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 MOTION FOR PRELIMINARY INJUNCTION

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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.

[1] The "exhibits" to which this memorandum refers are the exhibits to Plaintiff's cross motion for summary judgment, filed November 18, 2013 (ECF No. 91-4). 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]."

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 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 applying 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 crippling 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.

The College is thus likely to succeed on the merits of its RFRA claim.[2] The other preliminary injunction factors also warrant the entry of relief. The College will suffer irreparable harm in the absence of an injunction, and that harm outweighs any burden Defendants might suffer from an injunction. And the public has no interest in the enforcement of a regulation that violates the fundamental right of religious freedom.

STANDARD OF REVIEW

To obtain a preliminary injunction, a party must establish four factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury outweighs any damage the injunction may cause the opposing party; and (4) that the injunction will not disserve the public interest. *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir.1991).

[2] The Mandate also violates the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act, and various statutory prohibitions on compelled support for abortion. Because the RFRA claim is adequate to afford preliminary injunctive relief at this stage of the proceedings, these other arguments are not set forth in greater detail herein.

ARGUMENT

I. THE COLLEGE IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

The College is likely to succeed on its Religious Freedom Restoration Act claim. The Mandate substantially burdens its religious exercise by interfering with its pursuit of its religious objectives and by compelling it to perform immoral acts. The College will suffer irreparable injury in the absence of an injunction, and this threatened injury far outweighs any damage the injunction may cause the government. The requested injunction will not disserve the public interest.

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.

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 must 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, in their motions to dismiss and for summary judgment, that the Mandate does not "substantially burden" the College's religious exercise, Defendants reveal their 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 violate 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 its 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.[3] That the two actions might be

[3] 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

said, in a willfully truncated assessment of their significance, to bear some superficial resemblance hardly means that Defendants have not coerced the College into "modifying its behavior."

It is unsurprising that the only court to address this contention to date summarily rejected it. In *Zubik v. Sebelius*, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013), the court embraced an analogy offered by the plaintiffs there:

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

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

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.

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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?

The College's complicity in this accommodation is just as problematic as providing these services ourselves."[4] 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, 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

[4] 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.

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 disputed, 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 (the Seventh, Tenth, and DC Circuits) have rejected Defendants' effort to alter the inquiry.

In Hobby Lobby, the Tenth Circuit held that a for-profit organization challenging the Mandate was likely to succeed on the merits of its RFRA claim, emphasizing that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [Plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 723 F.3d at 1141.

Similarly, in *Gilardi v. U.S. Department of Health and Human Services*, the D.C. Circuit held that the Mandate substantially burdens the religious exercise of the Catholic owners of two corporations by requiring those corporations to include contraceptive coverage in their employee health plans. 733 F.3d 1208, 1216-19 (D.C. Cir. 2013). The court rejected the government's argument that the interposition of the corporate form between the Gilardis and their employees rendered the Gilardis' participation "too remote and too attenuated" to constitute a substantial

burden. *Id.* at 1217. As the D.C. Circuit explained, "'[c]ourts are not arbiters of scriptural interpretation,'" *id.* at 1216 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)); thus, "[w]hen even attenuated participation may be construed as a sin, it is not for courts to decide that the corporate veil severs the owner's moral responsibility," *id.* at 1215 (citation omitted). Instead, the court held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.* at 1216 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), *Thomas*, 450 U.S. at 718). The Mandate, therefore, imposed a substantial burden on the Gilardis because they are forced to choose between "abid[ing] by the sacred tenets of their faith, pay[ing] a penalty of over $14 million, and crippl[ing] th[eir] companies . . . , or . . . becom[ing] complicit in a grave moral wrong. If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." *Id.* at 1218.

Likewise, in *Korte v. Sebelius*, 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*, 733 F.3d at 1216. 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*, at 1218. 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. *See also Zubik*, 2013 WL 6118696, at *25.

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 are a few aspects of Defendants' argument that merit 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 . . . ."[5] This overstates the 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

[5] 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 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).

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 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 choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other 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.*) (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*, 733 F.3d at 1219-22; *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); *Zubik v. Sebelius*, 2013 WL 6118696, at *28-32; *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *6-8 (W.D. Pa. June 18, 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[6] is not the least restrictive means of advancing a compelling governmental interest. 2013 WL 5960692, at *25-26. 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

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

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"); *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.[7] (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 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).[8] *See also O Centro*, 546 U.S. at 430-31; *Tyndale House Publishers, Inc. v.*

[7] 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.

[8] 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

Sebelius, 904 F. Supp. 2d at 125-29. For this reason alone, Defendants cannot satisfy strict scrutiny, and therefore the College is likely to succeed on its RFRA claim and is thus entitled to summary judgment.[9]

II. THE OTHER PRELIMINARY INJUNCTION FACTORS WARRANT RELIEF.

A. A Preliminary Injunction Is Needed to Prevent Irreparable Harm.

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal quotation marks and citation omitted). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F.Supp.2d 106, 129 (D.D.C. 2012) (citing *O Centro Espirita Beneficente União do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418)). Here, coercing the College to facilitate access to abortifacients in direct violation of their faith is the epitome of irreparable injury.

All courts addressing the question have concluded that imposing the Mandate upon a religiously objecting organization inflicts irreparable harm. *See Beckwith Elec. Co. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013); *Zubik v. Sebelius*, 2013 WL 6118696, at *32-22; *Geneva Coll. v. Sebelius*, 2013 WL 3071481, at *11 (W.D. Pa. June 18, 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 808 (E.D. Mich. 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294-95 (D. Colo. 2012). *See also Hobby Lobby*, 723 F.3d at 1146 (noting that the irreparable harm standard is satisfied by alleging a violation of RFRA, just as it would be where a First Amendment violation were asserted); *Korte*, 2013 WL 5960692 at *7 (holding that the

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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)).

[9] The College respectfully refers the Court to its memorandum of law in support of its cross-motion for summary judgment for additional discussion of the government's failure to satisfy strict scrutiny.

strength of the RFRA claim warrants no need for consideration of the preliminary injunction equities).

B. The Balance of Equities Warrants Entry of a Preliminary Injunction.

The balance of equities tips strongly in favor of the College. The College is subject to crippling fines for non-compliance with the Mandate, and the potential harm to the Government in exempting a small number of employees compared to the millions already exempt is *de minimis*.

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

Defendants cannot possibly establish that they would suffer any substantial harm from a preliminary injunction pending final resolution of this case. The government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate immediately against the College before its legality can be fully adjudicated. Furthermore, Defendants concede that there is no reason to impose the Mandate on employers whose employees share their religious convictions concerning abortifacients.

In addition, given that courts have concluded that the Mandate already contains exemptions available to "tens of millions of people," *Hobby Lobby*, 713 F.3d at 1143, Defendants cannot plausibly claim that they will be harmed by a temporary delay in enforcement against the College. On remand in *Hobby Lobby*, the district court held that, because a "bulk of the approved [contraceptive] methods are available" to health plan beneficiaries, "unlike a substantial number of other employees whose plans the government has completely exempted from the contraceptive coverage requirement," balanced against the potential crippling fines established that "the threatened injury to the [Plaintiffs]. . .outweighs the potential harm to the

government." *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3869832, at *1 (W.D. Okla. July 19, 2013).

Indeed, any claim of harm to Defendants is fatally undermined by the fact that they consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g., Mot. to Stay, Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); Order, *Sioux Chief Mfg. Co. v.* Sebelius, No. 4:13-cv-00036, (W.D. Mo. Feb. 28, 2013) (Dkt. # 9); Order, *Hall v. Sebelius*, No. 13-cv-00295, (D. Minn. Apr. 2, 2013) (Dkt. # 11). Defendants "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v Sebelius*, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). Indeed, "[i]f the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith Elec. Co., Inc. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013). In short, especially when balanced against the serious irreparable injury being inflicted on the College, any harm the Defendants might claim from a preliminary injunction is *de minimis*.

C. A Preliminary Injunction Would Serve the Public Interest.

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement *properly* the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA, there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). On remand in *Hobby Lobby*, the district court held that:

> Given the importance of the interests at stake […], the fact that the ACA's requirements raise new and substantial questions of law and public policy, and that substantial litigation as to the mandate here is ongoing around the country, the court concludes that there is an overriding public interest in the resolution of

> the legal issues raised by the mandate before [Plaintiffs] are exposed to the substantial penalties that are potentially applicable.

Hobby Lobby, 2013 WL 3869832, at *1. Thus, the public interest favors protecting the College's religious liberty by enjoining enforcement of the Mandate until it is permanently struck down.

CONCLUSION

For the foregoing reasons, the College respectfully requests that this Court grant its motion for preliminary injunction.

Respectfully submitted this 2nd day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 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