if they did, these women have expressed their commitment to the sanctity of human life and believe that the use of such drugs and devices is sinful. Declaration of Jasmine Davis, ¶¶ 6-7; Declaration of Terri N. Blaisdell, ¶¶ 6-7; Declaration of Adena LeJeune, ¶¶ 6-7. Accordingly, representative members of the College community have explicitly declared that they will not use and do not want coverage for these drugs and devices. Davis Decl., ¶¶ 6-9; Blaisdell Decl., ¶¶ 6-9; LeJeune Decl., ¶¶ 6-9. Third, it can hardly be said that the equal status of the College's women of reproductive capacity hinges upon whether they can avoid paying, at most, about $55 for a box of ella or Plan B[4] – 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 LC employees, there are other ways it could accomplish this objective that are less burdensome to the College's religious exercise.

To make matters worse, the government's refusal to extend the religious exemption to the College 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.*, La. Rev. Stat. Ann. § 23:332(H)(2) (exempting "[a] school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution or institution of learning is directed toward the propagation of a

[4] http://ec.princeton.edu/locator/concerned-about-cost.html (last visited Nov. 17, 2013), Exhs. at 636-38.

particular religion" from Louisiana's ban on religious discrimination in employment); 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,[5] 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* advance any compelling interest when applied to employers who employ employees who share their religious convictions – a category that includes the College.[6] Denying it the exemption is

[5] 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 College is apparently ineligible for integrated auxiliary status, and thus for the Mandate's exemption, primarily because it receives the majority of its revenue from "external" sources (*i.e.*, tuition paid by students and their families) rather than an "internal" one (*i.e.*, an affiliated church).

[6] It bears noting that the College is 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 numerous others. *See*

thus arbitrary, capricious, irrational, unjustified, and discriminatory. It is denied the exemption's protection, simply because it is not structured as an integrated auxiliary to a denomination or convention or association of churches. Discriminating against it because of incidental religious structural choices cannot survive scrutiny under either the Establishment Clause or the Administrative Procedure Act.

STANDARD OF REVIEW

The College moves for summary judgment and opposes 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 College's opposition to 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 College's 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.

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.

ARGUMENT

I. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS RFRA CLAIM.

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

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

Three "exercises of religion" are at the heart of this case. Two are affirmative pursuits of religious objectives; the third is avoidance of conduct contrary to the College's beliefs. First, the College affirmatively lives out its religious belief in the dignity of human life by making available to its workforce health insurance coverage that reflects the College community's shared pro-life beliefs. Second, it creates and fosters 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 College seeks to avoid facilitating sinful behavior, thereby engaging in immoral conduct itself. Defendants do not dispute that the College is exercising religion in the health insurance context and that the Mandate affects that religious exercise.

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

Through the Mandate, Defendants interfere with each of these three "exercises of religion." First, Defendants have made it untenable, to put it mildly, for the College to provide employee health insurance that correlates with its pro-life beliefs. Left free to exercise its religion in the health insurance context, the College's plan 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 its plans would not trigger the "free" availability of embryo-destroying drugs and devices to College employees and their dependents. Because of the Mandate, however, an insurance issuer will sell the College a plan that either (a) *expressly* includes abortifacients; or (b) *functionally* includes abortifacients by guaranteeing separate payments for them upon the College's execution of a "self-certification." If the College were to purchase an employee health plan that did not facilitate access to abortifacients in one of these two ways, it would face fines of $100 per beneficiary per day, amounting to $6,570,000 annually.

Defendants have also made it impossible, as a practical matter, for the College to avoid facilitating the use of abortifacients by dropping employee health insurance altogether (something that would transgress the College's religious convictions in its own right). The financial penalty for such a move is $2,000 per employee per year after the first 30 employees. This would be $300,000 per year for the College.

Because Defendants have left the College without the option of fulfilling its religious convictions by providing health insurance that does not facilitate access to abortifacients (or of dropping employee health insurance altogether), it is forced to provide health insurance that *does* facilitate that access. This significantly interferes with the College's other two "exercises of religion." First, it directly and significantly interferes with its ability to make and enforce religiously-rooted rules of conduct applicable to its employees, all of whom voluntarily joined the College community. It directly and significantly interferes with LC's ability effectively to communicate its pro-life message to students, faculty, staff, and the broader community. It

directly and significantly interferes with its pursuit of its mission to grow the spiritual maturity of members of its community by fostering obedience to and love for God's laws.

Second, it forces the College to engage in behavior that violates its religious convictions. Either complying with the Mandate as originally written or complying with it by executing a self-certification that ensures the same result (*i.e.*, free access for employees to abortifacients as a consequence of their employment with LC) is, in the eyes of the College, sinful and immoral. The College believes that sin adversely affects its relationship with God. Although the shape and magnitude of this adverse effect cannot be predicted or calculated, the College nonetheless believe it is quite real, and to be avoided.

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

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

Regarding the identity of LC's exercises of religion, Defendants focus exclusively on the question whether they are forcing the College to do something forbidden by its religious beliefs, not comprehending that the College also "exercises 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 College's "freedom to" shape its community and transform the spiritual lives of its members – except, apparently, to deny the existence or impugn the exercise of such a freedom. (Defendants' Memorandum in Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment, [hereinafter "Defs.' Br."] at 2) (indignantly suggesting that it is "extraordinary" for a religious college to want to avoid helping the co-religionist members of its workforce to transgress religiously-based community ethical standards).

Defendants also have a remarkably cramped vision of how their actions pressure the College to undertake actions that transgress its religious convictions. Again, they focus exclusively on the act of executing the self-certification under the government's "accommodation." Defs.' Br. at 10-11. (And they identify things the College is 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 College must either provide insurance to it employees or face enormous fines. LC's decision to provide employee health insurance inevitably causes the provision of free abortifacients to its employees. Every time the College hires an individual, it knows that the individual (and perhaps his or her family as well) will gain access to abortifacients, because of his or her status as a College employee. And that access will be provided by the College's own insurer.

Defendants contend that executing the self-certification is essentially no different than actions the College took prior to the existence of the Mandate. Defs.' Br. at 10-11. More specifically, they observe that, prior to the existence of the Mandate, the College informed its insurer that it 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 College's prior practice (telling its insurer not to provide abortifacients) was *members of its communities not obtaining access to life-destroying drugs and devices*, whereas the consequence of executing the self-certification is *exactly the opposite*. To contend that these two actions are the same, particularly when the claim is that the coerced conduct violates conscience, is astonishing.[7] That the two actions might be said, in a willfully truncated assessment of their significance, to bear some superficial

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

resemblance hardly means that Defendants have not coerced the College into "modifying its behavior."

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

As noted above, the Mandate burdens the College's religious exercise by coercing it to take action it believes to be sinful and immoral, and by interfering with its freedom to foster a voluntary community that encourages spiritual maturity through compliance with shared ethical commitments rooted in religious conviction.

As to the first of these ways Defendants burden the College's religious exercise, the College will transgress its understanding of God's laws by providing health insurance to its employees that gives them guaranteed payments for drugs and devices that take human life. In short, by complying, they will sin. Dr. Joseph Aguillard, President of Louisiana College, declared that complying with the Mandate, even with its so-called "accommodation," would be unethical "because it puts the College in the position of facilitating the provision of these medications, which, when taken as designed, produce an outcome that we believe constitutes sin. The College's complicity in this accommodation is just as problematic as providing these services ourselves."[8] Declaration of Joseph Aguillard, ¶ 14, Exhs. at 1. And non-compliance, either through dropping employee coverage, or by continuing its current coverage (which excludes abortifacients), is not possible, either financially, ethically, or both.

As discussed above, the College not only wants to avoid committing sin, but also wants to foster the spiritual maturity of members of its community, faculty, staff, and students alike. Christian conviction—including respect for the dignity and worth of human life from the moment of conception—is a qualification for participation in the LC workforce. Aguillard Decl. at ¶ 11, 17-18, 20-22, Exhs. at 1; Davis Decl., ¶¶ 6-11, 14, Exhs. at 7; Blaisdell Decl., ¶¶ 6-9, 12,

[8] The government's contention that the burden on the College's religious exercise is "too attenuated," Defs. Br. at 16-18, is, for all intents and purposes, simply a disguised rejection of the College's 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 College, the thing it is *actually* doing cannot be deemed a substantial burden on its religious exercise.

Exhs. at 12; LeJeune Decl., ¶¶ 6-11, 14, Exhs. at 17. And, it bears noting, administrators, faculty, and staff all voluntarily join the LC community. Indeed, the LC community is 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. Aguillard Decl. at ¶ 11; Davis Decl., ¶ 10; Blaisdell Decl., ¶ 8; LeJeune Decl., ¶ 10. As an educational institution, it explicitly aims to transform the lives of its students. This objective is pursued, in part, through faculty and staff modeling behaviors that bring glory to God. Louisiana College Academic Catalog, Exhs. at 206; LC Christian Commitment Statement, Exhs. at 37; LC Faculty Handbook, Exhs. at 40.

Foisting unwanted access to free abortifacients upon the College's employees and their families tangibly interferes with this key component of the College's mission. 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 the College cannot out of one side of its mouth say "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death" (The Baptist Faith and Message 2000, incorporated into the Christian Commitment Statement and the Academic Catalog) 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 College's religious educational mission; in the language of the Religious Freedom Restoration Act, this interference "substantially burdens" the College's religious exercise.

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

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

In *Gilardi v. U.S. Department of Health and Human Services*, the D.C. Circuit held that the Mandate substantially burdens the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 2013 WL 5854246, at *7-8 (D.C. Cir. 2013). The court rejected the government's argument that the interposition of the corporate form between the Gilardis and their employees rendered the Gilardis' participation "too remote and too attenuated" to constitute a substantial burden. *Id.* at *7. As the D.C. Circuit explained, "'[c]ourts are not arbiters of scriptural interpretation,'" *id.* (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)); thus, "[w]hen even attenuated participation may be construed as a sin, it is not for courts to decide that the corporate veil severs the owner's moral responsibility," *id.* at *6 (citation omitted). Instead, the court held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at *7 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), *Thomas*, 450 U.S. at 718). The Mandate, therefore, imposed a substantial burden on the Gilardis because they are forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit in a grave moral wrong. If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id.* at *8.

Likewise, in *Korte v. Sebelius*, 2013 WL 5960692 (7th Cir. 2013), the Seventh Circuit held that the Mandate substantially burdens the religious exercise of two corporations and their Catholic owners by requiring those corporations to include contraceptive coverage in their employee health plans. The court rejected the government's contention that the actions required by the Mandate were too "insubstantial" or too "attenuated" to impose a substantial burden on the plaintiffs. 2013 WL 5960692, at *23-24. As the Seventh Circuit explained, the government's argument was not only factually incorrect but also legally flawed, because "the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations." *Id.* at *22. "It is enough that the claimant has an 'honest conviction' that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion." *Id.* The Mandate, therefore, imposes a substantial burden on the *Korte* plaintiffs' religious exercise because it forces them to act contrary to their religious beliefs by taking actions that they deem to be impermissible facilitation of contraception. By threatening fines of "$100 per day per employee," the government "placed enormous pressure on the plaintiffs to violate their religious beliefs." *Id.* at *23.

The same is true here. The College has a sincere religious objection to providing or facilitating "coverage for [abortifacients] in their employee health-care plans." *Id.* at *23. The Mandate's "accommodation" does not change the analysis, because the College continues to have "an 'honest conviction' that what the government is requiring, prohibiting, or pressuring [them] to do conflicts with [their] religion." *Id.* at *22. The only relevant question under the "substantial burden" test is whether the Mandate imposes "substantial pressure" on the College to violate those beliefs. *Gilardi*, 2013 WL 5854246, at *7. It makes no difference whether the government believes the accommodation is adequate to dispel Plaintiff's religious objections. What matters is that Plaintiff itself "ha[s] concluded that [its] legal and religious obligations are incompatible: The contraception mandate forces [it] to do what [its] religion tells [it] [it] must not do." *Korte*, 2013 WL 5960692 at *24. It is undisputed that, even with the accommodation, the Mandate forces the College to choose between (1) "abid[ing] by the sacred tenets of [its]

faith, pay[ing] a [massive] penalty . . . , and crippl[ing] [their ministries]," or else (2) "becom[ing] complicit in a grave moral wrong." *Gilardi*, 2013 WL 5854246, at *8. Therefore, there can be no question that the Mandate imposes a substantial burden on the College's exercise of religion. *Id.*; *Korte*, 2013 WL 5960692, at *24; *Hobby Lobby*, 723 F.3d at 1137.

Defendants' argument that the Mandate's burden on the College's religious exercise is not "substantial" turns mostly on their misunderstanding or mischaracterization of (a) the College's religious exercise; and (b) the identity and character of the burden. Accordingly, accurately identifying the College's 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 Louisiana College a matter of minutes." (Defs. Br. at 13). Of course, the College does not disagree; yet, the number of minutes it takes to execute an action hardly is the sole (or even main) criterion for assessing whether the government is substantially burdening religious exercise. The College's ethical position is that sponsoring a health plan that grants access to abortifacients is sinful. Many sins can be committed quickly. That hardly means government is free to coerce the commission of such sins. Instead, a government regulation that "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs" substantially burdens his religious exercise. *Thomas v. Review Bd.*, 450 U.S. at 716-18. *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Second, Defendants ascribe to the College a conception of "substantial burden" it does not hold. They claim that LC's argument "rests on an unprecedented and sweeping theory of what it means for religious exercise to be burdened" under which "Louisiana College would . . . prevent *anyone else* from providing such coverage to its employees . . . ."[9] This overstates the

[9] The remainder of the quoted sentence asserts that the College's employees "might not subscribe to Louisiana College's religious beliefs." (Defs.' Br. at 11.) This is incorrect; sharing the College's religious convictions is a pre-requisite to initial and continuing employment. As evidenced by the declarations filed in support of Plaintiff's Cross-Motion for Summary Judgment, the College's employees wholeheartedly share its pro-life beliefs and its objection to the government coercively attaching its scheme for facilitating abortifacient access to its employee

College's position. To be sure, it would object to any scheme that conscripts it into serving as an essential cog in the government's mechanism. But it does not believe that RFRA prevents the government from giving its employees free abortifacients *under a scheme that does not involve the College*; if the College is not involved, its religious exercise is not burdened.

To illustrate the point, suppose that the government gave all religious employers, including the College, 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 Louisiana College considers itself exempt and therefore has declined to include abortifacients in its employee plan. The Department then undertakes an effort to identify the College's employees and offer them free abortifacients. The "substantial burden" argument the College is making does not require the Court to conclude that the Department would be substantially burdening religious exercise in the hypothetical.

Relatedly, the government seems to be convinced that the *only* way it can enhance access to abortifacients for the College's employees is to somehow conscript the College into its scheme. (Defs.' Br. at 13.) However, Defendants fail to explain why this must be so. There is no reason why abortifacients *must* be provided in connection with employer-based health plans; governments provide benefits without involving beneficiaries' employers all the time. Administrative convenience hardly justifies conscripting unwilling employers into the

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

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 College's religious exercise under the test set forth by the Fifth Circuit: "a government action or regulation creates a 'substantial burden' on a religious exercise if it . . . (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to chose between, on one hand, following his religious beliefs ." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)(citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)) (decided under RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Mandate does all these things to the College, and thus substantially burdens its religious exercise.

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

Courts applying strict scrutiny to the Mandate are unanimous: it fails. *See Korte*, 2013 WL 5960692 at *25-26; *Gilardi*, 2013 WL 5854246, at *10-13; *Hobby Lobby*, 723 F.3d at 1143-44; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16-18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *6-8 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756, slip op. at 1 (N.D. Ill. Jan. 3, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012). Forcing the College to facilitate access to abortifacients for its employees and their families is not the least restrictive means of advancing any compelling interest. Accordingly, the Mandate violates RFRA.

In *Korte*, the Seventh Circuit held that the Mandate almost certainly[10] is not the least restrictive means of advancing a compelling governmental interest. 2013 WL 5960692, at *25-

[10] 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

26. There, Defendants invoked the same interests asserted here—"public health" and "gender equality"—claiming that they were "compelling." The court resoundingly disagreed:

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

Id. at *25.

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

In explaining the rationale for the religious exemption from the Mandate, Defendants concede that forcing employers whose employees are likely to share their religious convictions does not advance the Mandate's stated interests.[11] (Defs.' Br. at 23-24; 78 Fed. Reg. 39,874.) Louisiana College is such an employer. Its employees share its religious convictions, including its 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

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suggests that its assessment of the merits might change based on discovery or other subsequent events in the district court.

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

and that they would not engage in such use. *See, e.g.*, Davis Decl., ¶ 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.*, Kirk Decl., ¶ 12 ("I am unaware of any instance in which a Louisiana College employee or student ever complained that the employee or student plan excluded abortifacients."); Blaisdell Decl., ¶ ("I am not aware of a single employee that rejects [Louisiana College's] pro-life beliefs.")

This undisputed reality—that the College's employees are unlikely to use the abortifacients to which the College objects—conclusively proves by itself that Defendants have no interest in imposing the Mandate on LC, 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).[12] *See also O Centro*, 546 U.S. at 430-31; *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d at 125-29. For this reason alone, Defendants cannot satisfy strict scrutiny, and therefore summary judgment in the College's favor on its RFRA claim is warranted.

Additional reasons reveal that applying the Mandate to the College is not the least restrictive means of furthering a compelling governmental interest. Defendants invoke the alleged benefits of preventive services in general and of making access to those services cost-free. (Defs. Br. at 19-21.) However, the College is not objecting to "preventive services" *in general*. Indeed, it is 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, it objects to a relatively small

[12] 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)).

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 College's employees and their families 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 Pregnancy."[13] The paper's conclusion is unambiguous: "no published study has yet demonstrated that increasing access to ECPs [emergency contraceptives like the morning-after and week-after pills] reduces pregnancy or abortion rates in a population." *Id*. at 15. Dr. Trussell similarly concludes: "it is unlikely that expanding access [to emergency contraceptives] will have a major impact on reducing the rate of unintended pregnancy." *Id*. The extent to which free access to "conventional" contraceptives might affect unintended pregnancy rates and thus the associated adverse health effects is irrelevant to this case, which is focused on emergency contraceptives that can function abortifaciently. Thus, the government's heavy emphasis on the alleged benefits of free contraceptives is besides the point.

Making the imposition of the Mandate on the College even more unjustified, there is scant evidence that providing cost-free access even to *conventional* contraceptives reduces unintended pregnancies. The Institute of Medicine report on which HHS relied in crafting the Mandate fails to demonstrate that forcing employers to cover FDA-approved contraceptives will actually reduce the number and percentage of unintended pregnancies — and thus the adverse health events that may (or may not) be attributable to the unintended nature of the pregnancy. The IOM report observes that private health insurance coverage of contraceptives had increased

[13] 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), Exhs. at 603-35.

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.[14]

The IOM report nonetheless claims that forcing employers to cover contraceptives without cost sharing will reduce unintended pregnancies. It cites a particular "policy brief" for the proposition that "cost-sharing requirements, such as deductibles and copayments, can pose barriers to care and result in reduced use of preventive and primary care services." *Id.* (citing Julie Hudman & Molly O'Malley, Kaiser Comm'n on Medicaid & the Uninsured, *Health Insurance Premiums and Cost-Sharing: Findings from the Research on Low-Income Populations* (Mar. 2003), Exhs. at 665). Yet this policy brief simply does not support the contention that forcing employers like the College to cover abortifacients (or, for that matter, contraceptives) will reduce unintended pregnancies.

Most significantly, the paper focuses exclusively upon low-income participants in publicly-financed health programs like Medicaid. One cannot legitimately draw broad inferences from studies focused on this population; the IOM report itself acknowledges that low-income women have much higher rates of unintended pregnancy. IOM Report at 102. One certainly cannot assume that the impact of co-payments and deductibles on health care utilization on relatively well-compensated employees of employers like the College 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.

[14] *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), Exhs. at 639; Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Unplanned Pregnancy in the United States*, http://www.thenationalcampaign.org/resources/pdf/briefly-unplanned-in-the-united-states.pdf (last visited Nov. 17, 2013).

In addition to the failure of the IOM report adequately to support the contention that free access to abortifacients will reduce unintended pregnancies, other evidence contradicts it outright. First, as discussed below, survey data reveals that cost plays a small role, if any, in decisions about birth control. Second, as also discussed below, state-specific research data conclusively prove that contraceptive mandates do not solve the unintended pregnancy problem. Indeed, the evidence reveals no apparent correlation between the existence of such mandates and unintended pregnancy rates. In fact, as shown *infra*, states *with* contraception mandates have *higher* rates of unintended pregnancy than states without them. Thus, the Mandate almost certainly will not advance the government's interest in reducing unintended pregnancies. Forcing religious institutions like Louisiana College 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*.[15] 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.

[15] Strategic Pharma Solutions, *Contraception in America: Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf (last visited Nov. 17, 2013) [hereinafter *Contraception in America*], Exhs. at 702.

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.[16] 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%.[17] Data showing the unintended pregnancy rates both before and after the adoption of a state mandate is available for seven states. In five of those states (Arkansas, New Mexico, Oregon, Washington, and West Virginia), the unintended pregnancy rate actually *increased* following the adoption of a contraceptive mandate.[18] Plainly, contraceptive mandates are not an effective means of noticeably diminishing unintended pregnancies.

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

Imposing the Mandate on the College also will not advance Defendants' stated interest in equalizing preventive care expenditures between the sexes. The College already includes conventional birth control pills and sterilization in its health care plan, and will comply with Mandate's directive to eliminate cost-sharing for those items. As noted above, it is highly unlikely that LC employees will ever use abortifacients, and, in the event they do, the cost of those items is not prohibitive. *See, e.g.*, LeJeune Decl., ¶ 13 ("Louisiana College employees are

[16] *See* Nat'l Conference of State Legislatures, *Insurance Coverage for Contraception Laws*, http://www ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Nov. 17, 2013), Exhs. at 655; Guttmacher Inst., *Insurance Coverage of Contraceptives*, http://www.ncsl.org/Issues-research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Nov. 17, 2013), Exhs. at 660.

[17] The Guttmacher Institute maintains and publishes a "reproductive health profile" for each of the 50 states. *See* Guttmacher Inst., State Data Center, http://www.guttmacher.org/datacenter/profile.jsp (last visited Oct. 11, 2013). Each state's profile includes the percentage of pregnancies in 2006 that were unintended. *See also* Kathryn Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2002, 2004, 2006 and 2008 (Guttmacher Institute, September 2013), Exhs. at 685.

[18] Kost, Unintended Pregnancy Rates; Table of State Unintended Pregnancy Rates, Exh. at 699-701.

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."); Sec. Am. Compl., ¶ 150 (Plan B widely available for between $30 and $65; ella widely available for $55); Exhs. at 636 (identifying ways to obtain emergency contraceptive at even lower cost).

In sum, imposing the Mandate on the College is not the least restrictive means of advancing a compelling governmental interest. Accordingly, this Court should grant the College summary judgment on its RFRA claim.

II. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS 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.[19] 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*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) (citing *Lukumi*, 508 U.S. at 542). "The Free

[19] 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).

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.

The Mandate 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,[20] yet the government refuses to exempt the College based on its religious objections. The grandfathering exemption is not based on any scientific rationale that those employees and covered persons are physiologically different than the people who work for religious-minded employers such as the College, such that birth control does not give them the same allegedly compelling benefits. Yet the government is content to withhold its Mandate from tens of millions of women enrolled in grandfathered plans that the government's regulations give a "right" to persist indefinitely.

The government has further undermined the applicability of its Mandate by refusing an exemption to the College but at the same time fully exempting "religious employers" that are churches, integrated auxiliaries of churches, conventions of churches, or the exclusively religious activities of religious orders. *See* 78 Fed. Reg. at 39874 ("simplifying" and "clarifying" the religious employer exemption by restricting it to only those non-profits referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii)). Defendants' explicit rationale for this exemption is that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the

[20] 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).

same objection, and who would therefore be less likely than other people to use contraceptive services." 78 Fed. Reg. at 39,874. Meanwhile, employees of entities such as the College "may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers to share such religious objections of the [Plaintiff]." 78 Fed. Reg. 8,456, 8,461–62. But there is no rational basis for the government to declare that integrated auxiliaries of churches—which are often schools and often automatically include seminaries—are "more likely than" the devoutly Christian Plaintiff in this case "to employ people of the same faith who share the same objection" to abortifacients. Defendants have presented no data about the beliefs of employees at the thousands of various integrated auxiliaries of churches around the country, it has no data about the beliefs of the College (except the verified facts indicating how deeply devout its activities are), and it has no rational grounds upon which to compare those nonexistent data sets and conclude that the former are worthy of an exemption but not the latter.

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

Defendants have also chosen not to apply some crucial penalties associated with this Mandate to small employers: they can drop employee coverage altogether (including this Mandate) without being fined under the Affordable Care Act, but larger employers such as the College cannot.[21] This leaves many employees without abortifacient coverage *delivered through their employers and their employers' insurers*—those employees will have to receive the

[21] *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).

Mandate's alleged benefits somewhere else. Yet the government claims it has a compelling interest in forcing that same mandated coverage to come to the College's employees through its own insurer. Defendants have no basis for distinguishing between employees of large and small entities and deciding that the latter need not receive the Mandate from their employers' insurers but the former must. This is not a generally applicable rule. In addition, the government has decided not to apply the Mandate to religious sects opposed to 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.[22]

The Mandate is also not generally applicable because the Affordable Care Act itself awards Defendants unlimited discretion to shape its scope. The Defendant Department of Health and Human Services "*may* establish exemptions" for religious objectors, 45 C.F.R. § 147.130 (emphasis added), or it may choose not to. And pursuant to 42 U.S.C. § 300gg-13, Defendants' discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46,623 (asserting that § 300gg-13 grants the Department of Health and Human Services and its Health Resources and Services Administration (HRSA) the "authority to develop comprehensive guideless" under which the Government believes "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers"). Section 300gg-13 has no criteria in it limiting the discretion of Defendants in deciding who should get an exemption, or why, or what kind. Using their unfettered discretion, Defendants have continually changed its exemptions and accommodations since August of 2011. This has led to numerous proposals and versions of the rule in the Federal Register, and multiple versions of a "safe harbor" Guidance that the Defendants have issued *in addition to* the regulations. The stated reasons behind why the government exempted "religious employers" but not the College—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

[22] 26 U.S.C. §§ 5000A(d)(2)(a)–(b).

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 the Affordable Care Act, "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it.'"[23] Defendants also asserts post hoc logistical reasons for the grandfathering provision, but all of those reasons are likewise secular, yet they deny tens of millions of women the alleged benefits of the Mandate while refusing to exempt similarly situated employers such as the College. 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)

[23] 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).

(campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches).

Defendants' many exemptions here span the gamut of reasons while still refusing a religious exemption to the College. The grandfathering provision gives plans a "right" to avoid the Mandate indefinitely for secular reasons; the "religious employer" exemption relies on secular tax code distinctions regarding which entities must file a 990 tax form, and on the government's unfounded claim that employees at religious non-profit entities such as the College do not sufficiently share their employers' mission-oriented beliefs as do schools and seminaries that the IRS deems "integrated auxiliaries." The small employer provision that allows them to dump health insurance coverage altogether without penalty serves secular and economic purposes under which the government is content to not have this Mandate flow to employees from their employers' or those employers' insurers, while the government would heavily penalize the College if it dropped coverage. These sorts of categorical exemptions led the court to deem the law not generally applicable in *Fraternal Order of Police*, 170 F.3d at 365. *See generally Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.").

B. The Mandate is Not Neutral.

The Mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not neutral; it discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of neutrality. *See, e.g.*, *Lukumi*, 508 U.S. at 532 (explaining that "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). As discussed above, the "religious employer" exemption protects the religious exercise of only *certain* religious employers, specifically distinguishing integrated auxiliaries of churches with regard to whether or not they are required to file an annual tax return, but without any objective basis to distinguish between employers like the College and those entities *for the*

purposes of deciding who must comply with this Mandate. *See* 78 Fed. Reg. at 39874 (aligning the "religious employer" definition with 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), which concerns the filing of tax returns). Defendants' explicit rationale for superimposing this tax code distinction onto a requirement of birth control coverage is its unsupported claim that "integrated auxiliary" schools and seminaries have employees who share their employers' beliefs to some significantly greater extent than the employees of entities like the College. *See* 78 Fed. Reg. at 39,874; 78 Fed. Reg. at 8,461–62.

This unfounded criterion engages in religious gerrymandering. *See Lukumi*, 508 U.S. at 534. Defendants made their own subjective decision about which religious employers to exempt. It is a mystery how Defendants determined that non-profit religious employers who are not exempt from filing a Form 990 each year would not possess the same values and generally employ the same sympathetic-minded individuals as exempt non-profit religious employers, even if both kinds of entities are schools.[24] Some schools are integrated auxiliaries of churches, and some are not, based on factors having absolutely nothing to do with the beliefs of the employees or their desire for abortifacient coverage in health insurance. The § 6033 distinction borrowed for this Mandate has no relationship to birth control or employee beliefs at all. It simply pertains to whether the IRS seeks to specifically examine the *donation* activities of a non-profit entity as would be reported on a Form 990, or whether that examination is not necessary because of the entity's relationship with a church. Thus there is no "neutrality" in using the § 6033 criteria for this Mandate, because the criteria have no articulated or evidence-based relationship with the Mandate, much less a rational connection to the delivery of abortifacient

[24] 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)).

coverage to some employees but not others.[25] 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 entities like the College, but not if it refused to exempt §6033(a)(3)(A)(i) or (iii) entities.[26] *See Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *see also Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (noting that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religious, that law is constitutionally invalid even though the burden may be characterized as being only indirect.").

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

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[25] *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.")

[26] *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).

Consequently, failing the requirements both of neutrality and of general applicability, the Mandate is subject to strict scrutiny. As discussed above, the Mandate fails; summary judgment should be granted to the College on this claim as well.

III. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS 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 Defendants' notion of what "counts" as religion and what does not 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 that are integrated auxiliaries of churches receive an exemption, while other devoutly religious schools are not exempt. But Defendants 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." *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (stating that 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). While Defendants may want the analysis to end where no specific reference is made to denominations 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, Defendants have used their 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 like the College 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, these criteria are used to examine 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. Defendants'

stated reason for utilizing the integrated auxiliary rule is the unfounded theory that entities that are *not* integrated auxiliaries will have employees who are less devoted to the entity's beliefs than are the employees of organizations that *are* integrated auxiliaries. But the beliefs of employees is a criterion found nowhere in 26 C.F.R. § 1.6033–2.

Defendants' decision to withhold an exemption from a thoroughly Christian institution of learning, based on unrelated criteria superimposed from IRS rules relating to filing informational returns, is an act of discrimination among religious entities that violates the Establishment Clause. Defendants' 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.[27] 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, Defendants have made a judgment about what individual *employees* beliefs may or may not be depending on which employer they choose to work for.[28] There is no evidence that Defendants have identified to justify its exemption of integrated auxiliaries but not the College on the basis of speculation about employee beliefs and institutional dedication to those beliefs.

[27] *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.

[28] 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).

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." *Valente*, 456 U.S. at 246. The similarities to *Valente* are fatal to Defendants' argument dismissal and summary judgment arguments.

The College respectfully requests that this Court grant it summary judgment on its Establishment Clause claim as well.[29]

IV. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS FREE SPEECH CLAUSE CLAIM.

The Mandate additionally violates the First Amendment by coercing the College to facilitate speech that is contrary to its religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Here, the Mandate unconstitutionally coerces the College to communicate a message it finds morally objectionable. It does so in two ways. First, the Mandate includes required

[29] As set forth above, Defendants cannot meet the compelling governmental interest standard.

coverage not only for abortifacients but also for "education and counseling" related to the same. Education and counseling are speech. The coverage of that speech includes speech in favor of abortifacient items, since by its terms the coverage includes any such education and counseling, and since if a doctor prescribes emergency contraception the information and counseling associated with that prescription will necessarily be supportive of using such items (otherwise the doctor would not be prescribing it). As discussed above, the Mandate and its "accommodation" coerce the College to provide a health plan that acts as the conduit for coverage of such "education and counseling," in the form of promised payments for such education and counseling by the College's insurer.

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 College 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 COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS DUE PROCESS CLAUSE CLAIM.

The Mandate violates the Due Process Clause of the Fifth Amendment because it creates a blank check for Defendants to discriminatorily create and enforce its "religious" exemptions and accommodations. HHS's Health Resources and Services Administration is tasked with determining, under the ACA, what groups are sufficiently "religious" to qualify for an exemption, and which ones are not; this unbridled discretion is impermissible under the Due Process Clause.

A law that is so "standardless that it authorizes or encourages seriously discriminatory enforcement" does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304. The 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 the Affordable Care Act and issue unilateral waivers, delays, and exemptions from those requirements without the authority of the Act or Congress. (*See*, *e.g.*, the one year delay in reporting requirements for large employers to provide health coverage to their employees, IRS Notice 2013-45, Jul. 9, 2013, available at http://www.irs.gov/pub/irs-drop/n-13-45.pdf, and the declaration that Congress will not be ejected from the subsidies provided in the Federal Employees' Health Benefits Program as the Affordable Care Act requires, IRS Notice 2013-45, Jul. 9, 2013, available at http://www.irs.gov/pub/irs-drop/n-13-45.pdf; OPM BAL 13-207, Sep. 30, 2013, available at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-207.pdf; ACA § 1312(d)(3)(D), 42 U.S.C. § 18032(d)(3)(D)). The Executive Branch's picking and choosing which parts of the Affordable Care Act to enforce, while refusing to give exemptions from this Mandate to the College, constitute an exercise of unfettered and illegal discretion under the Due Process Clause.

VI. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS 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 the College 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 the College until its health plan 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, 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 plaintiff 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 to the College. 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, the College must comply with the Mandate beginning in January 2014, instead of being allowed to wait as specified in the Affordable Care Act until the start of its plan year that begins more than a year after the July 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 flatly wrong. Defendants ignored the fact that many organizations object not merely to "paying" but to facilitating objectionable coverage (*e.g.*, through the "accommodation").

Defendants' contention that its Mandate is supported by compelling interests disregards the well-established legal principle that generic interests cannot, by definition, be compelling because they are too broadly formulated. 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 the College. *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).

"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 the College. 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,[30] 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

[30] 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.

constitutes an action that is abortifacient, that destroys a new human life, and that terminates a pregnancy.[31] 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 College to discrimination due to its refusal to cover abortifacient drugs and devices. The Mandate is therefore contrary to the Weldon Amendment.

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

[31] 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").

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 College respectfully requests that this Court grant its cross motion for summary judgment, and deny Defendants' motions to dismiss and for summary judgment.

Respectfully submitted this 18th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 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