IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Appellants—the Roman Catholic Archdiocese of Washington ("ADW"), the Consortium of Catholic Academies of the Archdiocese of Washington ("CCA"), Archbishop Carroll High School ("ACHS), Catholic Charities of the Archdiocese of Washington ("Catholic Charities"), and the Catholic University of America ("CUA")—submit this motion for a preliminary injunction against a series of regulations that force Appellants to violate their religious beliefs (the "Mandate"). The Government has now finalized the Mandate and indicated that enforcement will begin on January 1, 2014. *See* 78 Fed. Reg. 39,870 (July 2, 2013). Contrary to the Government's prior representations, the Mandate continues to require religious organizations, including Appellants, to provide, pay for, and/or facilitate access to abortion-inducing products, contraception, sterilization procedures, and related counseling, in a manner that is directly contrary to their religious beliefs.

With the Mandate bearing down, Appellants respectfully request that this Court exercise its authority under 5 U.S.C. § 705 and Federal Rule of Appellate Procedure 8(a) to issue a preliminary injunction, and remand this case to the district court for further proceedings on the merits. The relevant facts are undisputed, the issues are purely legal, and a remand without relief would serve only to create further delay and uncertainty.

BACKGROUND

The Government promulgated the Mandate pursuant to its authority to require employer health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the category of "preventive care" to include all "FDA-approved contraception," the Mandate requires employer health plans to cover abortion-inducing products, contraception, sterilization, and related counseling.[1] Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). Dropping their health plans altogether, moreover, subjects employers to substantial annual penalties of $2,000 per employee. *Id*. § 4980H(a), (c)(1).

The Mandate contains an extremely narrow "religious employer" exemption that is effectively limited to "houses of worship." 78 Fed. Reg. at 39,874 (citing 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013)). The exemption includes Appellant Archdiocese, but does not include many religious schools and charitable organizations, including Appellants Catholic Charities, CCA, ACHS, and CUA. And because several of these nonexempt organizations participate in the Archdiocese's health plan, the "exempt" Archdiocese is still burdened by the Mandate because it must either (a) sponsor a health plan that will facilitate access

[1] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited July 29, 2013). The category of mandatory FDA-approved contraceptives includes the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), which can induce abortions.

to the objectionable products and services for the employees of these nonexempt organizations, or (b) no longer extend its plan to these ministries.[2]

Appellants filed this suit in district court on May 21, 2012, shortly after the original version of the Mandate was finalized. *See Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:12-cv-00815 (D.D.C. May 21, 2012). In response to this and similar litigation, the Government promised that "the regulations [would] *never* be enforced in their present form," and that the Government was planning to make "amendments to the regulations in an effort to accommodate religious organizations with religious objections to contraceptive coverage." Defs.' Supp. Br. at 4, *Archbishop*, No. 1:12-cv-00815 (D.D.C. Jan. 16, 2013) (Dkt. # 38) (emphasis added). It then issued a Notice of Proposed Rulemaking ("NPRM") outlining its proposed "solution." *See* 78 Fed. Reg. 8,456 (Feb. 6, 2013). Based on those representations, the district court dismissed this suit on ripeness grounds, and this appeal followed.

While this appeal was pending, the Government continued to represent that it was devising an "accommodat[ion]" for religious organizations, and made a "binding commitment" that it would "*never*" enforce the Mandate against religious organizations until the new accommodation was released. *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012). As a result, this appeal was held in

[2] Ex. D, Affidavit of the Archdiocese of Wash. ¶ 14.

abeyance pending publication of the Final Rule. *See* Order, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5091 (D.C. Cir. June 21, 2013) (Dkt. # 17). On June 28, the Government published the Final Rule.

Contrary to the Government's promises, the Final Rule continues to infringe on Appellants' free exercise of religion. The vaunted "accommodation" is nothing more than an accounting gimmick whereby, as before, Appellants' health insurance plans serve as the conduit by which "free" contraception is delivered to Appellants' employees. Thus, eligible religious organizations must provide a "self-certification" to their insurance issuer or (for self-insureds) to their third-party administrator, objecting to coverage for FDA-approved contraception. That very self-certification, however, has the perverse effect of requiring Appellants' own insurance issuer or third-party administrator to provide or arrange "payments for contraceptive services" for Appellants' employees. *See* 78 Fed. Reg. at 39,892 (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). The mandated "payments" last only as long as the employees remain on Appellants' health plans.[3] And for self-insured entities, the "self-certification" actually "*designat*[*es*] . . . the third party

[3] *See* 29 C.F.R. § 2590.715-2713A(d) (for self-insured employers, the third-party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers offering insured plans, the issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). In short, under the original version of the Mandate and the Final Rule, the end result is the same: a nonexempt religious organization's decision to offer a group health plan results in the provision of "free" abortion-inducing products, contraception, sterilization, and related counseling, to its employees in a manner directly contrary to Appellants' religious beliefs.

Needless to say, this shell game does not address Appellants' fundamental religious objection to improperly facilitating access to the objectionable products and services. This should come as no surprise to the Government because the Archdiocese and like-minded religious objectors repeatedly informed Appellees that the so-called "accommodation" (as set forth in the NPRM) would not relieve the burden on Appellants' religious beliefs.[4] Despite its representations to this and other courts that it was making a good-faith effort to address the religious objections of Appellants and like-minded organizations, the Government finalized the NPRM's proposal without any material change. Consequently, as before,

[4] *E.g.*, Ex. A, Comments of U.S. Conference of Catholic Bishops at 3 (Mar. 20, 2013); Ex. B, Comments of Archdiocese of Wash. at 2 (Apr. 4, 2013); Ex. C, Comments of U.S. Conference of Catholic Bishops at 3, 10–18 (May 15, 2012).

Appellants are coerced, through threats of crippling fines and other pressure, into acting directly contrary to their sincerely held religious beliefs.[5]

ARGUMENT

Section 705 of the Administrative Procedure Act provides:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, *including the court to which a case may be taken on appeal* from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added). Federal Rule of Appellate Procedure 8(a) and Circuit Rule 8(a) likewise authorize motions for "emergency relief" upon a showing that "moving first in the district court would be impracticable." Under both provisions, courts apply "the four-part test used to evaluate requests for interim injunctive relief," *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) (internal quotations and citation omitted): "(1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

Here, Appellants plainly satisfy all four factors. In addition, waiting for relief from the district court would be impracticable. Accordingly, this Court

[5] *See* Ex. D, Affidavit of ADW ¶¶ 13-16; Ex. E, Affidavit of CUA ¶¶ 5-11; Ex. F, Affidavit of CCA ¶¶ 5-10; Ex. G, Affidavit of ACHS ¶¶ 5-10; Ex. H, Affidavit of Catholic Charities ¶¶ 4-10.

should grant the requested relief "to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

Under the Religious Freedom Restoration Act ("RFRA"), the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). Here, the Mandate cannot possibly survive scrutiny under RFRA.[6]

A. The Mandate Substantially Burdens Appellants' Exercise of Religion

Under RFRA, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's sincere "exercise of religion." 42 U.S.C. § 2000bb-1(a). This initial inquiry requires courts to (1) identify the particular exercise of religion at issue and then (2) assess whether the law substantially burdens that religious practice. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, No.

[6] The Mandate also violates the Free Speech Clause and Religion Clauses of the First Amendment, and various statutory prohibitions on compelled support for abortion and interference with student health plans. Because the RFRA claim is adequate to afford complete relief at this stage in the proceedings, these other arguments are not set forth in greater detail herein.

12-6294, 2013 WL 3216103, at *20 (10th Cir. June 27, 2013) (en banc) (stating that the court must (1) "identify the religious belief in this case," (2) "determine whether this belief is sincere," and (3) "turn to the question of whether the government places substantial pressure on the religious believer"); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (distinguishing between the exercise of religion and the burden on that religious exercise). Here, the Mandate imposes a substantial burden on Appellants' religious exercise by forcing them to do precisely what their religion forbids: impermissibly facilitate access to abortion-inducing products, contraception, sterilization, and related counseling.

1. "Exercise of Religion"

RFRA defines "exercise of religion" to include "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). Whether an act or practice is rooted in religious belief, and thus entitled to protection, does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, a court must accept Appellants' description of their beliefs and practices, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15. "Courts," as the Supreme Court has put it, "are not arbiters of scriptural interpretation." *Id.* at 716.

In keeping with the deference owed to private claims of religious belief, the judicial role is limited to "determining 'whether the beliefs professed by [the plaintiff] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)). By screening claims for sincerity, and allowing the Government to impose burdens that are truly necessary to serve a compelling interest, courts can apply RFRA to grant bona fide religious exemptions without "allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). 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)).

Here, there can be no doubt that Appellants' refusal to facilitate access to abortion-inducing products, contraception, sterilization, and related counseling is a protected exercise of religion under RFRA. Appellants do not seek to impose their religious beliefs on anyone else, or "to require the government itself to conduct its affairs in conformance with [their] religion." *Kaemmerling*, 553 F.3d at 680. On the contrary, Appellants recognize that notwithstanding their religious objections,

they have no legal right to prevent individuals from procuring the objectionable products and services from the Government or anywhere else. Appellants simply invoke RFRA to vindicate the principle that the Government may not force them, *in their own conduct*, to take actions that violate their religious conscience. In short, by requiring Appellants to serve as the conduit by which FDA-approved contraception is delivered to their employees, the Mandate is a clear-cut effort to "force[] them to engage in conduct that their religion forbids." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

2. "Substantial Burden"

Once Appellants' refusal to facilitate access to FDA-approved contraception is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As the Supreme Court has made clear, a federal law "substantially burdens" an 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, or "put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas,* 450 U.S. at 716–18. In *Yoder*, for example, the Court found that a substantial burden was imposed by a $5 penalty imposed on the Amish Appellants for refusing to follow a compulsory secondary-education law. In *Thomas*, the Court similarly held that the denial of

unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets.

Here, refusal to comply with the Mandate will subject Appellants to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Appellants seek to exit the insurance market altogether, they will be subject to an annual fine of $2,000 per full-time employee after the first thirty employees. *See* 26 U.S.C. § 4980H(a), (c)(1). Such costs and penalties clearly impose the type of pressure that qualifies as a substantial burden under RFRA—far outweighing, for example, the $5 fine that was found to be a substantial burden in *Yoder*. In the face of such pressure, the Tenth Circuit recently 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*, 2013 WL 3216103, at *21. The same is true here.

It is no answer to claim that Appellants, unlike the *Hobby Lobby* litigants, may be eligible for the Government's so-called accommodation, because that "accommodation" does nothing to resolve the conflict with Appellants' religious beliefs. For purposes of this Court's analysis, what matters is whether the Government is coercing entities to take actions that violate their sincere religious

beliefs. *Id.* at *19 ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."). The fact remains that the accommodation compels Appellants, through their health insurance plans, to serve as the conduit through which objectionable products and services are provided to Appellants' employees, in violation of Appellants' sincerely held religious beliefs. These sincere religious beliefs are entitled to no less protection than the nearly-identical sincere religious beliefs at issue in *Hobby Lobby*.

B. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must show a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31; *Tyndale House*

Publishers, Inc. v. Sebelius, No. 12-1635, 2012 WL 5817323, at *15 (D.D.C. Nov. 16, 2012) (same). This, it cannot begin to do.

At the most basic level, "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, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433; *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297–98 (D. Colo. 2012). Here, the Government cannot claim an interest of the "highest order" because the Mandate already exempts millions of employees—through a combination of "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. As other courts have found, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103, at *23; *Newland*, 881 F. Supp. 2d at 1298; *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238, at *25 (W.D. Pa. Mar. 6, 2013); *Tyndale*, 2012 WL 5817323, at *18.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and

are also covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

C. The Mandate Is Not Narrowly Tailored

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "[a] statute or regulation is the least restrictive means if no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Kaemmerling*, 553 F.3d at 684 (internal quotation marks and citation omitted). The government, moreover, cannot meet its burden "unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (stating that strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives" to achieve the government's goal (internal quotation marks and citation omitted)).

Here, the Government has myriad ways to achieve its asserted interests without conscripting Appellants to violate their religious beliefs. Appellants in no way recommend these alternatives, and, indeed, oppose many of them as a matter of policy. But the fact that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; or (iv) grant tax credits or deductions to women who purchase contraceptive services.[7] In light of these alternatives, there is no possible justification for forcing Appellants to violate their religious beliefs.

[7] *See, e.g., Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *18 n.16 (M.D. Fla. June 25, 2013) ("Certainly forcing private employers to violate their religious beliefs in order to supply emergency contraceptives to their employees is more restrictive than finding a way to increase the efficacy of an already established [government-run] program that has a reported revenue stream of $1.3 billion."); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026, at *11 (E.D. Mich. Mar. 14, 2013) ("[T]he Government has not established its means as necessarily being the least restrictive."); *Newland*, 881 F. Supp. 2d at 1299 (Mandate not narrowly tailored in light of "the existence of government programs similar to Plaintiffs' proposed alternative").

II. INTERIM RELIEF IS NEEDED TO PREVENT IRREPARABLE HARM

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal quotation marks and citation omitted). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Tyndale*, 2012 WL 5817323, at *18 (citing *O Centro Espirita Beneficente União do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, 546 U.S. 418). Here, coercing Appellants to facilitate access to FDA-approved contraception in direct violation of their faith is the epitome of irreparable injury.

The impending enforcement of the Mandate is also causing significant disruption to Appellants' hiring and human-resources planning. Health plans do not take shape overnight, but instead require a number of analyses, negotiations, and decisions before Appellants can offer a health benefits package to their employees. Employers using an outside insurance issuer must work with actuaries to evaluate their funding reserves, and then negotiate with the insurer to determine the cost of the products and services they want to offer their employees. Employers that are self-insured must similarly negotiate with third-party administrators. Under normal circumstances, Appellants must begin the process of

determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the Mandate make this already lengthy process even more complex. In addition, if Appellants choose to follow their religious conscience instead of complying with the Mandate, they will be subject to massive fines and penalties. Appellants require time to budget for such additional expenses. Such jarring uncertainties adversely affect Appellants' ability to hire and retain employees.[8]

III. INTERIM RELIEF WOULD IMPOSE NO HARM ON THE GOVERNMENT

The Government cannot possibly establish that it would suffer any substantial harm from a preliminary injunction pending final resolution of this case. The Government has not mandated contraceptive coverage for over two centuries, and there is no urgent need to enforce the Mandate immediately against Appellant before its legality can be adjudicated. In addition, given that courts have concluded that the Mandate already contains exemptions available to "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, the Government cannot plausibly claim that it will be harmed by a temporary delay in enforcement against Appellants.

[8] These facts, which the Government has never disputed, are laid out in detail in Appellants' affidavits filed below in response to the Government's Motion to Dismiss. *See* Ex. I, Duffy Aff. ¶¶ 13–35; Ex. J, Houle Aff. ¶¶ 7–14; Ex. K, Conley Aff. ¶¶ 12–18; Ex. L, Blaufuss Aff. ¶¶ 12–17; Ex. M, Enzler Aff. ¶¶ 11–16; Ex. N, Persico Aff. ¶¶ 8–14.

Indeed, any claim of harm to the Government is fatally undermined by the fact that it consented to or did not oppose preliminary injunctive relief in several other cases challenging the Mandate. *See, e.g.*, Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092, (E.D. Mo. Mar. 11, 2013) (Dkt. # 41); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036, (W.D. Mo. Feb. 28, 2013) (Dkt. # 9); Order, *Hall v. Sebelius*, No. 13-cv-00295, (D. Minn. Apr. 2, 2013) (Dkt. # 11). The Government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, No. 2:12–cv–00207, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). Indeed, "[i]f the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith*, 2013 WL 3297498, at *18. In short, especially when balanced against the serious irreparable injury being inflicted on Appellants, any harm the Government might claim from a preliminary injunction is *de minimis*.

IV. INTERIM RELIEF WOULD SERVE THE PUBLIC INTEREST

"It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers." *Mylan Pharms. Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). In addition, "pursuant to RFRA,

there is a strong public interest in the free exercise of religion." *O Centro*, 389 F.3d at 1010. Thus, the public interest favors protecting Appellants' religious liberty by enjoining enforcement of the Mandate until it is struck down, or the Government can show it is the least restrictive means to further a compelling interest.

V. SEEKING INJUNCTIVE RELIEF IN THE DISTRICT COURT WOULD BE IMPRACTICABLE

With enforcement of the Mandate set to begin, there is insufficient time for Appellants to await a remand before seeking interim relief. On remand, Appellants will need to file an amended complaint and then immediately seek preliminary relief. Full briefing and argument in the district court could take months, as even the "expedited" procedure for seeking a preliminary injunction does not entitle plaintiffs to obtain a *hearing* until 21 days after their brief is filed. *See* LCVR 65.1(d). After that, Appellants would have to await a high-stakes decision from the district court, and then possibly face even more delay if it is necessary to file another appeal. In the meantime, with each passing day, the legal uncertainty and disruption to Appellants' operations becomes ever more severe as enforcement draws nearer.

There is, moreover, no reason to prolong these harms with a remand to the district court. The relevant facts are undisputed and, for the reasons explained herein, Appellants' entitlement to a preliminary injunction is clear. This is

precisely why numerous federal courts across the country have issued preliminary relief against the Mandate in cases involving for-profit religious entities.[9]

CONCLUSION

From the time this lawsuit was filed, the Government has deployed a series of delay tactics and empty promises designed to stave off adjudication on the merits. As a result, Appellants have suffered considerable prejudice as they have been left wondering whether and when their religious practices would be outlawed. Now the Government has made clear its intentions and set a date certain, and there is no reason for further delay. Accordingly, for the foregoing reasons, this Court should grant Appellants' request for a preliminary injunction and remand this case to the district court for further proceedings on the merits.

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[9] *See Hobby Lobby*, 2013 WL 3216103; Order, *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. # 24); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); Order, *Ozinga v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-03292 (N.D. Ill. July 16, 2013) (Dkt. # 25); *Beckwith*, 2013 WL 3297498; *Geneva Coll.*, 2013 WL 1703871; Order, *Johnson Welded Prods. v. Sebelius*, No. 1:13-cv-00609 (D.D.C. May 24, 2013) (Dkt. # 8); Order, *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013) (Dkt. # 16); Order, *Hall*, No. 13-00295 (Dkt. # 11); Order, *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 19); Order, *Tonn & Blank Constr., LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Apr. 1, 2013) (Dkt. # 43); Order, *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013) (Dkt. # 21); *Monaghan*, 2013 WL 1014026; Order, *Sioux Chief*, No. 13-0036 (Dkt. #9); Order, *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Dkt. # 50); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale*, 2012 WL 5817323; *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012); *Newland*, 881 F. Supp. 2d 1287.

Respectfully submitted, this the 12th day of August, 2013.

By: /s/ *Noel J. Francisco*

Noel J. Francisco
D.C. Bar No. 464752
njfrancisco@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Noel J. Francisco*

Noel J. Francisco
Email: njfrancisco@jonesday.com
D.C. Bar No. 464752
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax (202) 626-1700

Counsel for Appellants

EXHIBIT A

Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

March 20, 2013

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Notice of Proposed Rulemaking on Preventive Services
File Code No. CMS-9968-P

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Notice of Proposed Rulemaking ("NPRM") on preventive services. 78 Fed. Reg. 8456 (Feb. 6, 2013).

The current proposal, like previous ones, would mandate coverage of abortifacient drugs, contraceptives, sterilization procedures for women, and related education and counseling in health plans.[1] The comments we file today reflect the same basic themes as the comments we filed on earlier Administration proposals on this topic:[2]

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[1] We use the term "mandate" or "contraceptive mandate" as shorthand for the requirement that plans cover the aforementioned items. We use the term "contraceptive coverage," as the NPRM does, to mean coverage of all these items.

[2] Our previous comments, filed in August 2011 and May 2012, are available at http://www.usccb.org/about/general-counsel/rulemaking. Also available at the same link are our September 2010 comments, which predate the mandate but explain why contraceptives and sterilization procedures are not appropriately viewed as "preventive services" and should not be mandated.

• Like earlier iterations, the latest proposed regulation requires coverage of sterilization, contraception, and drugs and devices that can cause abortions. These are items and procedures that, unlike other mandated "preventive services," do not prevent disease. Instead, they are associated with an increased risk of adverse health outcomes, including conditions that other "preventive services" are designed to prevent. The proposed regulation is therefore at odds with the purpose of the preventive services provision of the Affordable Care Act ("ACA" or "the Act") upon which that regulation purports to be based. In addition, insofar as the regulation requires coverage of drugs that can operate to cause an abortion, the mandate violates the following: (a) provisions of ACA on abortion and non-preemption, (b) a distinct federal law forbidding government discrimination against health plans that do not cover abortion, and (c) the Administration's own public assurances, both before and after enactment of ACA, that the Act does not require, and would not be construed to require, coverage of abortion. We have raised all these issues previously.

• Under the current proposal, no exemption or accommodation is available at all for the vast majority of individual or institutional stakeholders with religious or moral objections to contraceptive coverage. Virtually all Americans who enroll in a health plan will ultimately be required to have contraceptive coverage for themselves and their dependents, whether they want it or not. Likewise, unless it qualifies as a "religious employer," every organization that offers a health plan to its employees (including many religious organizations) will be required to fund or facilitate contraceptive coverage, whether or not the employer or its employees object to such coverage. This requirement to fund or facilitate produces a serious moral problem for these stakeholders. We have raised all these issues previously.

• Although the definition of an exempt "religious employer" has been revised to eliminate some of the intrusive and constitutionally improper government inquiries into religious teaching and beliefs that were inherent in an earlier definition, the current proposal continues to define "religious employer" in a way that—by the government's own admission—excludes a wide array of employers that are undeniably religious. Those employers therefore remain subject to the mandate. Generally the nonprofit religious organizations that fall on the "non-

exempt" side of this religious gerrymander include those organizations that contribute most visibly to the common good through the provision of health, educational, and social services. We have previously raised problems associated with dividing the religious community into those "religious enough" to qualify for the exemption from the mandate, and those not—especially when that division falsely assumes that preaching one's faith is "religious," while living it out is not. We have likewise previously raised objections to linking the exemption to provisions of the tax code that have nothing to do with health care or conscience.

- The Administration has offered what it calls an "accommodation" for nonprofit religious organizations that fall outside its narrow definition of "religious employer." The "accommodation" is based on a number of questionable factual assumptions. Even if all of those assumptions were sound, the "accommodation" still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage. Such organizations and their employees remain deprived of their right to live and work under a health plan consonant with their explicit religious beliefs and commitments. We have raised these problems previously, and we raise them again here.

- The mandate continues to represent an unprecedented (and now sustained) violation of religious liberty by the federal government. As applied to individuals and organizations with a religious objection to contraceptive coverage, the mandate violates the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. We are willing, now as always, to work with the Administration to reach a just and lawful resolution of these issues. In the meantime, along with others, we will continue to look for resolution of these issues in Congress[3] and in the courts.[4]

Our more detailed comments follow.

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[3] *See* H.R. 940, Health Care Conscience Rights Act of 2013, introduced March 4, 2013 by Rep. Diane Black. Currently the bill has over a hundred co-sponsors.

[4] At least 50 lawsuits, with over 150 plaintiffs, have been filed to date challenging the mandate. *See* http://www.becketfund.org/hhsinformationcentral/.

I. The Mandate is Unchanged.

The NPRM makes no change in the underlying mandate. For reasons discussed more fully in our earlier comments, we believe the mandate should be rescinded. Contraceptives and sterilization procedures, unlike other mandated "preventive services," do not "prevent" disease. Instead, they disrupt the healthy functioning of the human reproductive system. Furthermore, various contraceptives are associated with adverse health outcomes, including an increased risk of such serious conditions as breast cancer, cardiac failure, and stroke. *See* our comments of August 31, 2011, at 3-4; *see also* our comments of September 17, 2010, at 4. The contraceptive mandate is therefore at war with the statutory provision on which it claims to be based, a provision that seeks to ensure coverage of services that prevent disease, rather than increase the risk of it.

Insofar as it requires coverage of *abortifacient* drugs and devices in particular, the mandate also violates: (a) a provision of ACA dealing with abortion coverage; (b) a provision of ACA dealing with non-preemption of state law; (c) a federal law (the Weldon Amendment) that forbids government discrimination against health plans that do not cover abortion; and (d) the Administration's own public assurances that ACA does not require abortion coverage. The mandate runs afoul of these laws *wholly apart from* the various religious freedom issues that the mandate also creates. We have raised these issues previously, and we raise them again here.

A. Violation of ACA's Abortion Provision.

Section 1303(b)(1)(A) of ACA 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." As Section 1303 goes on to state, it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage of [abortion] services…." Thus, under ACA, it is not the government, but plan issuers, that have the authority to decide whether a plan covers abortion.

There is no indication in the text or legislative history of ACA that Congress intended on the one hand to bar coverage of surgical abortion, but on the other hand to permit—indeed, mandate—coverage of so-called medical (*i.e.*, drug-induced) abortion. Indeed, Congress itself drew no distinction between surgical

and medical abortion when, in ACA, it decided to give plans the discretion whether or not to cover abortion. To impute this senseless distinction to Congress would be an unreasonable construction of the Act.

In particular, one drug approved by the FDA for "emergency contraception" and therefore covered by the mandate, Ella or ulipristal, is said to be just as effective in avoiding a sustained pregnancy even if taken almost a week after sexual activity. Ella is a close analogue to the abortion drug RU-486, described by many medical authorities as having the same ability to induce an abortion even after implantation. In fact, if the FDA in the future were to approve RU-486 for "emergency contraception," a step recommended by officials of the World Health Organization ("WHO"), the Administration's proposed regulation would automatically mandate coverage of RU-486 as well.[5]

B. Violation of ACA's Non-Preemption Provision.

Insofar as it requires coverage of any abortifacient drug, the mandate also conflicts with State laws in at least 21 states that restrict abortion coverage in all plans or in all exchange-participating plans.[6] Section 1303(c)(1) of ACA states

[5] On Ella's close similarity in formula and mode of action to the abortion drug RU-486, see the sources cited in our August 2011 comment letter (p. 5 n.10), and European Medicines Agency, *Evaluation of Medicines for Human Use: CHMP Assessment for Ellaone* (2009), at 8 ("Ulipristal acetate prevents progesterone from occupying its receptor, thus the gene transcription normally turned on by progesterone is blocked, and the proteins necessary to begin and maintain pregnancy are not synthesized") and 16 (in animal tests "ulipristal acetate is embryotoxic at low doses"). WHO experts now call RU-486 itself the "method of choice" for "emergency contraception." S. Mittal and P. Aggarwal, *Interventions for emergency contraception: RHL commentary* (last revised: 1 November 2012), the WHO Reproductive Health Library (Geneva: World Health Organization), available at http://apps.who.int/rhl/fertility/contraception/cd001324_mittals_com/en/index.html. If the FDA follows suit, the drug universally known as "the abortion pill" will automatically be included in the "contraceptive" mandate.

[6] Those states are Alabama, Arizona, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin. *See* Ala. Code §§ 26-23C-1 to 26-23C-4; Ariz. Rev. Stat. Ann. § 20-121; Fla. Stat. Ann. §§ 627.64995, 627.66996, 641.31099; Idaho Code Ann. §§ 41-1848, 41-2142, 41-2210A, 41-3439; Ind. Code Ann. §§ 27-8-33-1, 27-8-33-4; Kan. Stat. Ann. § 40-2,190; Ky. Rev. Stat. Ann. § 304.5-160; La. Rev. Stat. Ann. § 22:1014; Miss. Code Ann. §§ 41-41-95 to 41-41-99; Mo. Ann. Stat. § 376.805; Neb. Rev. Stat. §§ 44-8401 to 44-8404; N.D. Cent. Code § 14-02.3-03; Ohio Rev. Code Ann. § 3901.87; Okla.

that nothing in the Act preempts, or has any effect on, any State law regarding abortion coverage. It follows that any construction of the Act that would preempt State law precluding abortion coverage would violate Section 1303(c)(1). Yet this is precisely what the Administration has done by mandating coverage of abortifacient drugs under the preventive services provision of ACA. As to such drugs, therefore, the mandate is invalid where it conflicts with any state law restricting abortion coverage.

C. Violation of the Weldon Amendment.

Under the Weldon Amendment, which has been included in every Labor/HHS appropriations law since 2004, no Labor/HHS funds may be made available to any government agency (including HHS) that discriminates against any health plan on the basis that the plan does not provide abortion coverage.[7] Obviously, to require that plans cover any form of abortion, as a condition for being offered at all, is the most direct form of abortion-based discrimination against plans that seek to exclude such coverage. Insofar as the mandate requires such coverage, it violates the Weldon Amendment.

D. Violation of Administration Assurances Against Mandatory Coverage of Abortion.

The mandate violates the Administration's public assurances, both before and after enactment of ACA, that the Act would not be construed to require coverage of abortion. Such assurances played a major role in securing final passage of the bill, and were formalized in an Executive Order issued by the President. *See* Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 Fed. Reg. 15599 (Mar. 24, 2010).

Stat. Ann. tit. 63, § 1-741.3; R.I. Gen. Laws Ann. § 27-18-28; S.C. Code Ann. § 38-71-238; S.D. Codified Laws § 58-17-147; Tenn. Code Ann. § 56-26-134; Utah Code Ann. § 31A-22-726; Va. Acts 2011, c. 823; Wis. Stat. Ann. § 632.8985.

[7] For the text of the Weldon Amendment, *see* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. F, § 507(d) (2012).

II. The NPRM Offers No Exemption or Accommodation of Any Kind for Most Stakeholders.

Well-deserved attention has been paid to the mandate's impact on religious organizations, and the scope of any related exemption or accommodation. This, however, should not obscure the fact that, for the overwhelming majority of stakeholders, the proposed regulation offers *no exemption or accommodation of any kind whatsoever*. Those without an exemption or accommodation include conscientiously-opposed individuals, for-profit employers (whether secular or religious), nonprofit employers that are not explicitly religious organizations (even in cases where their objection is religious in nature), insurers, and third-party administrators. Respect for their consciences demands some adequate legal protection, but under the current proposed regulation they have none.

A. Institutions.

For-profit organizations (whether religiously-affiliated or not) and nonprofit organizations having no explicit religious affiliation receive no exemption or accommodation under the proposed regulation. To take one example, even a publisher of Bibles is forbidden to offer its employees a health plan that complies with the publisher's espoused Biblical values. The contraceptive mandate has been preliminarily enjoined in just such a case. *Tyndale Home Publishers v. Sebelius*, No. 12-1635 (RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (granting preliminary injunction).

Courts have recognized that the mandate violates religious freedom in other cases as well. So far, at least eleven other *for-profit* plaintiffs with religious objections to covering sterilization, contraceptives, or abortifacient drugs have obtained either preliminary or temporary injunctive relief against the mandate. *Annex Medical v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013) (granting motion for preliminary injunction pending appeal); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012) (granting stay pending appeal); *Monaghan v. Sebelius*, No. 12-15488 (E.D. Mich. Mar. 14, 2013) (granting preliminary injunction); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (same); *Triune Health Group v. U.S. Dep't of Health & Human Servs.*, No. 12 C 6756 (N.D. Ill. Jan. 3, 2013) (same); *Sharpe Holdings v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012

WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012) (same). The cited cases, though not yet finally dispositive on the merits, only tend to confirm the existence and gravity of the religious freedom problems we have repeatedly highlighted. And because courts have been willing to recognize the problem so clearly in the for-profit context, we would expect recognition at least as widespread and strong in cases brought by nonprofit and religious organizations, which generally have yet to reach the merits.

In addition, the proposed regulation fails to recognize the religious and moral objections of insurers and third-party administrators ("TPAs"). All insurers and third-party administrators will be required to provide, or administer and arrange for, respectively, a plan with contraceptive coverage, with the narrow exception of insurers and TPAs that serve only exempt "religious employers."

B. Individuals.

Under the Administration's proposal, virtually all Americans who purchase a health plan will ultimately be required to have coverage for contraceptives and sterilization procedures for themselves and their dependents, whether they want such coverage or not. Even the employees of religious organizations that do not qualify as exempt "religious employers" will have no choice in the matter, for the NPRM indicates they are to be "automatically" enrolled in a plan that covers the mandated items. 78 Fed. Reg. at 8463.[8] This appears to be a change from the

[8] Language indicating that the separate coverage will be mandatory rather than voluntary appears throughout the preamble of the NPRM and in the text of the proposed regulation. *See, e.g.*, 78 Fed. Reg. at 8473 (stating in the proposed regulation that for insured plans, the issuer "must automatically provide health insurance coverage for … contraceptive services … through a separate health insurance policy … for each plan participant and beneficiary"); *id*. at 8474 (same); *id*. at 8475 (same); ; *id*. at 8473 (stating in the proposed regulation that insurers must inform group plan participants and beneficiaries that "[y]ou and any covered dependents will be enrolled" in the contraceptive-only policy); *id*. at 8474 (same); *id*. at 8475 (same); *id*. at 8463 (stating in the preamble that for insured plans the "issuer would automatically enroll plan participants and beneficiaries" in an individual contraceptive-only policy); *id*. (stating in the preamble that for self-insured plans "a third party administrator … would automatically arrange" such policies). On the other hand, the language of "offer" does appear once in the preamble of the NPRM in reference to this coverage. *See id.* (stating that for insured plans, contraceptive-

Administration's earlier proposal to have insurers "*offer* contraceptive coverage directly to the employer's plan participants (and their beneficiaries) *who desire it*." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added).[9] While some argue that the mandate vindicates the value of individual women's choice over the religious values of their employers, in fact women will have no freedom of choice either – not the freedom to decline such coverage, nor even the freedom to keep their own minor children from being offered "free" and "private" contraceptive services and related "education and counseling" without their consent.[10] The mandate therefore poses a threat not only to the rights of employers, religious and secular, but to the religious freedom and parental rights of individuals as well.

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only coverage "would be offered … to plan participants and beneficiaries"). The heavy preponderance of language in both the ANPRM and NPRM, and in the actual text of the proposed regulation, seem to indicate a shift away from voluntary and toward mandatory coverage of contraception for employees of "accommodated" employers. In any event, a clarification is necessary, and we urge the Administration to resolve any ambiguity in favor of giving women the choice to opt out of this coverage.

[9] President Obama reinforced this message the same day, stating: "Every woman should be in control of the decisions that affect her own health. Period. … [I]f a woman's employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their [sic] health plan, the insurance company – not the hospital, not the charity – will be required to *reach out and offer* the woman contraceptive care free of charge, without co-pays and without hassles." Remarks of the President on Preventive Care, February 10, 2012, at www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (emphasis added).

[10] In addition, in the case of an insured plan, employees of "eligible organizations" who themselves have a religious objection to contraceptive coverage will be contributing to a pool of funds from which the insurer will draw to pay claims for contraceptives and sterilization procedures (as no other pool of funds is available from which to pay such claims). Thus, those employees of "eligible organizations" who share their employer's religious objection to such coverage, like the employer itself, will ultimately be paying for *other people's* contraceptives and sterilization procedures, even if they themselves and their dependents do not use such items or undergo such procedures. We describe the funding problem in greater detail below in Part IV.A. of our comments.

III. Though Improved Slightly in One Respect, the "Religious Employer" Exemption Is Worsened in Another Respect and Remains Problematic in Several Others.

A. The Government's Proposed Definition of "Religious Employer" Eliminates Some Problematic Language.

Under the exemption finalized in February 2012, an exempt "religious employer" was one that met each of four criteria: (1) its purpose is the inculcation of religious values, (2) it primarily hires persons who share the organization's religious tenets, (3) it primarily serves persons who share those tenets, and (4) it is a nonprofit organization of a type described in section 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.[11] The proposed regulation would eliminate prongs (1) through (3) of this four-pronged test. As a result, some of the intrusive and constitutionally improper government inquiries that were inherent in the earlier definition have been eliminated. Although this represents a small improvement in the definition, it continues to be highly objectionable, as discussed further below.

B. The Government's Proposed Definition of "Religious Employer" Still Excludes Most *Bona Fide* Religious Employers and Therefore Is Still Too Narrow.

The Administration continues to exclude from the definition of "religious employer" a wide array of organizations that undeniably are "religious" and undeniably "employ" people. Just as before the NPRM, most Catholic ministries of service—such as Catholic hospitals, charities, and schools—are deemed not to be "religious employers" and therefore remain subject to the mandate. By its own admission, the NPRM's change to the definition of "religious employer" will "not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. at 8461. The exemption was too narrow before the NPRM, and having changed only slightly in scope, it remains too narrow. Instead, the definition of "religious employer" should include all *bona fide* religious employers.

[11] Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of a religious order.

C. The Government's Proposed Definition of "Religious Employer" Still Reduces Religious Freedom to Freedom of Worship by Limiting the Exemption Almost Exclusively to Houses of Worship.

As the NPRM itself explains, "the primary goal" of the original definition of "religious employer" was "to exempt the group health plans of houses of worship," and the proposed change to that original definition is designed to achieve that same goal more effectively. *See* 78 Fed. Reg. at 8461. That goal continues to pose a great religious freedom problem, for it continues to create a division—alien to our tradition—between our houses of worship and our ministries of service, and continues to treat the latter as if they had secondary religious importance.[12] Moreover, providing full protection only to houses of worship implies that only the activities of houses of worship are entitled to such protection. But just as religion is not limited to worship, the freedom of religion is not limited to the freedom of worship. Religious freedom must also include the freedom to abide by Church teachings, even outside the four walls of the sanctuary.[13]

As explained further below, the operative language of the Church Amendment of 1973 is the only complete solution to the problem of improperly defining our religious community, for that language avoids entirely the question of which people or groups are deserving of religious freedom protection.[14] The identity of the person or group having the religious freedom objection should not matter; what should matter instead is whether the person or group faces

[12] *See* USCCB Administrative Committee, "United for Religious Freedom" (Mar. 14, 2012) (reaffirmed by acclamation of full body of U.S. Catholic Bishops on June 13, 2012).

[13] From the earliest centuries of the Christian church, "the exercise of charity became established as one of her essential activities, along with the administration of the sacraments and the proclamation of the word: love for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to her as the ministry of the sacraments and preaching of the Gospel." Pope Benedict XVI, Encyclical Letter *Deus caritas est* (2005), no. 22.

[14] Obviously, we are not urging the government simply to "cut and paste" the Church Amendment into the regulations, but instead to apply its core principle in this context. The key point is that conscience protection, as reflected in the Church Amendment and countless other federal laws affording protection to those with religious or moral objections, should continue to be available to *all* individuals and entities with such objections, as they have been over the last several decades, and not simply to some subset of the political community (let alone to some subset of the religious community).

government coercion to violate conscience. Religious freedom is for *all* who face this threat, not just some.

D. The Government's Proposed Definition of "Religious Employer" Still Cannot Be Reconciled with the Longstanding Precedent of Generous Federal Government Conscience Protection in the Health Care Context.

Although the new proposed definition of "religious employer"—the fourth part of the original four-part test—does derive from existing federal law, it is wholly unprecedented in its use as a conscience protection at the federal level. The fourth prong describes some (but not all) of the religious institutions that are exempt from the general requirement that nonprofit organizations file the IRS Form 990. In that context, that definition served to reduce the church-state entanglement issues inherent in mandating financial reporting and accountability on the part of churches and religious organizations. However, it does not, and was never intended to, protect against a government requirement that may violate conscience. The Form 990 filing exemptions therefore have no relevance whatsoever to church welfare or benefit plans.

Indeed, if ultimately implemented, the new proposed definition would represent the narrowest protection of conscience in health care anywhere in federal law. As we have noted repeatedly in prior comments, federal conscience protections in the health care context are typically robust. Foremost among these is the Church Amendment of 1973, 42 U.S.C. §300a-7. Its operative language—which protects against government coercion of conduct that "would be contrary to [the] religious beliefs or moral convictions" of individuals or entities—has enjoyed broad bipartisan support, and has been repeated in numerous federal conscience laws over the forty years since its original passage.[15] As we have urged repeatedly before, language like this represents the only complete solution to the religious freedom problems caused by the mandate.

The NPRM's proposed definition not only disregards this leading option in continuity with the strong, bipartisan tradition of generous federal conscience protection, it disregards an alternative exemption that, while still substantially

[15] *See* USCCB Secretariat of Pro-Life Activities, "Current Federal Laws Protecting Conscience Rights" (2012) (available at http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf).

flawed, would represent a far less radical break from the past. Other prominent commenters have proposed a definition of "religious employer" based on the category of employers whose benefit plans may qualify as "Church Plans" under the Employee Retirement Income Security Act (ERISA). *See* I.R.C. § 414(e). USCCB has declined to endorse this proposal, because it would not extend protection to all nonprofit religious employers,[16] or to any for-profit employers with a religious objection. On the other hand, it is at least based on a law that has some—rather than absolutely no—bearing on health insurance plans, and it would cover substantially more employers than the currently proposed exemption.

In sum, the revised exemption proposed in the NPRM continues the persistent refusal to follow in the mainstream of federal conscience protection language, or even to opt for a relatively modest departure from that mainstream. If the "houses of worship"-focused approach to conscience protection survives in this context, it will soon spread to others. Regulatory assurances to the contrary are ineffectual, as they cannot and do not control what may happen beyond the present rulemaking process. Once again, we urge the Administration in the strongest possible terms to reject this radical departure, and to return instead to the bipartisan consensus of the last forty years, which is embodied in the core language of the Church Amendment and the numerous federal conscience protection laws that have followed it.

E. The Government's Proposed Definition of "Religious Employer" Would Narrow the Exemption Further by Excluding Otherwise Exempt Employers That Extend Their Coverage to the Employees of Other Employers.

In at least one significant respect the modified definition may make the universe of eligible plans *smaller*. Previously, the Administration suggested that the employees of a non-exempt religious organization might be enrolled in the health plan of an affiliated, exempt religious employer; such a plan would not be required to include contraceptive coverage. 77 Fed. Reg. 16501, 16502 (March 21,

[16] We note that the NPRM's proposed definition of "eligible organization"—if it described the scope of an exemption from the mandate, rather than an "accommodation"—would also represent a substantial improvement in relation to the current proposed definition of "religious employer," since it would encompass all self-identified, nonprofit, religious employers with a religious objection. Unfortunately, this definition instead represents still another less constrictive understanding of "religious employer" that has been needlessly bypassed.

2012) (advance notice of proposed rulemaking); *see* our comments of May 15, 2012, p. 18 (requesting clarification on this issue). In its latest proposed regulation, however, the Administration states that such opportunities will not be available. 78 Fed. Reg. at 8467 (stating that any exemption or accommodation will be available only on an "employer-by-employer basis"). Thus, under this latest proposed regulation, the range of organizations exempt from the mandate would actually shrink.

F. The Government's Proposed Definition of "Religious Employer" Is Not Reasonably Related to a Legitimate Government Objective.

As explained above, the proposed test for deciding whether an organization is a "religious employer" is lifted from an entirely different statutory context, one having no bearing whatsoever on health plans or conscience protection. Congress's concern in enacting the Form 990 filing exemptions was financial accountability and tax administration—not health insurance or conscience. As the proposed test for deciding whether an organization is a "religious employer" bears no rational relationship to any legitimate governmental interest that the mandate or the exemption purports to advance, it does not withstand constitutional scrutiny.

As it happens, religious employers that do not fit the regulation's definition of "religious employer" include those organizations that contribute most visibly to the common good through the provision of health, educational, and social services, including Catholic hospitals, colleges, universities, and charities. The Administration claims that employees of such organizations are less likely than the employees of churches, conventions and associations of churches, integrated auxiliaries and religious orders to share their employer's views about contraceptives and sterilization. 78 Fed. Reg. at 8461-62. What knowledge the government could have about employees' individual religious beliefs seems entirely speculative, as well as irrelevant to the question whether the mandate infringes on the employer's own religious convictions and those of at least some of its employees.

In any event, the Administration's claim of a disparity in religious belief between employee and employer ignores four facts: (1) employees of religiously-affiliated hospitals, colleges, universities, and charities have *chosen* to be employed by such organizations and therefore, as to any employee benefits that those employers provide, have implicitly agreed to the employer's terms of employment, including compensation and benefits; (2) with the rare exception of

employee-pay-all coverage, the employees' health coverage is offered, sponsored and paid for in part *by the employer*; (3) employees who disagree with their employer's objection to contraceptive and sterilization coverage are not foreclosed from obtaining such coverage *on their own and from another source* (including through a group or individual plan that they can purchase on the Exchange); and (4) the workplaces of exempt and nonexempt religious organizations in many instances are comparable in terms of the services they provide, and the religious reasons why they provide them.

The last point requires elaboration. The Administration concedes that "if a church maintains a soup kitchen that provides free meals to low-income individuals," that should have no effect on its exempt status. 78 Fed. Reg. at 8461. However, if the very same church forms an unaffiliated separate corporation through which devout believers can provide free meals to low-income individuals in compliance with Jesus' call to feed the hungry, then that organization is *not* exempt even though it does precisely what the church would do directly had it not housed the services under a separate organization. Thus, the availability of an exemption from the contraceptive mandate will often depend upon, as it were, the accident of corporate form rather than what the church believes and does. In our example, the church and separately-incorporated organization provide the same services. Each is motivated by the same religious belief. Given those similarities, we fail to see how the government's interest in ensuring access to health coverage while accommodating conscience is furthered by denying an exemption, based solely on how the organization providing soup kitchen services is structured.

As another example of the lack of reasonable relation between the Form 990 filing requirement and the exemption, consider the activities of a religious order. If the order engages in "exclusively religious" activities, its health plan is exempt from the mandate. But if the very same religious order runs a religious bookstore, sells fruit preserves, or performs some other work as a means of supporting itself, any health coverage offered in connection with the latter is not exempt from the contraceptive mandate even if the only employees are the devout members of the order or lay people who share its beliefs.

Even if an exemption from the Form 990 filing requirement bore a reasonable relation to the exemption from the mandate (which, we explain above, is not the case), the latter is under-inclusive. Many organizations, including "educational organizations" below the college level that are affiliated with a church or operated by a religious organization, are exempt from the requirement to file an

annual return. *See* 26 C.F.R. § 1.6033-2(g). But these organizations, exempt as they are from the filing requirement, are not exempt from the mandate because they are not churches, conventions or associations of churches, integrated auxiliaries, or the exclusively religious activities of religious orders. If exemption from the Form 990 filing requirement is a reasonable proxy for exemption from the mandate, then why are churches, conventions and associations of churches, integrated auxiliaries, and the exclusively religious activities of religious orders the *only* non-filers exempt from the mandate?

IV. The Accommodation Described in the NPRM Does Not Appear to Meaningfully Accommodate Even Those Stakeholders That Qualify for It.

Now as before, it does not appear that what the Administration describes as an "accommodation" for "eligible organizations" (those religious employers that do not qualify for an exemption) will actually relieve them of the burden on religious liberty that the mandate creates.

A. Insured plans.

Under the proposed regulation, the plan sponsor (the employer) and enrollees (employees and their dependents) would pay for a group plan that excludes contraceptive coverage. The issuer of the group plan would then "automatically" issue a "separate" individual policy to each enrollee for contraceptive coverage. 78 Fed. Reg. at 8462-63. The NPRM recites that the issuer would assume "sole responsibility, independent of the eligible organization and its plan," for providing such an individual policy, and would do so "without cost sharing, premium, fee, or other charge to plan participants and beneficiaries." *Id*. at 8462. In addition, the NPRM states that "no fee or other charge in connection with [the contraceptive] coverage is imposed on the eligible organization or its [group] plan." *Id*.

If there is no charge to the plan sponsor or enrollees, the question arises: what funds will the insurer use to pay for contraceptives, sterilization procedures, and related education and counseling? The NPRM does not say, but says only that "such … coverage is *cost neutral* because [the insurer] would be insuring the *same set of individuals* under both policies and would experience lower costs from

improvements in women's health and fewer childbirths." *Id*. at 8463 (emphasis added).

This cost-neutral assumption ignores the insurer's additional administrative costs in administering the companion contraceptive coverage program. In any event, even if this assumption were valid, there is only one funding stream from which contraceptives, sterilization procedures, and related education and counseling for these enrollees can be paid: contributions made by the sponsor of the group plan and its enrollees. It necessarily follows that, even though contraceptive coverage is housed under "separate" individual plans, it is not truly separate, and the objecting employer and enrollees are ultimately paying for the objectionable services through their contributions. As there is no statutory authority, and there would appear to be legal constraints, for requiring an insurer to pay for contraceptives and sterilization procedures out of *other* clients' resources, employer and employee contributions to the group plan provide the only pool of funds from which payments for contraceptives and sterilization under the individual contraceptive-only policies can be made.

This seems especially obvious when, as here, the cost savings of reduced childbirths are cited by the Administration as paying for contraceptives and sterilization. As the NPRM itself points out, this only makes sense if the reimbursements come from funds paid *for those same individuals* for childbirth coverage. And those premiums for coverage of childbirth came from the employee and employer. In other words, some of the funds the employer and employee paid for childbirth coverage will, arguably, not be needed for childbirths, and so will be available to reimburse for contraceptives and sterilization instead.[17]

[17] In pointing out this implication of the Administration's statements, of course, we are not endorsing the apparent assumption that contraceptive coverage necessarily "saves" the "costs" of childbirth, that children are ultimately a burden on rather than a contribution to the economic and other aspects of American well-being, or that, in a society where overall fertility rates are already below replacement levels, there is a compelling or even legitimate government interest in persuading religious Americans or their employees to have fewer children. On the implications of the plunging U.S. birthrate, *see* T. Bahrampour, "U.S. birthrate plummets to its lowest level since 1920," *The Washington Post*, November 29, 2012, at http://articles.washingtonpost.com/2012-11-29/local/35585758_1_birthrate-immigrant-women-population-growth ("The decline could have far-reaching implications for U.S. economic and social policy. A continuing decrease could challenge long-held assumptions that births to immigrants will help maintain the U.S. population and create the taxpaying workforce needed to support the aging baby-boom generation.").

Thus, notwithstanding the Administration's claim that the issuer cannot, "directly or indirectly" (78 Fed. Reg. at 8473), charge the employer or employee for contraceptive coverage, there still seems to be a funding tie between the employer and the objectionable coverage. In addition, the attempted segregation of contraceptive and sterilization procedures is ineffective because plan premiums (and adjustments to premiums) are ultimately based on total claims history, which will now include claims for contraceptives and sterilization procedures—regardless of whether the organization objects to the coverage of those items, and regardless of whether those services are listed in the plan summary or other plan documents.

Put in other terms, if there are actually reduced claims against the employer's main plan as a result of its employees having separate contraceptive-only plans, then in the ordinary course, those cost savings would result in the accommodated employer's paying reduced premiums in subsequent years. But under the proposed accommodation for insured plans, if claims against the main plan actually are reduced, the employer would *not* pay a reduced premium for that plan. Instead, the employer's premium would remain as high as previously, even though its claims experience should result in a lower premium. And it is precisely that increment of premium over the actual experience-based cost that would pay for the separate contraceptive-only policy. In this way, the accommodated employer's (and employees') premiums for the main health plan are paying for the contraceptive-only policy.

Even apart from the proposed rule's flawed accounting mechanisms, the claimed "accommodation" still requires religious organizations to facilitate access to objectionable services in direct contravention of their sincerely-held religious beliefs. Insofar as the insurer is providing *individual* policies for contraceptive coverage by virtue of the participants' enrollment in the *group* plan, the purchase of contraceptives and sterilization procedures is ultimately facilitated by the group plan which the religious objector has offered to, and purchased for, its employees. So even if the purchaser's premiums were somehow segregated to eliminate the funding tie, it is not evident that it would resolve the moral problem. In effect, offering a group health plan would operate automatically as a "ticket" or "trigger" for contraceptive coverage. The employee (and her dependents such as female minor children) will receive this "entitlement" whether she wants it or not, triggered by her enrollment in a health plan from her religious employer (albeit not a "religious employer" as the Administration defines it).

As we have pointed out before, this is different from a situation in which an employee uses his or her salary for purposes the employer believes to be intrinsically evil. The difference is that the employee's salary is not earmarked for the purchase of anything – once paid, those funds simply belong to the employee. Health care premiums, by contrast, are paid specifically for the purchase of a health plan. And the fact that the insurer provides contraceptives for "free" under policies that are provided automatically because of enrollment in the employer-sponsored group plan would likewise seem sufficient to establish a burden on the employer's religious freedom.[18]

Our comments on this proposal are not new. We pointed to the problems of both funding *and* facilitating contraceptive coverage when the idea of having insurers provide contraceptive coverage was first aired. *See* our comments of May 15, 2012, pp. 10-18. As we pointed out then (pp. 12-13), suppression of religious freedom can take at least two forms. It can take the form of making conscientious objectors actively *cooperate with what they see as morally forbidden*. But it can also take the form of depriving those objectors of the right (a right that others continue to exercise) *to do what they see as morally required*. Under the proposed regulation, those who favor contraceptive coverage will retain the right they have always had as employers to provide a health plan consistent with their values. Objecting employers, including many religious organizations, will lose that right, because any plan they offer will be turned into a conduit for the objectionable coverage. The practical outcome for employees and their children is exactly the same as if the organization had no objection. Employees who share the objecting organization's religious tenets are similarly deprived of the freedom to choose a workplace organized according to their own values, and are forced to accept coverage for their families to which they have their own religious or moral objection.[19]

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[18] It is also morally problematic that the group plan is serving as a gateway for speech ("related education and counseling"), including persuasive speech to minor children, that squarely contradicts the plan sponsor's religious or moral beliefs and possibly those of the adult employee as well. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that state bar members could not be compelled to finance political and ideological activities with which they disagree); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (holding that state employees could not be required, consistent with the First Amendment, to provide financial support for ideological union activities unrelated to collective bargaining).

[19] We should also point out that because all enrollees in the contraceptive-free group plan are provided with individual contraceptive-only policies, *both* the plan sponsor *and* all contributing employees in the group plan are, ultimately, paying for and facilitating access to contraceptives

B. Self-insured plans.

As described in the NPRM,[20] the Administration proposes that the plan sponsor and employees may pay for a self-insured group plan that excludes contraceptive coverage. However, the third-party administrator ("TPA") is then to find an insurer that will automatically issue individual contraceptive-only plans to all persons enrolled in the group plan (that is, all employees and their dependents). 78 Fed. Reg. at 8463.[21] Since the insurer is not providing these individually-insured persons with group coverage of other (non-contraceptive) items and services, the Administration cannot (and does not) make any claim of cost savings as a result of enrollment in the self-insured group plan. As described in the NPRM, however, issuers of contraceptive-only plans will be given an adjustment in the Federally-facilitated Exchange ("FFE") user fee they would otherwise be required to pay to participate in that Exchange.[22] The insurer, in turn, is required to

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and sterilization procedures *even if* many of the enrolled employees and their dependents do not personally make use of the contraceptive-only policy by obtaining contraceptives. In other words, the individual contraceptive-only policies function like one large contraceptive-only group plan, for the persons enrolled in the non-contraceptive group plan are *identical* in all respects to the persons enrolled in the contraceptive-only policies (whether characterized as individual policies or as one large group policy). As a result, conscientiously-opposed employers and employees are, in the aggregate, paying for and facilitating *other* employees' contraceptives and sterilization procedures.

[20] The NPRM does not include the text of a proposed regulation with respect to self-insured plans, but the preamble includes a description of how enrollees in such plans would obtain contraceptive coverage. Our analysis is based on that description. Further comment must await publication of a proposed regulation on self-insured plans.

[21] The first of the three options described for self-insured plans states only that TPAs will have an "economic incentive" to arrange for contraceptive coverage (which could be read to mean something less than a "requirement" to make such arrangements); elsewhere, the NPRM states that under *all three* options, contraceptive coverage will be provided "automatically." 78 Fed. Reg. at 8463. Obviously we believe contraceptive coverage should not be required, and we ask for clarification on this point.

[22] A recently published regulation defines an FFE as "an Exchange established and operated within a State by the Secretary [of HHS] under section 1321(c)(1) of the Affordable Care Act." 78 Fed. Reg. 15410, 15532 (March 11, 2013). Section 1321(c)(1) authorizes the Secretary to establish an FFE if a state fails to do so. In support of such FFEs, the Administration has proposed that participating issuers pay a monthly user fee. *Id.* at 73213. It is this fee that the Administration now proposes to adjust, as a mechanism for encouraging insurers to offer

share a portion of that adjustment with the TPA to offset the latter's administrative cost in arranging individual contraceptive-only coverage.

A number of assumptions are built into this proposal. For example, the proposal assumes that (a) the plan sponsor with a religious or moral objection to contraceptive coverage does not self-administer the plan, (b) the sponsor will be both willing and able to find a TPA that does not share its objection and is willing to arrange such coverage, and (c) TPAs in turn will be willing and able to find an insurer to provide such coverage, and only as consideration for an adjustment in the insurer's FFE user fee. This, in turn, assumes that (d) there is a market of willing insurers that participate, or have an affiliate that participates, in the FFE for which (e) the costs of contraceptives and sterilization procedure will not outpace the adjustment in the insurer's (or its affiliate's) FFE user fee.[23] There may be other assumptions built into the Administration's proposal that would be familiar to those who sell or administer plans and on which they can comment further.[24]

Even if all these assumptions were sound, which we question, the underlying approach would still pose a moral problem because *the group plan itself* continues to facilitate access to items and procedures to which the employer has a religious or moral objection. In other words, even if the objecting employer's monetary contributions did not directly pay for contraceptives and sterilization procedures, the plan itself would continue to function as a morally objectionable gateway or "ticket" to such coverage.[25] Thus, as described earlier in the context of insured

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individual contraceptive-only policies and as a means of paying for such policies and the items they cover.

[23] The Administration's promise to "assist in identifying issuers" of contraceptive-only policies (78 Fed. Reg. at 8463) does not, of course, ensure that there will be an economically viable market for such issuers.

[24] *See*, *e.g.*, NPRM Comments from the Self-Insurance Institute of America, Inc. (Feb. 25, 2013).

[25] This is especially explicit in some of the proposed ways for making this intricate proposal function. For example, one scenario envisions that the employer's simple act of self-certifying that it objects to contraceptive coverage "would have the effect of designating the third party administrator as the plan administrator under section 3(16) of ERISA solely for the purpose of fulfilling the requirement that the plan provide contraceptive coverage without cost sharing." 78 Fed. Reg. at 8464. In other words, the plan sponsor's very act of stating its religious objection to this coverage is what gives the TPA the legal authority under ERISA to impose such coverage on all of the sponsor's employees and their dependents.

plans, the self-insured plan (and the self-certification of non-coverage that the sponsor provides to the TPA) would automatically trigger contraceptive coverage. The moral dilemma for the plan sponsor with a religious or moral objection to such coverage lies in being forced to trigger the objectionable coverage *even if* the funds paying for the group plan are not also used to pay for the contraceptive coverage.

The particular ways in which the proposed regulation calls on various parties to facilitate coverage to which they may have a religious or moral objection only deepens the dilemma. The sponsor must (1) identify a TPA able and willing to arrange the objectionable coverage; (2) provide the TPA with a certification that the group plan does not include the objectionable coverage; and (3) provide the TPA, as it usually does, with the names and identifying information of enrollees so the TPA can administer the plan, which in this case will include arranging for an individual contraceptive-only plan for those enrollees, the very thing that the sponsor objects to.[26]

Again, our views on this are not new. We pointed out the problem of improperly facilitating contraceptive coverage when the idea of having TPAs arrange such coverage was first aired. *See* our comments of May 15, 2012, pp. 13-18. As we observed then, the problem relates not only to cooperation with what the plan sponsor views as immoral. Here, as in the case of insured plans, it is also an infringement of religious freedom for government to deprive stakeholders of the opportunity (which others continue to enjoy) to do what they regard as a necessary good—namely, to offer, buy, or enroll in a health plan that conforms to their most basic religious or moral convictions.[27] As we said in previous comments,

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[26] The NPRM notes that, under one of three alternative proposals for self-insured plans, "there would be no obligation on a third party administrator to enter into or continue a third party administration contract with an eligible organization if the third party administrator were to object" to arranging for contraceptive-only coverage. 78 Fed. Reg. at 8464. Though not explicitly stated, this also appears to be equally true of the two other alternative proposals for self-insured plans. Obviously, if a TPA refuses for conscientious reasons to enter into or to continue a TPA contract with an eligible organization, that organization must find another TPA, specifically one that does not share its (or its previous TPA's) objection to contraceptive coverage. And the TPA that shares the employer's religious beliefs, in turn, is being told that it must either violate those beliefs or exit the marketplace. Indeed, some TPAs may themselves be religious organizations, but they receive no exemption under the proposed regulation.

[27] It is especially difficult to understand why the Administration would present many employers with the Hobson's choice of abandoning its conscientious beliefs or ceasing to offer a health plan at all, when one of ACA's central goals is to *improve* access to health plans.

protecting a religious organization from being forced to act immorally, by depriving it of the ability to act at all, is no way to serve religious freedom.

V. Conclusion.

The proposed regulation keeps in place a regulatory definition of "preventive" health care which includes items that do not prevent disease, but rather are intended to render a woman temporarily or permanently infertile, and may be associated with adverse health outcomes. Under the proposed regulation, most stakeholders are offered no exemption or accommodation. The proposed regulation creates an exemption that artificially and arbitrarily carves up the religious community into those deemed "religious enough" for the exemption and those that are not, generally excluding those who practice their faith by most visibly serving the common good. Finally, under the proposed "accommodation" for non-exempt religious organizations, plan premiums or the plan, or both, would continue to serve as the source or conduit for the objectionable "services."

In short, the Administration continues to propose: (a) an unjust and unlawful mandate; (b) no exemption or "accommodation" at all for most stakeholders in the health insurance process, such as individual employees and for-profit employers; (c) an unreasonably and unlawfully narrow exemption for some nonprofit religious organizations, mostly houses of worship; and (d) an "accommodation" that still requires *bona fide* religious employers that fall outside the narrow government definition of "religious employer" to fund or facilitate the objectionable coverage.

Once again, we urge the Administration to reconsider this proposed course.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

Michael F. Moses
Associate General Counsel
UNITED STATES CONFERENCE OF
CATHOLIC BISHOPS
3211 Fourth Street, NE
Washington, DC 20017
(202) 541-3300

EXHIBIT B

ARCHDIOCESE OF WASHINGTON

Archdiocesan Pastoral Center: 5001 Eastern Avenue, Hyattsville, MD 20782-3447
Mailing Address: Post Office Box 29260, Washington, DC 20017-0260
301-853-4500 TDD 301-853-5300

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

April 4, 2013

Re: Notice of Proposed Rulemaking on Preventive Services
File Code No. CMS-9968-P

Dear Sir or Madam:

The Archdiocese of Washington (the "Archdiocese") respectfully submits the following comments on the Notice of Proposed Rulemaking ("NPRM") on preventive services. 78 Fed. Reg. 8456 (Feb. 6, 2013). The Archdiocese is the local arm of the Roman Catholic Church in Washington, D.C., and five counties in Maryland: Montgomery, Prince George's, Calvert, Charles, and St. Mary's. The Archdiocese serves a religious community of Roman Catholics under the leadership of Cardinal Donald Wuerl and provides a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike. The Archdiocese not only provides pastoral care and spiritual guidance for nearly 600,000 Catholics, but also serves individuals throughout the D.C. area through its schools and multiple charitable programs.

The Archdiocese has long expressed its concern that the regulations at issue here (the "Mandate"), which require the provision of insurance coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling, force faithful Catholics to choose between facilitating services and speech that violate their religious beliefs or exposing their organizations to devastating penalties. Indeed, the Archdiocese itself has filed a lawsuit challenging the Mandate, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815, 2013 WL 285599 (D.D.C. Jan. 25, 2013), and has previously commented on prior iterations of that regulation, *see, e.g.*, Comments of Archdiocese of Washington (Sept. 30, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB44a-14694.pdf.

Regrettably, the proposals contained in the NPRM fail to resolve the serious religious liberty issues presented by the Mandate. The NPRM does not expand the scope of the "religious employer" exemption in any meaningful way. The so-called "accommodation" for nonexempt

religious organizations is an accounting maneuver that likewise effects no substantive change to existing law. And the NPRM actually removes an existing, important protection that allows a "religious employer" to include within its insurance plan affiliated religious organizations with which the employer "shares common religious bonds and convictions." Consequently, the proposals in the NPRM are, in fact, demonstrably worse than the regulations that they are intended to replace. Moreover, as a practical matter, the NPRM creates insurmountable administrative and logistical difficulties for organizations, such as the Archdiocese and its affiliates, that operate or participate in large self-insured plans that provide coverage for multiple affiliated employers.

Accordingly, the Archdiocese continues to strenuously oppose the Mandate, including the proposed changes set forth in the NPRM. Instead, the Archdiocese urges the Government to (1) adopt a definition of "religious employer" that recognizes that religious organizations do far more than operate "houses of worship"; and (2) abandon its proposal to rescind the ability of "religious employers" to include affiliated religious organizations in their insurance plans and thereby shield them from the Mandate.

I. THE NPRM INCREASES THE BURDEN THAT THE MANDATE IMPOSES ON RELIGIOUS LIBERTY

The NPRM does not offer any meaningful relief to religious organizations, like the Archdiocese's affiliates, that are morally opposed to providing, paying for, and/or facilitating access to abortion-inducing drugs, contraception, sterilization, and related education and counseling. First, the NPRM fails to expand, in any meaningful way, the scope of the "religious employer" exemption. Second, the so-called "accommodation" likewise offers no relief of substance; it still requires religious organizations to provide, pay for, and/or facilitate access to objectionable products and services. Third, the NPRM proposes to reverse existing law in a way that substantially *narrows* the number of religious entities who may seek shelter under the already impermissibly cramped definition of "religious employer," and, therefore, is significantly *worse* than existing law. Each of these issues is explained in greater detail below.

A. The changes to the "religious employer" exemption provide little, if any, substantive relief to Catholic social service organizations.

The NPRM first proposes a revised definition of "religious employer" that would be used to determine which entities would be completely exempt from compliance with the Mandate. Currently, the religious employer definition exempts organizations that meet four 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"; and "(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 Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B). The NPRM would eliminate the first three prongs of this definition. Consequently, under the NPRM, an exempt "religious employer" would be "a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." *See* 78 Fed. Reg. at 8461.

This proposed modification does not, nor is it intended to, accomplish any significant change to the scope of existing law. Indeed, the NPRM candidly admits as much, conceding that this change "would *not* expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." *See id.* (emphasis added). Instead, this proposal would continue to "restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." *Id.* In this respect, the NPRM is little different from the existing "religious employer" exemption, which was intended to focus on "the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Religious organizations that have a broader mission are still not, in the Government's view, "religious employers."

Practically speaking, this cramped definition of religious employer would continue to exclude numerous organizations, such as Catholic hospitals, charitable organizations, universities, and elementary and secondary schools that are indisputably religious. While these revisions may ensure that the Archdiocese itself would be exempt from the Mandate, the NPRM offers no such guarantee to many of the distinct diocesan corporations the Archdiocese has established to carry out its ministries. Indeed, the decision to exempt the Archdiocese, but not all of its ministries, flows from a fundamentally misguided view of religious liberty. Freedom of religion means far more than the freedom to worship, and religious exercise is not confined within the four walls of a parish church. As Pope Benedict explained, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, Deus Caritas Est ¶ 22 (2006). Ignoring this reality, the NPRM persists in separating the Archdiocese from the ministries it has established to care for the "widows[,] orphans, prisoners, and the sick and needy of every kind," awarding an exemption to the former, but not to the latter. The Catholic organizations that carry out the Church's charitable mission, however, are no less "religious" than the Archdiocese itself.

Finally, it makes no sense for the NPRM to adopt Section 6033 as the dividing line between organizations that are, or are not, deemed sufficiently "religious" to warrant exemption from the Mandate. Section 6033 was never intended to distinguish among religious organizations for purposes of the provision of health care. Instead, it merely addresses whether and when nonprofit entities that are exempt from paying taxes under the Code must file an annual informational tax return, known as a Form 990. 26 C.F.R. § 1.6033-2(a). The choice of this provision is all the more puzzling since there are myriad provisions in federal law that, unlike Section 6033, *are* intended to protect religious freedom. *See, e.g.*, 42 U.S.C. § 300a-7 (protecting hospitals and individuals that receive federal funds in various health programs from participating in abortion and sterilization procedures if such participation is "contrary to [their] religious beliefs or moral convictions"); 29 U.S.C. § 1002(33) (defining "church plans"). The decision to adopt Section 6033, rather than these other provisions, seems to be based solely upon a desire to define a "religious employer" as narrowly as possible and thereby force objecting religious organizations to abandon sincerely held religious beliefs with which the Government disagrees. This would be unconscionable in almost any context. It is particularly so where, as here, the regulations target religious organizations precisely because their religious mission includes charitable outreach that extends beyond the four walls of their "houses of worship."

B. The proposed "accommodation" is an accounting maneuver that still requires religious organizations to provide, pay for, and/or facilitate access to contraception, abortion-inducing drugs, sterilization, and related education and counseling.

The NPRM also proposes an "accommodation" for nonexempt objecting religious nonprofit organizations that do not qualify as "religious employers." Under that proposal—which largely parrots the prior and inadequate proposal contained in the Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16,501 (Mar. 21, 2012)—a nonexempt, nonprofit religious entity (deemed an "eligible organization") that objects to providing the mandated coverage as part of its group health plan must self-certify its objection to contraceptive coverage. The self-certification then "automatically" requires a third-party entity—either the nonprofit's insurance company or its third-party administrator ("TPA")—to provide or procure the objectionable coverage "at no additional cost." *See* 78 Fed. Reg. at 8462–64. Coverage is automatic; female employees and employees with female dependents do not have the option to reject it.

This so-called "accommodation" is an accounting maneuver that, like the cosmetic changes to the "religious employer" definition, offers no meaningful relief to religious organizations opposed to the Mandate. Like existing law, the "accommodation" still requires Catholic organizations to provide, pay for, and/or facilitate access to the objectionable services. The following example illustrates this point:

- Under the Mandate as it now exists, a Catholic organization contracts with an insurance company, and the insurance company must provide the Catholic organization's employees with an insurance policy that covers contraception, abortion-inducing drugs, sterilization, and related counseling.

- Under the NPRM, a Catholic organization contracts with an insurance company, and the insurance company must provide the Catholic organization's employees with two different insurance policies, simultaneously: one that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling, and one that does.

There is no material difference between these two scenarios. In both instances, the Catholic organization's contract with the insurance company automatically results in insurance coverage for the objectionable services. The fact that, as an accounting matter, the coverage comes in two policies rather than one does not solve the moral problem.

Thus, the Government's assurances that the objecting employer's premiums will not flow to the payment of contraceptives are irrelevant; either way, the Catholic organization's contract with the insurance company triggers the provision of objectionable insurance coverage. These assurances are, in any event, implausible in at least two respects.

First, according to the NPRM, the provision of contraceptive coverage will be "at least cost neutral" for insurance companies, because insurers will "experience lower costs from improvements in women's health and fewer childbirths." 78 Fed. Reg. at 8463. This, the NPRM claims, will allow insurance companies to offer contraceptive coverage at "no *additional* cost" to

employers. *Id.* (emphasis added).[1] In other words, insurance companies will not have to charge employers *more* to provide contraceptive coverage. Presumably, their premiums will remain the same. But this means that even granting the NPRM's assumptions about contraceptive coverage being cost neutral—which, as discussed immediately below, are themselves implausible—the "accommodation" is nothing more than a shell game. Premiums previously paid by the objecting employers to cover, for example, "childbirths," will now be redirected to pay for contraceptive coverage.[2] Thus, not only would an objecting employer *trigger* the coverage of contraceptive services by providing a health plan, but the employer would also actually be *paying* for such services.

Second, industry experts have expressed deep "skeptic[ism]" that it will be "cost neutral for insured plans to bear the cost of contraceptive coverage."[3] Creating "'individual policies for contraceptive coverage would be a significant undertaking,'" involving "administrative hassles such as setting up and getting state approval for new individual insurance products" and potentially "'significant'" costs in providing notice to eligible employees.[4] In some cases, the creation of these "individual polic[ies] covering only one service" would conflict with state law.[5] Simply put, "insurers aren't going to give away such coverage for free," and may well "raise the premium for the religious employer opting out of coverage" without including a "separate line item on the bill."[6] Consequently, the assumption that the addition of contraceptive coverage will be cost-neutral is implausible.

The proposal for self-insured entities, while more opaque, appears to be similarly troubling. It is, of course, difficult to comment meaningfully on this proposal, since the NPRM has not articulated any specific regulatory language; instead, it has merely describes several "alternative approaches" under "consider[ation]." 78 Fed. Reg. at 8463. "[U]nder all approaches," however, employers would be required to self-certify their religious objection to their third party administrator, who would then "automatically arrange separate individual health insurance policies for contraceptive coverage from an [insurance company] providing such polices." *Id.* All related costs would allegedly be offset by fee adjustments from Federally

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[1] The source cited by the NPRM contains similar language. *See* John Bertko et al., *The Cost of Covering Contraceptives Through Health Insurance* (February 9, 2012) ("[A]vailable data indicate that providing contraceptive coverage as part of a health insurance benefit *does not add* to the cost of providing insurance coverage." (emphasis added)), *available* at http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml; *id.* (stating that in one instance, "there was no need to adjust premium levels because *there was no cost increase* as a result of providing coverage of contraceptive services" (emphasis added)); *id.* (indicating that in another instance a "mandate did not appear to *increase* insurance costs" (emphasis added)).

[2] The NPRM also suggests that providing contraceptive coverage "may result in cost-savings." 78 Fed. Reg. at 8463. But there is certainly no guarantee that will take place, nor does there appear to be any requirement that insurance companies lower premiums for religious objectors should such savings be realized.

[3] *Insurers May Incur Significant Costs from Proposal on Contraceptive Benefit Opt-Out*, AIS's Health Reform Week, Feb. 11, 2013, at 1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2.

Facilitated Exchanges. *Id.*[7] It is doubtful that the administrative "offsets" would, in fact, fully compensate the TPAs, in which case it is likely that the costs would be passed back to the employer. In addition, it is again the employer's provision of health insurance in the first place that triggers the TPA's obligation to procure the objectionable coverage.[8] Finally, the NPRM does not address how it would work if the TPA is, itself, a religious organization that objects to providing the mandated coverage.

In short, the NPRM's division between "religious employers," who are exempt from the Mandate, and other equally religious organizations, who are subject to the so-called "accommodation," is no solution at all to the Mandate's infringement on religious liberty. The Government's attempt to drive a wedge between these religious organizations, moreover, is all the more objectionable given the Government's stated purpose for doing so. According to the NPRM, the Government drew a distinction between "religious employers" and organizations that are eligible for the "accommodation" based on a belief that "the participants and beneficiaries [of eligible organizations' plans] . . . may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers to share [the] religious objections of the eligible organizations." 78 Fed. Reg. at 8461–62. It cannot be, however, that an organization's religious freedom turns on the beliefs of its employees. It is, after all, the religious organization's beliefs that are protected by the Religious Freedom Restoration Act ("RFRA") and the First Amendment; the organization's employees have no corollary right to force the religious organization to subsidize the employees' contrary beliefs. Nor can it be that the Government is permitted to parcel out the protections of RFRA and the First Amendment based on its speculation about whether an organization's employees are more or less likely to be devout believers. Consequently, the so-called "accommodation" does not alleviate the burden that the Mandate imposes on religious freedom.

Finally, it is unclear whether the agencies even have the statutory authority to promulgate the accommodation. The statute states that "group health plan[s]" must provide coverage for "preventive care." 42 U.S.C. § 300gg-13(a)(4). It is, therefore, unclear whether, once "preventive care" is defined to include contraception, the so-called "accommodation" can require that contraception be provided separate and apart from the group plans in which plan participants are enrolled. In addition, it is unclear how the statute could be construed as authorizing the

[7] "Under the first approach [described in the NPRM], a third party administrator receiving the copy of the self-certification would have *an economic incentive to voluntarily* arrange for the separate individual health insurance policies for contraceptive coverage for plan participants and beneficiaries because it would be compensated for a reasonable charge for automatically arranging for the contraceptive coverage through payment by the issuer of the contraceptive coverage." 78 Fed. Reg. at 8463–64 (emphasis added). This language seems to suggest that a TPA would "voluntarily" arrange contraceptive coverage because it would have an "economic incentive" to do so. *Id.* This appears to be in tension with other portions of the NPRM that states that "under all approaches" a TPA would "automatically" arrange separate coverage. *Id.* at 8463. It is therefore unclear what, exactly, the Government's "first approach" entails.

[8] *See* Comments of the U.S. Conference of Catholic Bishops at 22 (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf ("The moral dilemma for the plan sponsor with a religious or moral objection to such coverage lies in being forced to trigger the objectionable coverage even if the funds paying for the group plan are not also used to pay for the contraceptive coverage.").

agencies to force group-plan insurers to provide contraception completely free of charge. The statute provides that preventive-care coverage must be provided without "cost sharing requirements," *id.*, but the accommodation goes much further, requiring contraception to be provided "without cost sharing, *premium, fee, or other charge* to plan participants and beneficiaries." 78 Fed. Reg. at 8462 (emphasis added). The authority for this sweeping prohibition on *all* premiums, fees, or other charges is not apparent.

C. The NPRM actually makes the problem worse by eliminating an important protection that Catholic organizations previously had under existing law.

Not only does the NPRM propose a "solution" that does not alleviate religious objectors' core concerns, but in at least one significant respect, it would actually make their situation even worse than existing law. In the ANPRM, the Government acknowledged that the religious employer exemption was "available to religious employers in a variety of arrangements." 77 Fed. Reg. at 16,502. It specifically stated that a nonexempt entity could thus "provide[] health coverage for its employees through" a plan offered by a separate, "affiliated" organization that is a "distinct common-law employer." *Id.* And in that situation, if the "affiliated" organization was "exempt from the requirement to cover contraceptive services, then neither the [affiliated organization] nor the [nonexempt entity would be] required to offer contraceptive coverage to its employees." *Id.*

For example, the Archdiocese operates a self-insurance plan that covers not only the Archdiocese itself, but numerous other affiliated Catholic organizations—including Archbishop Carroll High School, Inc., the Consortium of Catholic Academies of the Archdiocese of Washington, Inc. (the "Consortium"), Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"), and dozens of additional Catholic organizations. Under the existing religious employer exemption, if the Archdiocese is an exempt "religious employer," then these other Catholic organizations get the benefit of that exemption, regardless of whether they independently qualify as "religious employers," so long as they continue to participate in the Archdiocese's exempt plan. These affiliated religious organizations, therefore, could benefit from the Archdiocese's exemption even if they, themselves, could not meet the NPRM's unprecedentedly narrow definition of "religious employer."

The NPRM proposes to *eliminate* this protection. It provides that "each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents." *See* 78 Fed. Reg. at 8467. Thus, if, as the NPRM suggests, the Archdiocese is an exempt "religious employer," Catholic Charities, Archbishop Carroll High School, and the Consortium of Catholic Academies would be unable to obtain the benefit of the exemption simply by participating in the archdiocesan plan. Instead, unless they independently qualify as "religious employers," under the NPRM, they would be forced to facilitate access to contraceptives, abortion-inducing drugs, sterilization, and related education and counseling, contrary to their sincerely held religious beliefs. In this respect, the NPRM is significantly *worse* than existing law. Moreover, as explained further below, this proposal drives a wedge between the various entities that comprise the Catholic Church and, in so doing, poses insurmountable administrative challenges for the Archdiocese's self-insured church health plan. *See infra* Part III.

D. Catholic private employers and business owners do not even get the benefit of the illusory "accommodation."

The NPRM also fails to address the concern that the Mandate includes no conscience protection at all for individuals seeking to live in accordance with their faith. Private employers continue to be denied their right to make decisions that reflect their religious beliefs. Numerous courts have correctly recognized that this infringes on the religious freedom of these individuals. Indeed, many have awarded preliminary relief to private employers challenging the Mandate. *See, e.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (Dkt. # 24) (granting injunction pending appeal); *Annex Med., Inc. v. Sebelius,* No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (same); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (same); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs*., No: 12-3357 (8th Cir. Nov. 28, 2012) (granting stay pending appeal); *Hall v. Sebelius*, No. 13-00295 (D. Minn. Apr. 2, 2013) (Dkt. # 12) (granting preliminary injunction); *Bick Holdings Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo. Apr. 1, 2013) (Dkt. # 21) (same); *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 13-1210 (N.D. Ill. Mar. 20, 2013) (same); *Monaghan v. Sebelius*, No. 12-15488, 2013 WL 1014026 (E.D. Mich. Mar. 14, 2013) (same); *Sioux Chief Mfg. Co. v. Sebelius*, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (same); *Triune Health Group v. U.S. Dep't of Health & Human Servs*., No. 12 C 6756 (N.D. Ill. Jan. 3, 2013) (same); *Sharpe Holdings v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92-DDN, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs*., No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same).

II. THE MANDATE, INCLUDING THE NPRM, CONSTITUTES AN UNCONSTITUTIONAL AND ILLEGAL INFRINGEMENT ON RELIGIOUS FREEDOM

As the proposals contained in the NPRM do not resolve the religious liberty issues presented by the Mandate, implementation of the NPRM is unlikely to resolve the lawsuits that Catholic and other organizations have filed across the country. As these lawsuits allege, the Mandate violates RFRA, the First Amendment, the Administrative Procedure Act ("APA"), and other federal statutes.[9] To date, numerous courts have held that the current form of the Mandate likely violates RFRA in challenges brought by for-profit companies. *See supra* p. 8 (citing

[9] *See, e.g.,* Compl., *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-0815 (D.D.C. May 21, 2012) (Dkt. # 1), attached as Exhibit A. The arguments set out in the Complaint are incorporated herein by reference. The proposals in the NPRM are illegal for many of the same grounds asserted therein, including but not limited to the fact that these proposals: (1) violate the Free Exercise Clause, *id.* ¶¶ 194–232; (2) violate the Establishment Clause, *id.* ¶¶ 213–32; (3) violate RFRA, *id.* ¶¶ 177–93; (4) impermissibly interfere with internal church governance, *id.* ¶¶ 233–47; (5) violate the Speech Clause, *id.* ¶¶ 248–61; (4) violate the APA, *id.* ¶¶ 262–305; and (5) violate the Weldon Amendment, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011), as well as the Affordable Care Act itself, 42 U.S.C. § 18118(c); *see also* Compl. ¶¶ 291–305.

cases). For the reasons discussed below, the same reasoning applies to the Mandate even if revised as proposed in the NPRM.

RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). In order to determine whether a substantial burden exists, courts must (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In identifying the relevant exercise of religion, a court must accept the "line" drawn by plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs.

Significantly, 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). It is therefore irrelevant whether the religious objection is to the direct funding of contraceptive services under current law or to the funding and facilitation of those services as contemplated by the NPRM. The refusal to take either action is a protected exercise of religion for purposes of RFRA. *See supra* p. 8 (citing cases).

Thus, if the NPRM were implemented, there would be little, if any, change in the RFRA calculus. If an organization's religious beliefs forbid it from compliance with the Mandate as modified by the NPRM, the question for a federal court would simply be whether the Mandate places substantial pressure on that organization to violate its religious beliefs. As numerous courts have found, putting organizations to the choice of breaching their faith or paying the substantial penalties imposed by the Mandate is the epitome of a substantial burden. Moreover, these courts have likewise concluded that this burden cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends. *See supra* p. 8 (citing cases).

Therefore, unless the NPRM is changed significantly before implementation, it, like the current Mandate, would violate RFRA (as well as the First Amendment, the APA, and other federal statutes).

III. THE NPRM'S PROPOSALS FOR SELF-INSURED ENTITIES ARE UNWORKABLE

As discussed above, in at least one significant respect, the NPRM actually makes the problem worse for entities, such as the Archdiocese and its affiliates, that operate or participate in large self-insured plans that provide coverage for multiple affiliated religious employers. *See supra* Part I.C. Previously, affiliated religious organizations that did not independently qualify as "religious employers" could nonetheless obtain the benefit of the exemption through their participation in a plan sponsored by an exempt "religious employer." The NPRM, however, would rescind this protection, proposing instead that "each employer [participating in the group plan] would have to independently meet the definition of . . . religious employer in order to take advantage of . . . the religious employer exemption with respect to its employees and their

covered dependents." 78 Fed. Reg. at 8467. Thus, although the Catholic organizations currently participating in the Archdiocese's self-insured health plan all share common religious bonds and convictions with the Archdiocese, the NPRM would require each of them to separately qualify for the "religious employer" exemption.

This requirement, however, is completely unworkable. Perhaps more importantly, it is based on a fundamentally flawed understanding of religious liberty that fails to acknowledge the varied means by which the Catholic Church carries out its mission. In practical effect, it would deny the benefits of the religious employer organization and self-insurance to indisputably religious entities and prevent the Archdiocese from ensuring that all of its affiliated religious corporations remain faithful to Catholic teaching.

A. The NPRM is administratively unworkable.

The NPRM's proposals are completely unworkable for self-insured entities like the Archdiocese. Indeed, in all likelihood, the Archdiocese's self-insured group health plan will not be able to exist and operate as it does today under the changes that would be required by the NPRM. Thus, contrary to President Obama's repeated assurances that "if you like your plan, you can keep it,"[10] if the Mandate remains unchanged, many participants in the Archdiocese's self-insurance plan will *not* be able to retain their existing insurance plan.

The Archdiocese maintains a Catholic self-insured health plan for its own and for other Catholic organizations' eligible employees. The Archdiocese chooses to self-insure so that it can customize its plan to meet the healthcare needs of its employees consistent with the teachings of the Catholic faith. In addition, since it operates in two jurisdictions, self-insuring allows the Archdiocese to avoid the conflicting state health insurance regulations and mandates of D.C. and Maryland. The Archdiocese sponsors the group health plan, effectively making the Archdiocese the insurer for its employees and those of its affiliated organizations. The Archdiocese is solely liable for payment of all benefits provided to its participants under the plan. For practical purposes of administering the plan and handling claims, the Archdiocese contracts with National Capital Administrative Services, LLC ("NCAS"). NCAS is a third party administrator that administers participating employees' claims and provides access to the CareFirst BlueCross BlueShield provider network of doctors.

Among the associated Church entities that participate in the Archdiocese's health plan are archdiocesan parishes and schools, as well as Catholic organizations that are associated with the Archdiocese. Included among these entities are separately incorporated educational, health care, and social service ministries of the Archdiocese.

All of the entities in the Archdiocese's health plan share common Catholic religious bonds and convictions that are central to their operating principles. Their Catholic identity and communion with the Church are established in their governing documents and in their listing in the Official Catholic Directory. Recognizing the ecclesial authority of the Church, archdiocesan

[10] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www hhs.gov/news/press/2010pres/06/20100614e html.

affiliated corporations reserve certain powers in their corporate members, which in all cases include the Archbishop, the Moderator of the Curia (a canonical position reserved for clergy), and the Chancellor (a canonical position that may be filled by either clergy or a layperson). Those reserved powers include the oversight and authentication of the corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. In addition, all of these affiliates are bound by the Archdiocese's *Policies for Archdiocesan Corporations,* which provide:

> Every Catholic and each agency, entity, or program that claims to carry on the work of the Church must maintain communion with the Church through communion with the bishops . . . . The touchstone for the unity of the local Church is the bishop . . . . In [some] cases, the bishop's responsibility for oversight is carried out through the several separately incorporated affiliated agencies [that] participate in the Church's mission through education and the corporal works of mercy.

Policies for Archdiocesan Corporations at 1. Consequently, each of these affiliated archdiocesan corporations participates in, and is integral to, the Archdiocese's overall religious mission.

Nevertheless, under the NPRM, each of these religious entities that are separately incorporated would have to independently assess at the beginning of each plan year whether they qualify for the "religious employer" exemption. The NPRM, moreover, suggests that if they do not independently qualify as a "religious employer," they would be unable to participate in the archdiocesan health plan, since that plan will not offer coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling. In that case, these indisputably religious organizations would be forced to find replacement group health insurance. But without the benefit of pooled financial resources, many of these religious entities would likely be unable to secure the benefits of self-insurance. Instead, they would have to turn to commercial plans, and would then be exposed not only to the demands of the Mandate that conflict with their religious beliefs, but also to state insurance regulations and mandates from which self-insured plans are currently exempt.

Without the option of a self-insured plan, Catholic organizations with less than fifty employees in the District of Columbia would be required to purchase insurance through the D.C. Exchange.[11] This, in turn, would subject them to the numerous mandates imposed under D.C. law.[12] In addition, it has been reported that this will restrict the ability of these employers to select plans tailored to their needs and may increase costs and premiums to a degree that employers may be forced to choose between dropping their health plans altogether or paying the

[11] *See* Ben Fischer, *D.C. Health Insurance Board Moves to Phase in Exchange Mandate*, Wash. Bus. J., Mar. 13, 2013, *available at* http://www.bizjournals.com/washington/blog/2013/03/dc-health-insurance-board-moves-to-delay.html?page=all.

[12] Victoria Craig Bunce & J.P. Wieske, *Health Insurance Mandates in the States* 3 (2010) (citing twenty-seven health mandates under D.C. law and sixty-seven health mandates under Maryland law).

exorbitant costs of providing coverage.[13] Consequently, employees of these organizations would not only be losing their affordable coverage under the Archdiocese's plan, but they would also face the possibility of losing coverage altogether and being forced to procure individual insurance policies on the D.C., or in some cases, Maryland Exchanges. (This is also why, unless the Mandate is changed, affiliated religious organizations will need a substantial period of time to procure new insurance policies.)

Even if the final rule were to ultimately permit nonexempt religious organizations to participate in an exempt employers' plan, the logistical hurdles to such participation still appear insurmountable. These nonexempt entities would have to ensure that their employees receive access to contraceptive services through the NPRM's proposed "accommodation." But it is unclear how such services could be provided if the nonexempt entity was part of the archdiocesan plan. These nonexempt organizations have no contractual relationship with the plan's TPA, whose contract is with the Archdiocese. And the TPA's contract with the Archdiocese does not, and would not, authorize the TPA to procure insurance for the objectionable services. Certainly, the Archdiocese, as an exempt "religious employer," would not and could not be forced to participate in the process of providing objectionable insurance coverage to the employees of the Archdiocese's religiously affiliated corporations.

Thus, regardless of whether nonexempt entities could remain on the archdiocesan health plan, it is evident that under the NPRM, the Archdiocese's health plan could not be maintained in a manner consistent with its prior practices and religious beliefs.

B. The NPRM reflects a flawed and arbitrary understanding of religious liberty.

The proposal contained in the NPRM also draws arbitrary distinctions between identically situated employees based solely on the corporate structure of their respective employers. As noted above, the NPRM purports to draw these distinctions based on a belief that employees of a nonexempt entity "may be less likely than participants and beneficiaries in group health plans established or maintained by religious employers" to share their employers religious beliefs. 78 Fed. Reg. at 8461–62. This assertion is baseless. Compare, for instance, a religion teacher at St. Augustine's School, an archdiocesan Catholic school that is not separately incorporated, to a religion teacher at St. Francis Xavier Academy, an archdiocesan Catholic school that is part of the Consortium of Catholic Academies, a separate civil corporation. These two Catholic school teachers each teach the same religion curriculum and are equally devoted to the task of teaching the Catholic faith through word and example. The corporate structure of the two archdiocesan Catholic schools that employ these teachers is not a reliable proxy for

[13] *See* Dennis Bass, *The Bad News for Small Business in D.C.'s Obamacare Plan*, Wash. Post, Oct. 12, 2012, *available at* http://articles.washingtonpost.com/2012-10-12/opinions/35499292_1_small-employers-higher-costs-aca; Philip Klein, *A Talk with D.C.'s Health Exchange Board*, Wash. Examiner, Nov. 18, 2012, *available at* http://washingtonexaminer.com/a-talk-with-d.c.s-health-exchange-board/article/2513796; Mercer Consulting, *District of Columbia Health Insurance Exchange Marketplace Report* (2011), *available at* http://www naifanet.com/100000/Mercer%20Report%20D13%20and%20D16%20Market%20Report%20and%20Summary%20Plan.pdf?CFID=1910208&CFTOKEN=68781248; Letter to Dr. Mohammad Akhter, Chair, D.C. Health Benefit Exchange Authority Executive Board (Sept. 13, 2012), *available at* http://www naifanet.com/100000/Small%20Employer%20Letter%20FINAL%20with%20addendum%2010-3-2012.pdf?CFID=1910208&CFTOKEN=68781248.

answering the question of "how Catholic" their jobs' duties are or "how devout" they as individuals are likely to be.

The Archdiocese has created separately incorporated organizations to carry out certain aspects of its ministry, not because those particular ministries are any less central to the Catholic faith, but rather for many of the same practical and legal reasons that ordinary civil corporations assume multi-tiered structures. The Consortium of Catholic Academies, for instance, was separately incorporated in part so that it could more thoroughly and effectively devote itself to the challenges of educating the often underserved children of inner city Washington. Surely it is not the Government's contention that employees of schools that serve disadvantaged youth are less likely to be faithful Catholics than teachers at schools in more affluent communities. That, however, is the precise implication of the arbitrary rule the NPRM seeks to establish.

Moreover, the Archdiocese has a special responsibility to ensure that these entities, whatever the corporate structure, remain faithful to the teachings of the Catholic Church. As noted above, the Archbishop, the Moderator of the Curia, and the Chancellor are the corporate members of each of these affiliated entities. In order to ensure each affiliate's Catholic identity and communion with the Church, the affiliated entities reserve certain powers in their corporate members, including oversight and authentication of the corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. In addition, all of these entities remain subject to canon law requirements regarding their Catholic identity, mission and fidelity to Catholic doctrine, as well as the Archdiocese's *Policies for Archdiocesan Corporations.* In short, each separately incorporated affiliate's communion with the archbishop originates in the prescriptions of canon law and is reflected in their civil organizational documents.

The Mandate as revised by the NPRM would destroy this communion and would prevent the Archdiocese from ensuring that each of its affiliated entities acts in accordance with Catholic teachings. It would create division where canon law commands unity, and would undermine the Archdiocese's duty before God to protect the integrity of the Catholic faith as believed and practiced within the local Church, most especially in its affiliated religious corporations. The Government has provided no plausible basis for so deeply (and unconstitutionally) intruding into the religious structure and beliefs of the Archdiocese and other similarly-situated Catholic entities.

IV. PROPOSED ALTERNATIVES TO THE NPRM

For the reasons explained above, the Mandate, including the proposals in the NPRM, would deeply intrude into the religious freedom and religious autonomy of the Archdiocese, its affiliated religious entities, and other similar organizations. Set forth below are two proposals that, if adopted, would mitigate these infringements on religious liberty.

First, the portion of the NPRM that requires each employer participating in a group health plan to independently qualify for the religious employer exemption should be rescinded. Instead, the Archdiocese's affiliated religious corporations should continue to be free to participate in the Archdiocese's insurance plan in the same way that they did prior to the NPRM. There is simply no reason to deny affiliated Catholic organizations the benefits conferred on entities like the

Archdiocese merely due to the fact that they are independently incorporated. As discussed above, such a distinction rests on a flawed view of religious liberty and would significantly impair the Church's ability to carry out its mission.

Second, and perhaps even more importantly, the scope of the "religious employer" exemption must be expanded. The following are several alternatives to that end—not all perfect, but all far better than the proposal contained in the NPRM.

1. Conscience Clause: Federal law is replete with conscience clauses that prevent individuals and entities from being forced to violate their religious beliefs. For example, the "Church Amendment," 42 U.S.C. § 300a-7, protects hospitals and individuals that receive federal funds in various health programs from participating in abortion and sterilization procedures if such participation is "contrary to [their] religious beliefs or moral convictions." *Id.* Indeed, even the Federal Employees Health Benefit Program, while mandating contraception coverage, nevertheless provides a conscience clause that exempts objecting plans and carriers. *See, e.g.*, Consolidated Appropriations Act, Pub. L. No. 112-74, div. C, tit. VII, § 727, 125 Stat. 786, 936 (2011); *see also* Consolidated Appropriations Act, Pub. L. No. 108-199, div. C, tit. IV, § 424, 118 Stat 3 (2004) ("[I]t is the intent of Congress that any legislation enacted on such issue [of contraceptive coverage by health insurance plans within the District of Columbia] should include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions.").

   Accordingly, the Government should adopt the following conscience clause, modeled after the Church Amendment: "Nothing in these regulations shall require the coverage of contraceptive services if the employer objects to such coverage on the basis of religious beliefs." As the U.S. Conference of Catholic Bishops has noted, this is the only alternative that will completely alleviate the religious liberty concerns raised by the Mandate.[14]

2. State Law Analogue: Several states define "religious employer" more broadly than the Mandate. For example, West Virginia defines a "religious employer" as "an entity whose sincerely held religious beliefs or sincerely held moral convictions are central to the employer's operating principles, and the entity is an organization listed under 26 U.S.C. 501(c)(3), 26 U.S.C. 3121, or listed in the Official Catholic Directory published by P. J. Kennedy and Sons." W. Va. Code § 33-16E-2. Arizona defines a "religious employer" as "[a]n entity whose articles of incorporation clearly state that it is a religiously motivated organization and whose religious beliefs are central to the organization's operating principles." Ariz. Rev. Stat. § 20-1057.08(G)(2).

   A definition modeled along these lines would be a substantial improvement over that contained in the NPRM.

[14] Comments of the U.S. Conference of Catholic Bishops, *supra* note 8, at 11.

For example, the following proposed definition draws on federal conscience clause language and the language found in the Arizona and West Virginia statutes:

> Section 1. "Religious Employer" is an entity that is exempt from tax under section 501 of title 26 and whose articles of incorporation clearly state that the entity's sincerely held religious beliefs or sincerely held moral convictions are part of the employer's operating principles.
>
> Section 2. Nothing in these regulations shall require the coverage of contraceptive methods, sterilization procedures, and related patient education and counseling if a "Religious Employer" objects to such coverage on the basis of religious beliefs.

3. ERISA "Church Plans": Finally, "religious employers" could be defined to include employers that maintain health insurance plans that would qualify as "church plans" under ERISA. A "church plan" is a pension or welfare plan established and maintained "for its employees (or their beneficiaries) by a church or by a convention or association of churches." 29 U.S.C. § 1002(33)(A). Significantly, "church plans" also include those maintained by organizations that are "controlled by or associated with" churches. *Id.* § 1002(33)(C).

   Some federal courts, however, have adopted unduly narrow constructions of ERISA's "church plan" provisions, making this a less than optimal solution. *See Chronister v. Baptist Health*, 442 F.3d 648, 653 (8th Cir. 2006); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001). Accordingly, if the Government adopts this proposal, a statement should be included in the preamble to any final rule indicating that the Government intends for this definition to apply to all religious organizations that are affiliated with a church, notwithstanding the narrow standards applied by the Eighth and Fourth Circuits, cited above. While this option is less preferable than the preceding alternatives, it too, would be a substantial improvement over the NPRM.

V. CONCLUSION

Ultimately, the NPRM does not address the problems created by the Mandate; indeed, it makes them worse. The result is a proposal that, if implemented, would continue to violate the rights of religious organizations under the First Amendment, RFRA, and numerous other federal statutes. Accordingly, the Archdiocese strongly urges the Government to reconsider its course and, instead, adopt the proposals outlined above.

Sincerely,

Jane G. Belford
Chancellor

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole;
5001 Eastern Avenue
Hyattsville, MD 20782

THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.;
5001 Eastern Avenue
Hyattsville, MD 20782

ARCHBISHOP CARROLL HIGH SCHOOL, INC.;
4300 Harewood Road, N.E.
Washington, DC 20017

CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.;
924 G Street, N.W.
Washington, DC 20001

and

THE CATHOLIC UNIVERSITY OF AMERICA,
620 Michigan Avenue, N.E.
Washington, DC 20064

Plaintiffs,

v.

CASE NUMBER: _____
JUDGE: _____

DATE STAMP: _____

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services;
200 Independence Avenue, S.W.
Washington, DC 20201

HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor,
200 Constitution Avenue, N.W.
Washington, DC 20210

TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of the Treasury;
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;
200 Independence Avenue, S.W.
Washington, DC 20201

U.S. DEPARTMENT OF LABOR;
200 Constitution Avenue, N.W.
Washington, DC 20210

and

U.S. DEPARTMENT OF THE TREASURY.
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Defendants.

COMPLAINT

1. This lawsuit is about one of America's most cherished freedoms: the freedom to practice one's religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception. Those services are freely available in the United States, and nothing prevents the Government itself from making them more widely available. Here, however, the Government seeks to require Plaintiffs—all Catholic entities—to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those services. American history and tradition, embodied in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), safeguard religious entities from such overbearing and oppressive governmental action. Plaintiffs therefore seek relief in this Court to protect this most fundamental of American rights.

2. Plaintiffs are Catholic religious entities that provide a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike. For example, Plaintiff Roman Catholic Archbishop of Washington, a corporation sole (the "Archdiocese") not only provides pastoral care and spiritual guidance for nearly 600,000 Catholics, but also serves individuals throughout the D.C. area through its schools and multiple charitable programs. The Archdiocese's programs serve those who are most often overlooked in the community, including those with disabilities, those challenged by an unexpected prenatal diagnosis, those re-entering society from imprisonment, and those poor and marginalized with nowhere else to turn. Likewise, Plaintiffs Consortium of Catholic Academies of the Archdiocese of Washington, Inc. ("CCA" or the "Consortium") and Archbishop Carroll High School, Inc. ("Archbishop Carroll" or "Carroll") are devoted to teaching a religiously and ethnically diverse student body consisting largely of inner-city children. And

Plaintiff Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"), the largest nongovernmental social service provider in the region, offers a host of social services to thousands in need throughout the District and Maryland. For those citizens in the community who could not otherwise afford them, Catholic Charities provides free physical and mental health care, legal assistance, immigration assistance, employment training, early childhood services, education, counseling, emergency shelter, housing, and dental services. For its part, Plaintiff Catholic University of America ("CUA" or the "University") offers nearly 7,000 undergraduate and graduate students a rigorous education, while at the same time serving the larger community through, *inter alia*, its research centers, intellectual offerings, and charitable outreach.

3. Plaintiffs' work is in every respect guided by and consistent with Roman Catholic belief, including the requirement that they serve those in need, regardless of their religion. This is perhaps best captured by words attributed to St. Francis of Assisi: "Preach the Gospel at all times. Use words if necessary." As Pope Benedict has more recently put it, "[L]ove for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2006). Or as Cardinal James Hickey, former Archbishop of Washington, once commented on the role of Catholic educators: "We do not educate our students because *they* are Catholic; we educate them because *we* are Catholic." Thus, Catholic individuals and organizations consistently work to create a more just community by serving any and all neighbors in need.

4. Catholic Church teachings also uphold the firm conviction that sexual union should be reserved to married couples who are so committed to one another that they are open to the

creation of life; thus, artificial interference with the creation of life, including through abortion, sterilization, and contraceptives, is contrary to Catholic doctrine.

5. Defendants have promulgated various rules (collectively, "the U.S. Government Mandate") that force Plaintiffs to violate their sincerely held religious beliefs. Under the U.S. Government Mandate, many Catholic and other religious organizations are required to provide health plans to their employees that include and/or facilitate coverage for abortion-inducing drugs, sterilization, and contraception, in violation of their sincerely held religious beliefs. Ignoring broader religious exemptions from other federal laws, the Government has crafted a narrow exemption to this Mandate for certain "religious employers" who can convince the Government that they satisfy four criteria:

- "The inculcation of religious values is the purpose of the organization";
- "The organization primarily employs persons who share the religious tenets of the organization";
- "The organization serves primarily persons who share the religious tenets of the organization"; and
- "The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."

Thus, in order to safeguard their religious freedoms, religious employers must plead with the Government for a determination that they are sufficiently "religious."

6. Plaintiff Archdiocese of Washington does not know whether the Government will conclude that it satisfies the definition of a "religious employer" under the impermissibly vague terms of the exemption. And in order to find out, it must submit to an intrusive governmental investigation into whether, in the Government's view, the Archdiocese's "purpose" is the "inculcation of religious values"; whether it "primarily" employs "persons who share [its]

religious tenets," even though it hires employees of all faiths; and whether it "primarily" serves such people, even though its schools, parishes, and social services are open to all.

7. The definition of "religious employer," moreover, excludes CCA, Archbishop Carroll, Catholic Charities, and CUA, even though they are "religious" organizations under any reasonable definition of the term. Consequently, to even attempt to qualify as a "religious employer," these Plaintiffs may be required to stop providing educational opportunities to non-Catholics, stop serving non-Catholics, and fire non-Catholic employees—actions that would betray their religious commitment to serving all in need without regard to religion and undermine the Church's vaunted tradition of service to others. Such a definition means that before extending services, Catholic organizations would have to stop saying, "are you hungry?" and say instead, "are you Catholic?"

8. The U.S. Government Mandate, including the exemption for certain "religious employers," is irreconcilable with the First Amendment, RFRA, and other laws. The Government has not shown any compelling need to force Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization, and contraception, or for requiring Plaintiffs to submit to an intrusive governmental examination of their religious missions. The Government also has not shown that the U.S. Government Mandate is narrowly tailored to advancing any interest in increasing access to these services, as these services are already widely available and nothing prevents the Government from making them even more widely available by providing or paying for them directly through a duly-enacted law. The Government, therefore, cannot justify its decision to force Plaintiffs to provide, pay for, and/or facilitate access to these services in violation of their sincerely held religious beliefs.

9. Accordingly, Plaintiffs seek a declaration that the U.S. Government Mandate cannot lawfully be applied to Plaintiffs, an injunction barring its enforcement, and an order vacating the Mandate.

I. PRELIMINARY MATTERS

10. Roman Catholic Archbishop of Washington, and his successors in office, in accordance with the discipline and government of the Roman Catholic Church, a corporation sole, is the legal name for Plaintiff Archdiocese of Washington. The Archdiocese is a nonprofit corporation sole, incorporated by Congress in 1948. It is considered to be a Washington, D.C., corporation; its principal place of business is in Hyattsville, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

11. Plaintiff CCA is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Hyattsville, Maryland. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

12. Plaintiff Archbishop Carroll is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

13. Plaintiff Catholic Charities is a nonprofit corporation incorporated in Washington, D.C. Its principal place of business is in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

14. Plaintiff Catholic University of America is a nonprofit Washington, D.C., corporation with its principal place of business in Washington, D.C. It is organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

15. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services ("HHS"). She is sued in her official capacity.

16. Defendant Hilda Solis is the Secretary of the U.S. Department of Labor. She is sued in her official capacity.

17. Defendant Timothy Geithner is the Secretary of the U.S. Department of the Treasury. He is sued in his official capacity.

18. Defendant U.S. Department of Health and Human Services is an executive agency of the United States within the meaning of RFRA and the Administrative Procedure Act ("APA").

19. Defendant U.S. Department of Labor is an executive agency of the United States within the meaning of RFRA and the APA.

20. Defendant U.S. Department of the Treasury is an executive agency of the United States within the meaning of RFRA and the APA.

21. This is an action for declaratory and injunctive relief under 5 U.S.C. § 702, 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 2000bb-1.

22. An actual, justiciable controversy currently exists between Plaintiffs and Defendants. Absent a declaration resolving this controversy and the validity of the U.S. Government Mandate, Plaintiffs are uncertain as to their rights and duties in planning, negotiating, and/or implementing their group health insurance plans, their hiring and retention

programs, and their social, educational, and charitable programs and ministries, as described below.

23. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

24. This Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2).

25. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1).

A. The Archdiocese

26. Plaintiff Archdiocese of Washington encompasses 140 parishes serving Washington, D.C., and Maryland's Calvert, Charles, Montgomery, Prince George's, and St. Mary's counties, including the nearly 600,000 Catholics residing therein. Originally part of the Archdiocese of Baltimore—the oldest diocese in the United States—Washington, D.C., was named a separate archdiocese by Pope Pius XII in 1939. The five neighboring Maryland counties were added shortly thereafter. The Archdiocese was incorporated by an Act of Congress in 1948, establishing a corporation sole in the name of the Archbishop. The parishes of the Archdiocese and fifty-three schools are part of the corporation sole. The charitable work of the Archdiocese is also performed through a number of separate, affiliated corporations, including (among others) CCA, Archbishop Carroll, and Catholic Charities.

27. The Archdiocese has been led since 2006 by Cardinal Donald W. Wuerl, formerly the Bishop of Pittsburgh. Cardinal Wuerl is assisted in his ministry by four auxiliary bishops and by a staff of clergymen, religious brothers and sisters, and lay people. The Archdiocese has approximately 2100 benefits-eligible employees. The Archdiocese does not know how many of its employees are Catholic.

28. The Archdiocese itself—that is, the corporation sole—carries out a tripartite spiritual, educational, and social service mission, reflecting the several dimensions of its ministry. The spiritual ministry of the Archdiocese is conducted largely through its parishes: through the ministry of its priests, the Archdiocese ensures the regular availability of the sacraments to all Catholics living in or visiting the D.C. area. It also provides numerous other opportunities for prayer, worship, and faith formation. In addition to overseeing the sacramental life of its parishes, the Archdiocese coordinates Catholic campus ministries at six colleges and universities within its borders.

29. The Archdiocese conducts its educational mission through its schools. The first Catholic school opened in the nation's capital nearly 200 years ago, before the city had a public school system.

30. Much of the Archdiocese's educational mission is performed through fifty-three elementary schools that are part of the corporation sole. Those schools serve nearly 14,300 students and employ over 1200 teachers (including principals) and an additional number of school staff. The educational work of the Archdiocese is also carried out through the Consortium of Catholic Academies, Mary of Nazareth Roman Catholic Elementary School, Archbishop Carroll High School, and Don Bosco Cristo Rey High School, which are archdiocesan schools managed and operated by separate, affiliated corporations. Together, these schools, whether part of the corporation sole or incorporated separately, are referred to as "Archdiocesan schools."

31. Archdiocesan schools welcome students in all financial conditions, from all backgrounds, and of any or no faith. In order to make a Catholic education available to as many children as possible, the Archdiocese expends substantial funds in tuition assistance programs; it awarded $5 million in tuition assistance for the 2011-2012 school year. Through direct subsidies

to parishes for students in need, the Archdiocese gives an additional $4.5 million to Catholic education on an annual basis. Forty-six percent of the students in the fifty-three elementary schools that are part of the corporation sole are minorities.

32. The Catholic educational system has demonstrated a particular dedication to teaching the underserved. For example, St. Augustine's School, located in D.C.'s U Street neighborhood, was founded by free blacks and former slaves in 1858 and began educating black students four years before public education for black children became mandatory in the District of Columbia. It is currently led by a Nigerian order of nuns and serves nearly 200 students, 100% of whom are minorities and 59% of whom are not Catholic. Schools like St. Augustine's are no less an expression and outgrowth of genuine Catholic belief because they primarily serve non-Catholics. Indeed, quite the opposite: the Archdiocese sees these schools as a vital part of its mission to offer to every student, in every place, a safe, morally sound, and academically rigorous education.

33. The schools of the Archdiocese offer a unique educational experience. As Cardinal Wuerl has said about Catholic education, "we educate people not just for exams, but for life eternal. We educate the whole person: mind, body, and spirit." To that end, the Archdiocesan schools have established priorities that make them stand out from other educational institutions. Students are taught faith—not just the basics of Christianity, but how to have a relationship with God that will remain with them after they leave their Catholic school. Service, the giving of one's time and effort to help others, is taught as both a requirement of true faith and good citizenship. Finally, high academic standards help each student reach his or her potential. Four Archdiocesan schools were among the forty-nine private schools nationwide to receive the

U.S. Department of Education's Blue Ribbon Schools Award this year. Nationally, over 99% of students in Catholic high schools graduate.

34. The success of the Archdiocese's approach to education is demonstrated by Don Bosco Cristo Rey High School, a joint project of the Archdiocese and the Salesians of Don Bosco, which serves students from economically challenged families. All seventy seniors in the school's first graduating class last year were accepted into college. Sixty percent of those students are the first generation in their families to attend college.

35. The Archdiocese also operates seven early childhood development programs that provide an Archdiocesan-approved curriculum for preschool students ages three to four.

36. The social service work of the Archdiocese is performed largely through its parishes, which, like the fifty-three elementary schools discussed above, are also part of the corporation sole. The parishes that comprise the Archdiocese maintain their own charitable efforts, serving the needs of their communities with programs including parish chapters of the St. Vincent DePaul Society, adopt-a-family programs at Christmas, meals served to the homeless, and visits to nursing homes. The Archdiocese oversees all of the social service work undertaken by its parishes. Neither the Archdiocese nor its parishes keeps a tally of persons served through these outreach programs, nor do they request to know the religious affiliation of those served.

37. In summary, the Archdiocese—and the entire Catholic Church—is committed to serving anyone in need, regardless of religion.

38. In addition to serving individuals of all faiths, the Archdiocese also employs individuals of all faiths.

39. The Archdiocese does not know how many of those it hires or serves are Catholic. In order to determine those statistics, the Archdiocese would be required to ask the religious

affiliation of all individuals that it employs or serves. That inquiry, however, would substantially burden the Archdiocese's religious exercise.

40. It is therefore unclear whether the Government will conclude that the Archdiocese qualifies as a "religious employer" under the narrow exemption from compliance with the U.S. Government Mandate.

41. Regardless of whether the Government concludes that the Archdiocese qualifies for the exemption, the Archdiocese is in every respect Roman Catholic.

42. Moreover, determining whether an organization—such as the Archdiocese—qualifies for the exemption will require the Government to engage in an intrusive inquiry, based on an understanding of religion that is inconsistent with the Catholic faith, into whether, in the view of the Government, (1) the Archdiocese's "purpose" is the "inculcation of religious values," (2) whether the Archdiocese "primarily" employs "persons who share [its] religious tenets," even though it hires employees of all faiths and does not know how many Catholics it employs, and (3) whether it "primarily" serves such people, even though its schools and social services are open to all.

43. Regardless of outcome, the Archdiocese strongly objects to such an intrusive and misguided governmental investigation into its religious mission.

44. Finally, the Archdiocese operates a self-insured health plan. That is, the Archdiocese does not contract with a separate insurance company that provides health care coverage to its employees. Instead, the Archdiocese itself functions as the insurance company underwriting its employees' medical costs. Plaintiffs CCA, Archbishop Carroll, and Catholic Charities also offer coverage through the Archdiocese's plan.

45. Consistent with Church teachings, this plan does not cover abortion-inducing drugs, contraceptives, or sterilization. In limited circumstances, the Archdiocese's health plan administrator can override the exclusion of certain drugs commonly used as contraceptives if a physician certifies that they were prescribed with the intent of treating certain medical conditions, not with the intent to prevent pregnancy.

46. The Archdiocese's plan is administered by a third party administrator, NCAS. NCAS handles the administrative aspects of the Archdiocese's self-insured employee health plan, but NCAS bears none of the risks for benefits nor does it provide any of the funds used to pay health care providers.

47. The Archdiocese's self-insured health plan does not meet the Affordable Care Act's definition of a "grandfathered" plan. The Archdiocese has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act. *See, e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

48. The plan year for the Archdiocese (and the organizations it insures) begins on January 1.

B. The Consortium of Catholic Academies

49. The Consortium of Catholic Academies was founded in order to centralize resources, staff and teacher training, and oversight for inner-city parish elementary schools in Washington, D.C. There are currently four CCA schools—Sacred Heart, in the Mount Pleasant neighborhood of Northwest D.C.; St. Anthony, located in the Brookland neighborhood of Northeast D.C.; and St. Francis Xavier and St. Thomas More, both located in Southeast D.C.

50. According to its bylaws, CCA's purpose is to engage in charitable, educational, and/or religious activities of every description in accordance with the teachings of the Roman

Catholic Church, as exclusively determined by the Roman Catholic Archbishop of Washington. Specifically, it exists to provide management and support for Catholic elementary schools.

51. CCA plays a crucial role in the effort to provide inner-city children in Washington, D.C. with a safe, morally sound, and academically rigorous alternative to the District's public school system.

52. CCA welcome students in all financial conditions, from all backgrounds, and of any or no faith. Forty-one percent of CCA's 797 students live at or below the federal poverty line. CCA does not have a single non-minority student. Fifty-nine percent of CCA's students are non-Catholic.

53. CCA employs approximately 122 teachers and staff. Like the Archdiocese, CCA employs individuals of all faiths. CCA does not know how many of its employees are Catholic.

54. CCA itself does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

55. CCA is an affiliated corporation of the Archdiocese. The Archdiocese directly oversees the curriculum and management of the CCA schools through its Catholic Schools Office.

56. CCA employees are offered health insurance through the Archdiocese's health plan.

C. Archbishop Carroll

57. Archbishop Carroll High School, in Northeast D.C., was at its founding in 1951 the first fully integrated high school in Washington.

58. Archbishop Carroll offers its diverse student body a rigorous college preparatory education in a supportive learning environment. For example, it is one of a select number of high schools in the D.C. area offering the International Baccalaureate Programme; in the first year the

Programme was offered, nearly 20% of Carroll juniors enrolled. Over 98% of Carroll graduates go on to college.

59. Consistent with its Catholic identity, Carroll teaches its students to integrate faith and life. It stresses the importance of building a just society and provides numerous opportunities for students to participate in charitable work. Its annual Thanksgiving Food Drive, for example, is one of the largest high school food drives in the country.

60. Archbishop Carroll welcome students in all financial conditions, from all backgrounds, and of any or no faith. It has a co-ed student body of 449 students. Of these students, 99% are non-white and 77% are non-Catholic.

61. Archbishop Carroll has seventy-one employees. Like the Archdiocese, CCA employs individuals of all faiths. It does not know how many of its employees are Catholic.

62. Archbishop Carroll is an affiliated corporation of the Archdiocese. As with CCA, the Archdiocese supports and oversees the curriculum of Archbishop Carroll.

63. Archbishop Carroll itself does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

64. Archbishop Carroll employees are offered health insurance through the Archdiocese's health plan.

D. Catholic Charities

65. Catholic Charities, the largest non-governmental social service provider in the region, provided services to over 100,000 people last year. Its purpose is to carry out the mandates of the Gospel and the social teaching of the Church through works of Christian charity, service, and social justice by providing competent and caring social services, special assistance to those in great need, and programs of community outreach and advocacy using the skills and talents of professional staff and volunteers. Catholic Charities pursues these goals through its

own programs and through partnerships with parishes, community groups, and governmental agencies.

66. The seventy-seven programs run by Catholic Charities in fifty-three locations provide a panoply of services, including financial assistance, dental and medical care, pro bono legal aid, adult education, emergency shelters, care for the developmentally disabled, English as a Second Language courses, and many others.

67. For example, the Spanish Catholic Center is one of the programs operated by Catholic Charities. It is an integral part of the social service network serving the Washington, D.C. area's large and growing immigrant population, with a special outreach to Latinos. The offerings at the Spanish Catholic Center's four locations include medical and dental care, English classes, job training programs, and a food pantry. In 2011, the Center served more than 23,000 people through more than 68,000 interactions. Staff at the Spanish Catholic Center speak eight languages and are well-equipped to serve immigrants from around the world.

68. Anchor Mental Health, another of Catholic Charities' flagship programs, fights poverty by helping adults with mental illness obtain a diagnosis and treatment plan that will put them on the path to independent lives. Located in Northeast D.C., it is a full-service mental health clinic that has served more than 1500 persons of all races, religions, and ethnic backgrounds. A partner program operated by Catholic Charities, ChAMPS, or Children & Adolescent Mobile Psychiatric Service, provides help for families and children experiencing a behavioral or mental health crisis. A crisis response team is available twenty-four hours a day to respond to calls made to the ChAMPS hotline; the team will go to the child's home or school to offer assistance and begin recovery—at no cost to the child's family.

69. Catholic Charities is an affiliated corporation of the Archdiocese.

70. Catholic Charities serves people in need without regard to their religion. It does not ask whether people whom it serves are Catholic and, therefore, it does not know whether they are Catholic.

71. On information and belief, a majority of the people served by Catholic Charities are not Catholic.

72. Catholic Charities has approximately 800 employees. Catholic Charities does not inquire about the religious commitments of its applicants for employment, and, as a result, it does not know how many of its employees are Catholic.

73. Catholic Charities itself does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

74. Catholic Charities employees are offered health insurance through the Archdiocese's health plan.

E. The Catholic University of America

75. Located in the heart of Washington, D.C., CUA is the national university of the Roman Catholic Church in the United States and the only institution of higher education founded and sponsored by the bishops of this country. It was established in 1887 with the support and approval of the Holy See. The University was originally a graduate research center; it opened its doors to undergraduates in 1904. "At every level" the University is "dedicated to the advancement of learning and particularly to the development of knowledge in the light of Christian revelation, convinced that faith is consistent with reason and that theology and other religious studies themselves profit from the broader context of critical inquiry, experimentation and reflection."

76. As described in its mission statement, "The Catholic University of America is committed to being a comprehensive Catholic and American institution of higher learning,

faithful to the Teachings of Jesus Christ as handed on by the Church. Dedicated to advancing the dialogue between faith and reason, The Catholic University of America seeks to discover and impart the Truth through excellence in teaching and research, all in service to the Church, the nation, and the world."

77. The University embraces the riches of the Catholic intellectual tradition, as reflected in *Ex Corde Ecclesiae*, "consecrat[ing] itself without reserve to the cause of truth." "As a Catholic university, it desires to cultivate and impart an understanding of the Christian faith within the context of all forms of human inquiry and values." At the same time, "[a]s a member of the American academic community, it accepts the standards and procedures of American institutions and seeks to achieve distinction within the academic world." To those ends, the University is composed of twelve schools, including Arts & Sciences, Engineering, Nursing, Music, and others. Three of the schools are pontifical faculties, accredited by the Holy See. Awarding undergraduate degrees in seventy-two programs, master's degrees in 103 programs, and doctoral or terminal degrees in sixty-six programs, the University pursues the highest academic achievement in every discipline.

78. As the first Catholic university in the United States founded as a graduate institution, research plays a prominent role in the University's mission. The bishops sought to establish "a place where the Church could do its thinking, an institution that would go beyond the preservation of learning and teaching to also encompass the advancement of knowledge through research." As the home to twenty-one institutes and research centers, the University continues that tradition today.

79. Though committed to remaining a distinctly Catholic institution, the University opens its doors to students, academics, and prospective employees of all faiths and creeds. Over

3600 students are currently enrolled in the University's undergraduate programs, and nearly 3300 are enrolled in its graduate and law programs. The school maintains a regular (full-time) faculty of 426 members and an additional 417 temporary faculty members. CUA retains over 1147 staff members.

80. On information and belief, a majority of CUA's total employees are not Catholic.

81. The University's mission to educate and serve others extends beyond the borders of CUA's campus. For example, the University has developed numerous faith-based charitable programs in which its students, professional staff, and faculty participate. These programs serve individuals regardless of faith, race, or financial condition and range from volunteer opportunities in D.C. (where students can participate in a variety of activities, such as serving the homeless or working as tutors) to service/missions trips abroad (where students assist the underprivileged in communities in Central and South America). CUA also hosts a number of educational events, lectures, and programs on its campus that are open to the public. The University is home to the Catholic University of America Press, which publishes between thirty-five to forty books annually in fields including theology, philosophy, literature, history, and political theory. The University does not know how many of the individuals served by these programs are Catholic.

82. Faith is at the heart of all of the University's efforts. Indeed, the University's commitment to Catholic teachings permeates campus life. Most full-time undergraduates are housed on campus in residence halls that are predominantly (and will soon be entirely) single-sex. The University maintains a visitation policy that does not permit men to be overnight guests in the women's residence halls and vice versa. The University's student handbook reminds students that the University "is committed to the teachings and moral values of the Catholic

Church," including the belief that sexual union should be "'expressed only in a monogamous heterosexual relationship of lasting fidelity in marriage.'" And the University does not make artificial contraception available to its students, faculty, or staff at its on-campus health care facility unless necessary for medical treatment unrelated to contraception.

83. CUA's Catholic educational mission is furthered by its leadership. The President of the University has always been a Catholic, and twelve of the University's fifteen Presidents have been clerics or members of a religious order. The President is elected by the University's Board of Trustees and confirmed by the Vatican Congregation for Catholic Education. The Board itself is entrusted with supervising the management of the University and determining University policy. Twenty-four of the Board's forty-eight elected members must be clerics; at least eighteen of those twenty-four must be members of the United States Conference of Catholic Bishops. The Archbishop of Washington serves as the chancellor of the University, acting as a liaison between the University and the United States Conference of Catholic Bishops, as well as between the University and the Holy See.

84. More than 90% of full-time undergraduate students receive some form of financial aid, with the Office of Student Financial aid awarding nearly $40 million in institutional grants and scholarships as well as more than $2 million in federal and state grant funds to undergraduate students in the 2010–11 school year.

85. CUA does not appear to qualify as an entity described in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

86. CUA's employees are offered United Healthcare health care plans. These plans do not cover abortion-inducing drugs or sterilization. Consistent with Church teachings, CUA's

plans cover drugs commonly used as contraceptives only when prescribed with the intent of treating a medical condition, not with the intent to prevent pregnancy.

87. CUA's plan years begin on January 1.

88. The health plans offered by CUA to its employees do not meet the Affordable Care Act's definition of a "grandfathered" plan. CUA has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it believes its plans are grandfathered health plans within the meaning of section 1251 of the Affordable Care Act. *See, e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

89. CUA does not qualify as a "religious employer" under the exemption to the U.S. Government Mandate.

90. CUA makes available to its students a health plan provided by AETNA. Like CUA's employee plans, the plan offered to CUA students does not cover abortion-inducing drugs or sterilization. The health plan CUA offers to its students covers drugs commonly used as contraceptives only when prescribed with the intent of treating a medical condition, not with the intent to prevent pregnancy.

91. The health plan offered by CUA to its students does not meet the Affordable Care Act's definition of a "grandfathered" plan. CUA has not included and does not include a statement in plan materials provided to participants or beneficiaries informing them that it believes its plan is a grandfathered health plan within the meaning of section 1251 of the Affordable Care Act. *See, e.g.*, 26 C.F.R. § 54.9815-1251T(a)(2)(i).

II. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Background

92. In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation

Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "Affordable Care Act" or the "Act"). The Affordable Care Act established many new requirements for "group health plan[s]," broadly defined as "employee welfare benefit plan[s]" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1), that "provide[] medical care . . . to employees or their dependents." 42 U.S.C. § 300gg-91(a)(1).

93. As relevant here, the Act requires an employer's group health plan to cover certain women's "preventive care." Specifically, it indicates that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). Because the Act prohibits "cost sharing requirements," the health plan must pay for the full costs of these "preventive care" services without any deductible or co-payment.

94. "[T]he Affordable Care Act preserves the ability of individuals to retain coverage under a group health plan or health insurance coverage in which the individual was enrolled on March 23, 2010." Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,731 (July 19, 2010) ("Interim Final Rules"); 42 U.S.C. § 18011. These so-called "grandfathered health plans do not have to meet the requirements" of the U.S. Government Mandate. 75 Fed. Reg. at 41,731. HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41,732.

95. Violations of the Affordable Care Act can subject an employer and an insurer to substantial monetary penalties.

96. Under the Internal Revenue Code, certain employers who fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" will be exposed to significant annual fines of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1).

97. Additionally, under the Internal Revenue Code, group health plans that fail to provide certain required coverage may be subject to an assessment of $100 a day per individual. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro, Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012) (asserting that this applies to employers who violate the "preventive care" provision of the Affordable Care Act).

98. Under the Public Health Service Act, the Secretary of HHS may impose a monetary penalty of $100 a day per individual where an insurer fails to provide the coverage required by the U.S. Government Mandate. *See* 42 U.S.C. § 300gg-22(b)(2)(C)(i); *see also* Cong. Research Serv., RL 7-5700 (asserting that this penalty applies to insurers who violate the "preventive care" provision of the Affordable Care Act).

99. ERISA may provide for additional penalties. Under ERISA, plan participants can bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(1)(B); *see also* Cong. Research Serv., RL 7-5700. Similarly, the Secretary of Labor may bring an enforcement action against group health plans of employers that violate the U.S. Government Mandate, as incorporated by ERISA. *See* 29 U.S.C. § 1132(b)(3); *see also* Cong. Research Serv., RL 7-5700

(asserting that these penalties can apply to employers and insurers who violate the "preventive care" provision of the Affordable Care Act).

100. Several of the Act's provisions, along with other federal statutes, reflect a clear congressional intent that the executive agency charged with identifying the "preventive care" required by § 300gg-13(a)(4) should exclude all abortion-related services. The Act itself states that "nothing in this title (or any amendment made by this title) 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." 42 U.S.C. § 18023(b)(1)(A)(i). And the Act left it to "the issuer of a qualified health plan," not the Government, "[to] determine whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii).

101. Likewise, the Weldon Amendment, which has been included in every HHS and Department of Labor appropriations bill since 2004, prohibits certain agencies from discriminating against an institution based on that institution's refusal to provide abortion-related services. Specifically, it states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of 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." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

102. The legislative history of the Act also demonstrates a clear congressional intent to prohibit the executive branch from requiring group health plans to provide abortion-related services. For example, the House of Representatives originally passed a bill that included an

amendment by Congressman Bart Stupak prohibiting the use of federal funds for abortion services. *See* H.R. 3962, 111th Cong. § 265 (Nov. 7, 2009). The Senate version, however, lacked that restriction. S. Amend. No. 2786 to H.R. 3590, 111th Cong. (Dec. 23, 2009). To avoid a filibuster in the Senate, congressional proponents of the Act engaged in a procedure known as "budget reconciliation" that required the House to adopt the Senate version of the bill largely in its entirety. Congressman Stupak and other pro-life House members, however, indicated that they would refuse to vote for the Senate version because it failed to adequately prohibit federal funding of abortion. In an attempt to address these concerns, President Obama issued an executive order providing that no executive agency would authorize the federal funding of abortion services. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

103. The Act was, therefore, passed on the central premise that all agencies would uphold and follow "longstanding Federal laws to protect conscience" and to prohibit federal funding of abortion. *Id.* That executive order was consistent with a 2009 speech that President Obama gave at the University of Notre Dame, in which he indicated that his Administration would honor the consciences of those who disagree with abortion, and draft sensible conscience clauses.

B. Regulatory Background – Defining "Preventive Care" and the Narrow Exemption

104. In a span of less than two years, Defendants promulgated the U.S. Government Mandate, subverting the Act's clear purpose to protect the rights of conscience. The U.S. Government Mandate, moreover, was implemented contrary to the normal procedural rules governing the promulgation and implementation of rules of this magnitude.

105. In particular, on July 19, 2010, Defendants issued initial interim final rules concerning § 300gg-13(a)(4)'s requirement that group health plans provide coverage for women's "preventive care." Interim Final Rules, 75 Fed. Reg. 41,726. Defendants dispensed with notice-

and-comment rulemaking for these rules. Even though federal law had never required coverage of abortion-inducing drugs, sterilization, or contraceptives, Defendants claimed both that the APA did not apply to the relevant provisions of the Affordable Care Act and that "it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed." *Id.* at 41,730.

106. The interim final rules referred to the Affordable Care Act's statutory language. They indicated that "a group health plan . . . must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or deductible) with respect to those items or services: . . . (iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration." Interim Final Rules, 75 Fed. Reg. at 41,759 (codified at 45 C.F.R. § 147.130(a)(iv)).

107. The interim final rules, however, failed to identify the women's "preventive care" that Defendants planned to require employer group health plans to cover. 42 U.S.C. § 300gg-13(a)(4). Instead, Defendants noted that "[t]he Department of HHS [was] developing these guidelines and expects to issue them no later than August 1, 2011." *Id.* at 41,731.

108. Defendants permitted concerned entities to provide written comments about the interim final rules. *See id.* at 41,726. But, as Defendants have conceded, they did not comply with the notice-and-comment requirements of the APA. *Id.* at 41,730.

109. In response, several groups engaged in a lobbying effort to persuade Defendants to include various contraceptives and abortion-inducing drugs in the "preventive care"

requirements for group health plans. *See, e.g.*, Press Release, Planned Parenthood, Planned Parenthood Supports Initial White House Regulations on Preventive Care (July 14, 2010), *available at* http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-supports-initial-white-house-regulations-preventive-care-highlights-need-new-33140.htm. Other commenters noted that "preventive care" could not reasonably be interpreted to include such practices. These groups indicated that pregnancy was not a disease that needed to be "prevented," and that a contrary view would intrude on the sincerely held beliefs of many religiously affiliated organizations. *See, e.g.*, Comments of U.S. Conference of Catholic Bishops, at 1-2 (Sept. 17, 2010), *available at* http://old.usccb.org/ogc/preventive.pdf.

110. In addition to the U.S. Government Mandate that applies to group health plans for employees, on February 11, 2011, HHS also announced that, if colleges or universities contract with a health insurance issuer to provide insurance to their students, the health insurance issuer must provide these "preventive care" services in the student health plans. *See* Student Health Insurance Coverage, 76 Fed. Reg. 7,767, 7,772 (Feb. 11, 2011).

111. On August 1, 2011, HHS announced the "preventive care" services that group health plans would be required to cover. *See* Press Release, HHS, Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html. Again acting without notice-and-comment rulemaking, HHS announced these guidelines through a press release rather than enactments in the Code of Federal Regulations or statements in the Federal Register.

112. The press release made clear that the guidelines were developed by a non-governmental "independent" organization, the Institute of Medicine ("IOM"). *See id.* In developing the guidelines, IOM invited certain groups to make presentations on preventive care.

On information and belief, no groups that oppose government-mandated coverage of contraception, abortion, and related education and counseling were among the invited presenters. Comm. on Preventive Servs. for Women, Inst. of Med., Clinical Preventive Services for Women app. B at 217-21 (2011), *available at* http://www.nap.edu/openbook.php?record_id=13181&page=R1.

113. The IOM's own report, in turn, included a dissent that suggested that the IOM's recommendations were made on an unduly short time frame dictated by political considerations, through a process that was largely subject to the preferences of the committee's composition, and without the appropriate transparency for all concerned persons. *Id.* app. D at 231–35.

114. In direct contradiction of the central compromise necessary for the Affordable Care Act's passage and President Obama's promise to protect religious liberty, HHS's guidelines required insurers and group health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Health Res. Servs. Admin., Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Apr. 25, 2012). FDA-approved contraceptives that qualify under these guidelines include drugs that induce abortions. For example, the FDA has approved "emergency contraceptives" such as the morning-after pill (otherwise known as Plan B), which can prevent an embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or ella), which likewise can induce abortions.

115. A few days later, on August 3, 2011, Defendants issued amendments to the interim final rules that they had enacted in July 2010. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and

Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011). Defendants issued the amendments again without notice-and-comment rulemaking on the same grounds that they had provided for bypassing the APA with the original rules. *See id.* at 46,624.

116. When announcing the amended regulations, Defendants ignored the view that "preventive care" should exclude abortion-inducing drugs, sterilization, or contraceptives that do not prevent disease. Instead, they noted only that "commenters [had] asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *Id.* at 46,623.

117. Defendants then sought "to provide for a religious accommodation that respect[ed]" only "the unique relationship between a house of worship and its employees in ministerial positions." *Id.* Specifically, the regulatory exemption ignores definitions of religious employers already existing in federal law and, instead, covers only those employers whose purpose is to inculcate religious values, and who employ and serve primarily individuals of the same religion. It provides in full:

> (A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.
>
> (B) For purposes of this subsection, a "religious employer" is an organization that meets all of 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 Internal Revenue Code of 1986, as amended.

Id. at 46,626 (codified at 45 C.F.R. § 147.130(a)(iv)(A)-(B)).

118. The exemption excludes the health plans of all other religiously affiliated employers that view their missions as providing charitable, educational, and employment opportunities to all those who request it, regardless of their religious faith.

119. Moreover, determining whether an organization is sufficiently "religious" to qualify for the exemption, requires an unconstitutionally invasive inquiry into an organization's religious beliefs and practices. For example, the Government must determine the "religious tenets" of an organization and the individuals it employs and serves; it must determine whether the organization "primarily" employs and "primarily" serves individuals who "share" the organization's "religious tenets"; and it must determine whether "the purpose" of the organization is the "inculcation of religious values."

120. When issuing this interim final rule, Defendants did not explain why they constructed such a narrow religious exemption. Nor did Defendants explain why they refused to incorporate other "longstanding Federal laws to protect conscience" that President Obama's executive order previously had promised to respect. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). ERISA, for example, has long excluded "church plans" from its requirements, more broadly defined to cover civil law corporations that share religious bonds with a church. *See* 29 U.S.C. §§ 1002(33)(C)(iv), 1003. Likewise, the Affordable Care Act's requirement that all individuals maintain minimum essential coverage excludes those individuals who have a religious objection to receiving benefits from public or private insurance. 26 U.S.C.

§§ 1402(g)(1), 5000A(d)(2). Nor did Defendants consider whether they had a compelling interest to require religiously affiliated employers to include services in their health plans that were contrary to their religious beliefs, or whether Defendants could achieve their views of sound policy in a more religiously accommodating manner.

121. Suggesting that they were open to good-faith discussion, Defendants once again permitted parties to provide comments to the amended rules. Numerous organizations, including the Archdiocese of Washington, expressed the same concerns that they had before, noting that the mandated services should not be viewed as "preventive care." They also explained that the religious exemption was "narrower than any conscience clause ever enacted in federal law, and narrower than the vast majority of religious exemptions from state contraceptive mandates." Comments of U.S. Conference of Catholic Bishops at 1-2 (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf. In addition to endorsing the comments submitted by the USCCB, the Archdiocese submitted its own comments emphasizing that "[p]regnancy is not a disease, and drugs and surgeries to prevent it are not basic health care that the government should require all Americans to purchase." Comments of Archdiocese of Washington at 1 (Sept. 30, 2011), *available at* http://www.dol.gov/ebsa/pdf/1210-AB44a-14694.pdf. The Archdiocese also emphasized its long history of serving the social, educational, and medical needs of the community.

122. Three months later, "[a]fter evaluating [the new] comments" to the interim final rules, Defendants gave their response. They did not request further discussion or make attempts at compromise. Nor did they explain the basis for their decision. Instead, Defendant Sebelius issued a short, Friday-afternoon press release, announcing, with little analysis or reasoning, that

HHS had decided to keep the exemption unchanged, but creating a temporary enforcement safe harbor whereby "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law." *See* Press Release, HHS, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html. As noted by Cardinal Timothy Dolan, the release effectively gave objecting religious institutions "a year to figure out how to violate [their] consciences." Taken together, these various rules and press releases amount to a mandate that requires most religiously affiliated organizations to provide coverage for services that are directly contrary to their religious beliefs.

123. On February 10, 2012, after a continuing public outcry against the U.S. Government Mandate and its exceedingly narrow conscience protections, the White House held a press conference and issued another press release about the U.S. Government Mandate. The White House announced that it had come up with a policy to "accommodate" religious objections to the U.S. Government Mandate, according to which the insurance companies of religious organizations that object to providing coverage for abortion-inducing drugs, sterilization, or contraceptives "will be required to directly offer . . . contraceptive care [to plan participants] free of charge." White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

124. HHS has since indicated that a similar arrangement will apply for student health plans that colleges and universities provide to students through a health insurance issuer. Student Health Insurance Coverage, 77 Fed. Reg. 16,453, 16,457 (Mar. 21, 2012).

125. Despite objections that this "accommodation" did nothing of substance to protect the right of conscience, when asked if there would be further room for compromise, White House Chief of Staff Jacob Lew responded: "No, this is our plan." David Eldridge & Cheryl Wetzstein, *White House Says Contraception Compromise Will Stand*, The Washington Times, Feb. 12, 2012, http://www.washingtontimes.com/news/2012/feb/12/white-house-birth-control-compromise-will-stand/print/.

126. Defendants subsequently explained in the Federal Register that they "plan[ned] to initiate a rulemaking to require issuers to offer insurance without contraception coverage to [an objecting religious] employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it, with no cost-sharing." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). The Federal Register further asserted that the rulemaking would "achieve the same goals for self-insured group health plans." *Id.*

127. Defendants then "finalize[d], without change," the interim final rules containing the religious employer exemption, 77 Fed. Reg. at 8729, and issued guidelines regarding the previously announced "temporary enforcement safe harbor" for "non-exempted, non-profit religious organizations with religious objections to such coverage." *Id.* at 8725; *see* Ctr for Consumer Info. & Ins. Oversight, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

128. The temporary safe harbor also applies to student health plans. 77 Fed. Reg. at 16,457.

129. On March 16, 2012, Defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comment on various ways to structure the proposed accommodation. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). The proposed scenarios require an "independent entity" to provide coverage for the objectionable services at no cost to the participants. But private entities do not provide insurance coverage "for free." Moreover, even if these proposals were adopted, they would still require religious organizations to provide, pay for, and/or facilitate access to the objectionable services. Finally, it is also unclear whether the Government has statutory authority to implement each of the possibilities referenced in the ANPRM.

130. The ANPRM does not alter existing law. It merely states an intention to do so at some point in the future. But a promise to change the law, whether issued by the White House or in the form of an ANPRM, does not, in fact, change the law. The U.S. Government Mandate is therefore the current, operative law. Plaintiffs have until the start of the next plan year following August 1, 2013, to come into compliance with this law.

III. THE U.S. GOVERNMENT MANDATE IMPOSES AN IMMEDIATE AND SUBSTANTIAL BURDEN ON PLAINTIFFS' RELIGIOUS LIBERTY

A. The U.S. Government Mandate Substantially Burdens Plaintiffs' Religious Beliefs

131. Responding to the U.S. Government Mandate, Cardinal Wuerl has declared that "what is at stake here is a question of human freedom." And indeed it is. Since the founding of this country, our society and legal system have recognized that individuals and institutions are entitled to freedom of conscience and religious practice. As noted by Thomas Jefferson, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."

132. The U.S. Government Mandate seeks to require Plaintiffs to provide, pay for, and/or facilitate access to services that are contrary to their religious beliefs. It thus severely burdens Plaintiffs' firmly held religious beliefs.

133. The U.S. Government Mandate also seeks to compel Plaintiffs to fund related "patient education and counseling for all women with reproductive capacity." It therefore compels Plaintiffs to pay for, provide, and/or facilitate speech that is contrary to their firmly held religious beliefs.

134. Although the U.S. Government Mandate contains a narrow religious exemption, in order to qualify, religious organizations must submit to an invasive governmental inquiry regarding their purpose and religious beliefs. Requiring Plaintiffs to submit to this government-conducted religious test likewise substantially burdens their firmly held religious beliefs.

135. It is unclear how the Government defines or will interpret "the purpose" of an organization.

136. It is unclear how the Government defines or will interpret vague terms, such as "primarily," "share," and "religious tenets."

137. It is unclear how the Government will ascertain the "religious tenets" of an organization, those it employs, and those it serves.

138. It is unclear how much overlap the Government will require for religious tenets to be "share[d]."

139. Any attempt by Plaintiffs to qualify for the narrow religious employer exemption by restricting their charitable and educational mission to coreligionists would have devastating effects on the communities Plaintiffs serve.

140. Indeed, the Government does not even provide Plaintiffs the option to attempt to avoid the U.S. Government Mandate by exiting the health care market. Eliminating its employee group health plan or refusing to provide plans that cover abortion-inducing drugs, sterilization, or contraceptives would expose each Plaintiff to substantial fines. It is no "choice" to leave those employees scrambling for health insurance while subjecting Plaintiffs to significant fines for breaking the law. Yet that is what the U.S. Government Mandate requires for Plaintiffs to adhere to their religious beliefs.

141. The U.S. Government Mandate also inhibits Plaintiffs' ability to hire and retain employees, attract students, and solicit charitable contributions.

142. Nor would the opaque, promised "accommodation"—even if it were law, which it is not—relieve Plaintiffs from the unconscionable position in which the U.S. Government Mandate currently puts them, for numerous reasons.

143. First, the promised "accommodation" would not alter the fact that Plaintiffs would be required to facilitate practices that run directly contrary to their beliefs. Catholic teaching does not simply require Catholic institutions to avoid directly paying for practices that are viewed as intrinsically immoral. It also requires them to avoid actions that facilitate those practices.

144. Second, any requirement that insurance companies or other independent entities provide preventive services "free of charge" is illusory. For-profit entities do not provide services for free. Instead, increased costs are passed through to consumers in the form of higher premiums or fees. Under the proposed accommodation, doctors will still have to be paid to prescribe the objectionable services and drug companies and pharmacists will still have to be paid for providing them. Hypothetical future savings cannot be used to pay those fees; rather, the money will necessarily be derived from increased premiums or fees.

145. Third, the "accommodation" does not affect the narrow exemption applicable to "religious employers." To qualify for that narrow exemption, religious organizations must submit to an invasive governmental inquiry. Requiring Plaintiffs to submit to this government-conducted test to determine if Plaintiffs are sufficiently religious is inappropriate and substantially burdens their firmly held religious beliefs.

146. Finally, as noted below, the U.S. Government Mandate is burdening Plaintiffs religious beliefs right now. Plaintiffs cannot possibly wait until August 1, 2013, to determine how to respond to the U.S. Government Mandate.

147. In short, while the President claimed to have "f[ou]nd a solution that works for everyone" and that ensures that "[r]eligious liberty will be protected," in reality, his promised "accommodation" does neither. Unless and until this issue is definitively resolved, the U.S. Government Mandate does and will continue to impose a substantial burden on Plaintiffs religious beliefs.

B. The U.S. Government Mandate Is Not a Neutral Law of General Applicability

148. The U.S. Government Mandate is not a neutral law of general applicability. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling. It was, moreover, implemented by and at the behest of individuals and organizations who disagree with certain religious beliefs regarding abortion and contraception, and thus targets religious organizations for disfavored treatment.

149. For example, the U.S. Government Mandate exempts all "grandfathered" plans from its requirements.

150. The Government has also crafted a religious exemption to the U.S. Government Mandate that favors certain religions over others. As noted, it applies only to plans sponsored by

religious organizations that have, as their "purpose," the "inculcation of religious values"; that "primarily" serve individuals that share their "religious tenets"; and that "primarily" employ such individuals. 45 C.F.R. § 147.130(a)(iv)(B).

151. The U.S. Government Mandate, moreover, was promulgated by Government officials, and supported by non-governmental organizations, who strongly oppose certain Catholic teachings and beliefs. For example, on October 5, 2011, Defendant Sebelius spoke at a fundraiser for NARAL Pro-Choice America. Defendant Sebelius has long supported abortion rights and criticized Catholic teachings and beliefs regarding abortion and contraception. NARAL Pro-Choice America is a pro-abortion organization that likewise opposes many Catholic teachings. At that fundraiser, Defendant Sebelius criticized individuals and entities whose beliefs differed from those held by her and the other attendees of the NARAL Pro-Choice America fundraiser, stating: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much."

152. Consequently, on information and belief, Plaintiffs allege that the purpose of the U.S. Government Mandate, including the narrow exemption, is to discriminate against religious institutions and organizations that oppose abortion and contraception.

C. The U.S. Government Mandate Is Not the Least Restrictive Means of Furthering a Compelling Governmental Interest

153. The U.S. Government Mandate is not narrowly tailored to promoting a compelling governmental interest.

154. The Government has no compelling interest in forcing Plaintiffs to violate their sincerely held religious beliefs by requiring them to provide, pay for, or facilitate access to abortion-inducing drugs, sterilizations, contraceptives, and related education and counseling. The

Government itself has relieved numerous other employers from this requirement by exempting grandfathered plans and plans of employers it deems to be sufficiently religious. Moreover, these services are widely available in the United States. The U.S. Supreme Court has held that individuals have a constitutional right to use such services. And nothing that Plaintiffs do inhibits any individual from exercising that right.

155. Even assuming the interest was compelling, the Government has numerous alternatives to furthering that interest other than forcing Plaintiffs to violate their religious beliefs. For example, the Government could have provided or paid for the objectionable services itself through other programs established by a duly enacted law. Or, at a minimum, it could create a broader exemption for religious employers, such as those found in numerous state laws throughout the country and in other federal laws. The Government therefore cannot possibly demonstrate that requiring Plaintiffs to violate their consciences is the least restrictive means of furthering its interest.

156. The U.S. Government Mandate, moreover, would simultaneously undermine both religious freedom—a fundamental right enshrined in the U.S. Constitution—and access to the wide variety of social and educational services that Plaintiffs provide. The Archdiocese, CCA, and Archbishop Carroll educate inner-city children whose families want an alternative to the public school system; and Catholic Charities provides a range of social services to the citizens of the District of Columbia and Maryland. Likewise, CUA operates world-class research centers while providing its students with a high-quality education in numerous fields of study. As President Obama acknowledged in his February 10th announcement, religious organizations like Plaintiffs do "more good for a community than a government program ever could." The U.S. Government Mandate, however, puts these good works in jeopardy.

157. That is unconscionable. Accordingly, Plaintiffs seek a declaration that the U.S. Government Mandate cannot lawfully be applied to Plaintiffs, an injunction barring its enforcement, and an order vacating the Mandate.

D. The U.S. Government Mandate's Religious Employer Exemption Excessively Entangles the Government in Religion and Interferes with Religious Institutions' Religious Doctrine

158. The U.S. Government Mandate's religious employer exemption further excessively entangles the Government in defining the purpose and religious tenets of each organization and its employees and beneficiaries.

159. In order to determine whether the Archdiocese—or any other religious organization—qualifies for the exemption, the Government would have to identify the organization's "religious tenets" and determine whether "the purpose" of the organization is to "inculcate" those tenets.

160. The Government would then have to conduct an inquiry into the practices and beliefs of the individuals that the organization ultimately employs and educates.

161. The Government would then have to compare and contrast those religious practices and beliefs to determine whether and how many of them are "share[d]."

162. Regardless of outcome, this inquiry is unconstitutional, and Plaintiffs strongly object to such an intrusive governmental investigation into an organization's religious mission.

163. The religious employer exemption is based on an improper Government determination that "inculcation" is the only legitimate religious purpose.

164. The Government should not base an exemption on an assessment of the "purity" or legitimacy of an institution's religious purpose.

165. By limiting that legitimate purpose to "inculcation," at the expense of other sincerely held religious purposes, the U.S. Government Mandate interferes with religious

autonomy. Religious institutions have the right to determine their own religious purpose, including religious purposes broader than "inculcation," without Government interference and without losing their religious liberties.

166. Defining religion based on employing and serving primarily people who share the organization's religious tenets directly contradicts Plaintiffs sincerely held religious beliefs regarding their religious mission to serve all people, regardless of whether or not they share the same faith.

167. This narrow exemption may protect some religious organizations. But it does not protect the many Catholic and other religious organizations that educate students of all faiths, provide vital social services to individuals of all faiths, and employ individuals of all faiths. The U.S. Government Mandate thus discriminates against such religious organizations because of their religious commitment to educate, serve, and employ people of all faiths.

168. It is unclear whether, if an entity qualifies as a "religious employer" for purposes of the exemption, any affiliated corporation that provides coverage to its employees through the exempt entity's group health plan would also receive the benefit of the exemption. 77 Fed. Reg. at 16,502.

169. It is unclear whether, if the Archdiocese qualifies a "religious employer" under the exemption to the U.S. Government Mandate, any affiliated corporation that provides coverage to its employees through the Archdiocese's group health plan would therefore also receive the benefit of the exemption.

E. The U.S. Government Mandate Is Causing Present Hardship to Plaintiffs That Should Be Remedied by a Court

170. The U.S. Government Mandate is already causing serious, ongoing hardship to Plaintiffs that merits judicial relief now.

171. Health plans do not take shape overnight. A number of analyses, negotiations, and decisions must occur each year before Plaintiffs can offer a health benefits package to their employees. For example, an employer using an outside insurance issuer—like CUA—must work with actuaries to evaluate its funding reserves, and then negotiate with the insurer to determine the cost of the products and services it wants to offer its employees. An employer that is self-insured—like the Archdiocese—after consulting with its actuaries, must similarly negotiate with its third-party administrator ("TPA").

172. Under normal circumstances, Plaintiffs must begin the process of determining their health care package for a plan year at least one year before the plan year begins. The multiple levels of uncertainty surrounding the U.S. Government Mandate make this already lengthy process even more complex.

173. For example, if Plaintiffs decide that the only tolerable option is to attempt to qualify as a "religious employer" under the U.S. Government Mandate, they will need to undertake a major overhaul of their corporate structures, hiring practices, and the scope of their programming. This process could take years.

174. In addition, if Plaintiffs do not comply with the U.S. Government Mandate, they may be subject to government fines and penalties. Plaintiffs require time to budget for any such additional expenses.

175. The U.S. Government Mandate and its uncertain legality, moreover, undermine Plaintiffs' ability to hire and retain employees.

176. Plaintiffs therefore need judicial relief now in order to prevent the serious, ongoing harm that the U.S. Government Mandate is already imposing on them.

IV. CAUSES OF ACTION

COUNT I
Substantial Burden on Religious Exercise in Violation of RFRA

177. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

178. RFRA prohibits the Government from substantially burdening an entity's exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

179. RFRA protects organizations as well as individuals from Government-imposed substantial burdens on religious exercise.

180. RFRA applies to all federal law and the implementation of that law by any branch, department, agency, instrumentality, or official of the United States.

181. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs.

182. In order to qualify for the "religious employer" exemption to the U.S. Government Mandate, Plaintiffs must submit to an intrusive government inquiry into their religious beliefs.

183. The U.S. Government Mandate substantially burdens Plaintiffs' exercise of religion.

184. The Government has no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

185. Requiring Plaintiffs to comply with the U.S. Government Mandate is not the least restrictive means of furthering a compelling governmental interest.

186. By enacting and threatening to enforce the U.S. Government Mandate against Plaintiffs, Defendants have violated RFRA.

187. The Government is also requiring student health plans, including the one currently offered by CUA, to include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling.

188. To require CUA's student health plan to include coverage for services that violate CUA's religious beliefs substantially burdens CUA's exercise of religion.

189. The Government has no compelling government interest to require CUA's student health plan to include coverage for services that violate CUA's religious beliefs.

190. Requiring CUA's student health plan to include coverage for services that violate its religious beliefs is not the least restrictive means of furthering a compelling government interest.

191. Defendants have also violated RFRA by requiring CUA's student health plan to include coverage for services that violate CUA's religious beliefs.

192. Plaintiffs have no adequate remedy at law.

193. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT II
Substantial Burden on Religious Exercise in Violation of the Free Exercise Clause of the First Amendment

194. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

195. The Free Exercise Clause of the First Amendment prohibits the Government from substantially burdening an entity's exercise of religion.

196. The Free Exercise Clause protects organizations as well as individuals from Government-imposed burdens on religious exercise.

197. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs.

198. In order to qualify for the "religious employer" exemption to the U.S. Government Mandate, Plaintiffs must submit to an intrusive government inquiry into their religious beliefs.

199. The U.S. Government Mandate substantially burdens Plaintiffs' exercise of religion.

200. The U.S. Government Mandate is not a neutral law of general applicability, because it is riddled with exemptions for which there is not a consistent, legally defensible basis. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling.

201. The U.S. Government Mandate is not a neutral law of general applicability, because it discriminates against certain religious viewpoints and targets certain religious organizations for disfavored treatment. Defendants enacted the U.S. Government Mandate despite being aware of the substantial burden it would place on Plaintiffs' exercise of religion.

202. The U.S. Government Mandate implicates constitutional rights in addition to the right to free exercise of religion, including, for example, the rights to free speech and to freedom from excessive government entanglement with religion.

203. The Government has no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

204. The U.S. Government Mandate is not narrowly tailored to further a compelling governmental interest.

205. By enacting and threatening to enforce the U.S. Government Mandate, the Government has burdened Plaintiffs' religious exercise in violation of the Free Exercise Clause of the First Amendment.

206. The Government is also requiring student health plans, including the one currently offered by CUA, to include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling.

207. To require CUA's student health plan to include coverage for services that violate CUA's religious beliefs substantially burdens CUA's exercise of religion.

208. The Government has no compelling government interest to require CUA's student health plan to include coverage for services that violate CUA's religious beliefs.

209. Requiring CUA's student health plan to include coverage for services that violate its religious beliefs is not the least restrictive means of furthering a compelling government interest.

210. Defendants have also violated the Free Exercise Clause of the First Amendment by requiring CUA's student health plan to include coverage for services that violate CUA's religious beliefs.

211. Plaintiffs have no adequate remedy at law.

212. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT III
Excessive Entanglement in Violation of the
Free Exercise and Establishment Clauses of the First Amendment

213. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

214. The Free Exercise Clause and the Establishment Clause of the First Amendment prohibit intrusive government inquiries into the religious beliefs of individuals and institutions, and other forms of excessive entanglement between religion and Government.

215. This prohibition on excessive entanglement protects organizations as well as individuals.

216. In order to qualify for the exemption to the U.S. Government Mandate for "religious employers," entities must submit to an invasive government investigation into an organization's religious beliefs, including whether the organization's "purpose" is the "inculcation of religious values" and whether the organization "primarily employs" and "serves primarily" individuals who share the organization's religious tenets.

217. The U.S. Government Mandate thus requires the Government to engage in invasive inquiries and judgments regarding questions of religious belief or practice.

218. The U.S. Government Mandate results in an excessive entanglement between religion and Government.

219. The U.S. Government Mandate is therefore unconstitutional and invalid.

220. The enactment and impending enforcement of the U.S. Government Mandate violate the Free Exercise Clause and the Establishment Clause of the First Amendment.

221. Plaintiffs have no adequate remedy at law.

222. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT IV
Religious Discrimination in Violation of the
Free Exercise and Establishment Clauses of the First Amendment

223. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

224. The Free Exercise Clause and the Establishment Clause of the First Amendment mandate the equal treatment of all religious faiths and institutions without discrimination or preference.

225. This mandate of equal treatment protects organizations as well as individuals.

226. The U.S. Government Mandate's narrow exemption for certain "religious employers" but not others discriminates on the basis of religious views or religious status.

227. The U.S. Government Mandate's definition of religious employer likewise discriminates among different types of religious entities based on the nature of those entities' religious beliefs or practices.

228. The U.S. Government Mandate's definition of religious employer furthers no compelling governmental interest.

229. The U.S. Government Mandate's definition of religious employer is not narrowly tailored to further a compelling governmental interest.

230. The enactment and impending enforcement of the U.S. Government Mandate violate the Free Exercise Clause and the Establishment Clause of the First Amendment.

231. Plaintiffs have no adequate remedy at law.

232. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT V
Interference in Matters of Internal Church Governance in Violation of the Free Exercise and Establishment Clauses of the First Amendment

233. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

234. The Free Exercise Clause and Establishment Clause protect the freedom of religious organizations to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

235. Under these Clauses, the Government may not interfere with a religious organization's internal decisions concerning the organization's religious structure, ministers, or doctrine.

236. Under these Clauses, the Government may not interfere with a religious organization's internal decision if that interference would affect the faith and mission of the organization itself.

237. Plaintiffs are religious organizations affiliated with the Roman Catholic Church.

238. The Catholic Church views abortion, sterilization, and contraception as intrinsically immoral, and prohibits Catholic organizations from condoning or facilitating those practices.

239. Plaintiffs have abided and must continue to abide by the decision of the Catholic Church on these issues.

240. The Government may not interfere with or otherwise question the final decision of the Catholic Church that its religious organizations must abide by these views.

241. Plaintiffs have therefore made the internal decision that the health plans they offer to their employees may not cover, subsidize, or facilitate abortion, sterilization, or contraception.

242. The U.S. Government Mandate interferes with Plaintiffs' internal decisions concerning their structure and mission by requiring them to facilitate practices that directly conflict with Catholic beliefs.

243. The U.S. Government Mandate's interference with Plaintiffs' internal decisions affects their faith and mission by requiring them to facilitate practices that directly conflict with their religious beliefs.

244. Because the U.S. Government Mandate interferes with the internal decision-making of Plaintiffs in a manner that affects Plaintiffs' faith and mission, it violates the Establishment Clause and the Free Exercise Clause of the First Amendment.

245. For the same reasons, Defendants' requirement that student health plans, like the one currently offered by CUA, include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling, also violates the Establishment Clause and the Free Exercise Clause of the First Amendment.

246. Plaintiffs have no adequate remedy at law.

247. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VI
Compelled Speech in Violation of
the Free Speech Clause of the First Amendment

248. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

249. The First Amendment protects against the compelled affirmation of any religious or ideological proposition that the speaker finds unacceptable.

250. The First Amendment protects organizations as well as individuals against compelled speech.

251. Expenditures are a form of speech protected by the First Amendment.

252. The First Amendment protects against the use of a speaker's money to support a viewpoint that conflicts with the speaker's religious beliefs.

253. The U.S. Government Mandate would compel Plaintiffs to provide health care plans to their employees that include or facilitate coverage of practices that violate their religious beliefs.

254. The U.S. Government Mandate would compel Plaintiffs to subsidize, promote, and facilitate education and counseling services regarding these practices.

255. By imposing the U.S. Government Mandate, Defendants are compelling Plaintiffs to publicly subsidize or facilitate the activity and speech of private entities that are contrary to their religious beliefs.

256. The U.S. Government Mandate is viewpoint-discriminatory and subject to strict scrutiny.

257. The U.S. Government Mandate furthers no compelling governmental interest.

258. The U.S. Government Mandate is not narrowly tailored to further a compelling governmental interest.

259. For the same reasons, Defendants' requirement that student health plans, like the one currently offered by CUA, include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling, also violates the Free Speech Clause of the First Amendment.

260. Plaintiffs have no adequate remedy at law.

261. Defendants are imposing an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VII
Failure to Conduct Notice-and-Comment Rulemaking and Improper Delegation in Violation of the APA

262. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

263. The Affordable Care Act expressly delegates to an agency within Defendant HHS, the Health Resources and Services Administration, the authority to establish guidelines concerning the "preventive care" that a group health plan and health insurance issuer must provide.

264. Given this express delegation, Defendants were required to engage in formal notice-and-comment rulemaking in a manner prescribed by law before issuing the guidelines that group health plans and insurers must cover. Proposed regulations were required to be published in the Federal Register and interested persons were required to be given an opportunity to participate in the rulemaking through the submission of written data, views, or arguments.

265. Defendants promulgated the "preventive care" guidelines without engaging in formal notice-and-comment rulemaking in a manner prescribed by law.

266. Defendants, instead, delegated their responsibilities for issuing preventive care guidelines to a non-governmental entity, the IOM.

267. The IOM did not permit or provide for the broad public comment otherwise required under the APA concerning the guidelines that it would recommend. The dissent to the IOM report noted both that the IOM conducted its review in an unacceptably short time frame, and that the review process lacked transparency.

268. Within two weeks of the IOM issuing its guidelines, Defendant HHS issued a press release announcing that the IOM's guidelines were required under the Affordable Care Act.

269. Defendants have never explained why they failed to enact these "preventive care" guidelines through notice-and-comment rulemaking as required by the APA.

270. Defendants also failed to engage in notice-and-comment rulemaking when issuing the interim final rules and the final rule incorporating the guidelines.

271. Defendants' stated reasons for promulgating these rules without engaging in formal notice-and-comment rulemaking do not constitute "good cause." Providing public notice and an opportunity for comment was not impracticable, unnecessary, or contrary to the public interest for the reasons claimed by Defendants.

272. By enacting the "preventive care" guidelines and interim and final rules through delegation to a non-governmental entity and without engaging in notice-and-comment rulemaking, Defendants failed to observe a procedure required by law and thus violated 5 U.S.C. § 706(2)(D).

273. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

274. Plaintiffs have no adequate remedy at law.

275. The enactment of the U.S. Government Mandate without observance of a procedure required by law and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VIII
Arbitrary and Capricious Action in Violation of the APA

276. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

277. The APA condemns agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

278. The APA requires that an agency examine the relevant data and articulate an explanation for its action that includes a rational connection between the facts found and the policy choice made.

279. Agency action is arbitrary and capricious under the APA if the agency has failed to consider an important aspect of the problem before it.

280. A court reviewing agency action may not supply a reasoned basis that the agency itself has failed to offer.

281. Defendants failed to consider the suggestion of many commenters that abortion-inducing drugs, sterilization, or contraception could not be viewed as "preventive care."

282. Defendants failed adequately to engage with voluminous comments suggesting that the scope of the religious exemption to the U.S. Government Mandate should be broadened.

283. Defendants did not articulate a reasoned basis for their action by drawing a connection between facts found and the policy decisions it made.

284. Defendants failed to provide any standards or processes for how the Administration will decide which religious institutions will be included in the religious exemption.

285. Defendants failed to consider the use of broader religious exemptions in many other federal laws and regulations.

286. Defendants' promulgation of the U.S. Government Mandate violates the APA.

287. For the same reasons, Defendants' requirement that student health plans like CUA's must include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling, also violates the APA.

288. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

289. Plaintiffs have no adequate remedy at law.

290. Defendants are imposing an immediate and ongoing harm on the Plaintiffs that warrants relief.

COUNT IX
Acting Illegally in Violation of the APA

291. Plaintiffs repeat and reallege each of the foregoing allegations in this Complaint.

292. The APA requires that all Government agency action, findings, and conclusions be "in accordance with law."

293. The U.S. Government Mandate and its exemption are illegal and therefore in violation of the APA.

294. The Weldon Amendment states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of 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." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

295. The Affordable Care Act states that "nothing in this title (or any amendment by this title) 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." 42 U.S.C. § 18023(b)(1)(A)(i). It adds that "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion.]" *Id.* § 18023(b)(1)(A)(ii).

296. The Affordable Care Act contains no clear expression of an affirmative intention of Congress that employers with religiously motivated objections to the provision of health plans that include coverage for abortion-inducing drugs, sterilization, contraception, or related education and counseling should be required to provide such plans.

297. The U.S. Government Mandate requires employer based-health plans to provide coverage for abortion-inducing drugs, contraception, sterilization, and related education. It does not permit employers or issuers to determine whether the plan covers abortion, as the Act requires. By issuing the U.S. Government Mandate, Defendants have exceeded their authority, and ignored the direction of Congress.

298. The U.S. Government Mandate violates RFRA.

299. The U.S. Government Mandate violates the First Amendment.

300. The U.S. Government Mandate is not in accordance with law and thus violates 5 U.S.C. § 706(2)(A).

301. For the same reasons, Defendants' requirement that student health plans like CUA's must include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling, also violates RFRA and the First Amendment and, therefore, is not in accordance with law and thus violates 5 U.S.C. § 706(2)(A).

302. In addition, the Affordable Care Act states that, "nothing in this title (or an amendment made by this title) shall be construed to prohibit an institution of higher education . . . from offering a student health insurance plan . . . ." 42 U.S.C. § 18118(c). This provision has been interpreted as prohibiting any law that has the effect of prohibiting an institution of higher education from offering a student health plan. Student Health Insurance Coverage, 76 Fed. Reg. at 7,769. The requirement that student health plans offered through a health insurance issuer include abortion-inducing drugs, sterilization, contraception, and related education and counseling, however, has the effect of prohibiting CUA from offering a student health insurance plan. Defendants' requirement that student health plans offered through a health insurance issuer include abortion-inducing drugs, sterilization, contraception, and related education and counseling, therefore, also violates 42 U.S.C. § 18118(c) and thus is not in accordance with law under 5 U.S.C. § 706(2)(A).

303. Plaintiffs have no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

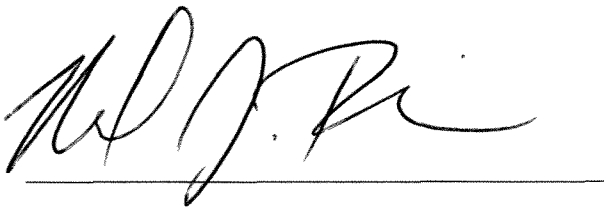
304. Plaintiffs have no adequate remedy at law.

305. Defendants failure to act in accordance with law imposes an immediate and ongoing harm on Plaintiffs that warrants relief.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under the First Amendment;
3. Enter a declaratory judgment that the U.S. Government Mandate was promulgated in violation of the APA;
4. Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against Plaintiffs;
5. Enter an order vacating the U.S. Government Mandate;
6. Enter a declaratory judgment that Defendants' requirement that student health plans include coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling violates Plaintiffs' rights under RFRA and the First Amendment; enter an injunction prohibiting the Defendants from enforcing that requirement against Plaintiffs; and enter an order vacating the requirement;
7. Award Plaintiffs attorneys' and expert fees under 42 U.S.C. § 1988; and
8. Award all other relief as the Court may deem just and proper.

Respectfully submitted, this the 21 day of May, 2012.



Stephen J. Brogan
D.C. Bar No. 939082
sjbrogan@jonesday.com
Mary Ellen Powers
D.C. Bar No. 334045
mepowers@jonesday.com
Noel J. Francisco
D.C. Bar No. 464752
njfrancisco@jonesday.com
Gregory M. Shumaker
D.C. Bar No. 416537
gshumaker@jonesday.com
Michael A. Carvin
D.C. Bar No. 366784
macarvin@jonesday.com
Eric S. Dreiband*
esdreiband@jonesday.com
D.C. Bar No. 497285
David T. Raimer*
D.C. Bar No. 994558
dtraimer@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Paul M. Pohl**
pmpohl@jonesday.com
JONES DAY
500 Grant Street – Suite 4500
Pittsburgh, PA 15219
(412) 391-3939

Counsel for Plaintiffs

**Application for Admission Pending*
***Motion for Admission Pro Hac Vice Forthcoming*

EXHIBIT C

Office of the General Counsel
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

May 15, 2012

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Advance Notice of Proposed Rulemaking on Preventive Services
File Code No. CMS-9968-ANPRM

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Advance Notice of Proposed Rulemaking ("ANPRM") on preventive services. 77 Fed. Reg. 16501 (March 21, 2012). The ANPRM expresses the Administration's intention to propose additional regulations, in order to establish "alternative ways" of "ensuring contraceptive coverage for plan participants and beneficiaries" enrolled in plans offered by non-exempt "religious organizations" that object to such coverage while, at the same time, "accommodating such organizations." *Id*. at 16501.

Our comments make essentially six points.

First, the ANPRM does not change the inclusion of "contraceptive services" in the list of mandated preventive services.[1] This aspect of the mandate is now a

[1] We use the term "contraceptive services" as shorthand for all FDA-approved contraceptives (including drugs that can cause an abortion), sterilization procedures, and related education and counseling for women with reproductive capacity. We use the term "contraceptive mandate" or "mandate" to refer to the regulatory requirement that plans or policies cover contraceptive services. It is unclear whether the Administration is using these terms in the same way. As we have suggested in the past, and as we discuss below, the Administration should clarify what it means by these terms, particularly as it bears upon the scope of the exemption or any future "accommodation."

final rule, entirely unchanged from August 2011. As we explained in our prior comments, the mandate is not only poor public policy, but unlawful.[2]

Second, the ANPRM does not change the Administration's four-pronged exemption for "religious employers." The exemption is now a final rule, entirely unchanged from August 2011. As we explained in our prior comments, the exemption is unprecedented in federal law, improperly narrow, and unlawful.

Third, many religious and other stakeholders with a conscientious objection to some or all of the mandated coverage are ineligible for either the exemption or the temporary enforcement safe harbor. These stakeholders will be subject to the mandate for plan or policy years beginning on or after August 1, 2012. The ANPRM does not even acknowledge this problem, least of all propose or allow for possible solutions to it. As a result, absent a change of course by the Administration or a court order granting relief,[3] individuals, insurers, for-profit employers, and many other stakeholders with a moral or religious objection to contraceptive coverage will be required in the next few months either to drop out of the health insurance marketplace, potentially triggering crippling penalties, or to provide coverage that violates their deeply-held convictions. As discussed in our previous comments, we believe that the contraceptive mandate violates the religious and conscience rights of these stakeholders and is unlawful.

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[2] Our August 2011 and September 2010 comments, both of which address the issue of contraceptives and conscience, are available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf. We incorporate them herein by reference.

[3] At least eleven lawsuits have been filed to date challenging the contraceptive mandate and the unduly narrow religious exemption. *See, e.g.*, *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989 (D.D.C.) (filed Nov. 10, 2011); *Colorado Christian University v. Sebelius*, No. 11-cv-03350-CMA-BNB (D. Colo.) (filed Dec. 21, 2011); *Eternal Word Television Network v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala.) (filed Feb. 9, 2012); *Priests for Life v. Sebelius*, No. 12-cv-753 (E.D.N.Y.) (filed Feb. 15, 2012); *Louisiana College v. Sebelius*, No. 1:12-cv-00463 (W.D. La.) (filed Feb. 18, 2012); *Ave Maria University v. Sebelius*, No. 2:12-cv-88-FRM-29SPC (M.D. Fla.) (filed Feb. 21, 2012); *Geneva College v. Sebelius*, No. 2:2012-cv-00207 (W.D. Pa.) (filed Feb. 21, 2012); *State of Nebraska v. United States Department of Health and Human Services*, No. 4:12-cv-03035 (D. Neb.) (filed Feb. 23, 2012); *O'Brien v. United States Department of Health and Human Services*, No. 4:2012-cv-00476 (E.D. Mo.) (filed Mar. 15, 2012); *Newland v. Sebelius*, No. 1:12-cv-1123 (D. Colo.) (filed Apr. 30, 2012); *Legatus v. Sebelius*, No. 2:12-cv-12061-RHC-MJH (E.D. Mich.) (filed May 7, 2012).

Fourth, the Administration has invited public comment on (but has not yet formally proposed) what it describes as a further "accommodation" for non-exempt "religious organizations." Given the stated intent to accommodate only "religious" organizations, it is evident that whatever this further "accommodation" will or will not accomplish, secular stakeholders will be excluded from it. Even a nonprofit organization that is eligible for a one-year delay in enforcement under the temporary enforcement safe harbor will receive no "accommodation" if it is not also a "religious organization." We believe that the contraceptive mandate violates the religious and conscience rights of these stakeholders as well and is unlawful.

Fifth, however the term "religious organization" is ultimately defined, the Administration's suggested "accommodation" for such organizations, as described in the ANPRM, will not relieve them from the burden on religious liberty that the mandate creates. Under the ANPRM, the central problem for insured plans remains: conscientiously-objecting non-exempt religious organizations will still be required to provide plans that serve as a conduit for contraceptives and sterilization procedures to their own employees, and their premiums will help pay for those items. For self-insured plans, the Administration has invited comment on a number of different approaches. As a practical or moral matter, none of them will solve the problem that the mandate creates for non-exempt religious organizations with a conscientious objection to contraceptive coverage.

Sixth, the ANPRM raises a variety of new questions regarding the exemption and "accommodation," such as whether an employer must be independently exempt for its employees to participate in an exempt plan; whether religious objections to some (but not all) contraceptives should be accommodated; and whether the past practice of offering contraceptive coverage should preclude accommodation. In each case, we urge resolution of these questions in favor of more, not less, religious freedom.

On balance, while the ANPRM may create an appearance of moderation and compromise, it does not actually offer any change in the Administration's earlier stated positions on mandated contraceptive coverage, which are now enshrined in a final rule. The simplest and best solution to the various problems described above is the one the Administration so far has declined to adopt: to rescind the mandate. Failing this, the Administration should provide an exemption that protects all stakeholders with a religious or moral objection, in keeping with the consistent language and longstanding tradition of federal conscience protection law. Either

rescission or exemption would allow stakeholders that object to offering or purchasing contraceptive coverage to decline to do so, while allowing those who do not object to offering or purchasing such coverage to do so.

We are convinced that no public good is served by this unprecedented nationwide mandate, and that forcing individual and institutional stakeholders to sponsor and subsidize an otherwise widely available product over their religious and moral objections serves no legitimate, let alone compelling, government interest. Indeed, as stated in our August 2011 comments, such coercion is a serious violation of federal statutory and constitutional guarantees of religious liberty and rights of conscience. Absent prompt congressional attention to this infringement on fundamental civil liberties, we believe the only remaining recourse, in light of the approaching regulatory deadlines, is in the courts.

1. The Mandate Is Finalized and Remains Unchanged.

The ANPRM makes no change in the underlying contraceptive mandate. For reasons set forth more fully in our August 2011 comments, we continue to believe that the mandate should be rescinded.

First, contraceptives and sterilization procedures are not "health" services, and they do not "prevent" disease. Instead they disrupt the healthy functioning of the human reproductive system. Furthermore, various contraceptives are associated with adverse health outcomes, including an increased risk of such serious conditions as breast cancer, cardiac failure, and stroke. The contraceptive mandate is therefore at war with the statutory provision on which it purports to be based, a provision that seeks to ensure coverage of health services that prevent disease. Indeed, insofar as contraceptives are linked to an increased risk of the very diseases whose prevention is sought in the regulation, the regulation is at war with itself. *See* our August 2011 comments at 3-13; *see also* our comments of September 2010, for a further discussion of these issues.

Second, the mandate represents an unprecedented violation of religious liberty by the federal government. Specifically, as applied to individuals and organizations with a religious objection to some or all contraceptive coverage, we continue to believe that the mandate violates the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and the Administrative Procedure Act ("APA"). In addition, insofar as it requires coverage of drugs that can operate to

cause an abortion, the mandate violates the Weldon amendment, certain provisions of the Patient Protection and Affordable Care Act ("PPACA" or "the Act") dealing with abortion and non-preemption, and the Administration's own public assurances, both before and after enactment of PPACA, that the Act does not require coverage of abortion. These points are discussed at length in our August 2011 comments.

The ANPRM makes no change in the mandate, and hence does not address or resolve any of these problems.

2. The Four-Part Exemption Is Finalized and Remains Unchanged.

The ANPRM does not change the Administration's extremely narrow four-part test for deciding which organizations are "religious enough" to warrant an exemption from the mandate.[4] Hence, the problems that we have described at length with respect to the exemption remain. See our August 2011 comments at 13-22.

The following points should be underscored.

First, despite requests for clarification, the Administration has failed publicly to clarify whether the four-pronged exemption for religious employers is intended to apply only to contraceptives, or also to sterilization and to education and counseling regarding contraceptives and sterilization. The ANPRM states that the exemption "is intended solely for purposes of the contraceptive coverage requirement …." 77 Fed. Reg. at 16502 (original emphasis). It remains unclear, however, whether the Administration is using the term "contraceptive coverage" here as shorthand for contraceptives, sterilization, and related education and

[4] Under the exemption, a "religious employer" is one that meets all four of the following criteria: (a) its purpose is the inculcation of religious values, (b) it primarily hires persons who share the organization's religious tenets, (c) it primarily serves persons who share those tenets, and (d) it is a nonprofit organization of a type described in sections 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of a religious order. In our earlier comments, we asked the Administration why the exemption included a reference to section 6033(a)(1), but no clarification has been forthcoming.

counseling, as the HRSA chart of preventive services for women would seem to suggest; or instead to emphasize that the exemption applies only to contraceptives, and not to sterilization, or education and counseling regarding contraceptives or sterilization. The ANPRM fails to resolve this ambiguity. *See id*. at 16504 (stating in circular fashion that "contraceptive coverage" means "contraceptive coverage required under the HRSA guidelines"). If the exemption and any future "accommodation" only apply to contraceptives, then the mandate is all the more objectionable, because it would require even "exempt" religious employers to cover these other items. In our August 2011 comments, we urged the Administration to clarify its intent on this point. We continue to urge clarification.

Second, the exemption provides no protection for any individual, insurer, or secular organization with a moral or religious objection to contraceptive coverage, and it protects only some religious organizations while leaving a large number of conscientiously opposed religious organizations subject to the mandate.[5]

Indeed, for individuals with a conscientious objection to contraceptive coverage, the ANPRM actually exacerbates the problem. In its February 10 rule, the Administration proposed to have insurers "offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added).[6] The ANPRM, however, no longer uses the language of "offer," which allows for the possibility of

[5] The ANPRM does not propose an exemption or accommodation for issuers or third-party administrators, but asks "whether an exemption or accommodation should be made" for "certain religious health insurance issuers or third-party administrators," and seeks information "about the number and location of such issuers and administrators…." 77 Fed. Reg. at 16507. The "number and location" of religiously-affiliated issuers and third-party administrators, whatever that turns out to be, is not an argument against providing those issuers and administrators with an exemption. The protection of conscience is all the more important for those in the minority. No one (religiously-affiliated or not) with a moral or religious objection to contraceptive coverage should be required to offer or provide it.

[6] President Obama reinforced this message on February 10, stating: "Every woman should be in control of the decisions that affect her own health. Period. … [I]f a woman's employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company—not the hospital, not the charity—will be required to reach out and offer the woman contraceptive care free of charge, without co-pays and without hassles." Remarks of the President on Preventive Care (Feb. 10, 2012) (available at www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care) (emphasis added).

acceptance or rejection. Instead, HHS would now require insurers or third-party administrators simply to "provide this coverage automatically to participants and beneficiaries covered under the organization's plan (for example, without an application or enrollment process), and protect the privacy of participants and beneficiaries covered under the plan who use contraceptive services." 77 Fed. Reg. at 16505 (emphases added).[7]

As a result, women will have less freedom, not more. They will not have the freedom to decline such coverage. They will not have the freedom to keep their own minor children from being offered "free" and "private" contraceptive services and related "education and counseling" without their consent. Thus, the mandate now poses a threat to the rights not only of employers, religious and secular, but of parents as well. It is even proposed that this intervention into the family may be delegated to "private, non-profit organization[s]" (77 Fed. Reg. at 16507), potentially including groups such as Planned Parenthood, which may volunteer for the task.[8]

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[7] This shift from optional to automatic coverage also contradicts the Secretary's own public comments regarding the proposed "accommodation." *See, e.g.*, "Sebelius Explains White House's Contraception Compromise," *PBS News Hour* (Feb. 10, 2012) (describing purpose of mandate as "mak[ing] sure that millions of women, regardless of who their employer is, can make their own health decisions…. So, in this case, again, the insurance company would be reaching out to employees, making it clear that it is their choice whether to access contraceptive benefits.") (emphasis added) (available at www.pbs.org/newshour/bb/politics/jan-june12/contraception_02-10.html).

[8] This circumvention of parental authority is no mere oversight. The Guttmacher Institute, Planned Parenthood's former research affiliate, has long proposed that any health care reform legislation should ensure that "the full range of reproductive health services," including all contraceptive methods, be provided "confidentially to all individuals covered," including dependents. Guttmacher's position paper emphasized that such coverage should be provided without "copayments and deductibles" not only to remove a cost barrier, but also "to facilitate the receipt of confidential care" (that is, minors can more easily access the services without parents' knowledge or consent if they do not even need to have cash for the copayment). *See* Guttmacher Institute, "Implications for Health Care Reform," in *Uneven & Unequal: Insurance Coverage and Reproductive Health Services* (Jan. 1995) (available at http://findarticles.com/p/articles/mi_7355/is_1995_Jan/ai_n32003787/). In these respects, the Administration seems to be following a script written long ago by groups strongly opposed both to our religious teaching and to parents' right to guide their children on sensitive issues of sexuality and reproduction.

Third, while the Administration's claims (77 Fed. Reg. at 16502) that the 4-part definition of "religious employer" is not "intended to set a precedent for any other purpose,"[9] the government has no power to prevent the definition from being used again in future regulations or legislation. In any event, the disclaimer raises a question: If the Administration does not consider the definition suitable as a model for future regulation or legislation, then one wonders why it considers the definition suitable for a nationwide contraceptive mandate.

A fourth and related point is this: Even if the definition of "religious employer" were never used elsewhere, it remains illegitimate and unconstitutional now. As we discussed at length in our August 2011 comments, the definition creates an impermissible gerrymander in which some religious organizations are deemed "religious enough" for the exemption, while others are not. It is patently wrong and unlawful, in our view, to claim that an organization is not "religious" if its purpose extends beyond inculcation of religious values, or if it substantially hires or serves persons other than its co-religionists, or if it fails to fit within Internal Revenue Code provisions having an entirely different purpose. Reduced to its simplest terms, an organization is "religious," in the Administration's view, only if it is insular, while organizations with a missionary or public outreach are deemed insufficiently "religious" to qualify for the exemption. We are free to worship our God, but not to serve our neighbor. As we noted previously, under this criterion, even Jesus would be deemed insufficiently "religious" to qualify for the exemption because he fed and healed people of many different beliefs. As discussed more fully in our August 2011 comments, neither this nor any other part of the exemption bears a reasonable relationship to any legitimate government objective.

The ANPRM does not address or resolve any of these problems.

3. The Safe Harbor Remains Unchanged and Provides No Relief to Several Categories of Objecting Stakeholders.

The Administration is offering what it characterizes as a "temporary enforcement safe harbor" to delay enforcement of the contraceptive mandate—but

[9] *See also* 77 Fed. Reg. at 16504 (making a similar claim with respect to any definition of non-exempt "religious organizations" adopted in the future for such organizations).

only temporarily, and only for non-exempt nonprofit organizations that meet specified criteria.

The ANPRM does not expand or change in any way the safe harbor or the criteria of eligibility established by the February 10 final rule. As a result, non-grandfathered, non-exempt stakeholders that do not qualify for the safe harbor will be subject to the mandate for plan or policy years beginning on or after August 1, 2012. In short, the ANPRM does nothing at all to change the imminent impact that the mandate will have on the religious liberty and conscience rights of these stakeholders. More specifically, individuals, insurers, for-profit employers, nondenominational nonprofit employers with a pro-life stance that have a moral objection to abortion, and many others with a moral or religious objection to some or all of the mandated items, will face a choice: They can drop out of the health insurance marketplace altogether, or offer or provide the objectionable coverage.

For those who do not qualify, the safe harbor provides no relief. And for those who do qualify, the safe harbor provides only a temporary reprieve. We continue to believe, as explained in our August 2011 comments, that the contraceptive mandate violates the religious and conscience rights of these stakeholders and is unlawful.

4. The "Accommodation" Described in the ANPRM Provides No Relief to Stakeholders That Fail to Qualify as "Religious Organizations."

The ANPRM states the Administration intends, at some point in the future, to propose and finalize an additional "accommodation" for non-exempt "religious organizations." It is evident that whatever this further "accommodation" will or will not accomplish, and however the term "religious organizations" is defined for this purpose, the Administration's stated intent is to exclude secular stakeholders with a religious or moral objection to contraceptive coverage. A fraternal organization, for example, devoted to the teachings of a particular religion, even though not formally associated with a church, would be ineligible for the "accommodation." Thus, a nonprofit organization that happens to be eligible for

the one-year delay in enforcement under the safe harbor will receive no "accommodation" if it is not also a "religious organization."[10]

For reasons set forth more fully in our August 2011 comments, we continue to believe that the contraceptive mandate violates the religious and conscience rights of these stakeholders and is unlawful.

5. The "Accommodation" Described in the ANPRM Does Not Meaningfully Accommodate Even Those Stakeholders That Qualify for It.

However the term "religious organization" is ultimately defined, the Administration's proposed "accommodation" as defined in the ANPRM will not actually relieve those "religious organizations" of the burden on religious liberty that the mandate creates.

Under the ANPRM, the central problem for insured plans remains: Conscientiously-objecting non-exempt "religious organizations" will still be required to provide plans that channel contraceptives and sterilization procedures to their employees; and those organizations (and their employees) will still be required to pay premiums that help pay for those items. The use of premiums as the source of funding is evident in the ANPRM, which states as follows:

> Issuers would pay for contraceptive coverage from the estimated savings from the elimination of the need to pay for services that would otherwise be used if contraceptives were not covered. Typically,

[10] The ANPRM says that the future accommodation for "religious organizations" will apply to "some *or all* organizations that qualify for the temporary enforcement safe harbor, and possibly to additional organizations." 77 Fed. Reg. at 16504 (emphasis added). Unless all "nonprofit organizations" are "religious organizations," which is plainly not the case, then a future accommodation for religious organizations will not protect all nonprofit organizations, or even the entire subset of nonprofit organizations that satisfy the specified conditions for the safe harbor. Those conditions include having a religious objection. There is no requirement that the entity seeking safe harbor protection be a religious organization, but that is stated as a requirement for any entity seeking the future accommodation. *See, e.g.*, 77 Fed. Reg. at 16504 (inviting comment on which "religious organizations" should be eligible for the future "accommodation"); *id.* at 16505 (stating that the future accommodation is intended to ensure contraceptive coverage while protecting a nonprofit "religious organization" that objects to such coverage on religious grounds).

> issuers build into their premiums projected costs and savings from a set of services. Premiums from multiple organizations are pooled in a "book of business" from which the issuer pays for services. To the extent that contraceptive coverage lowers the draw-down for other health care services from the pool, funds would be available to pay for contraceptive services without an additional premium charged to the religious organization or plan participants or beneficiaries.

77 Fed. Reg. at 16506 (emphasis added).[11]

This passage makes plain that there is only one funding stream from which contraceptive services can be paid: premiums. It necessarily follows that the objecting employer is ultimately paying for the objectionable services. The creation of a single account into which premiums from multiple organizations are paid does not solve the problem if objecting employers and employees are still paying into that account.

The question arises, in the case of insured plans, whether the insurer could be required by the government to create two accounts – one into which it places the premiums of non-objecting organizations, and the other into which it places the premiums of conscientiously-objecting organizations. Then the former, but not the latter, would be used to pay for contraceptive services. There are at least three problems with such a proposal.

First, there is no statutory authority for the federal government to require an insurer to use premium dollars paid into a health plan to subsidize services for persons who are not enrolled in that plan.

Second, the segregation of funds would be ineffective, because claims for contraceptives and sterilization procedures must still be paid—and paid by an employer that cannot achieve any alleged cost savings from reductions in births

[11] The ANPRM states that "contraceptive coverage would not be included in the plan document, contract, or premium charged to the religious organization," (77 Fed. Reg. at 16505) (emphasis added), but when it comes to explaining what funds will be used to pay for contraceptives and sterilization, the ANPRM can say only that it will come from premiums (*id*. at 16506). And the alleged cost savings from reduced use of "other health care services" are of course from averted live births, which are entirely paid for by the employer's and employee's premium dollars. It is these premium dollars that will become "available" to pay for contraceptive services instead.

among its own enrollees, because these payments are for contraceptive and sterilization services for non-enrollees. Unless the non-objecting employer is to be forced to raise its own premiums, those expenditures must be made up from premium dollars paid by the objecting employer—regardless of whether contraception and sterilization are listed in its plan summary or other plan documents. In short, having an insurer pay for contraceptives does not resolve the problem for plan sponsors who object to contraceptive coverage, because the plan premiums end up, over the sponsor's objection, paying for contraceptives and sterilizations anyway.

Third, because the insurer is enabled to pay for contraceptives only because the objecting employer has purchased a plan from the insurer, that enabling decision of the employer still facilitates the purchase of contraceptives. So even if the purchaser's premiums were somehow segregated, it would not resolve the moral problem. In effect, an employer's offering any health plan will operate as a "ticket," so to speak, entitling the bearer to reimbursement for the purchase of contraceptives to which she would not otherwise be entitled.

One might ask how this is any different from paying salary to an employee who then uses that salary toward purposes the employer believes to be intrinsically evil. The difference is that the employee's salary is not earmarked for the purchase of anything—once paid, those funds simply belong to the employee. Health care premiums, by contrast, are earmarked specifically for the purchase of health care. So if contraceptives and sterilization procedures are made available by virtue of the plan (even if not expressly listed in the plan summary), then the premiums have gone toward a plan that facilitated their purchase, even if those exact premium dollars were not used to purchase contraceptives.

Finally, the various intricate proposals to insulate religious organizations from any involvement in a major aspect of their own health plans miss an important point. One can suppress religion not only by making conscientious objectors actively cooperate with what they see as evil, but also by depriving them of the right (a right that others continue to exercise) to support what they see as good. Those who favor contraceptive coverage will retain the right they have always had as employers to provide a health plan consistent with their values. Objecting religious organizations will lose that right, because any plan they offer will be amended by others so that the practical outcome for employees is exactly the same as if the organization had no such objection. Those employees who share

the objecting organization's religious tenets are similarly deprived of the freedom to choose a work-place organized according to their own values, and are forced to accept coverage to which they have their own moral and religious objection. In general, protecting a religious organization from being forced to act immorally, by depriving it of the ability to act at all, is no way to serve religious freedom.

For self-insured plans, the ANPRM invites comment on several different approaches involving third-party administrators ("TPAs") or other third parties, including whether:

- a TPA could pay for contraceptives from "drug rebates, service fees, disease management program fees, or other sources" (77 Fed. Reg. at 16507);

- a TPA might receive funds "from a private, non-profit organization to pay for contraceptives for the participants and beneficiaries covered under the plan of a religious organization" (*id.*);

- a TPA could "receive a credit or rebate on the amount that it pays under the reinsurance program under section 1341 [of PPACA] in order to fund contraceptive coverage for participants and beneficiaries covered under the plan of a religious organization that sponsors a self-insured plan" (*id.*);

- the federal government could "incentivize or require one or more of the insurers offering a multi-State plan also to provide, at no additional charge, contraceptive coverage to participants and beneficiaries covered under religious organizations' self-insured plans" (*id.*);

- a tax-deferred account could be used for payment of contraceptives (*id.*).

In general, these approaches continue to pose a moral problem because, in each case, the plan itself continues to function as either a source of funding for, or a conduit facilitating access to, items and procedures to which the employer has a moral and religious objection.

To take one example, a drug rebate is called a "rebate" because the drug manufacturer returns to the TPA (or perhaps, more accurately, credits to the TPA) some portion of the funds which the TPA itself has paid for drugs offered under the plan. But the TPA obtained those funds from the objecting employer's premiums. In any event, even if premium dollars of an objecting employer did not actually pay for contraceptives, the plan itself would be functioning as a gateway to such payments. Thus, as described earlier in the context of insured plans,[12] the self-insured plan would serve as a kind of "ticket" for "free" contraceptives. It would be morally objectionable for an employer to provide anyone such a "ticket," even if the ticket costs the employer nothing to provide. Simply put, a stakeholder cannot avoid moral responsibility for an act by shifting the responsibility to another. If it is immoral to do a particular act, then it is immoral to arrange for another to do the same act.

At bottom, the Administration's proposal for a future "accommodation" through rulemaking cannot succeed under the terms that the Administration has set for itself, because it is trying to serve three goals that are inconsistent with each other:

1. To ensure that contraceptive coverage is provided to every woman, "no matter where she works," to use the President's words.

2. To make that coverage "free" in the sense that it is supported only by "the estimated savings from the elimination of the need to pay for services that would otherwise be used if contraceptives were not covered" (77 Fed. Reg. at 16506)—that is, by the premium dollars that otherwise would have had to pay for services such as childbirth and well-baby care.[13]

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[12] Because the approach the ANPRM has spelled out for insured plans also does not solve the moral problem, it is no consolation to be told that "nothing precludes a religious organization from switching from a self-insured plan to an insured plan such that a health insurance issuer rather than a [TPA] is responsible for providing the contraceptive coverage." 77 Fed. Reg. at 16507.

[13] We cite this as a stated goal of the Administration, not as a likely practical reality, as many studies have detected little or no reduction in unintended pregnancies from programs to increase access to contraceptives. *See* page 3 of our September 2010 comment letter, cited in note 2 *supra*.

> 3. To make the coverage "separate" in the sense that it does not involve the employer with a religious objection, or that employer's financial resources, so as to respect religious liberty.

In practice these goals cannot be reconciled.[14] For example, if, to serve Goal 1, contraceptive coverage is to be provided by others "automatically" to every employee of an employer with a religious objection, then Goal 3 is necessarily undermined: The employer will know that offering any health coverage to employees at all will be a necessary and sufficient cause for each employee to receive the objectionable coverage. That coverage will be added "automatically" as soon as the decision is made to provide overall coverage.

Likewise, Goals 2 and 3 cannot be served together. To serve Goal 2, the costs of contraceptives and sterilization must be paid by the premium dollars that otherwise would have supported childbirth. But those are the premium dollars of the objecting employer and its employees, so their financial resources will be directly involved. It is meaningless in this context to point out that insurers essentially "pool" risks among their clients. Other stakeholders without a religious objection already cover contraception and sterilization. If the intent is to make those other stakeholders pay the total cost of the coverage to which the religious employer objects, those others will have to increase their premium payments, because they cannot recoup that expenditure through any reduction of births among their own enrollees. But if that is not the intent, then the religious employer's premium payments must still be used to cover part or all of the cost.[15]

The Administration's assumption under Goal 2 is that the employees of objecting employers were not already using contraceptives. If, for example, they

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[14] Obviously, we do not believe that the first two goals are laudable. Our point is simply that the three goals are in conflict with each other.

[15] In this regard, when Congress, in enacting PPACA, tried to ensure that abortion coverage in health plans receiving federal tax credit subsidies would be "separate" from the part of the plan that receives federal funds, it provided that the plan "may *not* take into account any cost reduction estimated to result from such services, including prenatal care, delivery, or postnatal care." PPACA, § 1303(b)(2)(D)(ii)(I), codified at 42 U.S.C. § 18023(b)(2)(D)(ii)(I). We have criticized this approach as completely inadequate, as it still authorizes federal subsidies for private health plans that include elective abortions, contrary to the policy reflected in other federal laws. But even that inadequate separation is absent here. To make the coverage "free," the ANPRM provides that it will not be "separate" even by PPACA's own standard.

already were paying for contraceptives with their own financial resources, there would be no reduction in births from making those contraceptives "free." (The only thing to which this would "increase access" is whatever the employees will now purchase with the money they no longer spend on contraception—and that could be almost anything.) Yet in earlier rulemaking, the Administration tried to justify its narrow and discriminatory definition of an exempt "religious employer" by arguing that any broader class of religious organizations probably has many employees who have no objection to contraception and so will not be seriously impacted by the mandate. 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

The Administration faces a dilemma on this point. Is it trying to change these employees' reproductive behavior, or not? That is, does it assume that its policy will chiefly influence employees of religious employers to increase their use of contraception by removing perceived cost barriers, or that it will merely reduce the out-of-pocket cost of contraception for employees who already use it? If the former, it intrudes into the right of employees and their families to take account of the teaching of their faith without undue influence from government. If the latter, the policy may produce no "savings" that can be applied toward helping to offset the costs of contraceptive coverage, because it is chiefly being applied to people who already accept and use contraceptives anyway.[16] In the very cases where the contraceptive coverage is "free"—that is, where its costs are offset by "savings" in other areas—the Administration would achieve this goal by undermining a far more important freedom.

Finally, Goal 1 may be served by making contraceptive coverage "automatic" for all employees of objecting religious organizations and their

[16] Of course the policy's supporters sometimes argue that "free" contraceptive coverage will encourage many women to change their contraceptive method, from cheaper methods to more expensive but more effective methods such as injectable and implantable drugs. But no one has produced evidence that the marginally lower "contraceptive failure" rates of such methods will more than compensate for their greater upfront cost, which could be an order of magnitude greater than the cost of the ordinary oral contraceptive. *See* Cory L. Richards of the Guttmacher Institute, "Letter to the Editor: Cost a barrier to contraceptives' effectiveness," *The Washington Times* (Mar. 30, 2012) (available at www.washingtontimes.com/news/2012/mar/30/cost-a-barrier-to-contraceptives-effectiveness/). And these long-lasting drugs are favored by population control groups precisely because their effectiveness relies less on a woman's free choices—in the euphemism preferred by these groups, their effectiveness is said to be "independent of user motivation." Such an agenda is hardly consistent with the claim that one is advancing women's autonomy.

dependents, but that is achieved only by abandoning any pretense of advancing Goal 3, that of respecting the religious liberty of either employers or employees (or the parental rights of the latter). If the Administration really believes that the great majority of these employees want contraceptive coverage but have been held back only by the objections of their employer, why is its goal not served by making the coverage voluntary? Instead, it is contradicting its earlier statement that the coverage would be an "offer" for those "who desire it." *Id*. at 8728.

In short, the various alternatives proposed in the ANPRM are unconvincing because the Administration is trying to achieve incompatible goals. The government cannot remove all costs of the coverage to the employee without forcing other premium-payers to bear some of those costs. The government cannot conscript religious people and groups into a campaign to achieve a goal that the government knows full well they will find morally objectionable, while claiming to be committed to religious liberty. The government cannot suggest there is no meaningful difference between those who are exempt and those who are "accommodated," and yet treat the distinction between the two as indispensable by categorically refusing to extend the exemption. These are insoluble dilemmas of the government's own creation.

As we have urged previously, the only complete solution to this set of problems is to rescind the mandate.[17] Failing that rescission, the Administration should adopt an exemption that protects the consciences of all stakeholders with a religious or moral objection to the mandate, consistent with the longstanding federal tradition of strong religious accommodation.[18] Although either of these

[17] Even if the various approaches suggested for self-insured plans were to resolve the moral problem—which has not been demonstrated, and which appears impossible within the constraints established by the final rule—a number of technical legal questions would remain. For example, there is a question whether the government has the authority to require insurers offering a plan, such as a multi-state plan, to provide contraceptive coverage to persons not actually enrolled in the plan. Requiring a plan to provide abortifacient drugs, in particular, would violate the Weldon amendment, and requiring multi-state plans to provide such contraceptives would also violate PPACA itself, which ensures that at least one multi-state plan will not provide coverage of elective abortions. PPACA, § 1334(a)(6), codified at 18 U.S.C. § 18054(a)(6).

[18] The operative language of the bi-partisan Respect for Rights of Conscience Act, H.R. 1179, S. 1467, is an example of such an exemption. By assuring the right of all stakeholders to participate in the health insurance process in a manner that is "consistent with" or not "contrary to the[ir]… religious beliefs or moral convictions," the Act draws from a long string of federal

changes would appear to require the re-opening of the final rule, and so to fall beyond the scope of the ANPRM, we continue to urge them in the strongest possible terms.

6. The ANPRM Raises Various Questions That Should Be Resolved in Favor of More Religious Freedom, Not Less.

Some of the statements in the ANPRM warrant separate comment.

A. An ambiguous hypothetical should be clarified. In discussing the application of the 4-part exemption for "religious employers," the ANPRM uses the following illustration:

> For example, a Catholic elementary school may be a distinct common-law employer from the Catholic diocese with which it is affiliated. If the school's employees receive health coverage through a plan established or maintained by the school, and the school meets the definition of a religious employer in the final regulations, then the religious employer exemption applies. If, instead, the same school provides health coverage for its employees through the same plan under which the diocese provides health coverage for its employees, and the diocese is exempt from the requirement to cover contraceptive services, then neither the diocese nor the school is required to offer contraceptive coverage to its employees.

77 Fed. Reg. at 16502 (emphasis added).

We have two comments about this example. First, the unstated problem with the first part of the hypothetical is that it begs the question because many, if not most, religious schools will not meet the 4-pronged definition. Many religious schools do not qualify as a church, convention or association of churches, or integrated auxiliary. Many do not have "the inculcation of religious values" as their purpose (if, as it appears, "the purpose" of the organization means its sole purpose). 76 Fed. Reg. at 46626 (emphasis added). In addition, many religious

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conscience protection statutes dating back to 1973. See USCCB Secretariat of Pro-Life Activities, "Current Federal Laws Protecting Conscience Rights" (2012) (available at www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf).

schools do not primarily hire and serve those who share their religious tenets. Indeed, many Catholic schools that are models of outstanding educational service to inner city children enroll vastly more non-Catholic than Catholic students.

Second, the contrasting circumstance described in the example is ambiguous. When the Administration uses the phrase "the same school" (emphasis added), does it mean a school that independently qualifies for the 4-part exemption? If the answer is yes, then the example solves nothing, because then the only schools that can decline contraceptive coverage are precisely those that were independently exempt from the mandate anyway. If the answer is no, and the Administration agrees that the school can offer its employees enrollment in the health plan of an exempt organization that excludes contraceptive coverage, then why can't the school offer its own plan excluding contraceptive coverage? Or, put another way, what legitimate government interest is served by forbidding the school to do directly what it is permitted to do indirectly?

B. Diversity of religious objections should be respected. The ANPRM requests comment on:

> whether the definition of religious organization should include religious organizations that provide coverage of some, but not all, FDA-approved contraceptives consistent with their religious beliefs. That is, under the forthcoming proposed regulations, the Departments could allow religious organizations to continue to provide coverage for some forms of contraceptives without cost sharing, and allow them to qualify for the accommodation with respect to other forms of contraceptives consistent with their religious beliefs.

77 Fed. Reg. at 16505. We believe that the conscience rights of all stakeholders, including those with religious or moral objections only to certain types of contraceptive coverage, should be recognized. For example, some organizations may object only to abortifacient drugs, or only to the use of certain drugs for certain purposes. The best way to avoid a conflict between the mandate and the conscience rights of any and all of these organizations is to rescind the mandate.

C. Past practice should not preclude accommodation. The Administration has already conditioned the availability of certain rights, as in the case of the temporary enforcement safe harbor, upon an organization's past non-coverage of

contraceptive services. In our view, neither the safe harbor, nor any meaningful accommodation, should exclude organizations that have a sincerely-held religious objection to contraceptive coverage. That includes organizations that have provided such coverage in the past, but perhaps did so mistakenly or unknowingly, and organizations that have newly considered the question and concluded that they can no longer, in conscience, provide such coverage. Indeed, as this issue has gained publicity, it would not be unusual for organizations newly to discover, much to their dismay, that they had mistakenly or unknowingly allowed their insurer or third-party administrator to provide coverage for items to which they had a moral or religious objection. Such organizations should not be precluded from correcting that error.

Conclusion

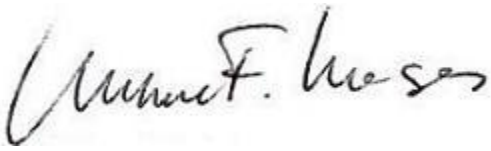
The final rule continues to keep in place a regulation that defines as "preventive health care" drugs, devices, and procedures that render a woman temporarily or permanently infertile, and that may be associated with serious adverse health outcomes. We believe that this mandate is unjust and unlawful—it is bad health policy, and because it entails an element of government coercion against conscience, it creates a religious freedom problem. These moral and legal problems are compounded by an extremely narrow exemption that intrusively and unlawfully carves up the religious community into those that are deemed "religious enough" for an exemption, and those that are not. Now, the ANPRM has invited comment on a promised future "accommodation" for some (but not all) non-exempt religious organizations—an "accommodation" that would still leave their plan premiums or plans (or both) as the source or conduit for the objectionable "services." But the use of premiums and plans for that purpose is precisely what is morally objectionable, and having an insurer or third party administer the payments does not overcome the moral objection.

In short, the mandate itself is unjust and unlawful, and it is subject to an unjustly narrow and unlawfully intrusive exemption. These aspects are unchanged from August 2011 and, under the terms of the ANPRM, will remain unchanged: They are enshrined in a final rule and unaffected by the present ANPRM, which instead promises only a future "accommodation" within the constraints of that final rule. Because of those constraints, and under the terms set out in the ANPRM, the "accommodation" cannot provide effective relief even for those few stakeholders that qualify for it.

We again urge the Administration to reconsider and to reverse course.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary
& General Counsel



Michael F. Moses
Associate General Counsel

UNITED STATES CONFERENCE OF
CATHOLIC BISHOPS
3211 Fourth Street, NE
Washington, DC 20017
(202) 541-3300

EXHIBIT D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Jane G. Belford, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Appellants' Motion for Preliminary Injunction in the above-captioned matter.

2. I serve as the Chancellor of the Archdiocese of Washington (the "Archdiocese"). I have been so employed in this capacity since 2001.

3. The Chancellor of a diocese/archdiocese is a canonical position that is appointed by a decree of the Archbishop. Chancellor is the highest ecclesiastical

or decision-making position a lay person can hold in the church. Under canon law, the principal duty of the Chancellor is to ensure that the acts and instruments of the diocese are drawn up and faithfully recorded, authenticated and safeguarded. The Chancellor's writing or signature establishes authenticity for such acts and instruments.

4. In the Archdiocese of Washington, the Chancellor has been assigned additional duties by the Archbishop. The Chancellor is designated in the bylaws of every affiliated archdiocesan corporation as one of the three corporate members of that corporation, who, by law, have certain reserved powers that are exercised over every archdiocesan affiliated corporation with regard to their mission, governance, operations, and Catholic identity.

5. Apart from these canonical roles and responsibilities, I also serve as senior legal advisor to the Archdiocese of Washington and provide advice and counsel in all aspects of the Church's civil operations. I report directly to the Archbishop of Washington, Cardinal Donald Wuerl.

6. As Chancellor, I am very familiar with the Archdiocese's mission and religious beliefs. I also am very familiar with the Archdiocese's self-insured health plan. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

7. The Archdiocese is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

8. Offering a health insurance plan that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Archdiocese.

9. The Archdiocese operates a health insurance plan, recognized under the Employee Retirement Income Security Act as a "church plan," that includes the employees of archdiocesan-affiliated ministries such as Appellants Archbishop Carroll High School, the Consortium of Catholic Academies, and Catholic Charities. Although separately incorporated, these affiliated ministries of education and social service are an integral part of the Church, participate directly in the Church's mission to minister to God's people, especially the poor and those in need, and are required to remain faithful to the Church's teachings and beliefs.

10. Consistent with Catholic teaching, the Archdiocese has historically excluded coverage for abortion, contraceptives (except when used for non-

contraceptive purposes), sterilization, and related education and counseling from its church plan.

11. Consistent with the requirements of canon law, the Archdiocese ensures that its separately incorporated ministries remain faithful to the teachings of the Catholic Church. In order to maintain this communion, the Archbishop, the Moderator of the Curia (a canonical position reserved for clergy), and the Chancellor serve as the corporate members of each of these affiliated entities and exercise certain reserved powers such as oversight and authentication of each corporation's mission, the adoption or amendment of a mission statement, and the amendment of articles of incorporation and bylaws. These powers assist the Archdiocese in fulfilling its duty before God to protect the integrity of the Catholic faith as believed and practiced within the local Church, most especially in its affiliated religious corporations.

12. The regulations at issue in this lawsuit (the "Mandate"), require employers, on pain of substantial and ruinous financial penalties, to facilitate access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through their employer health-care plan.

13. Though the Archdiocese meets the Mandate's definition of a religious employer and is thus exempt from facilitating access to the mandated products and services for its own employees, this exemption does not apply to the employees of

our affiliated ministries such as Appellants Archbishop Carroll High School, the Consortium of Catholic Academies, and Catholic Charities that participate in the Archdiocese's health plan. They are not exempt from the Mandate.

14. The Mandate thus forces the Archdiocese to either (1) sponsor a plan that will provide the employees of its non-exempt, affiliated ministries with access to "free" contraception, abortion-inducing products, sterilization, and related counseling, or (2) no longer extend its plan to these ministries, subjecting them to massive fines if they do not contract with another insurance provider that will provide the objectionable coverage. The first option forces the Archdiocese to act contrary to its sincerely-held religious beliefs. The second option compels the Archdiocese to submit to the government's interference with its structure and internal operations by accepting a construct that divides churches from their ministries.

15. Moreover, as a Catholic entity, the Archdiocese bears a particular responsibility to witness to the Church's teachings. The Archdiocese bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance.

16. Taking action that would trigger the provision of the objectionable products and services for the employees of its affiliated entities would be contrary to the Archdiocese's beliefs even in the event that the Archdiocese does not

directly fund the objectionable coverage. Of course, any use of the Archdiocese's funds to provide the mandated products and services would only exacerbate the violation of the Archdiocese's religious beliefs.

FURTHER AFFIANT SAYETH NOT.

STATE OF MARYLAND)
COUNTY OF Calvert)

Sworn to and subscribed before me
this 5th day of August 2013

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

AFFIDAVIT OF THE CATHOLIC UNIVERSITY OF AMERICA

I, Frank G. Persico, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Appellants' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the Chief of Staff and Vice President for University Relations at The Catholic University of America (hereinafter "CUA" or "University"). I have been so employed in this capacity, under different titles, since 2000 and have worked for the University in a variety of executive capacities,

including as dean of students, executive director of alumni relations, and associate dean of the university's law school since 1974.

3. As Chief of Staff and VP of University Relations, I am responsible for or aware of most aspects of the University's day-to-day operations, I coordinate the senior staff, and I personally advise the University president.

4. I am very familiar with CUA's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

5. CUA adheres to the teachings and philosophies of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

6. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the University.

7. Accordingly, though CUA provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when

used for non-contraceptive purposes), sterilization, and related education and counseling from its health plan.

8. The regulations at issue in this lawsuit (the "Mandate"), however, require the University, on pain of substantial financial penalties, to violate its sincerely held religious beliefs by facilitating access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through its employer health-care plan.

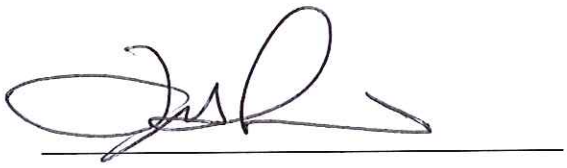
9. The so-called "accommodation" does not resolve CUA's religious objection. The Mandate, even in its revised form, forces the University to facilitate access to products and services antithetical to the Catholic faith, as CUA's employees would receive free contraceptives, sterilization, abortifacients, and related counseling only by virtue of their participation in CUA's insurance plan. In other words, under both the original and final versions of the Mandate, CUA's decision to provide a group health plan triggers the provision of contraceptive benefits to its employees in a manner contrary to the University's beliefs.

10. Moreover, as a Catholic entity, CUA bears a particular responsibility to witness to the Church's teachings. CUA bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were the University to comply with the Mandate, in

addition to impermissibly facilitating access to the objectionable products and services, CUA would commit the further offense of giving scandal by acting in a way that is inconsistent with Church teachings.

11. Compliance with the Mandate would be contrary to CUA's beliefs even in the event that the University did not directly fund the objectionable products and services. Of course, any use of CUA's funds to provide the mandated products and services would only exacerbate the violation of the University's religious beliefs.

FURTHER AFFIANT SAYETH NOT.



Frank G. Persico

STATE OF INSERT) District of Columbia
COUNTY OF INSERT)

Sworn to and subscribed before me
this 23rd day of July 2013

District of Columbia : SS
Subscribed and Sworn to before me
this 23rd day of July, 2013

Susan M. Weir, Notary Public, D.C.
My commission expires September 30, 2015

EXHIBIT F

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

AFFIDAVIT OF THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Marguerite Conley, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Appellants' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the Executive Director of The Consortium of Catholic Academies of the Archdiocese of Washington, Inc ("CCA" or the "Consortium"). I have been in that position since June 2010.

3. I am very familiar with the Consortium's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. CCA is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

5. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of the Consortium.

6. Accordingly, though CCA provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, the Consortium's employees are offered health insurance through the Archdiocese of Washington's health plan.

7. The regulations at issue in this lawsuit (the "Mandate"), however, require the Consortium, on pain of substantial financial penalties, to violate its

sincerely held religious beliefs by facilitating access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through its employer health-care plan.

8. The so-called "accommodation" does not resolve the Consortium's religious objection. The Mandate, even in its revised form, forces CCA to facilitate access to products and services antithetical to the Catholic faith, as the Consortium's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of their participation in the insurance plan offered by CCA. In other words, under both the original and final versions of the Mandate, the Consortium's decision to provide a group health plan triggers the provision of contraceptive benefits to its employees in a manner contrary to CCA's beliefs.

9. Moreover, as a Catholic entity, CCA bears a particular responsibility to witness to the Church's teachings. CCA bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were the Consortium to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, CCA would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

10. Compliance with the Mandate would be contrary to the Consortium's beliefs even in the event that CCA does not directly fund the objectionable products and services. Of course, any use of the Consortium's funds to provide the mandated products and services would only exacerbate the violation of CCA's religious beliefs.

FURTHER AFFIANT SAYETH NOT.

Marguerite Conley

STATE OF MARYLAND)
COUNTY OF CALVERT)

Sworn to and subscribed before me
this 29 th day of July, 2013

EXHIBIT G

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

AFFIDAVIT OF ARCHBISHOP CARROLL HIGH SCHOOL

I, Mary Elizabeth Blaufuss, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Appellants' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the President of at Archbishop Carroll High School. ("ACHS"). I have been so employed since October 2012. Since 2006, I had been Vice-Principal for Academic Affairs at ACHS.

3. I am very familiar with ACHS's mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. ACHS is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

5. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of ACHS.

6. Accordingly, though ACHS provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, ACHS employees are offered health insurance through the Archdiocese of Washington's health plan.

7. The regulations at issue in this lawsuit (the "Mandate"), however, require ACHS, on pain of substantial financial penalties, to violate its sincerely

held religious beliefs by facilitating access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through its employer health-care plan.

8. The so-called "accommodation" does not resolve ACHS's religious objection. The Mandate, even in its revised form, forces ACHS to facilitate access to products and services antithetical to the Catholic faith, as ACHS's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of their participation in the insurance plan offered by ACHS. In other words, under both the original and final versions of the Mandate, ACHS's decision to provide a group health plan triggers the provision of contraceptive benefits to its employees in a manner contrary to ACHS's beliefs.

9. Moreover, as a Catholic entity, ACHS bears a particular responsibility to witness to the Church's teachings. ACHS bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were ACHS to comply with the Mandate, in addition to impermissibly facilitating access to the objectionable products and services, ACHS would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

10. Compliance with the Mandate would be contrary to ACHS's beliefs even in the event that ACHS does not directly fund the objectionable products and

services. Of course, any use of ACHS's funds to provide the mandated products and services would only exacerbate the violation of ACHS's religious beliefs.

FURTHER AFFIANT SAYETH NOT.

Mary Elizabeth Blaufuss

STATE OF Maryland)
COUNTY OF Anne Arundel)

Sworn to and subscribed before me
this 29 th day of July 2013

My commission expire on 10/17/2016

EXHIBIT H

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,

Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,

Appellees.

Case No. 13-5091

AFFIDAVIT OF CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON

I, Rev. Msgr. John Enzler, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Appellants' Motion for Preliminary Injunction in the above-captioned matter.

2. I am employed as the President and CEO at Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). I have been so employed since July 2011.

3. I am very familiar with Catholic Charities' mission, religious beliefs, and health insurance policy. The facts set forth herein are based upon my personal knowledge and information available to me, and if I were called upon to testify to them, I could and would competently do so.

4. Catholic Charities is part of the Roman Catholic Church. The Church teaches that life begins at the moment of conception, that sexual union should be reserved to committed marital relationships in which the husband and wife are open to the transmission of life, and, therefore, that artificial interference with life and conception are immoral.

5. Offering a health insurance policy that provides coverage for or facilitates access to abortion-inducing products, contraceptives, sterilization, and related education and counseling is thus inconsistent with the core moral and religious beliefs of Catholic Charities.

6. Accordingly, though Catholic Charities' provides health insurance to its employees, it has historically excluded coverage for abortion, contraceptives (except when used for non-contraceptive purposes), sterilization, and related education and counseling from its health plan. Currently, Catholic Charities' employees are offered health insurance through the Archdiocese of Washington's health plan.

7. The regulations at issue in this lawsuit (the "Mandate"), however, require Catholic Charities, on pain of substantial financial penalties, to violate its sincerely held religious beliefs by facilitating access to abortion-inducing products, artificial contraception, medical sterilization procedures, and related counseling through its employer health-care plan.

8. The so-called "accommodation" does not resolve Catholic Charities' religious objection. The Mandate, even in its revised form, forces Catholic Charities to facilitate access to products and services antithetical to the Catholic faith, as Catholic Charities' employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of their participation in the insurance plan offered by Catholic Charities. In other words, under both the original and final versions of the Mandate, Catholic Charities' decision to provide a group health plan triggers the provision of contraceptive benefits to its employees in a manner contrary to Catholic Charities' beliefs.

9. Moreover, as a Catholic entity, Catholic Charities bears a particular responsibility to witness to the Church's teachings. Catholic Charities bears witness to those teachings not only by word, but also by deed, including its actions regarding the provision of employee health insurance. Were Catholic Charities to comply with the Mandate, in addition to impermissibly facilitating access to the

objectionable products and services, Catholic Charities would commit the further offense of giving scandal by acting in a way inconsistent with Church teachings.

10. Compliance with the Mandate would be contrary to Catholic Charities' beliefs even in the event that Catholic Charities does not directly fund the objectionable products and services. Of course, any use of Catholic Charities' funds to provide the mandated products and services would only exacerbate the violation of Catholic Charities' religious beliefs.

FURTHER AFFIANT SAYETH NOT.

Rev. Msgr. John Enzler

STATE OF Washington DC)
COUNTY OF _____)

Sworn to and subscribed before me
this 6 th day of August 2013

MICHELLE A. SIMMS
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 14, 2017

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** **Defendants.**	**Civil Action No. 12-cv-00815**

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Thomas Duffy, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Chief Financial Officer for the Archdiocese of Washington (hereinafter "the Archdiocese"). I have been employed by the Archdiocese since 2007 and have been the CFO since 2008.

3. In my capacity as CFO, I oversee a number of areas including real estate, human resources, property casualty and health insurance, information technology, and finance and accounting.

4. I am very familiar with the process by which the Archdiocese's Central Pastoral Administration sets its budget for each fiscal year, and with the state of its finances, and I am familiar with the budget process for archdiocesan parishes, schools, and affiliated corporations. I am also familiar with the process by which the Archdiocese recruits and retains employees, establishes ongoing compensation for employees, and the self-insured healthcare program that is provided to benefits-eligible employees and their eligible dependents. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

I. The Mandate Presents an Impossible Dilemma

5. The U.S. Government Mandate ("the Mandate") presents the Archdiocese with an impossible dilemma. It is unthinkable that the very institution that has championed health care services and benefits for all individuals for over 200 years in the United States would be forced to deny its own employees health care benefits due to a government regulation. The Archdiocese is morally committed to providing health insurance to its employees. Yet, under the Mandate, the Archdiocese is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related

counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. The provision or facilitation of contraceptives, sterilization, and abortion-inducing drugs is inconsistent with the core moral and religious beliefs of the Archdiocese. It therefore is not possible for the Archdiocese to offer an employee health plan that covers these products and services.

6. Based on the criteria that I have been advised that we would have to meet to qualify for an exemption, the Archdiocese also cannot gain the benefit of the religious employer exemption. This is because, as a practical matter, the Archdiocese does not know whether it primarily serves and primarily employs individuals who share its religious tenets, and the steps that would be necessary to gather such information are themselves offensive to the Archdiocese's religious commitment to serve all in need, with no regard to religious affiliation, through its parishes, schools, social service programs, and employment opportunities.

7. For example, the Archdiocese does not know whether, and therefore cannot claim that, it serves "primarily" Catholics. Although the Archdiocese tracks the religious affiliation of the students in its schools, it does not track—or even inquire into—the religious beliefs of the many people who are served through the social service programs the Archdiocese conducts through its parishes and its schools. In fact, even attempting to conduct an invasive census of the religious beliefs of those the Archdiocese serves through its social service programs—as the religious employer exemption would require—would itself be fundamentally contrary to the Archdiocese's religious commitment to serve all. The Archdiocese serves where it sees need, not where it sees people who share it religious tenets.

It therefore will not violate its religious commitments by asking the recipients of its services where their own religious commitments lay.

8. In addition, based on the information available to the Archdiocese, it cannot claim that it "primarily" employs Catholics. With the exception of those positions that directly involve teaching Catholic doctrine, the Archdiocese does not inquire into the religious beliefs of employees either before or after hiring, and so does not know how many of its employees are Catholic. Moreover, the Human Resources Department lacks the technological capability to determine and track the religious persuasion of all of its employees. And inquiring into the religious beliefs of all of its employees would likewise be offensive to the Archdiocese's religious commitment to serve individuals (including through employment opportunities) without regard to their religious beliefs.

9. Consequently, based on the criteria that I have been advised that we would have to meet, the Archdiocese is not capable of qualifying for the exemption, and is faced with complying with the Mandate that forces it to violate its sincerely held religious beliefs. It can either (1) continue to provide health insurance to employees but refuse to provide the mandated contraception, sterilization, abortion-inducing drugs, and related counseling, or (2) be forced to stop providing health coverage for employees altogether. The first choice subjects the Archdiocese to devastating fines, which will place an enormous burden on the Archdiocese's resources that it is unprepared to absorb. The second choice would also subject the Archdiocese to burdensome fines and, in addition, be a violation of the Archdiocese's moral commitment to its employees.

10. I understand that if the Archdiocese were to continue offering health insurance to its employees without the mandated products and services, then the fine

applicable would be $100 per individual, per day. Because the Archdiocese has approximately 2100 benefits-eligible employees that participate in the health plan (this number does not account for the dependants who are also covered on the Archdiocese's insurance), I calculate that the Archdiocese could incur a fine of as much as $76.65 million per year at a minimum. This amount constitutes over two times the entire operating budget of the Archdiocese's Central Pastoral Administration.

11. I understand that the fine applicable if the Archdiocese were to cancel its employee health plan altogether would be $2000 per benefits-eligible employee, beyond the first thirty, per year. With more than 2100 benefits-eligible employees, I calculate that the Archdiocese would incur, at a minimum, a fine of more than $4 million per year. This amount is over 10% of the Archdiocese's annual operating budget.

12. In light of these options—the only ones available to the Archdiocese under the Mandate that will enable the Archdiocese to comply with its sincerely held religious beliefs—the Mandate is currently causing the Archdiocese to suffer significant, adverse harms now, and will cause additional such harm in the very near future, in three distinct ways: (1) budgeting for the payment of these fines, (2) taking the steps necessary to reduce and/or eliminate the Archdiocese's educational, charitable, and religious programs and services as necessary if it is required to pay such fines, and (3) undermining the Archdiocese's ability to recruit and retain employees. These immediate and ongoing harms are described in greater detail below.

II. The Archdiocese Must Begin to Prepare Now to Pay Millions in Fines

13. The Archdiocese has a limited budget. It has not previously been obligated to pay fines for not providing health insurance coverage for contraception, abortion-

inducing drugs, sterilization, and related counseling. As part of its upcoming budgeting process, it therefore must allocate funds previously designated for other purposes to the payment of these fines. And, because the fines are so large, the Archdiocese must begin to prepare immediately to pay these fines, which will begin to accrue on January 1, 2014. Again, even the lower fine of $4.14 million per year is over 10% of the Archdiocese's annual operating budget.

14. The Archdiocese's fiscal year begins on July 1. Under normal circumstances, the process of preparing a budget begins approximately seven months prior to the start of a new fiscal year. Thus, the budgeting process normally begins on or around November 30. The first aspect of the budget that must be addressed is the budget for the Archdiocesan schools, which must be finalized in time to set tuition by January 31, the start date for the annual registration drive. This is necessary because the schools must be able to inform parents and prospective parents of the tuition that the schools will charge. Failure to do so would not only jeopardize the ability of the schools to properly educate the students and honor commitments to teachers and school employees, but also put the schools' sponsor (the Archdiocese) at significant financial risk.

15. The Code of Canon Law is a legal system established by the Roman Catholic Church that governs all members of the Catholic Church and Catholic entities. The Code contains provisions that regulate Church sacraments, property, and procedures that the Church and its institutions must follow. The Code of Canon Law is binding on the Archdiocese and all of its affiliated entities, such as parishes and corporations.

16. It is the practice of the Archdiocese to finalize the proposed budget for the next fiscal year in April, prior to the start of its fiscal year on July 1. This date was

established by the archdiocesan Finance Department and is based upon Canon 493 of the Code of Canon Law, which requires the Archdiocesan Finance Council (a group of lay advisors that meets quarterly) to prepare a budget before the start of a fiscal year. Incorporated in the Canon is the requirement that budgets must be approved by the Archdiocesan Finance Council prior to the start of the fiscal year. In order to fulfill this requirement, the budget materials need to be prepared and distributed in advance so that the Finance Council, and its sub-committees, have adequate time to review, discuss, and assess the budget materials prior to the meeting which occurs in May. If, as the Government has suggested, the Archdiocese were to wait until August 1, 2013, to prepare its budget, the Archdiocese would violate the canonical requirement that the Finance Council must approve the budget for the fiscal year (which, for the Archdiocese, begins on July 1, 2013).

17. As a standard business practice observed by the Archdiocesan Central Pastoral Administration, all significant changes to the budget (including the payment of the fines required by the Mandate) must undergo a further layer of review that involves multiple advisory bodies—not just the Finance Council. These additional review bodies include the Archbishop of Washington, his Administrative Board (which consists of the senior staff of the Archdiocese), and the Archdiocesan Priest Council (which is a canonically required body of advisors selected from the clergy of the Archdiocese).

18. This already lengthy budgeting process will of necessity become even lengthier now that the Archdiocese must be prepared to pay massive fines and consider which of its programs must be curtailed or eliminated in order to pay for those fines. The Mandate will apply to the Archdiocese beginning on January 1, 2014—the start date for our first health plan year after the Mandate becomes effective on August 1, 2013—and the fines required by

the Mandate will begin to accrue that day. This means that the Archdiocese's budget for the fiscal year beginning on July 1, 2013, must account for payments of the fines required by the Mandate.

19. Under normal circumstances, the planning process for the July 1, 2013 budget would begin in late November of this year (2012). But the planning process must now begin before November because the Archdiocese must also plan for the payment of millions of dollars of annual fines. This is not simply an effort to avoid a reckless business practice, but an obligation to address the implications that payment of such fines will have on the employees of the Archdiocese, the nearly 15,000 students in our elementary schools, and the hundreds of thousands of individuals who benefit from our religious and charitable ministries. It would be reckless to put their respective livelihoods, educations, and spiritual and social welfare at risk without planning for the massive changes that will be required if relief is not granted.

20. First, extra time will be required in order to prudently determine which programs and services currently provided by the Archdiocese will need to be curtailed or eliminated to be able to pay millions of dollars in fines each year, a portion of which will accrue during the upcoming fiscal year.

21. These fines, moreover, will have a disproportionate impact on a service organization like the Archdiocese. Because the Archdiocese does not manufacture or sell products, or charge for services performed, there is no way to roll the cost of the fines into a source of income. Instead, the Archdiocese must simply absorb the fines.

22. Absorbing millions of dollars in annual fines, however, will require massive cuts in programming and the elimination of a significant number of jobs.

23. A determination of which programs and ministries to cut can only be responsibly made after development of a long-range strategic plan. The Archdiocese is not staffed to conduct this study internally while maintaining its current level of services; instead, it will need to hire a consultant to assist with the project, producing another direct financial loss. To avoid a reckless approach and unnecessary risks, the Archdiocese would ordinarily prepare a request for proposal, submit it to members of the consulting market, and after an appropriate period of time to permit thoughtful responses, analyze the submissions, interview the leading candidates, and negotiate a final agreement.

24. Finally, the Archdiocese will also attempt to pay at least a portion of the fines incurred by its affiliated entities whose employees receive health insurance through the Archdiocesan health plan. This, too, will increase the financial strain on the Archdiocese's budget beginning with the upcoming fiscal year. Consequently, it also must be accounted for in the Archdiocese's budget as well as the budgets of the affiliated entities. Because these affiliated entities include multiple schools that need to publish tuition rates no later than January 31, 2013, the Archdiocese must communicate whatever level of support can be made available to the school by November 2012, so that it can be incorporated into the schools' budget processes. Failure to do so puts a severe financial burden on the schools, and puts their ability to deliver a quality education to their students at risk. Knowing of these financial changes, parents may not be willing to gamble with their children's education, and may seek enrollment elsewhere. The Archdiocese will need to devote resources, which are currently unavailable, to address this issue for its schools.

25. Under normal circumstances, the budgeting process for the fiscal year beginning on July 1, 2013—the first fiscal year in which the Archdiocese will be subject to

fines under the Mandate—must begin no later than November 30, 2012. But because of the enormous additional costs that must be accounted for in the budget for the fiscal year beginning on July 1, 2013, the Archdiocese must commence the budgeting process even earlier. In fact, it is likely already too late to engage an outside consultant to finish the required strategic planning in time for the budget process to begin by late November.

26. The Government has stated that it will attempt to finalize an unspecified accommodation by August 1, 2013. But the Archdiocese cannot possibly wait until August 1, 2013, to begin preparing for the payment of massive fines, on the hope that the Government will eliminate the intolerable burden on the Archdiocese's religious beliefs. For if the Government does not eliminate the burden, then it will be too late to budget for the payment of these fines, because the Archdiocese will have already entered the very fiscal year in which fines for noncompliance will start to accrue.

27. Consequently, the Archdiocese has no choice but to begin budgeting for that massive financial burden immediately.

III. The Archdiocese Must Begin the Administrative Processes Necessary to Respond to the Mandate

28. In addition to the protracted budgeting process that will be necessary in order for the Archdiocese to prepare for the annual fines and the other new costs that will result from the Mandate, the Archdiocese must also undertake additional administrative review and preparations to prepare for the fines.

29. First, as mentioned, the budget process normally involves review and approval by the Archdiocesan Finance Council. Significant changes to the budget may also require review and approval by the Administrative Board and the Priest Council, as well.

30. Paying millions of dollars in fines, as the Mandate requires in order for the Archdiocese to avoid violating the Church's teachings, would involve yet another layer of review. The Code of Canon Law requires that before taking any action which can worsen the financial condition of the Archdioceses, the Archbishop must obtain the consent not only of the Archdiocesan Finance Council, but also of the College of Consultors, which is a consultative body consisting of members of the clergy who advise the Archbishop. Obtaining the consent of the College of Consultors and the Finance Council for this decision, however, will involve additional time outside of the typical budgeting timeframe, as I will need to prepare to make a presentation to these two bodies, and each body must meet, deliberate, and render a decision.

31. Second, any programmatic changes necessitated by the Mandate will require substantial additional time to implement. The Archdiocese cannot reasonably decide which programs and personnel to cut without consulting with those affected and then obtaining the advice of an outside consultant, as discussed. Although I cannot say with certainty which programs would be cut, the magnitude of the fine is such that very dramatic changes will be required, including potentially the elimination or reduction of tuition assistance for students at the Archdiocesan schools, closing schools altogether, and/or eliminating social services for those in need.

32. Large-scale changes like these will require yet more layers of review, and more time. Changes to or eliminations of archdiocesan programs requires the careful analysis of pastoral priorities. In addition, the standard practice of the Archdiocese when implementing other, less significant changes, has been to hold town hall style meetings across

the Archdiocese, inviting the faithful to provide input on the decision, and to make recommendations on how to address the devastating impact of these fines.

33. Consequently, the administrative planning process involved in preparing to pay these fines required by the Mandate should begin within the next few months, at the very latest.

IV. The Mandate Hinders the Archdiocese's Efforts at Recruiting and Retaining Employees

34. In my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertainty regarding these factors undermines the Archdiocese's ability to retain existing employees and recruit new ones.

35. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, the Archdiocese is faced with the impossible dilemma: (1) paying an annual $76.65 million fine and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a $4.14 million fine and eliminating its health insurance plan. Employers who, unlike the Archdiocese, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing the Archdiocese at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

V. The ANPRM Does Not Resolve the Archdiocese's Concerns

36. The Government's proposal to alter the Mandate in some way by August 1, 2013, set forth in the Government's Advanced Notice of Proposed Rulemaking ("ANPRM"), does not alleviate any of the foregoing harms.

37. In terms of budgeting for the proposed fines, the Archdiocese cannot wait until August 1, 2013, in the hope that the Government will eliminate the burden on the Archdiocese's religious beliefs. For if the Archdiocese does not begin immediately to undertake the costly and complex measures described herein, and discovers on August 1, 2013, that the Government has not eliminated the burden on the Archdiocese's religious beliefs, it will then be too late for the Archdiocese to make the necessary preparations to pay the massive fines that the Mandate requires. Likewise, in terms of the current impact on the Archdiocese's ability to recruit new and retain current employees, that impact exists now, and will not be alleviated between now and whenever the Government finalizes any possible change in the law. Consequently, all of these harms currently exist, and will continue to exist, regardless of the ANPRM.

38. Indeed, it would be financially and morally reckless to not begin planning for the payment of substantial fines, on the gamble that, this time, the Government will solve the problem. It would, moreover, be particularly imprudent given the Government's recent actions with respect to this matter. The Government received approximately 200,000 comments when it first proposed the Mandate, and those comments resulted in no meaningful changes. Instead, the Government finalized the Mandate and narrow "religious employer" definition. Moreover, the possibilities the Government has proposed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on the Archdiocese's religious

beliefs. Rather, they would still require the Archdiocese to provide, pay for, and/or facilitate the provision of services that violate the Archdiocese's sincerely held religious beliefs or pay the devastating fines discussed above.

39. For example, the Government has suggested that it will "accommodate" the concerns of objecting self-insured entities like the Archdiocese by requiring their third party administrator ("TPA") to arrange for the mandated products and services "for free." This, however, ignores the practical reality that if the TPA arranges for the provision of these services to participants by virtue of their employment with the Archdiocese, the TPA will have direct additional expenses, and no opportunity to reduce other expenses through lower healthcare services that could otherwise accrue to the benefit of an insurer. Obviously, it is inconsistent with free markets to believe that the TPA will not pass along their financial losses to the Archdiocese. In any event, this arrangement still requires the Archdiocese to facilitate the provision of products and services antithetical to the Catholic faith, since the Archdiocese's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of their employment at the Archdiocese.

38. Consequently, the existence of the ANPRM does alleviate any of the foregoing existing harms that the Mandate is currently imposing on the Archdiocese.

FURTHER AFFIANT SAYETH NOT.

Thomas Duffy

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me
this 27 day of August, 2012

Notary Public in and for the
State of Maryland
Commission Expires: 6/16/16

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** **Defendants.**	**Civil Action No. 12-cv-00815**

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Matthew Houle, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this declaration. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I serve as the Director of Talent Selection within the Department of Human Resources at the Archdiocese of Washington (hereinafter "the Archdiocese"). I have been so employed since August 2011.

3. Prior to my employment at the Archdiocese, I worked in the field of talent recruitment in various locations on the Eastern Seaboard for over two decades.

4. In addition to my official position at the Archdiocese, I also serve as a Deacon in the Roman Catholic Church.

5. I am very familiar with the process by which the Archdiocese screens and hires its employees. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

6. In my capacity as the Director of Talent Selection for the Archdiocese, I am responsible for overseeing the recruiting and hiring of employees at the Archdiocese's Central Pastoral Administration (Archdiocesan "headquarters," essentially.) I occasionally also assist the parishes of the Archdiocese with their hiring.

7. The ability to offer and provide health benefits to current and prospective employees is crucial to retaining existing employees and recruiting new ones. In my experience, a job applicant almost always inquires very early on in the hiring process about the health benefits offered with the position. And employee health benefits are a key factor in the decision-making process of most job applicants. Consequently, any uncertainty regarding the Archdiocese's ability to offer a competitive healthcare package undermines its ability to retain existing employees and recruit new ones.

8. The U.S. Government Mandate (the "Mandate") is currently creating just such uncertainty. Under the Mandate, the Archdiocese is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This is in direct contravention of Catholic beliefs. I understand that if the Mandate remains in place, the Archdiocese will be forced to choose either to drop its health plan (and pay the attendant fines), or to maintain a health plan without the mandated services and pay extraordinary fines, rather than violate its beliefs.

9. As a result of this Mandate, there is, therefore, currently significant uncertainty as to the Archdiocese's ability to continue to offer health insurance benefits to existing and future employees, which, as discussed, undermines our ability to retain existing employees and recruit new ones.

10. I am already beginning to witness the effects of this uncertainty.

11. Since beginning my current position, I have interviewed hundreds of job applicants for a variety of positions, including Attorney, Accountant, Human Resource Generalist, Director of Curriculum & Instruction, Manager of Property Analysis, Administrative Assistant, and many others. I do not recall a single incident, prior to the Government's announcement of the Mandate on January 20, 2012, in which the Archdiocese's decision not to offer contraceptives, sterilization, abortion-inducing drugs, and related counseling to its employees was even referenced by a job applicant; nor am I aware of any such incident occurring prior to my own employment at the Archdiocese. But since the

Government announced the Mandate, applicants for positions with the Archdiocese have asked me directly how the employee health benefits offered by the Archdiocese will be affected by the Mandate. I have had to respond that the Archdiocese's obligations under the Mandate are ill-defined at present and that I cannot answer the question.

12. Likewise, during my over twenty years of work in the field of recruiting and hiring, I have found that it is extremely unusual for job applicants who have a scheduled interview to fail to attend the interview. This is particularly so in the current economic climate, in which jobs are scarce and the demand for jobs is high. Moreover, in my experience, the rare occasion of a missed interview is almost always followed by an explanation or apology.

13. Since the announcement of the Mandate, however, I have seen an unprecedented number of "no shows." In particular, during a span of about eight weeks, from late May to late July of this year, four applicants—constituting approximately 10% of the second-round interviews scheduled during that time period—were confirmed for second-round interviews but failed to appear, and subsequently failed to respond to my repeated attempts at reaching them after the missed interview. Until that time, this type of "no-show" had never occurred during the time in which I had worked at the Archdiocese.

14. In my opinion, the questions I am receiving during the interview process, the answers that I am required to give, and the "no show" interviews, all discussed above, are a result of the Mandate. The existence of the Mandate, therefore, has already impacted the Archdiocese's hiring, and it will continue to have an impact on the Archdiocese until a court or the government definitively relieves us of our obligation to comply with the Mandate. Indeed, if the Mandate remains in place, in my opinion, the impact of the Mandate

on the Archdiocese's ability to hire and retain employees will be catastrophic. I say this because the Archdiocese cannot now definitely affirm to its applicants and employees whether the Archdiocese will be able to offer health insurance to them after the government's so-called enforcement moratorium ends on August 1, 2013. The inability to guarantee such benefits puts the Archdiocese at a severe and significant disadvantage when it comes to employee recruiting and retention. Consequently, the Mandate currently is, and, as long as it remains in place, will continue to damage the Archdiocese's ability to attract and retain individuals in a competitive environment.

FURTHER AFFIANT SAYETH NOT.

Matthew Dale
[Name]

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me
this 24th day of August, 2012

Brenda L Spence
Notary Public in and for the
State of Maryland
Commission Expires: 6/16/16

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** **Defendants.**	**Civil Action No. 12-cv-00815**

AFFIDAVIT OF THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.

I, Marguerite Conley, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Executive Director of The Consortium of Catholic Academies of the Archdiocese of Washington, Inc (the "Consortium"). I have been in that position since June 2010.

3. I am very familiar with the employee hiring and retention efforts made by the Consortium, as well as with its finances and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. The U.S. Government Mandate (the "Mandate") has put the Consortium in an impossible position. Under the Mandate, the Consortium is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs, and the Consortium cannot and will not comply with it.

5. The Consortium cannot gain the benefit of the religious employer exemption, described above, and will not even attempt to do so. The notion of employing and serving primarily fellow Catholics is inconsistent with the Consortium's institutional values and the values of the Catholic faith.

6. As a practical matter, the Consortium cannot meet the religious employer exemption because it does not serve primarily Catholics. The Consortium consists of four schools: St. Anthony School, St. Francis Xavier Academy, Sacred Heart School, and

St. Thomas More Academy. Three of the four schools serve a student body that is not primarily Catholic; overall, fifty-nine percent of the Consortium's students are not Catholic. Moreover, with the exception of a few positions that directly involve teaching Catholic doctrine, the Consortium does not inquire into the religious beliefs of employees either before or after hiring, and so cannot certify that it employs primarily Catholics.

7. Consequently, the Consortium is not a "religious employer" under the exemption. The Consortium's employees are offered health insurance through the Archdiocese of Washington's (the "Archdiocese") health plan. The Archdiocese's determination of how to respond to the Mandate will govern the Consortium as well.

8. The Archdiocese and the Consortium are committed to following the teachings of the Catholic Church, and as a result, the Consortium is unable to comply with the Mandate. Specifically, the Consortium cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and the Consortium will and must remain faithful to those teachings. As a result, like the Archdiocese, the Consortium is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

9. For example, if the Archdiocese and the Consortium decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, the Consortium will incur a $100 per day per individual fine. Because there are 80 benefits-eligible individuals employed by the

Consortium (this number does not account for dependents covered on the Consortium's insurance), the Consortium could incur a fine of as much as $2.92 million every year. The Consortium's entire annual budget is approximately $8 million and as a result, the Consortium cannot possibly pay such a fine.

10. The fine that applies if the Consortium and the Archdiocese cancel their employee health plan would be $2,000 per benefits-eligible employee, beyond the first 30, per year. Because the Consortium has approximately 80 benefits-eligible employees, I calculate that the Consortium would incur a fine of as much as $100,000 per year. This is a significant amount of money to the Consortium, and an annual fine of that magnitude will require the Consortium to limit or eliminate education and extracurricular programs and opportunities for its students. Moreover, eliminating its employee health plan would place the Consortium in violation of its moral commitment to provide health benefits to its employees.

11. Consequently, the Mandate is currently harming the Consortium in at least two distinct ways.

12. First, in my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertain regarding these factors undermines the Consortium's ability to retain existing employees and recruit new ones. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, the Consortium is faced with the choice of (1) paying a fine of as much as $2.92 million and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a fine of approximately $100,000 and eliminating its health

insurance plan. Employers who, unlike the Consortium, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing the Consortium at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

13. The Consortium provides its employees with letters of intent—soliciting employees' interest in returning for the next academic year, and officially beginning the process of retaining its staff from one year to the next—in February of the preceding school year. The Consortium must know by around that time whether it will be able to assure its employees that they will continue to receive health benefits.

14. Second, the Mandate impacts the Consortium's budgeting process. The changes to the budget required by the Mandate must be accounted for in the Consortium's budget for fiscal year 2013, which begins on July 1, 2013. The Consortium will begin the budgeting process for fiscal year 2013 no later than December 2012. Moreover, by January 2013, the Consortium must make decisions regarding the tuition its schools will charge for the 2013-2014 school year. Planning to pay a massive penalty will have to be factored into the tuition setting process.

15. The Consortium cannot, however, pay for such a large annual fine solely by increasing tuition, as its schools primarily serve underprivileged children. Approximately 60% of the Consortium's students receive tuition assistance from the Archdiocese; another portion receives other forms of financial aid. Only about 10% of Consortium students pay full tuition, often with great sacrifice on behalf of the families. Further tuition increases will drive students away.

16. The Consortium will therefore be forced to cut programming and alter its academic plans for its schools. In particular, the Consortium is currently making plans to extend both the school day and the academic year at its schools beginning with the 2013 academic year, in an effort to further enhance its students' scholastic experience. The extended calendar will benefit the Consortium students but will place a major strain on the Consortium's already limited resources. If forced to account for a huge fine while planning its budget for fiscal year 2013, the Consortium will be forced to forego its plans to move to the extended calendar. Setting aside the plan to move to the extended calendar will be detrimental to our students, and it will result in a massive waste of the time and resources already being poured into this plan.

17. The Consortium will also need to divert money from necessary facility maintenance in order to account for such a large fine.

18. The Consortium has already calculated its projected annual budgets through Fiscal Year 2020. These projected budgets guide fundraising efforts as well as long-range planning, like the planning for the extended calendar. A large annual fine would render these projections useless, and the time and effort put into making them would be wasted.

19. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking ("ANPRM") that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to the Consortium.

20. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on the Consortium's religious beliefs. Rather, they still require the Consortium to provide, pay for, and/or facilitate the provision of services that violate the Consortium's sincerely held religious beliefs.

21. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is wholly insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, the Consortium must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees. If the Consortium remains incapable of offering that assurance, its schools could likely be devastated by a departure of employees that will occur months before the finalization of any "accommodation," as the Consortium's teachers and staff would reasonably consider seeking other employment for the 2013-14 school year.

22. Consequently, the existence of the ANPRM does not alleviate the harms that the Mandate poses for the Consortium.

FURTHER AFFIANT SAYETH NOT.

Marguerite Conley

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me

this 27th day of August, 2012

Notary Public in and for the

State of Maryland

Commission Expires: 6/16/16

EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** **Defendants.**	**Civil Action No. 12-cv-00815**

AFFIDAVIT OF ARCHBISHOP CARROLL HIGH SCHOOL

I, Mary Elizabeth Blaufuss, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Vice-Principal for Academic Affairs at Archbishop Carroll High School. ("ACHS"). I have been so employed since 2006. Beginning in October 2012, I will be the Acting Principal and Chief Executive Officer at ACHS.

3. I am very familiar with the employee hiring and retention efforts made by ACHS, as well as with its finances and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. The U.S. Government Mandate (the "Mandate") has put ACHS in an impossible position. Under the Mandate, ACHS is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs, and ACHS cannot and will not comply with it.

5. ACHS cannot gain the benefit of the religious employer exemption, described above, and will not even attempt to do so. The notion of employing and serving primarily fellow Catholics is inconsistent with ACHS's institutional values and the values of the Catholic faith.

6. As a practical matter, ACHS cannot meet the religious employer exemption because it does not serve primarily Catholics. For the 2012-2013 school year, approximately 70% of ACHS students are not Catholic. Nearly all receive some kind of scholarship or tuition assistance.

7. Consequently, the Mandate applies to ACHS. ACHS employees are offered health insurance through the Archdiocese of Washington's health plan. The Archdiocese's determination of how to respond to the Mandate will govern ACHS as well.

8. The Archdiocese and ACHS are committed to following the teachings of the Catholic Church, and as a result, ACHS is unable to comply with the Mandate. Specifically, ACHS cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and ACHS will and must remain faithful to those teachings. As a result, like the Archdiocese, ACHS is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

9. If the Archdiocese and ACHS decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, ACHS will incur a $100 per day per individual fine. Because there are over 59 individuals covered on ACHS insurance, I calculate that ACHS could incur a fine of as much as $2.15 million every year. ACHS's entire annual budget is approximately $6.55 million, and as a result, ACHS cannot possibly pay such a fine.

10. The fine that applies if the Archdiocese and ACHS cancel their employee health plan would be $2000 per benefits-eligible employee, beyond the first 30, per year. Because ACHS has approximately 69 benefits-eligible employees, I calculate that ACHS would incur a fine of as much as $78,000 per year. This is a significant amount of money to ACHS, and an annual fine of that magnitude will require ACHS to limit or eliminate

education and extracurricular programs and opportunities for its students. Moreover, eliminating its employee health plan would place ACHS in violation of its moral commitment to provide health benefits to its employees.

11. Consequently, the Mandate is currently harming ACHS in at least two distinct ways.

12. First, in my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertainty regarding these factors undermines ACHS's ability to retain existing employees and recruit new ones.

13. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, ACHS is faced with the choice of (1) paying a fine of at least $2.15 million and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a $78,000 fine and eliminating its health insurance plan. Employers who, unlike ACHS, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing ACHS at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

14. ACHS provides its employees with appointment letters and asks employees to return those letters by February of each year. These appointment letters invite employees to return for the next academic year, and officially begin the process of retaining staff from one year to the next. ACHS must know by February, therefore, whether it will be able to assure its employees that they will continue to receive health benefits.

15. The departure of employees that is likely to occur if ACHS remains incapable of affirming for its teachers and staff that the school will continue to provide health benefits would devastate ACHS.

16. Second, the Mandate also stands to impact ACHS's budgeting process. ACHS cannot account for the large annual fine it will owe annually by increasing tuition. Two-thirds of ACHS students already receive financial aid, and further increases to tuition will drive families away. Instead, ACHS will be forced to cut programming at the school.

17. The changes to the budget required by the Mandate must be in place by the start of the fiscal year beginning on July 1, 2013. The budgeting process must begin in December 2012, when the Finance Committee of the ACHS Board of Directors will convene to begin to discuss the budget for the upcoming year. This means that beginning in December of this year, ACHS will begin to plan how it will: be able to pay a massive annual fine; notify its employees that ACHS may not be able to continue to offer them health insurance coverage; reduce and eliminate programs in order to pay the annual fine; prepare for the potential departures of faculty and staff; find qualified staff and faculty who are willing to work at ACHS under circumstances of serious financial instability; and determine whether it will have to reduce enrollment due to departures by faculty and staff.

18. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking ("ANPRM") that it may finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to ACHS.

19. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on ACHS's religious beliefs. Rather, they would still require

ACHS to provide, pay for, and facilitate the provision of services that violate ACHS's sincerely held religious beliefs.

20. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is wholly insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, ACHS must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees. If it remains incapable of offering that assurance, the school will likely be devastated by the departure of employees that will occur months before the finalization of any "accommodation," as our teachers and staff will reasonably consider seeking other employment for the 2013-14 school year.

21. In addition, as noted above, long before August 1, 2013, ACHS must begin to plan for the payment of the fines that will apply if the Mandate's narrow religious employer exemption remains unchanged.

22. Consequently, the existence of the ANPRM does not alleviate any of the foregoing harms that the Mandate poses for ACHS.

FURTHER AFFIANT SAYETH NOT.

Mary Elizabeth Blaufuss

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me

this 27 day of August, 2012

Notary Public in and for the

State of Maryland

Commission Expires: 6/16/2016

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, **Plaintiffs,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,** **Defendants.**	**Civil Action No. 12-cv-00815**

AFFIDAVIT OF CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON

I, Rev. Msgr. John Enzler, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the President and CEO at Catholic Charities of the Archdiocese of Washington, Inc. ("Catholic Charities"). I have been so employed since July 2011.

3. I am familiar with Catholic Charities' finances, as well as with its employee hiring and retention efforts, and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. I understand that the U.S. Government Mandate ("the Mandate") requires that a group health plan provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, except to employees of any entity that can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets.

5. Catholic Charities cannot gain the benefit of the religious employer exemption, and will not even attempt to do so, because it does not apply to our organization. Catholic Charities does not ask the religious affiliation of those whom it serves, but I estimate that approximately 80% of those we serve are not Catholic. Asking those we serve to tell us their religious affiliation would violate our mission to serve all regardless of creed. Additionally, Catholic Charities does not ask the religious affiliation of its employees, so we do not know how many of our employees are Catholic. I estimate, however, that 40 to 60% of our employees are not Catholic. Finally, Catholic Charities would not be able to certify that its purpose is the inculcation of religion. Catholic Charities is the *charitable* arm of the Archdiocese. Our purpose is to serve the needs of the less fortunate.

6. Consequently, Catholic Charities is not a "religious employer" under the exemption. Catholic Charities' employees are offered health insurance through the Archdiocese of Washington's (the "Archdiocese") health plan. The Archdiocese's determination of how to respond to the Mandate will govern Catholic Charities as well.

7. The Archdiocese and Catholic Charities are committed to following the teachings of the Catholic Church, and as a result, Catholic Charities is unable to comply with the Mandate. Specifically, Catholic Charities cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and Catholic Charities will and must remain faithful to those teachings. As a result, like the Archdiocese, Catholic Charities is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

8. I have been advised that if the Archdiocese and Catholic Charities decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, Catholic Charities will incur a $100 per day per individual fine. I am advised that Catholic Charities has approximately 549 benefits-eligible employees (this number does not account for dependents covered on Catholic Charities insurance). Consequently, Catholic Charities could incur a fine of as much as $20 million every year. Catholic Charities' annual budget, however, is approximately $60 million; a $20 million fine, therefore, would be one-third of Catholic Charities' annual budget.

9. I have been advised that the fine that applies if the Archdiocese and Catholic Charities cancel their employee health plan would be $2000 per benefits-eligible employee, beyond the first 30, per year. Because Catholic Charities has approximately 549 benefits-eligible employees, Catholic Charities would incur a fine of as much as $1 million per year.

10. Consequently, the Mandate is currently harming Catholic Charities in at least two distinct ways.

11. First, the Mandate is currently creating uncertainty that undermines Catholic Charities' efforts to recruit and retain employees. As noted, under the Mandate, Catholic Charities is faced with the impossible dilemma of (1) paying a fine of approximately $20 million in order to provide its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying an approximate $1 million fine and being required to eliminate its health insurance plan. Employers who, unlike Catholic Charities, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing Catholic Charities at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

12. I understand that Catholic Charities has already begun to witness the negative effects of the uncertainty caused by the Mandate. I am advised by the Human Resources Department that several employees have already approached HR staff and said that if Catholic Charities eliminates its employee health plan, they will quit and find employment elsewhere.

13. Second, the Mandate impacts Catholic Charities' budgeting process. The annual operating budget of Catholic Charities is approximately $60 million per year. However, approximately $45 million—a full three-quarters—of this budget comes from grants, contracts, and foundations that obligate us to use those moneys for particular programs. The fine would have to come out of the remaining one-quarter, or approximately $15 million, of our budget. In other words, the approximate $1 million annual fine would be approximately 7% of Catholic Charities' unrestricted budget and the alternative, the potential $20 million fine, is more than our entire unrestricted budget. Consequently, payment of either of these fines would force Catholic Charities to either reduce or eliminate many programs.

14. In addition to cutting programming, Catholic Charities would likely have to reduce overhead by eliminating positions in the accounting, human resources, and information technology departments. This will mean that the entire agency will run less efficiently and effectively. Our mission of serving our needy clients would likely suffer.

15. Moreover, any amount of money that Catholic Charities must pay to the Government in order to avoid violating its religious beliefs is money that is not available for Catholic Charities to spend on direct service to those in need.

16. All changes to the budget required by the Mandate must be in place by the start of the fiscal year beginning on July 1, 2013. Typically, the budgeting process begins in January 2013, when the executive staff asks senior management at each of Catholic Charities' 77 programs to begin building their proposed budgets for the upcoming fiscal year. The proposed budgets must then go through a lengthy series of approvals and revisions, including review by the division directors of our programming, then the Finance Committee of the Catholic Charities Board of Directors, then the full Board of Directors.

17. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking ("ANPRM") that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to Catholic Charities.

18. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on Catholic Charities' religious beliefs. Rather, they still require Catholic Charities to provide, pay for, and/or facilitate the provision of services that violate Catholic Charities' sincerely held religious beliefs.

19. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, Catholic Charities must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees.

20. Consequently, the existence of the ANPRM does not alleviate the harms that the Mandate poses for Catholic Charities.

FURTHER AFFIANT SAYETH NOT.

Reverend Msgr. John Enzler

STATE OF Maryland)
)
COUNTY OF Prince Georges)

Sworn to and subscribed before me
this 27 day of August, 2012

William W. Biggs

Notary Public in and for the
State of Maryland
Commission Expires: May 12, 2014

WILLIAM W. BIGGS
Notary Public
Montgomery County
Maryland
My Commission Expires May 12, 2014

EXHIBIT N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole; THE CONSORTIUM OF CATHOLIC ACADEMIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; ARCHBISHOP CARROLL HIGH SCHOOL, INC.; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF WASHINGTON, INC.; and THE CATHOLIC UNIVERSITY OF AMERICA, Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor, TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY, Defendants.	Civil Action No. 12-cv-00815

AFFIDAVIT OF THE CATHOLIC UNIVERSITY OF AMERICA

I, Frank G. Persico, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Chief of Staff and Vice President for University Relations at The Catholic University of America (hereinafter "Catholic" or "University"). I have been so employed in this capacity, under different titles, since 2000 and have worked for the University in a variety of executive capacities, including as dean of students, executive director of alumni relations and associate dean of the university's law school since 1974.

3. As Chief of Staff, I am responsible for or aware of most aspects of the University's day-to-day operations, I coordinate the senior staff, and personally advise the University president.

4. I am very familiar with the University's mission and all aspects of the process by which Catholic University sets its budget for each fiscal year, and with the state of its finances. I sit on the University's Budget Committee. The facts set forth herein are based upon my personal knowledge and information available to me as Chief of Staff, and if I were called upon to testify to them, I could and would competently do so.

5. The U.S. Government Mandate (the "Mandate") has put Catholic University in an impossible position. Under the Mandate, the University is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs.

6. The Catholic University of America cannot gain the benefit of the religious employer exemption, described above, and to even attempt to do so would contravene the University's commitment to serve people of all faiths. It employs

approximately 426 full-time faculty members and an additional 417 temporary faculty members. Catholic University employs over 1,147 staff members. Although our full-time faculty is approximately 55% Catholic, the University does not inquire into the religious beliefs of staff members either before or after hiring (and does not currently have the technology to track such information), and so does not know how many of its employees are Catholic.

7. Catholic University is therefore faced with three untenable options: 1) to continue to provide health insurance to employees but refuse to provide the mandated contraception, sterilization, and abortion-inducing drugs and pay a massive penalty, 2) cease health insurance coverage for employees altogether and pay a massive penalty, or 3) comply with the Mandate in contravention of Catholic University's institutional values and the values of the Catholic faith.

8. The first option would expose the University to massive fines that will start to accrue on January 1, 2014—the start date of the first plan year to which the Mandate will apply. Thus, the University's budget for the fiscal year beginning on May 1, 2013 would have to account for payments of any such fines required by the Mandate. If the University continues to offer health coverage to its employees, but refuses to offer the mandated coverage for contraceptives, sterilization, and abortion-inducing drugs, it will face fines of $100 per day per individual insured on its employee plan. Because approximately 1,710 individuals are eligible to be insured[1] on Catholic University's employee health plan, this fine would amount to approximately $62.4 million, annually, for as long as Catholic is subject to the Mandate. The University's current annual budget is approximately $220 million, so it

[1] The total of eligible individuals includes dependents, so this is a larger number than the number of employees.

cannot possibly pay such a fine—which would constitute approximately 28% of its entire budget.

9. Likewise, the second option (cease health insurance coverage for employees altogether) would also expose the University to massive fines starting January 1, 2014. In particular, if Catholic decides to discontinue its employee health insurance coverage altogether, the University will face fines of $2,000 per benefits-eligible employee, beyond the first 30, per year. Because the University has approximately 1,381 benefits-eligible employees, it has calculated that its fines for failing to provide an employee health plan will amount to approximately $2.7 million annually, for as long as it is subject to the Mandate.

10. The $2.7 million annual fine is not the only cost that must be factored into the budgeting process in the event Catholic University elects to cancel its health plan. In an effort to avoid a mass exodus of employees, the University would have to increase employee salaries so that employees could purchase their own health insurance. Catholic would have to survey current pay levels and increase employee pay to above the market rate in order to enable employees to purchase health insurance. As discussed more fully below, the survey would be a time-consuming process, and the salary increases would escalate the University's labor costs significantly, because different sectors of the University are at different levels of market competitiveness. An additional cost at the level of magnitude of these fines would greatly harm the University's competitive position.

11. Catholic University's fiscal year begins on May 1. Under normal circumstances, the process of preparing a budget begins approximately seven months prior to the start of a new fiscal year. Thus, for the May 1, 2013 fiscal year—the first fiscal year in which the University would be subject to the fines discussed above—the budgeting process

normally would begin October 2012. The University's Budget Committee typically makes recommendations to the University President. Once the President approves the budget, the Vice President for Finance and Treasurer presents it to the Board's Finance Committee, which reviews the budget in detail. The Finance Committee normally makes recommendations regarding tuition increases to the University's Board in December and submits a final proposed operating and capital budget to the Board in March.

12. This budgeting process would become significantly more complicated if Catholic were forced to pay substantial fines or taxes to the government or to compensate its employees for the loss of benefits. To ensure its fiscal integrity, the University's budget process is strictly defined and regulated; consequently, any deviation from the process – including to pay unforeseen costs during the fiscal year – would be highly irregular and require consultation and approval by the committees and the Board, as described in paragraph 11. It would have to make dramatic, short-term changes to be able to pay the fine. For instance, many University employees are currently paid below-market wages. Catholic University would have to analyze each job code and analyze positions and groups of positions in enough detail to determine whether a pay adjustment was appropriate. The University is not staffed to conduct this type of analysis, so it will need to hire a consultant to assist with the project, producing another direct financial loss.

13. Once the market adjustment analysis was complete, Catholic would have to determine how much it will increase each employee's pay above market in order to compensate for the loss of medical benefits. This will take time. And, regardless of the ultimate salary increases, the University will likely have a difficult time hiring and retaining employees because they will have to deal individually with health insurance companies

instead of being part of a collective group—a fact that will put them at a significant competitive disadvantage and likely result in higher costs to each employee and correspondingly higher labor costs for the University. The ability to offer and provide health benefits to current and prospective employees is crucial to retaining existing employees and recruiting new ones. In my experience, employees and job applicants can be as concerned about health benefits as they are about salary. Consequently, any uncertainty regarding Catholic's ability to offer a competitive health care package will undermine its ability to recruit new faculty and staff and retain existing ones. The Mandate, however, is currently creating just such uncertainty, because it means that the University cannot confidently forecast the way that it will meet the health insurance needs of its current and prospective employees.. This puts CUA at a significant competitive disadvantage in its ability to recruit and retain employees.

14. Absorbing a $2.7 million annual fine along with the costs of increased salaries to offset not having a health plan could require massive cuts in University programs and the elimination of jobs. Indeed, the $2.7 million fine is more than Catholic's budgets for certain of its colleges. A determination of which programs and positions to cut can only be made after significant deliberation and analysis, and likely require revisions of the time tables or priorities associated with implementing the University's recently developed Strategic Plan – and ultimately require consultation with or approval by the Board of Trustees. This analysis would take time and may require creating a reserve in anticipation of having to pay the fine, all of which would be part of the budgeting process. Another option, of course, would be to increase tuition to cover these costs, but that would directly undermine the University's competitiveness in the higher education marketplace.

15. The third option (comply with the Mandate) is untenable. The University is committed to following the teachings of the Catholic Church. As such, the University opposes providing insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling. To provide such coverage would be an affront to the University's institutional values and the values of the Catholic faith.

16. I understand that the Government has stated that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not alleviate the current burdens on the University to plan for and anticipate the fines.

17. The accommodations suggested in the Government's Advanced Notice of Proposed Rulemaking ("ANPRM") will not alter the core requirement of the Mandate that forces the Catholic University of America to provide, pay for, or facilitate the provision of abortifacients, sterilization, and contraception, in contravention of Catholic doctrine to which the University adheres.

18. The only concrete proposal contained in the ANPRM would require our insurance issuer, United Healthcare, to provide those services, free of charge, to our covered employees and their beneficiaries. By paying premiums to the issuer, the University will indirectly pay for these "free" services. The University will also be facilitating the provision of these services since the objectionable coverage will be triggered by Catholic's health insurance plan. The University also is currently evaluating, for its own business reasons, whether to self-insure, in accordance with the trend of educational institutions of similar size. The Mandate would discourage the University from making what might otherwise be a wise business decision because the University, even with a third party administrator, would be the

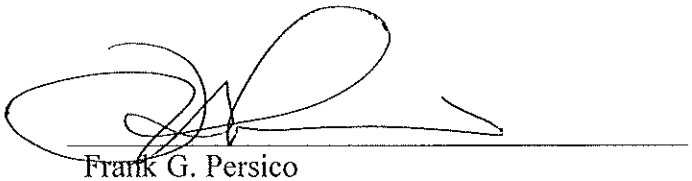
effective agent of and revenue source for abortifacients, sterilization, and contraception for its employees.

19. Under the ANPRM's proposed accommodations, Catholic University will thus be forced, whether it continues with conventional insurance or self-insures, to facilitate the provision of abortifacients, sterilization, and contraception by providing both the insurer relationship and the employment through which its employees will have access to health care coverage and, thus, coverage for the services at issue. Consequently, the existence of the ANPRM does not in any way ameliorate the foregoing existing harms that the Mandate is currently imposing on the University.

20. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations adds additional complexity to the University's budget process. The Government has suggested that it may finalize an altered rule by August 1, 2013. But long before that date, the University must begin to plan for the payment of the enormous fines that will apply if it is ultimately forced to choose noncompliance with the government requirement, and to make a decision whether to continue to offer insurance, and to plan for the consequences of such a decision.

21. The Catholic University of America therefore cannot wait until August 1, 2013, to begin planning to pay the fines required by the Mandate on the hope that the Government will solve the problem, for if the Government does not solve the problem, the University will have insufficient time to undertake all of the steps, discussed above, necessary to implement the only viable options available to it under the Mandate. The proposals contained in the ANPRM would not alleviate the burden on the University's religious beliefs.

FURTHER AFFIANT SAYETH NOT.



Frank G. Persico

District of Columbia)
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Sworn to and subscribed before me
this 27th day of August 2012

Notary Public in and for the
District of Columbia

Commission Expires: September 30, 2015

Susan M. Weir
Notary Public, District of Columbia
My Commission Expires 9/30/2015