IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR;	)	
Plaintiffs	)	
v.	)	Case No. 2:12-cv-00207-JFC
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, 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.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This case challenges the federal government's unlawful impairment of the fundamental right to freely exercise religion. The U.S. Departments of Health and Human Services ("HHS"), Labor, Treasury, and their respective Secretaries have promulgated final regulations ("the Mandate") requiring group health plans to cover abortifacients, contraception, sterilization, and related counseling. The Plaintiffs – a Christ-centered college and a family-owned business operated consistent with the family's Roman Catholic ethical principles – can neither pay for nor otherwise facilitate the use of these drugs, devices, and services without violating their religiously-informed consciences. Despite the absence of a compelling interest behind the Mandate and the availability of other means of pursuing their alleged goals, Defendants have been consistently unwilling to accommodate and respect the Plaintiffs' religious beliefs and exercise.

In a transparent effort to avoid consideration of the merits, Defendants – in this case and in the many others challenging the Mandate – have claimed that Geneva College's claims are premature, invoking a temporary suspension of enforcement and vague but ultimately empty promises of plans to "accommodate" the consciences of the College and others at some point in the future. As discussed in more detail below, none of these litigation-minded maneuvers change certain essential realities that demand judicial consideration of the College's claims: the Mandate is a final rule, and it is currently inflicting cognizable injuries – and will imminently inflict additional injuries – upon the College.

As for the claims brought by the Hepler family and their businesses, Defendants contend that they have failed to state a claim, primarily based on the fanciful argument that for-profit businesses and their family owners are simply incapable of exercising religion, and thus cannot

have their rights violated. As discussed in more detail below, this contention lacks support in the case law, constitutional policy, or common sense.

Plaintiffs respectfully request that this Court reject Defendants' efforts to avoid consideration of the merits of this case, and deny their Motion to Dismiss.

STATEMENT OF FACTS

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") requires employer "group health plans" to cover women's "preventive care and screenings" without cost sharing. 42 U.S.C. § 300gg-13(a)(4). Defendant HHS asked the Institute of Medicine ("IOM"), a non-governmental body, to propose "preventive care" guidelines. IOM recommended that "preventive care" include "[t]he full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." [1] FDA-approved contraceptive methods include the abortion-inducing drugs levonorgestral (*i.e.*, Plan B or the "morning-after pill") and ulipristal (*i.e.*, ella or the "week-after pill"), as well as IUDs.[2] In August 2011, without the required notice-and-comment, HHS adopted IOM's "preventive care" guidelines in their entirety in an interim final rule.[3]

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[1] Comm. on Preventive Servs. for Women, Inst. of Med., Clinical Preventive Services for Women (2011), *available at* http://www.iom.edu/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Preventive%20Services%20Women%202011%20Report%20Brief.pdf (last visited Sep. 12, 2012).

[2] *See* FDA, *Birth Control Guide* (Oct. 19, 2011), *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm#emerg (last visited Aug. 8, 2012) (describing various FDA-approved contraceptives).

[3] Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Aug. 8, 2012). *See also* 76 Fed. Reg. 46,621 (Aug. 3, 2011) ("Group Health Plans and Health

The Mandate exempts an extraordinarily narrow subset of religious organizations, only those meeting the following criteria:

> (1) The inculcation of religious values is the purpose of the organization;
> (2) The organization primarily employs persons who share the religious tenets of the organization;
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of [the tax code].

76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(1)(iv)(B)). Mother Teresa's order of nuns who serve people of all faiths or no faith would not qualify as a "religious employer" under this remarkably narrow exemption. None of the Plaintiffs in this case are protected by the exemption. Am. Compl. ¶¶ 31–32, 64, 69–71. Sponsors of group health plans can be punished for failing to comply with the Mandate through agency enforcement actions and through proceedings commenced by plan beneficiaries. *See* 29 U.S.C. § 1132(a).

In a January 20, 2012 press release, Secretary Sebelius noted "the important concerns some have raised about religious liberty" but offered no change to the Mandate or its exemption, despite significant public outcry. *See* Statement of HHS Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Aug. 8, 2012). Instead, she announced that non-exempt religious institutions would be given one year "to adapt to this new rule." *Id.* In February 2012, HHS released a bulletin offering guidance about a "Temporary Enforcement Safe Harbor" for certain organizations, declaring that Defendants themselves would not commence enforcement actions for violations of the Mandate for one year against non-exempt, religiously-opposed, non-profit entities—as long as they could

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Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act").

certify that they had not provided any contraceptive coverage since February 10, 2012.[4] The bulletin did not suspend the Mandate or otherwise protect employers from other consequences of violating the Mandate during the one-year period. The Government also indicated it might later provide some sort of "accommodation" requiring insurers to provide free contraceptives and abortifacients.

At the same time, Defendants issued "final regulations" adopting the Mandate and its narrow religious employer exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). Under the final rule, the Mandate begins applying to plans at the start of the first plan year after August 1, 2012. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. at 46623.

On, March 16, 2012, the government issued an Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16501 (Mar. 21, 2012). The ANPRM states that Defendants "intend to propose a requirement that health insurance issuers providing coverage for insured group health plans sponsored by such religious organizations assume the responsibility for the provision of contraceptive coverage without cost sharing to participants and beneficiaries." 77 Fed. Reg. at 16503. Yet while the ANPRM's intent is clear, it proposes no actual rule to accomplish that intent. Instead, it merely recites proposals, hypotheticals, and "possible approaches" to allegedly ameliorate the Mandate's massive violation of conscience. 77 Fed. Reg. 16,501, 16,507. The ANPRM neither provides a current solution nor analyzes various proposals; it does not commit to provide a potential solution until August 2013, when the Government intends to lift its temporary suspension of its own enforcement actions. The ANPRM does make clear,

[4] *See* Dep't of Health & Hum. Servs., Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers (Feb. 10, 2012), at p. 3, *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Aug. 8, 2012).

however, that the religious employer exemption, which was finalized in February 2012, will not be changed as a consequence of the ANPRM process. *See* 77 Fed. Reg. 16,501-08.

Both Geneva College and the Hepler Plaintiffs object, on religious grounds, to paying for or otherwise facilitating certain of the drugs and devices that the Government requires them to include in their health plans. (Am. Compl. ¶¶ 2, 3). They filed an Amended Complaint on May 31, 2012, and Defendants filed a Motion to Dismiss on August 2, 2012. Defendants contend that the Plaintiffs lack standing to sue; that Geneva's claims are not ripe; and that the Hepler Plaintiffs have failed to state a claim upon which relief may be granted. None of these arguments has merit, and the Motion to Dismiss should be denied.

LEGAL STANDARD

In adjudicating a motion to dismiss filed pursuant to Fed. R. Civ. P. 12, this Court must "accept as true plaintiffs' material allegations, and construe the complaint in the light most favorable to them." *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 758 (3d Cir. 2009). The Court can also consider the Hepler Plaintiffs' supporting affidavit because it is integral to their claims and amplifies their allegations. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).[5]

ARGUMENT

I. DEFENDANTS DO NOT CONTEST STANDING OR RIPENESS FOR THE MAJORITY OF THE COLLEGE'S CLAIMS.

Defendants do not challenge most of Plaintiffs' claims on standing or ripeness grounds.

[5] If the Court declines to consider the Hepler Plaintiffs' affidavit (and deems its content necessary for proper adjudication of the motion to dismiss), it should grant them leave to amend the Complaint to incorporate the affidavit. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008).

Defendants' challenges to the College's claims are based on their assertion that the College's injuries are not imminent because the safe harbor delays enforcement of the Mandate and because the Government may eventually change the law to protect its religious rights. Four of the College's claims, however, are uncontested by such arguments (Second, Third, Fifth and Sixth Claims for Relief).

First, the Government's arguments do not contest the justiciability of the College's claims that the religious employer exemption violates the Free Exercise, Establishment, and Due Process Clauses. (Am. Compl. ¶¶ 208-09, 211-17, 222-28). The Government has expressly disavowed any intent to alter the religious employer exemption and has expressed no intent to displace it. 77 Fed. Reg. 16,501-08; *see also* 77 Fed. Reg. at 8,729 (adopted in a final rule "without change"). Indeed, the ANPRM process is confined to "non-exempt" entities. *See also* 77 Fed. Reg. at 16,501, 16,504. Because Plaintiffs are challenging the constitutionality of the inquiry created by the exemption, which will not change and which will apply to Plaintiffs, these claims are clearly justiciable. *See, e.g., NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 345 (3d Cir. 2001); *see also Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012).

Second, the Government does not contest the College's claims that the Mandate and the narrow religious employer exemption were promulgated in violation of the APA. (Am. Compl. ¶¶ 229-40). The harms and injuries underlying these claims are actual, concrete, and will not change or develop further. For example, the Government failed to engage in notice-and-comment rulemaking when it established the Mandate and narrow religious employer exemption. *See, e.g.*, 76 Fed. Reg. at 46,624. Nothing about the ANPRM process will change those past APA violations and the injuries they have caused the College. *Pa. Dep't of Pub.*

Welfare v. U.S. Dep't of Health and Human Servs., 101 F.3d 939, 946-47 (3d Cir. 1996) (Alito, J.). Therefore, the College's APA claims should be adjudicated by this Court at this time.

At minimum, the College should be allowed to proceed on these four claims. Justiciability of these claims also strongly counsels against dismissing Plaintiffs' Religious Freedom Restoration Act, Free Exercise, and Free Speech claims (Am. Compl. ¶¶ 184-193, 194-210, 218-21); 13B Wright et al., *Federal Practice & Procedure* § 3532.6 (3d ed. 2008) ("Once issue is found ripe, the interests of the court, the agency, and the parties may be better served by finding ripe a related issue."). In any event, as explained below, the College has adequately alleged several concrete and immediate injuries that support justiciability of those claims as well.

II. PLAINTIFFS' CURRENT AND IMMINENT INJURIES CONFER STANDING.

Article III standing exists if: (1) a plaintiff has suffered an injury (2) that is fairly traceable to the defendant's challenged actions and (3) that is likely redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not dispute the second or third of these factors; they assert only that Plaintiffs have failed to allege a concrete and imminent injury. They are mistaken.

A. The Hepler Plaintiffs Amply Pled Non-Grandfathered Status

The Government contends that the Hepler Plaintiffs lack standing, claiming that they did not sufficiently plead that their health plan does not possess "grandfathered" status. This argument is simply an impermissible denial of facts. The Amended Complaint specifically alleges two facts demonstrating that the Hepler plan is not grandfathered (and therefore is subject to the Mandate).

First, the Amended Complaint alleges that because of plan changes through which the plan lost grandfathered status, plan participants have not received notification that the plan possesses grandfathered status. Under the Government's regulations, this lack of notification *alone* causes loss of grandfathered status. *See* 75 Fed. Reg. at 34,541, 34,566 (adding 45 C.F.R. part 147.140(a)(2)). Incomprehensibly, however, the Government asserts that this plain and specific allegation of lack of notice is *not* sufficient to show the plan lacks grandfathered status and is thus subject to the Mandate. The Government offers no argument or precedent to justify such a conclusion.

Second, the Government asserts that the Heplers failed to plead with sufficient specificity that plan changes they made cost their plan grandfathered status. This argument ignores the specificity of the Heplers' allegations. The Heplers specifically pled far more than the mere assertion of non-grandfathered status; they alleged the factual predicates of their plan's non-grandfathered status, namely, "significant plan changes made in the past several years, as well as a lack of the insurer providing the required notices." Am. Compl. ¶ 97. This far exceeds the requirements of the federal rules and Supreme Court precedent.

The Heplers' plan changes caused loss of grandfathered status because, in 2010 and again in 2012, employee deductibles and contributions were increased beyond what the Government's grandfathering regulations allow. See Exh. 1, Affidavit of Wayne L. Hepler. (Since dismissal on this issue is sought under Rule 12(b)(1) on jurisdictional grounds, affidavit evidence beyond the complaint is admissible.) The Government cannot contend that such changes did not cause loss of grandfathered status; its regulations clearly state otherwise. See 75 Fed. Reg. at 34,568–69. The simple ability of the Heplers to elaborate on such plan changes as evidenced in this affidavit proves that the complaint allegation of the same is "plausible" so as to substantiate

their standing to sue. If the Court desires that the Heplers incorporate these specific facts into a Second Amended Complaint they would be glad to do so, but they respectfully suggest that such a requirement exceeds the pleading requirements of the federal rules.

B. The Safe Harbor and ANPRM Do Not Deprive Geneva College of Standing.

The Government argues that Plaintiffs have not alleged a "concrete and imminent" injury because the safe harbor delays enforcement and the ANPRM process will change the law in the interim. But this argument clearly fails under the relaxed standard for First Amendment cases. The Mandate is the current law and the College's injuries are sufficiently imminent.

In First Amendment cases, the injury requirement is relaxed. Ordinarily a "litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). These injury standards are applied loosely, however, in pre-enforcement suits raising First Amendment claims, *Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011) ("[T]he injury requirement is most loosely applied . . . where First Amendment rights are involved"), because courts "should generally be receptive to [such] anticipatory challenges," *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979).[6]

The Government need not enforce the law before the College has standing to challenge it. Even under the ordinary standard, the Third Circuit has held that standing to challenge a current law is unaffected by promised non-enforcement: "the current enforcement intentions of the [agency] are of no relevance to our analysis" because "the mere fact that an agency does not currently intend to apply a statute in an unconstitutional manner cannot have the effect of an

[6] *See also* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed. 2008) ("The nature of First Amendment rights readily supports recognition of injury; the importance of these rights supports recognition of rather attenuated injury.").

explicit limiting construction." *Conchatta Inc. v. Miller*, 458 F.3d 258, 265 (3d Cir. 2006) (did not enforce and said it "d[id] not intend to enforce" the regulation). Indeed, a government policy of non-enforcement (especially if not passed as a final rule) is always subject to change. *See Eckles v. City of Corydon*, 341 F.3d 762 (8th Cir. 2003) (injury imminent where city "stated that it [would] abstain from enforcing" because there was "nothing to prevent the City from enforcing it immediately if it so chose"). And, a one-year enforcement delay, even one that makes enforcement uncertain, is not "too remote." *N.J. Physicians, Inc. v. President of the United States*, 653 F.3d 234, 240 n.5 (3d Cir. 2011) (noting effective date was not too remote);[7] *see also Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *overruled on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (June 28, 2012) (Government conceding forty-month gap does not defeat standing).

Particularly in the First Amendment context, the College is allowed to challenge the Government's regulation *before* enforcement to ensure that it is *never* faced with the choice between violating its religious liberty and facing potential financial ruin because the one-year enforcement delay has no affect on imminence. Moreover, the safe-harbor lasts only one year, has not been codified in the Code of Federal Regulations, does not have the force and effect of law, and nothing prevents the Government from trying to abandon it. Therefore, this Court must reach the merits. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2nd Cir. 2000); *see Chamber of Commerce of U.S. v. Fed. Election Comm'n*, 69 F.3d 600, 603 (D.C. Cir.

[7] *See also Thomas More Law Center v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011) ("almost six years and roughly three years"); *520 S. Mich. Ave. Assocs. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006) (reviewing "extensive" list of "decisions that conduct review . . . long before prosecution is 'imminent"); *Vill. of Bensenville v. Fed. Aviation Admin.*, 376 F.3d. 1114, 1119 (D.C. Cir. 2004) (where enforcement of final order begins in 2017 "the impending threat of injury is sufficiently real to constitute injury-in-fact.").

1995); *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 388 (4th Cir. 2001).

Nor do the Government's vague statements that it intends to "fix" the law deprive the College of standing. The Government has finalized the Mandate. It is current law and it currently applies to the College. By requiring coverage for abortifacients, contraception, sterilization, and related speech, it forces Geneva to decide whether to maintain current health coverage consistent with its beliefs or pay excessive fines. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). It also compels it to support speech with which it disagrees. (Am. Compl. ¶¶ 218-21); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004) (government interference with religious speech).[8]

The only "speculation" here is whether the Government will change the law in the future and whether any such change will alleviate the College's present concerns or redress its present injuries. The ANPRM merely expresses an intent to look at possible solutions. *See, e.g.*, 77 Fed. Reg. at 16,503 ("suggest[ing] multiple options"). Even the Government acknowledges that the ANPRM will not change the core requirement that the objectionable services be covered at no cost to the employees of non-exempt employers like Geneva. With that requirement and the religious employer exemption intact, it is speculative at best whether the Government can change the law to resolve Geneva's claims. The College thus has standing. *See Thomas More*, 651 F.3d at 537; *see also Larson v. Valente*, 456 U.S. 228, 242 (1982).

Finally, future changes in the law go to mootness—will the law resolve the case—not standing. *See, e.g., Becker v. Fed. Election Comm'n*, 230 F.3d 381, 387 n.3 (1st Cir. 2000)

[8] The Government can exempt the College specifically from the Mandate at any time, by withdrawing the regulations or entering a consent decree. But it cannot avoid an otherwise appropriate lawsuit merely by promising to consider Geneva's views in the future.

("[Q]uestions of standing and questions of mootness are distinct, and it is important to treat them separately."). Defendants' analysis is upside down, asking this Court to treat a final regulation as uncertain, and a speculative ANPRM as certain.

C. The College Has Standing Now Because the Mandate is Causing It to Suffer Actual Injuries Now.

On top of the College's *imminent* injury, "the present impact" of the Mandate also establishes an "injury in fact for standing purposes." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005). The Government argues that the College's current injuries are "manufacture[d]" and that it is are preparing "for the most remote and ill-defined harms" that are "from [its] own . . . personal choice" and "not from the operation of [the preventive services coverage regulations]." Gov't Br. at 18. The Government ignores both the reality of crafting health plans and Geneva's other current injuries.

There is nothing manufactured about the fact that Plaintiffs need substantial lead time to prepare for each year's health plans. (*See* Am. Compl. ¶¶ 56-57, 171). Indeed, Defendants *themselves* conceded the necessity for such advanced planning when they discarded notice-and-comment rulemaking precisely because the "requirements in these interim final regulations require significant lead time in order to implement." 75 Fed. Reg. 41,726, 41,730 (Jul. 19, 2010). Defendants recognized that employers need time and clarity for "establishing their premiums," changing "plan or policy benefits" designs, and receiving "necessary approvals in advance." *Id.* at 41,729-30 & n.4. But, to prevent this Court from redressing their constitutional violations, Defendants now argue that those exact same actions—establishing premiums, changing plan or benefit designs, and obtaining necessary approvals—do not require any advanced planning.

The College needs adequate time following a decision on the merits in this case to

determine and implement an appropriate course of action. *Va. Soc'y*, 263 F.3d at 389 (harm is "immediate because [Plaintiffs] need[] to plan the substance" of their health plans now); *see also Newland v. Sebelius*, 2012 WL 3069154, at *4 (D. Colo. 2012) (health plans do not take shape overnight). Defendants have committed to begin enforcement August 1, 2013, which is less than eleven months away. 77 Fed. Reg. at 16,503. Until this case is decided and its rights are clear, however, the College is being currently injured because it cannot adequately plan, because it is being forced to consider contingencies so it can implement whatever changes are necessary when the time comes, and because it is currently facing pressure to alter its religious beliefs and conduct. *See Miller v. Brown*, 462 F.3d 312, 321 (4th Cir. 2006) ("[P]laintiffs' injuries . . . [are] worse each day decision is delayed.").

The Mandate is causing the College other current injuries beyond crafting their health plans. First, Geneva is currently suffering monetary harm. *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) ("Monetary harm is a classic form of injury-in-fact."). The College has incurred preparation costs and other burdens as it plans for the current law. (Am. Compl. ¶¶ 180). Second, the Mandate is imposing a burden on the College's employee and student recruitment efforts by creating uncertainty as to whether or on what terms it will be able to offer or facilitate health insurance. (Am. Compl. ¶¶ 146-47); *see Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 529, 536 (1925) (long before effective date, challenge justiciable due to impact on schools' recruiting).

Accordingly, the College has standing to sue.

III. THE COLLEGE'S CLAIMS ARE RIPE FOR REVIEW.

The College's claims are ripe because they present concrete legal challenges to a final rule, and delay would exacerbate the harms plaguing its operations. Defendants' contrary

argument rests on improper speculation regarding potential future changes to the law, raising mootness, not ripeness issues. Furthermore, Defendants ignore the harms they have already caused the College.

A. The Government Has Misstated The Ripeness Test Applicable To Plaintiffs' First Amendment Claims.

As with standing, the Government fails to acknowledge that a lower ripeness standard applies to First Amendment claims. The Third Circuit has clearly established a "relaxed ripeness standard" for fundamental rights cases, including "[a] First Amendment claim, [and] particularly a facial challenge." *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003). This relaxed standard applies to prevent the substantial harm caused by chilling protected conduct. *Id*. at 434.

The Government cites and applies the wrong standards. The Government is correct that the *Step-Saver Data Sys., Inc. v. Wyse Tech.* three-prong test for pre-enforcement review should apply: (1) whether the parties are sufficiently adverse, (2) whether the court can issue a conclusive ruling, and (3) whether the decision will render practical help to the parties. 912 F.2d 643, 647 (3d Cir. 1990). But a lower bar for satisfying these prongs applies in First Amendment cases. For example, under the first prong, rather than demonstrating a "substantial threat of real harm," Gov't Br. at 19, the College need only show "even the remotest threat" of harm. *Peachlum*, 333 F.3d at 435; *see also Déjà vu of Nashville v. Metro. Gov't of Nashville*, 274 F.3d 377, 399 (6th Cir. 2002) ("A mere threat to First Amendment interests is a legally cognizable injury."). Likewise, for the second prong, rather than requiring a "concrete set of facts," even for "largely legal" claims, Gov't Br. at 20, a "concrete set of facts" is not required because "facts are not so important where the question is 'predominantly legal.'" *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1463-64 (3d Cir. 1994).

B. The College's Claims Are Ripe.

1. The College Has Established Adversity Through Current Harms and Threats of Future Harms.

The Government argues that the College's harms are based on uncertain future events because the Government has initiated a rulemaking process to address its concerns. This is simply wrong. Geneva is challenging the *current* law, which is in effect and published in the Code of Federal Regulations. The only uncertainty here is whether the Government will change the law in a way that resolves the College's claims, a "mere contingency" that "does not render premature [a] challenge to the existing requirements." *Albertson v. Subversive Activities Control Bd.*,382 U.S. 70, 77 (1965); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("[T]hat a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.").

First, as stated above the Government improperly applies a heightened standard that would require the College to show "a substantial threat of real harm." Gov't Br. at 19 (quoting *Presbytery*, 40 F.3d at 1463). For fundamental rights like the ones at issue here, however, the College need only show "*even the remotest threat*" of harm.[9] *Peachlum*, 333 F.3d at 435 (emphasis added). Geneva has alleged that the Mandate imposes the future threat of a choice between complying with the law, facing penalties, and adhering to their religious beliefs that is far more than a remote possibility. (Am. Compl. ¶ 115-16, 142, 144-45, 148, 165, 181).

[9] The Government relies on cases that do not involve fundamental rights, did not apply the "remotest threat" standard, and dealt with far different facts. Gov't Br. at 20; *Texas v. United States*, 523 U.S. 296, 300 (1998) (claim contingent because several intermediate findings and sanctions required before the challenged sanction became an available option); *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483-84 (5th Cir. 2005) (EPA "never issued a final rule" and no harm from inability to plan in an industry where "planning cannot be done far in advance").

Second, the College's claims are not based on "uncertain future events." The Mandate is the law. *See Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) (interim final rules in the C.F.R. passed without notice and comment are final). It will be enforced for Geneva's employee health plan no later than January 1, 2014, and for its student plan no later than August 1, 2013. Its challenge to the Mandate, therefore, is sufficiently adverse and not based on uncertainty. *Step-Saver Data Sys., Inc. v Wyse Tech.*, 912 F.2d 643, 649 n.7 (3d Cir. 1990) ("enforcement of an existing statute" is a future event that is certain to occur); *see also United States v. Loy*, 237 F.3d 251, 257 (3d Cir. 2001) ("[T]hat a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship.").

The only uncertain future event here is whether the Government can alleviate the threat to the College within the limited timeframe. As discussed earlier, the ANPRM only contains mere suggestions; it is uncertain whether the Government will change the law at all and if so under what timetable. Moreover, it is unclear whether any future change will alleviate the College's present concerns or redress its current injuries. Therefore, the ANPRM does not change the fact that Geneva's claims are currently ripe. *See, e.g., Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998) (ripe during "ongoing Commission proceedings" that could change the "Final Plan and implementing orders"); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 355 n.8 (D.C. Cir. 1993) (same as EPA "currently considering" regulatory changes).

2. The College Has Established Conclusivity Because Its Claims Are "Predominantly" Legal and the Facts Are Sufficiently Developed.

The Government next argues that the facts here are not sufficiently concrete to establish conclusivity because the Mandate has not taken final shape. Gov't Br. at 20-21. According to the Government, the suggestions in the ANPRM are not final and the College's current challenge may become moot if the Mandate changes. *Id*. But the Government ignores the relevant legal

standard and the College's actual arguments. Such arguments about the ANPRM and mootness also have nothing to do with conclusivity. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000)_ (defendants "confuse[] mootness with standing").

Instead, the relevant question for conclusivity is whether the issues are "predominantly legal."[10] *Presbytery*, 40 F.3d at 1463-64 (a "concrete set of facts" is not required because "facts are not so important where the question is 'predominantly legal'"). The Government concedes that "Plaintiffs raise largely legal claims." Gov't Br. at 20. Moreover, facial First Amendment challenges, like the ones here, are categorically "predominantly legal." *Pa. Family Inst., Inc. v. Celluci*, 489 F. Supp. 2d 460, 479 (E.D. Pa. 2007); *see also Presbytery*, 40 F.3d at 1469 (rejecting suggestion that First Amendment protection "is not ripe until a concrete factual situation is before the court"). Finally, the Government has not pointed to any missing facts that would aid the Court in deciding these claims, and discovery should proceed regarding the College's four other claims that are uncontested here. Therefore, Geneva's claims have conclusivity.[11]

The only potential future *fact* cited by the Government is a possible change in the *law* and, even if made, such a change is legally insufficient. It is well established that agency action, once final, does not become unripe merely because it is subject to change. *Albertson*,

[10] The district court in *Belmont Abbey* did not even consider whether the issues are predominantly legal because "prudential considerations counsel against reaching the merits." Gov't Br. at 20 (quoting *Belmont Abbey v. Sebelius*, 2012 WL 2914417, at *14). In addition to being a different circuit with a different test, arguing that "prudential considerations" should lead a court to avoid judicial review of a regulation that impacts First Amendment rights conflicts with a court's obligation to timely adjudicate ripe, justiciable cases within its jurisdiction.

[11] The Government mistakenly argues that the regulations at issue here have not "taken on fixed and final shape." Gov't Br. at 18 (citing *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952)). But, unlike the College here, the plaintiff in *Public Service Commission* sought a ruling that his business travels were interstate commerce that preempted state law without

382 U.S. at 77; *see also Appalachian Power*, 208 F.3d at 1022. An agency's claim that it plans to "again address th[e] issues" that it has already addressed "cannot transform long-final orders into conditional ones." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008). Otherwise, final rules[12] would never be ripe for review because "an agency *always* retains the power to revise a final rule through additional rulemaking." *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). The Court should not accept Defendants' blithe "trust us—we'll fix it later" assertions that the ANPRM will resolve all of the College's difficulties, especially at the pleading stage. *See CSI Aviation Services, Inc. v. U.S. Dept. of Transp.*, 637 F.3d 408, 410 (D.C. Cir. 2011) (rejecting a similar "trust us—we'll fix it later" approach).

A change in law, like the one argued by the Government here, raises at most a mootness question. *Friends of the Earth, Inc.*, 528 U.S. at 189; *see also* 13C Wright, *Federal Practice*, § 3533.6. And the ANPRM does not moot this case because it is merely a speculative potential future change. Gov't Br. at 21 ("[J]udicial review now of any future amendments . . .would be too speculative to yield meaningful review."); *CSI Aviation*, 637 F.3d at 414 ("DOT's assurances provide[d] nothing more than the mere possibility" of relief). Indeed, even after a law changes, a claim challenging that law is not necessarily moot. *See Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, at 262 (3d Cir. 2002). Because a change in the law will not automatically moot the College's claims and any such change here is speculative at best, it would be inappropriate to dismiss based on the potential for future mootness. *See, e.g.*, *CSI Aviation*, 637 F.3d at 414

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challenging any current statute, regulation, or even threatened agency action. 344 U.S. at 240-41.

[12] The Government mistakenly relies on cases that did not challenge final agency rules published in the C.F.R. *The Toca Producers v. FERC*, 411 F.3d 262 (D.C. Cir. 2005) (agency order that triggered a new proceeding to address the plaintiffs' concerns).

("fully fit" for review; temporary exemption and plan to change a "definitive legal position" raise mootness, not ripeness issues).

3. The College Has Established Utility Because the Parties' Plans of Action Will Be Affected By a Judgment.

A final judgment here will affect the College. The Government contends that any legal decision would not affect the College because it is not confronted at this moment with a choice between legal compliance, penalties and religious beliefs. Gov't Br. at 22. The Government is wrong. The College will be forced to choose between its religious beliefs and the law. Moreover, a Hobson's Choice is not the only way to establish utility. Gov't Br. at 22.[13] All that is required is that "the parties' plans of action are likely to be affected by a declaratory judgment." *Step-Saver*, 912 F.2d at 649 n.9. As the Government concedes, a ruling need only "alleviat[e] legal uncertainty." Gov't Br. at 21; *see also Pa. Dep't of Pub. Welfare*, 101 F.3d at 946 (to eliminate uncertainty regarding the plaintiffs' obligations); *Riva v. Massachusetts*, 61 F.3d 1003, 1012 (1st Cir. 1995) (to allow Plaintiffs to "prudently . . . arrange [their] fiscal affairs," with substantial risk of "guessing wrong").

Surely a ruling in this case will affect the parties' plans of action and alleviate legal uncertainty. The College will immediately be able to make informed decisions about how to plan and budget for their January 1, 2014 employee health plans and whether to restructure so

[13] The Government's cases are inapposite. *Armstrong World Industries, Inc. v. Adams* does not require a Hobson's Choice; there was no utility because a ruling could only impact third parties, which is different in kind from a Hobson's Choice. 961 F.2d 405, 423-24 (3d Cir. 1992). The Government's only Third Circuit case, *Wilmac Corp. v. Bowen*, did not involve a First Amendment claim, pre-dated *Step-Saver*, "challenged regulations" that "require[d] nothing of [the petitioner] directly" that one could "easily and certainly avoid," and the only potential harm was contradicted by a report from the petitioner showing the project's financial viability. 811 F.2d 809, 813-14 & n.4 (3d Cir. 1987). The Government also cites *Tennessee Gas Pipeline v. FERC*, which challenged an interpretive rule on the scope of the agency's power that imposed no substantive requirements or obligations. 736 F.2d 747, 748-49 (D.C. Cir. 1984).

they can qualify for the religious employer exemption. *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 197-98 (3d Cir. 2004) (more informed decision about investing more money in seeking a state permit). Geneva will also be able to understand the impact on employment and student recruitment. Additionally, a ruling will allow for smoother implementation and enforcement of the preventive care requirement and will help the Government with planning its future conduct. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (whether pre-enforcement review "is calculated to speed enforcement.").

IV. THE HEPLER PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

A. The Hepler Plaintiffs Have Stated a Claim Under RFRA.

The Government's argument that the Heplers cannot exercise religion is essentially an attempt to amend RFRA (and the Free Exercise Clause). Defendants draw distinctions that Congress and the Constitution did not make: profit vs. non-profit activity, corporate vs. individual activity, and direct vs. indirect activity. But RFRA asks much simpler questions: whether the Government is substantially burdening religious exercise, and, if so, whether the Government has demonstrated a compelling interest and shown that its challenged rule is the least restrictive means of achieving the same. 42 U.S.C. § 2000bb-1. The Government cannot prevail on these elements.

1. The Heplers exercise religion in the operation of their business.

The Hepler family and its businesses exercise religion under RFRA. Am. Compl. ¶¶ 76, 77, 79-86, 243. RFRA protects "any" free exercise of religion. *See* 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5). Conduct constitutes the "exercise of religion" if it is based upon a religious belief that is both sincere and founded on an established religious tenet. *See Wisconsin v. Yoder*, 406 U.S. 205, 210-19 (1972) (holding that the Amish objection to formal

education beyond the eighth grade is an "exercise of religion" because it is "firmly grounded in . . . central religious concepts"); *United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy its employee's wages was an exercise of religion under RFRA).

The Government argues that the Heplers forfeited their rights to religious liberty as soon as they endeavored to earn their living by running a corporation. Yet case law is to the contrary. In both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), the Ninth Circuit recognized that individual owners of a for-profit, "secular" corporation had their religious beliefs burdened by regulation of that corporation. Moreover, each corporation could sue to protect those beliefs. *Id.* The Government's premise seems to be that one cannot exercise religion while engaging in business.[14] But Free Exercise Clause cases have often involved the commercial sphere. In *Sherbert v. Verner*, 374 U.S. 398, 399 (1963), an employee's religious beliefs were burdened by not receiving unemployment benefits; likewise in *Thomas v. Review Board*, 450 U.S. 707, 709 (1981). In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were burdened by paying taxes for workers. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules.

Congress has rejected the Government's view in many ways. The ACA itself lets employers and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for"

[14] The government appears to adopt a literal interpretation of the Bible's injunction that you "cannot serve both God and money," Matthew 6:24. But no federal law enacts the government's particular reading of the Gospel of Matthew as a limitation on religious exercise.

abortions, without requiring them to be non-profits.[15] 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[16] These protections cannot be reconciled with the Government's view that religious exercise cannot occur in the world of commerce. A Mandate on a family business burdens the family's religious beliefs. Am. Compl. ¶¶ 76-85, 244. Terms such as "religious employer" in Title VII are not relevant to the scope of religious "exercise" in RFRA, since Congress chose to protect "any" exercise in RFRA and did not adopt a narrower scope.

The Government argues that because its Mandate applies to Seneca Harwood and WLH Enterprises, Mr. Hepler and Mrs. Kolesar are isolated from its effect. This is false for multiple reasons. First, since the Hepler family members are employees and beneficiaries of these health plans, they are directly coerced by the Mandate to accept and even pay for abortifacient, contraceptive, sterilization and "education" coverage for themselves and their children. Am. Compl. ¶¶ 2, 3, 12, 14, 15, 75, 81. 88, 95, 108, 119, 121, 248, 249, 264. Second, *Stormans* and *Townley* recognize that an imposition on a family business corporation is an imposition on the family owners. As a "close corporation," Seneca Hardwood and WLH are characterized by "unity of ownership and control."[17] Am. Compl. ¶ 3. The Mandate on them can only possibly be implemented by their family owners, Board, and officers: the Hepler family. Am. Compl. ¶¶ 75-100. Since the Hepler family members are the sole owners of these companies, Am.

[15] One out of every five community hospitals is for-profit. American Hospital Association, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (last visited July 16, 2012).

[16] *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); and Pub. L. 112-74, Title V, § 507(d). See also 48 C.F.R. § 1609.7001(c)(7).

[17] Harwell Wells, "The Rise of the Close Corporation and the Making of Corporation Law," 5 *Berkeley Bus. L.J.* 263, 274 (Fall 2008).

Compl. ¶ 3, the Mandate coerces the family members to use their property in a way that violates their religious beliefs. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert*, 374 U.S. at 403–04. Finally, to the extent the Government is arguing that its Mandate does not really burden the Heplers because they are free to abandon their jobs, their livelihoods, and their property so that others can take over their companies and comply, such expulsion from business would be an extreme form of burden.

2. Seneca Hardwood and WLH Enterprises can and do exercise religion.

The Mandate also burdens the free exercise of Seneca Hardwood and WLH Enterprises. Notably, the companies have presented detailed factual allegations that they have actually adopted and followed the Heplers' religious beliefs. Am. Compl. ¶¶ 75–100. These must be assumed to be true on a motion to dismiss. Knowing this, the Government contends that for-profit corporations cannot engage in "free exercise" as a categorical matter. But no law forbids a business corporation from pursuing business *goals* in adherence to religious or ethical *principles*. On the contrary, Pennsylvania law generously empowers the Hepler companies to do so. It declares that a business corporation "shall have the legal capacity of natural persons to act," 15 Pa. Consol. Stat. § 1501, and "shall have power . . . [t]o have and exercise all of the powers and means appropriate to effect the purpose or purposes for which the corporation is incorporated," 15 Pa. Consol. Stat. § 1502(a)(20). The Hepler family owners of their businesses have decided, in their capacities as shareholders and directors, to adopt religious principles as "means appropriate to effect" their business purposes. Am. Compl. ¶¶ 76, 77, 79–85, 93–100. Pennsylvania law empowers the Hepler family directors to "manage[]" and "direct[]" all the

"business and affairs" of Seneca Hardwood and WLH, 15 Pa. Consol. Stat. § 1721, which necessarily includes the adoption of religious principles the businesses will follow.

The Government contends that Seneca Hardwood and WLH cannot adopt religious beliefs because they are organized to pursue business purposes. But this begs the question by assuming that business is one thing and religion is an entirely different thing. That assumption, however, is not supported as a matter of law, and is instead an imposition of the Government's own essentially theological view. Religion is not an isolated category of human activity that can be cordoned off from other "separate" activities such as business. Religion is, among other things, a *viewpoint* from which people engage in *any* kind of activity or purpose, including business. *See Good News Club v. Milford Central School*, 533 U.S. 98, 107–12 (2001) (activities of any kind, whether "social," "civic," "recreational" or educational, are not different *kinds* of activities when religious, they are the same kind of activity simply done from a religious perspective).[18]

The Government's exclusionary attitude would push religion out of every sphere of life except the four walls of church. Case law has not, however, expelled religion from business. "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010) (regarding speech). *Stormans* affirmed not only that a for-profit pharmacy corporation's owners could assert free exercise claims, but that Stormans, Inc. itself could present those claims on the owners' behalf. 586 F.3d at

[18] To the extent the government may be contending that corporations can adopt ethics as long as they are not *religious* ethics, that position would be unconstitutional viewpoint discrimination. *Id.* (discussing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 831 (1995)).

1119–20. It was particularly relevant in *Stormans* that the business was a multi-generational family owned entity—the Court allowed for no relevant distinction between the burden on the owners' beliefs and the applicability of the mandate to the corporation. *Id.*; *see also EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d at 620 n.15 (recognizing free exercise claims asserted by a mining equipment manufacturer).

As stated by the Minnesota Supreme Court, the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *United States v. Lee*, 455 U.S. 252 (1982)). *See also Jasniowski v. Rushing*, 678 N.E.2d 743, 749 (Ill. App. Dist. 1, 1997) (for profit corporation may assert free exercise claim), *vacated*, 685 N.E.2d 622 (Ill. 1997). Other cases have likewise recognized that corporations can exercise religion. *See, e.g., Prima Iglesia Bautista Hispana of Boca Raton v. Broward County*, 450 F.3d 1295, 1305 (11th Cir. 2006) (declaring that not only the plaintiff, but corporations generally "possess Fourteenth Amendment rights of equal protection, due process, and through the doctrine of incorporation, the free exercise of religion"); *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, slip op. at 6–7 at (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners); *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business).

A court analyzing a free exercise claim does not ask whether the claimant is the right category of person; it asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. Shielding a religious family from an intrusive and crippling federal government Mandate that violates their cherished beliefs is squarely what the First Amendment and RFRA were designed to do. This is true with respect to the family or its business. If for-profit corporations can have no First Amendment "purpose," then the *New York Times* would have no right to free speech, because it could only claim profit motive and not speech as such. This is not the law. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Government fails in its attempt to use *United States v. Lee* to argue that religion is incompatible with earning a living. *Lee* made no such finding. Instead, the Court found that the Social Security tax *did* create an "interfere[nce] with the[] free exercise rights" of the Amish employers. 455 U.S. at 257. It only resolved the case *after* recognizing the religious liberty interest of the employer, when it applied the required scrutiny level. The Government brief's oft-repeated quote from *Lee* about plaintiffs who "enter into commercial activity" is lifted out of context to suggest that people in businesses can assert no free exercise burdens. Instead the quote came under the court's scrutiny standard. As explained below, that standard is weaker than RFRA and, even under *Lee*'s reasoning, shows that the Mandate is illegal.

3. The Mandate Substantially Burdens the Religious Exercise of the Hepler Plaintiffs.

The Mandate substantially burdens the Hepler Plaintiffs' ability to exercise their religious beliefs. Am. Compl. ¶¶ 4, 5, 7, 244, 246-49, 260-65. A federal law "substantially burdens" the free exercise of religion if it compels one "to perform acts undeniably at odds with fundamental tenets of [one's] religious beliefs," *Yoder*, 406 U.S. at 218 (a law imposing a $5.00 criminal

penalty for Amish children's failure to follow a compulsory secondary education law), or "puts substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717–18 (1980) (substantial burden when a law forces a choice "between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to [obtain the benefit,] on the other hand"); *Sherbert*, 374 U.S. at 404. The substantiality of a burden is therefore the measure of the kind of weight the Government imposes in its law.

The Mandate at issue in this case is a quintessentially substantial burden. It is a direct command that imposes penalties for failure to comply and thus creates pressure to violate conscience. The Mandate compels Seneca Hardwood and WLH Enterprises, and therefore the Hepler family owners and directors thereof, to violate their religious beliefs by providing objectionable abortifacient, contraceptive, and sterilizing health coverage. Am. Compl. ¶¶ 4, 5, 7, 244, 246-49, 260-65. To "*compel* a violation of conscience," which is what the Mandate does here, is the paradigm "substantial burden." *Thomas v. Review Bd.*, 450 U.S. at 717.

Notably, the Supreme Court has found a substantial burden where far less than direct compulsion was involved. In *Sherbert* and *Thomas*, there was no law requiring the plaintiffs to engage in Saturday work or tank manufacturing, but they simply complained that the government refused to give them unemployment benefits when they refused, for religious reasons. Yet the court found this indirect pressure to be a substantial burden. *Sherbert*, 374 U.S. at 399; *Thomas*, 450 U.S. at 709. With no sense of irony the Government quotes *Braunfeld v. Brown*, 366 U.S. 599 (1961), to sustain the Mandate as if it "does not make unlawful the religious practice itself" or is "indirect." But the Mandate *does* directly make unlawful the Hepler Plaintiffs' religious

practice of doing business without providing the objectionable coverage required here. It is hard to imagine how to write a more direct prohibition on the practice of such beliefs.

The Government contends that the Mandate's burden is not substantial because it applies to the Heplers' business instead of to themselves. This is incorrect on multiple levels. First, the complaint alleges that because the Hepler family members are, in large part, their own employees, the Mandate's impacts not only affect the Heplers as directors and owners, it affects them as covered employees. Am. Compl. ¶¶ 12, 15. In this respect, the Heplers object to the Mandate's requirement that they themselves receive and pay into abortifacient/contraceptive coverage for themselves and their children. Am. Compl. ¶¶ 80-81, 94-95. This burden would result from Seneca and WLH being forced to provide such coverage, and from the businesses being coerced into dropping coverage for the employees including the Hepler family members, and by the ACA's requirement that in such an event the families buy insurance on the open market that include the Mandate's items. Am. Compl. ¶ 82. The Government opines that the Heplers "have no right to control the choices of their company's employees," but in addition to this being a fanciful description (a mere omission of coverage "control[s] the choices" of exactly no one), this statement fails to recognize that the Hepler family members are themselves, in large part, "their company's employees" and covered beneficiaries. Apparently the Government believes that Wayne Hepler, Carrie Kolesar, their children, spouses and siblings "have no right to control the choices" of themselves.

The Government indulges an abstract legal fiction when it contends that a Mandate on Seneca Hardwood and WLH is not a mandate burdening the Hepler family owners, directors and officers of their own family businesses. As discussed above, the Mandate can only be obeyed by the Hepler family members acting to violate their own beliefs or face loss of their property,

livelihood and morally acceptable health insurance. The Government essentially admits it is forcing the Heplers to abandon their family's ability to engage in business at all if they don't want to succumb to the Government's religious dictates, since the Heplers' means of earning a living is merely voluntary action by which they waived religious exercise.

The Government also offers the *non sequitur* that because a corporation provides its owners limited liability, there is no religious burden in this case. That conclusion does not follow. Limited liability is merely one characteristic of a business corporation, and it is not the morally relevant one here. The Hepler family members and the businesses for which they have adopted beliefs contend that their religion makes it immoral for them to implement the Mandate's commands, which only they can do. Am. Compl. ¶¶ 75-82. This is why *Stormans* and several other cases concluded matter-of-factly that a government burden on a business corporation is a burden on its close holding family owners and directors. 586 F.3d at 1119–20; *McClure*, 370 N.W.2d at 850; *Jasniowski v. Rushing*, 678 N.E.2d at 749; *Morr-Fitz, Inc.*, No. 2005-CH-000495, slip op. at 6–7. Limited liability is not a talisman by which the Government can make up for its lack of case law indicating that businesses cannot exercise religion.

4. No compelling interest justifies Defendants' burden on the Hepler Plaintiffs' religious exercise.

Defendants cannot establish that their coercion of Plaintiffs is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006), imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.520, 546 (1993), and is implicated only by "the

gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot propose such a generalized interest "in the abstract," but must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *see also Lukumi*, 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"). The Government must "specifically identify an 'actual problem' in need of solving" and show that coercing Plaintiffs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). If Defendants' "evidence is not compelling," they fail to satisfy their burden. *Id.* at 2739. To be compelling, the Government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Id.* The Government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

Defendants' interest in coercing the Hepler Plaintiffs to provide coverage of contraception and sterilization is not compelling. The Government asserts that its Mandate as applied to the Hepler Plaintiffs will achieve women's health and equality by reducing unintended pregnancy. But these interests are generic and abstract. In *O Centro Espirita*, the Court held evidence to be insufficient showing that Schedule I controlled substances were "extremely dangerous," because that "categorical" support could not meet the Government's RFRA burden to consider the "particular" exception requested by the plaintiffs. 546 U.S. at 432.

The most obvious flaw in Defendants' assertion of a compelling interest is that the federal Government itself has voluntarily omitted 191 million people from the benefits of the Mandate. *Newland*, 2012 WL 3069154 at *1. The Mandate does not apply to thousands of plans that are "grandfathered" under the ACA. See 76 Fed. Reg. at 46623 & n.4. This exclusion, given for secular reasons, governs two thirds of the nation's population; yet Defendants still refuse to exempt the Hepler Plaintiffs. Also, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds (whether they are engaging in commerce or not). 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the Mandate exempts from its requirements "religious employers" defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. 76 Fed. Reg. at 46626. The Government has decided that employers in any of these categories simply do not have to comply with the Mandate.

These massive exemptions eviscerate Defendants' contention that the Mandate serves a compelling interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 520 (1993). No compelling interest exists when the Government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Plaintiffs are exempted too. *O Centro Espirita*, 546 U.S. at 434.

The Government misuses *U.S. v. Lee* to contend that the Mandate is like "statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the Mandate in this

case is emphatically not "binding on others in th[e] activity" of employer-provided insurance. Whereas *Lee*'s tax contained only a tiny exemption for some Amish, the Mandate here is not "binding" on 191 million people in grandfathered plans, Amish, "religious employers," and others. The Mandate is many things, but "uniform" is not one of them. *O Centro* was impatient with uniformity arguments such as are asserted here:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436. *Lee*'s universal tax is not comparable to the Mandate and its exceptions.

The law upheld in *U.S. v. Lee* was a tax to raise funds for operation of the Government. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. The United States has functioned for over 200 years without a federal mandate of employer contraception coverage in insurance. The Mandate is not a "government program." It does not require the Hepler Plaintiffs to pay taxes to fund government activity, but instead requires them to give specific benefits to their employees and their dependents. The program is private, not governmental. The Government elsewhere provides contraception, but here the Government has decided *not* to pursue its goals with a government program, but to conscript religiously objecting citizens.

Lee was in fact a precursor to *Smith*, which expanded on *Lee* to adopt the standard that RFRA affirmatively rejected. RFRA instead specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *U.S. v. Lee* from this list. *Lee* never says it is requiring a "compelling interest" or "least restrictive means." *Sherbert* and *Yoder*, however, did apply RFRA's test. Scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .

Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 224 (1994).

5. Applying the Mandate to the Hepler Plaintiffs is not the least restrictive means of pursuing the Government's alleged interests.

Even if a compelling interest existed, the Government could not possibly show that the Mandate is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. The fact that the Government could subsidize contraception itself to give it to employees at exempt entities, and that it already does so on a wide scale, shows that the Government fails RFRA's least restrictive means requirement. Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30.

Defendants fail the least restrictive means test because the Government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. Rather than coerce Plaintiffs to provide this coverage in their plan, the Government could possibly create its own "contraception insurance" plan covering all the items the Mandate requires, and then allow free enrollment in that plan for whomever the Government seeks to cover. Or the Government could directly compensate providers of contraception or sterilization. Or the Government could offer tax credits or deductions for contraceptive purchases. Or the Government might impose a mandate on the contraception manufacturing

industry to give its items away for free.[19] These and other options could fully achieve Defendants' goals while being less restrictive of Plaintiffs' beliefs. There is no essential need to coerce Plaintiffs or other religious objectors to provide the objectionable coverage themselves.

Defendants cannot deny that the Government could pursue its goal more directly. The federal government and many states already directly subsidize birth control coverage for many citizens through Title XIX/Medicaid and Title X/Family Planning Services funding. Thus the Court's RFRA analysis may stop here: the Mandate is not the least restrictive means of furthering Defendants' interest.

B. The Hepler Plaintiffs Have Stated A Claim Under the Free Exercise Clause.

The Mandate also violates the Free Exercise Clause of the First Amendment of the United States Constitution. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." 508 U.S. at 542–43 (internal quotation marks and citation omitted). In *Lukumi*, the Court said that the underinclusiveness of city's ban on animal sacrifice was "substantial" because it "fail[ed] to prohibit nonreligious conduct that endangers these interests [in public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id*. at 543. For the reasons stated above, the grandfathering and other exemptions demonstrate that the Mandate within the ACA is not "generally applicable" under *Lukumi*.

In cases striking down religiously burdensome laws containing exemptions, then-Judge Alito explained for the Third Circuit that strict scrutiny applies when discretionary or categorical

[19] And by virtue of Defendants' recent attempts to quell political backlash by claiming they may create an "accommodation" for some additional religious entities (but still not for Plaintiffs),

exemptions exist but religious objections are denied. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004); *Fraternal Order of Police*, 170 F.3d at 365. Here, in addition to the Mandate's categorical exemptions such as for grandfathered plans, Defendants admit that they possess "discretion" over the exemption they created for "religious employers" and the scope of who is covered. 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Defendants therefore admit that they could have exempted the Hepler Plaintiffs and other non-church religious objectors, but they chose not to. Meanwhile, their scheme's exemptions result in the exclusion, for purely secular reasons, of 191 million people from the benefits of the Mandate.

The Mandate is also not "neutral" under the Free Exercise Clause because when the "object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. The object of a law can be determined by examining its text and operation. *Id*. at 534–35. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 533. The Mandate explicitly exempts some "religious employers" but not others. This exemption is based on a variety of religious criteria, 76 Fed. Reg. at 46626, which together impose the Government's *theological* notion that employers are only religious if they are churches who stay in their own four walls and focus on self-serving purposes.

Consequently the Mandate is subject to strict scrutiny, and for the reasons stated above, it cannot pass that test.

C. The Hepler Plaintiffs Have Stated a Claim Under the Establishment Clause.

Defendants are necessarily admitting that the Mandate is not the least restrictive means to achieve their goals. See 77 Fed. Reg. 16501–08 (Mar. 21, 2012)

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption, as discussed above, sets forth Defendants' notion of what "counts" as religion and what doesn't for the purposes of the Mandate's religious exemption. Am. Compl. ¶¶ 127-37. But the Government may not create a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990).

Defendants used their unfettered discretion to pick and choose what criteria qualify a group as "religious" enough for an exemption, Am. Compl. ¶ 127-28, and they imposed their constricted theological view of religion on all Americans. The Mandate's four-pronged religious exemption emphasizing "the inculcation of religious values" necessarily requires the Government to explore a religious organization's purpose in impermissible ways. Am. Compl. ¶ 127. The exemption deems religious organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which would involve the Government's probing of what exactly count as the organization's religious "tenets," and which disfavors religious believers such as the Hepler Plaintiffs who exercise their beliefs not by only working with or for Catholics but by witnessing their faith by treating everyone with dignity according to the Catholic Church's notion of what human flourishing means.

D. The Hepler Plaintiffs Have Stated A Claim Under the Free Speech Clause.

The Mandate additionally violates the First Amendment by coercing the Hepler Plaintiffs to provide for speech that is contrary to their religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual

freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted).

The Mandate compels speech in two ways. First, it requires the Hepler Plaintiffs to cover "education and counseling" in favor of items to which they object. Am. Compl. ¶¶ 3-4, 80-81. Education and counseling are, by definition, speech. Second, the Mandate requires the Hepler Plaintiffs to fund this objectionable speech. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Hepler Plaintiffs have adequately alleged a Free Speech Clause violation.

E. The Heplers Have Stated a Claim Under the Due Process Clause.

The Mandate violates the Heplers' rights under the Due Process Clause because it creates a standardless, blank check for Defendants to discriminatorily select whatever they want to call "religious" and offer or withhold whatever accommodations they choose; indeed, that is exactly what Defendants have done.

When a law is so "standardless that it authorizes or encourages seriously discriminatory enforcement," the law does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304.

The ACA provision underlying the Mandate, Public Health Service Act § 2713, (codified at 42 U.S.C. § 300gg-13), authorizes Defendants to exempt religious employers—this is conceded by Defendants themselves. 76 Fed. Reg. at 46623. Yet the statutory authority in this regard is unfettered. Not only may HRSA decide whatever it wants to decide about which organizations are "religious enough" to warrant different kinds of accommodations, there is no limit on HRSA deciding whether or not contraception, abortifacients, and other services are preventive in the first place. Section 2713 literally contains no standards regarding these decisions; it offers zero guidance, not even key words or phrases, about who counts as religious and what kind of accommodation such religious persons or entities should be provided. No person can read § 2713 and have any notion of who Defendants may define as religious objectors or what accommodations such religious objectors may receive.

Section 2713 is therefore a quintessential law so "standardless that it authorizes or encourages seriously discriminatory enforcement." Defendants could literally decide that Buddhists get exemptions while Sikhs do not, without running afoul of the standards of Section 2713, because the section has no standards. The law practically invites discriminatory enforcement, and that is exactly what Defendants have done with it.

F. The Hepler Plaintiffs Have Stated a Claim Under the APA.

The Hepler Plaintiffs have also stated a claim under the Administrative Procedure Act. That claim can be divided into three parts.

1. Defendants refused to meaningfully consider objections before finalizing the Mandate.

The Defendants finalize the Mandate while transparently, even admittedly, refusing to satisfy their statutory duty to actually "consider" objections issued during the comment period. Section 706 of the APA provides that courts "shall hold unlawful and set aside agency action,

findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Defendants must follow the procedure found in § 553, which requires administrative agencies to: (1) publish notice of proposed rulemaking in the Federal Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose. 5 U.S.C. § 553(b) & (c).

The Court need not engage in any subjective judgment about whether Defendants provided due consideration to objections to the Mandate. In this case Defendants essentially admit that they did not do so. Central to this implicit concession are three facts acknowledged by Defendants themselves:

(1) The ACA prohibits the Mandate from going into effect until one year after it is in final, unchanged form.

(2) Defendants themselves insisted, in August 2011, prior to the comment period, that they believed the Mandate must exist in final form unchanged from as it was written on August 1, 2011.

(3) After adopting the interim August 2011 rule "without change" in February 2012, Defendants admitted in a new regulatory process that the same objections offered in the 2011 comment period required alterations that they refused to consider in 2011.

Combined, these admissions demonstrate that the Mandate was enacted in complete disregard to meaningful consideration of comments for interim final rules.

First, the ACA prohibits the Mandate from applying to plans, including the Heplers' plan, until a year after its finalization. Defendants admit this. 75 Fed. Reg. at 41726; see also 76 Fed. Reg. at 46624. Second, precisely because of this first fact, Defendants published the Mandate as an interim final rule—issued prior to the notice and comment period ordinarily required—on August 1, 2011, with a notice and comment period to follow afterwards. 76 Fed.

Reg. 46621–26. Defendants explained that their reason for this "shoot first and ask questions later" approach was that "[m]any college student policy years begin in August" so that if Defendants did not concretize their Mandate prior to the notice and comment period, "many students could not benefit from the new prevention coverage without cost sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year." *Id.* at 46624. In other words, female college students would have to wait another year for free contraception, abortifacients, and sterilization if the Mandate was not promulgated in final form on or by August 1, 2011.

By this assertion Defendants essentially admitted that they never had any intention of meaningfully considering the comments and religious objections submitted post-August 1, 2011, because doing so would destroy their supposed need to impose the Mandate in August 2012.

Third, Defendants themselves proved that they were closed to true consideration of the 2011 comments because Defendants initiated a new rulemaking process ("ANPRM") in March 2012 *to change the Mandate based on the 200,000 comments they ignored when they finalized the 2011 Mandate*. The ANPRM is wholly unnecessary if Defendants really considered those same objections prior to finalizing the August 2011 Mandate.

Defendants' disregard of the notice and comment process has led to palpable injury to the Heplers—without it they would not face the Mandate soon, and maybe not at all. The Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Defendant agencies until they actually finalize a Mandate after meaningful consideration of objections and then wait an additional year to impose it.

2. The Mandate is "contrary to law" and thus in violation of the APA.

The Mandate also violates the APA for being "contrary to law" and "constitutional right" under 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971). It is contrary to law and constitutional right, first, for all the reasons stated above: its violation of RFRA, the First Amendment clauses, and the Due Process Clause. The Mandate is also contrary to several other laws recited in the complaint.

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

The Mandate is contrary to the provision of the ACA that states that "nothing in this title"—i.e., title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." Section 1303(b)(1)(A) (codified at 42 U.S.C. § 18023). Some drugs included as "FDA-approved contraceptives" under the Mandate are abortifacient, causing the demise of human embryos after conception and before and/or after implantation in the uterine wall. Accordingly, the Mandate contradicts the ACA itself, in violation of the APA.

b. The Mandate is contrary to the Weldon Amendment.

The Mandate is contrary to the provisions of the Weldon Amendment to the Consolidated Appropriations Act of 2012, Public Law 112-74, § 507(d)(1), 125 Stat 786, 1111 (Dec. 23, 2011), which provide that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

The preventive services Mandate and Defendants' enactment and enforcement thereof are a program of the Labor and HHS Departments. Those Defendants are using funds appropriated under the 2012 and previous Appropriations Acts to subject the Heplers to discrimination due to their refusal to cover abortifacient drugs and devices. The amended complaint alleges that some required items do cause abortion. Accordingly, the Mandate violates the Weldon Amendment and, thus, the APA.

c. The Mandate is contrary to 42 U.S.C. § 300a-7(d).

The Mandate also violates the provisions of the Church Amendment, 42 U.S.C. § 300a-7(d), which provide that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." Defendants have contended that the Mandate is a program which they administer, such that they cannot tolerate exemptions to it. To the extent they administer it, they draw applicable funding to do so. Under the Mandate the Heplers are "required to perform or assist in the performance of any part of a health service program" even though their "performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions." The Hepler individual Plaintiffs are, of course, individuals. As the owners and operators of Seneca Hardwood and WLH, the Mandate forces the Heplers to assist in the performance of abortions in violation of their religious beliefs and moral convictions upon penalty of destroying their property ownership and family livelihood. This "require[ment]" violates § 300a-7(d), and thus the APA.

3. Defendants violated the APA by failing to address objections.

The Mandate additionally violates the APA for being "arbitrary and capricious" under 5 U.S.C. § 706(2)(A) (*see Volpe*, 401 U.S. at 415–17), for failing to sufficiently consider, if at all, the objection that it would violate employers' religious beliefs. "An agency must [] demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant." *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (citing *Professional Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997), and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)).

Defendants failed to respond to comments that the Mandate would violate entities' religious beliefs. Some commenters on the August 2011 interim final rules raised concerns "about paying for such [contraceptive] services and stated that doing so would be contrary to their religious beliefs," and that "the narrower scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act." 77 Fed. Reg. at 8727. But Defendants responded with only a cursory statement that the Mandate satisfies RFRA. 77 Fed. Reg. at 8729. This statement in no way explains why or how the Mandate satisfies each of the four prongs of RFRA; it does nothing but recite its elements. Thus it utterly fails to "*cogently explain* why it has exercised its discretion in a given matter." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). The statement similarly recites the elements of a First Amendment claim without offering an explanation, and does not explain why the Mandate can violate religious beliefs as an independent concern.

CONCLUSION

For all the foregoing reasons, Geneva College and the Hepler Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted this 13th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Eric R. Womack, Bradley P. Humphreys, and Albert W. Schollaert, Counsel for Defendants.

s/ Gregory S. Baylor