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-0463 JUDGE: Dee D. Drell MAGISTRATE: James D. Kirk

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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

In its memorandum of law supporting its cross-motion for summary judgment, Louisiana College ("the College" or "LC") argued that it was entitled to judgment without trial on its claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (RFRA). RFRA, of course, forbids the government from substantially burdening religious exercise unless application of the burden to the person is the least restrictive means of advancing a compelling governmental interest. Because the Mandate substantially burdens the College's exercise of religion without adequate justification, this Court should grant its cross-motion for summary judgment.

A. Defendants Are Substantially Burdening the College's Religious Exercise.

In its opening summary judgment brief, the College identified the three distinct exercises of its religion that the Mandate substantially burdens: first, offering health insurance that reflects the College community's shared Christian pro-life beliefs; second, fostering an academic community that encourages its members to grow in spiritual maturity through obedience to God's commands; and third, avoiding the facilitation of sinful behavior, which is itself sinful.

The College then explained how the Mandate, in the broader context of the Affordable Car Act's requirements,[1] substantially burdens each of these three distinct exercises of religion. First, the Mandate makes it impossible, as a practical matter, for the College to provide health insurance that reflects the community's shared Christian pro-life beliefs. The College desires to continue offering a health insurance plan that does not give beneficiaries access to abortifacients. But if it exercised its religious convictions in that manner, it would face fines of $100 per employee per day, amounting to $6,570,000 annually. Given the employer mandate, it cannot avoid this burden by simply dropping employee health coverage; the penalty for doing so would be approximately $300,000 per year.

[1] That is, (a) the requirement that employers with 50 or more employees offer health insurance; and (b) the punishments for offering plans that exclude required coverages.

The College also explained how the Mandate undermines its ability to foster an academic community that encourages its members to grow in spiritual maturity through obedience to God's commands. The College can either obey or disobey the Mandate. If it obeys, it will facilitate access to abortifacients, profoundly undermining its efforts to encourage employees to respect life. If the College disobeys, it will be subject to federal fines of up to $6,570,000 annually. The Mandate thus substantially interferes with the College's freedom to pursue its faith-based goals in a morally permissible manner.

The College finally argued that the Mandate substantially burdens the third exercise of religion at stake in this case: avoiding the immoral facilitation of sinful behavior. The Mandate makes it virtually impossible for the College to avoid that conduct; if it does so, it will face crippling financial penalties. Defendants essentially force the College to sin.

In their opposition to the College's cross-motion for summary judgment, Defendants contend that the Mandate does not substantially burden the College's religious exercise. Defs.' Br. at 3-19. They make five basic arguments (discussed *seriatim* below), all of which rest upon their distorted articulation of the religious exercise(s) at stake in this case.

1. *The religious exercise in question*

Defendants more or less admit that forcing the College to facilitate access to abortifacients violates the College's religious convictions (but argue that such coercion does not "substantially burden" its religious exercise). They acknowledge (but curtly dismiss) the College's desire to exercise its faith by fostering a spiritually mature, pro-life Christian community. Defs.' Br. at 3-4. But Defendants ignore the College's expressed desire to exercise its religious convictions by providing employee health coverage that reflects and communicates its pro-life religious convictions.

Defendants instead focus primarily upon the steps the College must take to invoke the accommodation, arguing as if the College's sole objection is to completing the self-certification. *See, e.g.*, Defs.' Br. at 5 ("Louisiana College need only fulfill the self-certification requirement and provide a copy to its insurer."); 6 (assessing the "burden imposed by this purely

administrative self-certification requirement"). Defendants' "substantial burden" arguments, to varying degrees, rest upon this erroneously truncated conception of the College's religious exercises; unsurprisingly, this foundational error manifests itself in each of the arguments on which it rests.

2. *The supposed "behavior modification" rule*

In their opposition, Defendants reiterate their contention that a law or regulation's burden on religious exercise is "substantial" for RFRA purposes *only* if the regulation pressures the claimant to "modify his behavior." Defs.' Br. at 1, 3. Defendants claim that federal government agencies and officials do not commit *prima facie* RFRA violations if they "merely" substantially pressure persons to violate their religious convictions.

This conception of RFRA is erroneous. 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 District of Columbia 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. In *Gilardi v. U.S. Department of Health and Human Services*, the District of Columbia Circuit held that "[a] 'substantial burden' is 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 733 F.3d 1208, 1216 (D.C. Cir. 2013) (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), and *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). The Mandate, therefore, imposed

a substantial burden on the Gilardis because they were 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. *See also Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) ("[i]t 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."); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (challenged law substantially burdens religious exercise if it compels claimant "to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

The only two district courts to consider the Government's argument have both rejected it. In *Roman Catholic Archdiocese of NY v. Sebelius*, No. 1:12-cv-02542, ECF 116 (E.D.N.Y. Dec. 16, 2013), the district court agreed that the "substantial pressure" test applied in *Korte* and *Hobby Lobby* should apply in that case as well. Slip Op. at 17-19, 22 ("Where government action coerces a religious adherent to undertake affirmative acts contrary to his religious beliefs, the 'substantial burden' inquiry under RFRA should focus primarily on the 'intensity of the coercion applied by the government to act.'") (quoting *Korte*, at 683 and *Hobby Lobby*, at 1137). *See also Zubik v. Sebelius*, 2013 WL 6118696, at *23 *et seq.* (W.D. Pa. Nov. 21, 2013).

After erroneously claiming that a law substantially burdens religious exercise *only if* it forces a person to modify his behavior, Defendants then contend that the Mandate does *not* require the College to change its conduct. They declare that the College ends up doing essentially the same thing *after* the Mandate as it did *before*—telling its issuer that it does not wish to cover abortifacients. Defs.' Br. at 5, 6. Defendants' assertion here rests on two premises: (1) that the *only* conduct that should be examined is the College's communication with its insurer; and (2) that "the conduct" in question has not been "modified."

Both of these premises are false. First, Defendants never explain why the entire substantial burden analysis should focus exclusively on the College's act of communicating with its insurer. The College never said that "communicating with its insurer" was the only

religiously significant act at stake in this case. Instead, as noted above, there are three distinct (but interrelated) exercises of religion at stake in this case: offering a religiously compliant health plan; fostering a Christian community; and avoiding sin. Under the Mandate, the College simply cannot do the first and the third, and it cannot do the second as effectively. Given that, it is perhaps understandable why Defendants mostly seek to avoid talking about the effect of the Mandate on these exercises, instead suggesting that the entire case focuses on the College's communication with its insurer.

Second, the Mandate *does* require the College to modify its behavior. Defendants' theory—that the College's pre- and post-Mandate communications with its insurer are "the same"—works only if the intended and foreseeable consequences of actions are irrelevant in assessing whether they are the same or different. This is a remarkable contention. Defendants are essentially arguing that the moral significance of an act is completely detached from the consequences of that act. To Defendants, it matters not that the consequence of the 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.[2] That the two actions might be said, in a willfully truncated assessment of their significance, to bear some superficial resemblance hardly means that Defendants have not coerced the College into "modifying its behavior."

It is unsurprising that the only two courts to address this contention to date summarily rejected it. In *Zubik*, the court embraced an analogy offered by the plaintiffs there:

> Plaintiffs liken this result by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily

[2] 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?

> granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

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

In *Roman Catholic Archdiocese of New York*, the court deemed "unpersuasive" the Government's argument that the Mandate, with the accommodation, required no change in the plaintiffs' conduct. Slip Op. at 26. The court held that even if Defendants were correct that the Mandate did not require the plaintiffs to modify their behavior,

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

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

This Court should similarly reject Defendants' argument that they are not substantially burdening the College's religious exercise on the ground that they supposedly have not required it to modify its behavior.

3. *The "character" of the actions required by Defendants*

Defendants also argue that a law that substantially pressures a person to violate his religious beliefs does not necessarily "substantially burden" the person's religious exercise for RFRA purposes. Defs.' Br. at 2. Defendants claim that something more is required: courts must additionally examine "the *objective* character of the actions required by the challenged law and the magnitude of the burden imposed by those requirements." *Id*. (emphasis in original). Defendants contend that a court must "examine the alleged burden . . . as a legal matter, outside the context of [the claimant's] religious beliefs—that is, from the perspective of an objective

observer." *Id*.; *see also id*. at 10-11 They claim that "in determining whether an alleged burden is substantial, courts look not only to the magnitude of the penalty imposed, but to *the character of the actions required by the challenged law and the magnitude of the burden* imposed by those requirements." Defs.' Br. at 9 (emphasis added).

As noted in the previous subsection, numerous courts in other HHS Mandate challenges have rejected this contention, instead holding that imposing significant pressure on a person to violate his religious beliefs constitutes a "substantial burden" under RFRA. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1140; *Gilardi*, 733 F.3d at 1216; *Korte*, 735 F.3d at 683. A claimant need not do more, such as demonstrating that the actions required by the challenged rule take a great deal of time, effort, or expense.

Defendants assert that the burden is insubstantial because all that the College allegedly need do is complete the self-certification, a purely administrative task. Defs.' Br. at 6 (effort required to complete the form "is, at most, *de minimis*"). Yet, this is not the essence of what Defendants require the College to do. Most simply, Defendants require the College to provide their employees health insurance coverage that gives them access to life-destroying drugs and devices. The College can comply with that requirement either (a) by including abortifacients in the four corners of the health insurance plan; or (b) by invoking the accommodation, under which the College's insurer will promise to make separate payments to the College's employees for abortifacients as a direct consequence of their employment with the College. The burden on the College's religious exercise lies not in the mechanism by which it invokes the accommodation, but rather in the requirement that it facilitate, in the first place, its employees' access to abortifacients, one way or the other.

The only district courts squarely to address Defendants' argument have rejected it. In *Zubik v. Sebelius*, "[t]he Government acknowledge[d] that the act of self-certification will require the Plaintiff-entities to sign the self-certification and supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling." 2013 WL 6118696, at *24. Defendants

conceded that the plaintiffs there, like the College here, sincerely believed that life is sacred from the moment of conception that "the facilitation of evil is as morally odious as the proliferation of evil." *Id*. "Given these concessions," the *Zubik* court "disagree[d] with the Government that Plaintiffs' ability or inability to 'merely sign a piece of paper,' and thus comport with the 'accommodation,' is all that is at issue here." *Id*. In other words, the question is not whether executing the self-certification is time-consuming or expensive, but rather whether Defendants are substantially pressuring religious employers like the College to violate their religious convictions. Without question, they are.

Similarly, in *Roman Catholic Archdiocese of New York*, the court held the Defendants' argument "finds no support in the case law." No. 1:12-cv-02542, ECF 116, Slip Op. at 24. It declared, "where a law places substantial pressure on a plaintiff to perform affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*." *Id*. (citing *United States v. Lee*, 455 U.S. 252 (1982), and *Yoder*, 406 U.S. 205). The court also concluded that the Government had failed to explain how its proposed test would work: "beyond its repeated insistence that this is an 'objective' inquiry, the Government provides no framework for how a court could determine whether an act that concededly violates a plaintiff's religious beliefs is actually only '*de minimis.*'" *Id*. at 24-25. As the Tenth Circuit stated in *Hobby Lobby*, "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." 723 F.3d at 1142.

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

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

Slip Op. at 25.

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

Defendants argue that this understanding of RFRA deprives the statutory word "substantial" of any significance. Defs.' Br. at 9-11. As is plain from the statutory text, however, "substantial[]" refers not to the type of actions required of plaintiffs—*i.e.*, their religious exercise—but rather the type of pressure imposed by the government —*i.e.*, the burden. 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion."). It requires courts to assess the pressure the government exerts on a plaintiff to violate his religious beliefs, not the nature of the religious exercise.

Thus, in evaluating whether government action imposes a substantial burden on religious exercise, the Supreme Court has consistently evaluated the magnitude of the coercion employed by the government, rather than the "significance" of the actions required of plaintiffs. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court did not consider whether the inconvenience to the Seventh-day Adventist plaintiff of working on Saturday was "*de minimis*." Defs.' Br. at 3, 6. Instead, the Court accepted her representation that she could not work on Saturday and assessed whether the resulting denial of unemployment benefits coerced her to abandon this religious exercise, ultimately concluding that the "pressure upon her to for[]go [her] practice [of abstaining from work on Saturday]" was tantamount to "a fine imposed against [her] for her Saturday worship." *See Sherbert*, 374 U.S. at 404.

Likewise, in *Thomas*, the Court did not ask whether Thomas' transfer from a factory making sheet steel to a factory that used the sheet metal for producing tank turrets caused increased expenditures time or effort. Rather, the Court evaluated the "coercive impact" of the state's refusal to award Thomas unemployment benefits when his pacifist convictions prevented him from accepting the transfer, concluding that the denial "put[] substantial pressure" on him "to violate his beliefs." 450 U.S. at 717–18. Defendants' attempt here to focus on how much time or effort is involved in the self-certification process misses the proper analytical point. The burden is the impact to the individual's religious beliefs by becoming a participant in the delivery of abortifacients.

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

Indeed, the impropriety—not to mention the impossibility—of courts determining whether an exercise of religion is significant or meaningful is self-evident. On Defendants' theory, a court could compel a Quaker to swear, rather than affirm, the veracity of his testimony on the theory that the change in verbiage is a "*de minimis*" act. Defs.' Opp. at 1, 6. An Orthodox Jew could be forced to flip a light switch on the Sabbath because such action "require[s] virtually nothing of [him]." *Id.* at 3. No "principle of law or logic" equips a court to

decide the significance or "meaning[]" of these acts. *Smith*, 494 U.S. at 887. What may be "no big deal" to the government may be a very big deal to a believer.

4. *Characterizing the scope of and theory behind the College's objection*

Defendants argue that the College "wants to prevent *anyone else* from providing [abortifacients] to its employees" and that it is arguing that such provision always substantially burdens its religious exercise. Defs.' Br. at 7-8; *see also id*. at 13 ("Louisiana College objects to the fact that the *consequence* of its refusal to provide contraceptive coverage to its employees is that a third party will provide such coverage in its stead.") Defendants contend that this demonstrates the allegedly defective character of the College's broader "substantial burden" argument. Defs.' Br. at 8-9.

Defendants misunderstand the College's argument. Contrary to the Government's contention, Defs.' Br. at 7, the College does *not* claim that RFRA forbids *anyone* from providing its employees abortifacients. Instead, it objects to being conscripted into a scheme in which its own insurer provides abortifacients to its own employees as a direct consequence of their employment with the College and their participation in the College's employee health plan. If the government wanted to provide abortifacients to its employees *without involving the College*, the College acknowledges that this would not substantially burden its religious exercise. Contrary to Defendants' contention, the College is not objecting to how the government runs its own internal programs but instead to being dragooned into participating in the government's mechanism.

The *Roman Catholic Archdiocese* court rejected this accusation when leveled at the plaintiffs in that case. Slip Op. at 27 ("that is not the case here."). It observed that this is *not* a case where the plaintiffs are challenging government conduct that does not involve them. *Id*. Accordingly, Defendants' stated concerns about the outer boundaries of the College's "substantial burden" argument are unwarranted; and they surely do not preclude entry of summary judgment for the College on its RFRA claim.

5. *Whether the burden is "too attenuated" to be substantial*

Defendants' next response to the College's "substantial burden" argument is that the impact of the Mandate on the College's religious exercise is "too attenuated" to constitute a substantial burden. Defs.' Br. at 2, 11-13. Defendants contend that a claimant cannot object to being compelled to do something based exclusively on the *consequences* of that action. Defs.' Br. at 13. RFRA claimants, in the government's view, can only object to being forced to do something that the claimant regards as *intrinsically* evil. Defendants contend that the "attenuation" assessment must be "viewed from the perspective of an objective observer." Defs.' Br. at 12.

This is not an evaluation of the pressure placed on the College to violate its beliefs, but is rather a particularly obvious invitation for the Court to assess whether the College's conduct is sufficiently remote from the use of abortifacients so as to absolve them from moral culpability for their actions. Courts, however, have no competence to make this religious determination. If the College interprets their religion to prohibit compliance with the Mandate, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

Multiple courts adjudicating HHS Mandate cases have rejected Defendants' "attenuation" argument. In *Gilardi*, for example, the D.C. Circuit 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.*, 450 U.S. at 716); 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).

The court in *Zubik* similarly rejected the government's argument:

> In sum, although the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation"

> requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

2013 WL 6118696, at *25.

Today's decision in *Roman Catholic Archdiocese* is in accord:

> The Government's argument that any burden placed on plaintiffs is too "attenuated" to be substantial is similarly flawed. Defendants argue that plaintiffs' self-certification would only result in the use of contraception after a series of independent decisions by plaintiffs' employees. Although factually accurate, this argument rests on a misunderstanding (or mischaracterization) of plaintiffs' religious objection. Plaintiffs' religious objection is not only to the use of contraceptives, but also to being required to actively participate in a scheme to provide such services. The Government feels that the accommodation sufficiently insulates plaintiffs from the objectionable services, but plaintiffs disagree. Again, it is not the Court's role to say that plaintiffs are wrong about their religious beliefs.

Slip Op. at 26 (citations omitted). *See also Korte*, 735 F.3d at 684; *Hobby Lobby*, 723 F.3d at 1154 ("Whether an act of complicity is or isn't 'too attenuated' from the underlying wrong is sometimes itself a matter of faith we must respect. *Thomas* and *Lee* teach no less.") (Gorsuch, J., concurring); *Geneva Coll.*, 2013 WL 3071481, at *9; *Zubik*, 2013 WL 6118696, at *24; *Grote v. Sebelius*, 708 F.3d 850, 854-55 (7th Cir. 2013); *Beckwith Elec. Co. v. Sebelius*, 2013 WL 3297498, at *15-16 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 681-83 (W.D. Pa. 2013).

Finally, the Tenth Circuit in *Hobby Lobby* rejected Defendants' apparently unprecedented assertion that whether a burden on religious exercise is "attenuated" should be "viewed from the perspective of an objective observer." Defs.' Br. at 12. The court stated, "the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." 723 F.3d at 1142.

In short, Defendants' "attenuation" argument provides no basis for denying the College summary judgment.

6. *The College's freedom to foster a spiritually mature community in other ways*

Finally, Defendants argue that their interference with the College's affirmative efforts to foster a Christian pro-life ethic is not "substantial," given that the College remains free to pursue that objective in other ways. Defs.' Br. at 1. More specifically, they assert that the burden is not substantial because the College remains free "to voice its disapproval of contraceptive use, and to encourage its employees to refrain from using contraceptive services." Defs.' Br. at 5.

The fact that a person may pursue his religious objectives in other ways does not absolve the government of its interference with religious exercise. Were it otherwise, the government could justify virtually any restriction on religious conduct. For example, RFRA would permit the federal government to forbid a congregation from singing hymns on the ground that it could worship God in other ways, such as through prayer, Scripture reading, and celebration of the Lord's Supper. This cannot be the law.

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

Courts applying strict scrutiny to the Mandate are unanimous: it fails. *See Korte*, 735 F.3d at 685-87; *Gilardi*, 733 F.3d at 1219-22; *Hobby Lobby*, 723 F.3d at 1143-44; *Roman Catholic Archdiocese of NY*, Slip Op. at 29-36; *Beckwith*, 2013 WL 3297498, at *16-18; *Zubik*, 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*, for example, the Seventh Circuit held that the Mandate almost certainly[3] is not the least restrictive means of advancing a compelling governmental interest. 735 F.3d at 685-87. There, Defendants invoked the same interests asserted here—"public health" and "gender equality"—claiming that they were "compelling." The court resoundingly disagreed:

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

Id. at 686.

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 686. *See also Hobby Lobby*, 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").

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.[4] 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,

[3] 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.

[4] 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.

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).[5] *See also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d at 125-29. For this reason alone, Defendants cannot satisfy strict scrutiny, and therefore the College is entitled to summary judgment on its RFRA claim.

II. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS FREE EXERCISE CLAUSE CLAIM.

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

[5] 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)).

A. The Mandate is Not Generally Applicable.

As discussed in the College's opening summary judgment memorandum, the Mandate is not generally applicable under the Free Exercise Clause because it is underinclusive, granting categorical exemptions, and involves an unfettered amount of individualized discretion to the government in crafting religious exemptions and "accommodations."

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

Even as briefing on the cross-motions for summary judgment proceeded, Defendants have conceded yet another significant exclusion from the Mandate, one that exacerbates the discrimination against the College. In two similar lawsuits, Defendants admitted that the Mandate's penalties cannot be imposed upon self-insured "church plans" that are exempt from ERISA.[6] These plans do not involve only churches: they can involve universities, hospitals, and other religious non-profits wholly indistinguishable from LC. No rational grounds exist for Defendants' differential treatment of substantially similar entities.

Where secular exemptions, even categorical ones, undermine the government's general interests while a religious exemption is denied, strict scrutiny is triggered. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (finding that the non-religious

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

exemptions for the bear-keeping prohibition undercut the stated interests of the law at least to the same extent as the type of religious exemption the plaintiff sought).

B. The Mandate is Not Neutral.

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

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

Additionally, the Government has decided that certain secular criteria (*e.g.*, small businesses choosing not to provide insurance and grandfathered plans) are sufficient for a

categorical exemption, but when it comes to granting a religious exemption, only some religious organizations are eligible. Giving preference to secular over religious reasons for an exemption is no less concerning to the neutrality analysis than discriminating *amongst* religions. *See Fraternal Order of Police*, 170 F.3d at 366 (noting that where "the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.")[7]; *see Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and non-religion.").

III. THE COLLEGE IS ENTITLED TO SUMMARY JUDGMENT ON ITS ESTABLISHMENT CLAUSE CLAIM.

The government favors certain religious denominations and groups over others. The Mandate is thus subject to strict scrutiny. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a [law] granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality."). While Defendants would focus on the distinction, supposedly ignored by the Schools, between denominations and organizations, this is a red herring. As Plaintiffs discussed in their opening summary judgment memorandum, the Court in *Valente* looked not only at the effect of the law favoring certain denominations over new or untraditional denominations, *see* Pls.' Br. at 34, *see also id*. at n. 24, *id*. at n. 27, but also at *how* it did so, namely by making "distinctions between different religious organizations." Pls.' Br. at 34; *see Larson*, 456 U.S. at 246 n. 23. As discussed above, this Mandate and its implementation are rife with distinctions

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

between and among religious organizations. The central distinction—between integrated auxiliaries and other religious non-profits—rests upon exactly the sort of criteria deemed constitutionally suspect in *Valente*: a "fifty percent rule" governing the sources of an organization's funding. *Id.* at 246–49; 26 CFR § 1.6033-2(h)(4).

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

Defendants too readily dismiss the Tenth Circuit's decision in *Colorado Christian University v. Weaver*. Though the court there faced an Establishment Clause challenge to a law that favored less sectarian religious institutions over more sectarian ones, it did not, as Defendants argue, limit itself to "laws that facially regulate religious issues." 534 F.3d at 1257 (citing the New York Constitution of 1777, art. XXXVIII, *reprinted in* 5 *The Founders Constitution*, at 75 (Philip B. Kurland & Ralph Lerner, eds., 1987)). Instead, it discussed discrimination "among religious *institutions*." *Id.* at 1258 (emphasis added). The court recognized that the purpose of the challenged provisions of the law was to "exclude some but not all religious institutions on the basis of the stated criteria." *Id*. There too the government argued that the law distinguished "not between types of religions, but between types of institutions." *Id*.

at 1259. The court rejected this argument, noting that the government could offer "no reason to think that [it] may discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in." *Id.*; *see also id.* n. 6 ("The issue is not whether the State can distinguish between sectarian and nonsectarian, or religious and secular, but whether it can distinguish *among* religious institutions.") (emphasis added). As in *Weaver*, the Mandate uses incidental criteria to exempt some religious institutions (integrated auxiliaries, participants in self-insured church plans) but not ones like Louisiana College.

Finally, Plaintiffs explained in detail the absence of a "neutral, secular basis," for the lines the government has drawn. *See* Pls.' Br. at 34-36; *id*. at n. 24-25; *id*. at n. 27; *see also id.* at 31-32 (discussing the absence of neutrality in the context of Plaintiffs' Free Exercise claim). The lack of rationality or relevance to its interest for exempting integrated auxiliaries and participants of self-insured church plans bolsters the College's Establishment Clause claim. *See Gillette v. U.S.*, 401 U.S. 437, 452 (1971) ("[T]he Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses.") (internal quotations and citations omitted).

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

The Mandate forces the College to facilitate government-dictated education and counseling concerning abortion that directly conflicts with its religious beliefs and teachings. Defendants contend that there is no requirement that the "education and counseling" favor any particular contraceptive service or contraception in general. *See* Defs.' Br.. at 25. This hides the ball. Whether all women will receive education in favor of abortifacients or not, education in favor of abortifacients is *covered* by the Mandate. This is undisputed and indisputable.[8] The Institute of Medicine Report specifies that when it recommends "patient education and

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

counseling" to be included in the Mandate, it is talking about patient education and counseling, "that are provided to prevent unintended pregnancies."[9] Defendants deny reality when they imply that the Mandate will not necessarily involve education and counseling in favor of abortifacients. All of the covered contraception under the Mandate is "as prescribed."[10] By definition, a doctor prescribing abortifacients believes them to be medically indicated, and her counseling and education regarding those items will be supportive of their use.

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

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

The government's argument that the College is unable to "identify a source of vagueness or confusion in the regulations" at issue, Defs.' Br. at 27, reflects its misunderstanding of the

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

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

College's Due Process Clause claim. The claim is that the discretion granted to HRSA by 42 U.S.C. § 300gg-13 to promulgate a religious exemption, or an accommodation, or whatever else Defendants have conjured up in this process, is itself impermissibly vague and standardless: it gives zero guidance about whose religious convictions can be recognized and whose can be ignored. That violates the Due Process Clause, because the Mandate's exemptions and accommodations are a product of this impermissibly unfettered discretion.

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

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

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

B. The Mandate is Arbitrary and Capricious.

The Mandate is "arbitrary and capricious" under 5 U.S.C. § 706(2)(A) and thus violates the APA. The Mandate's unwillingness to exempt entities like the College, in light of its exemption of integrated auxiliaries, is arbitrary and capricious. The Mandate's rationale for doing so—that integrated auxiliaries are likely to employ people of the same faith—applies no less to the College. Therefore, the refusal to exempt LC is unjustified. Defendants insist that "[i]t can hardly be irrational or arbitrary for the government to rely on such a longstanding statutory distinction." Defs'. Br. at 32 n.9. But the College is not challenging the statutory distinction as it applies in the taxation context; it is instead challenging the importation of that language into an utterly unrelated context. The statutory language that Defendants lifted from the tax code relates merely to which non-profit entities must file informational returns with the IRS. That language and the reason it exists has nothing whatsoever to do with whether an

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

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

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

C. The Mandate is Contrary to Law.

The APA forbids agency action from being contrary to law and constitutional right. 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971). As discussed above, the Mandate violates RFRA and the First and Fifth Amendments. Defendants fail to acknowledge this aspect of the College's claims, alleging only that the regulations do not violate federal restrictions regarding abortion, including the ACA, the Weldon Amendment, the Church Amendment. Defs.' Br. at 32-33.

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

CONCLUSION

For the foregoing reasons, the College respectfully requests that this Court grant its cross-motion for summary judgment.

Respectfully submitted this 16th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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