No. ___-_____

In the Supreme Court of the United States

WHEATON COLLEGE, an Illinois non-profit corporation,

Applicant,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Respondents.

APPENDIX

CHRISTIAN POLAND
BRYAN CAVE LLP
1661 N. Clark St., Suite 4330
Chicago, IL 60601-3315
(312) 602-5085

MARK L. RIENZI
Counsel of Record
LUKE C. GOODRICH
HANNAH C. SMITH
DIANA M. VERM
ADÈLE AUXIER KEIM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W.,
Suite 220
Washington, D.C. 20007
(202) 955-0095
mrienzi@becketfund.org

JUNE 29, 2014

Counsel for Applicant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:13-cv-08910
	)	
SYLVIA MATHEWS BURWELL, et al.,	)	Judge Robert M. Dow, Jr.
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Wheaton College is a Christian liberal arts college that provides health insurance benefits to its employees and students and opposes abortion and abortifacient contraceptives on religious grounds. Plaintiff alleges that its religious beliefs will be impermissibly and substantially burdened by regulations promulgated pursuant to the Patient Protection and Affordable Care Act ("ACA") that require group health insurance plans to cover "all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 78 Fed. Reg. 39870, 39870 (July 2, 2013) ("the Mandate"). Plaintiff is eligible for an accommodation that would excuse it from complying with the Mandate, but alleges that it should be eligible for an exemption rather than an accommodation and, moreover, that complying with the procedures necessary to obtain an accommodation – namely, completing and submitting to its third-party administrator "EBSA Form 700—Certification" – will "make it morally complicit in the wrongful destruction of human life." Plaintiff argues that the Mandate violates the First Amendment and the Religious Freedom Restoration Act ("RFRA") and was enacted in violation of the Administrative Procedures Act ("APA"). Plaintiff has requested a permanent injunction enjoining Defendants

from enforcing the Mandate, which Defendants may enforce against Plaintiff as early as July 1, 2014.

Defendants ("the Government") moved to dismiss all sixteen counts of Plaintiff's complaint or, in the alternative, for summary judgment. See [25]. Plaintiff cross-moved for summary judgment on six counts, see [41], [44], and also sought additional discovery under Federal Rule of Civil Procedure 56(d) in the event that its cross-motion were denied. See [43]. The parties fully briefed these motions, and the Court has taken their submissions under advisement. Because (1) the Mandate will take effect for Plaintiff on July 1, 2014, and (2) two cases currently pending before the United States Supreme Court, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, and *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, may affect the ultimate resolution of at least some of Plaintiff's claims, Plaintiff has moved for a preliminary injunction with respect to each of the six counts on which it has cross-moved for summary judgment. See [57], [58]. The Government opposes the motion [59].[1]

For the reasons stated below, the Court respectfully denies Plaintiff's motions for preliminary injunction [57], [58]. To the extent that *Hobby Lobby* and *Conestoga* call into question any material aspect of the Seventh Circuit's controlling decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), any party may file a motion for reconsideration of this order. This order is also subject to reconsideration on the Court's own motion.

This matter is set for a telephonic status conference on 6/30/2014 at 10:00 a.m.

[1] Briefing on the motions was delayed until after the Seventh Circuit issued its decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), and thus was not complete until May 19. The Court convened a conference call with counsel on June 9 to discuss how to proceed in light of the fact that the Supreme Court had not yet issued its rulings in the *Hobby Lobby* and *Conestoga* cases. During that call, the parties agreed to an expedited schedule for the filing of the briefs in support of and in opposition to the preliminary injunction motion.

I. Background

Plaintiff is a Christian liberal arts college located in Wheaton, Illinois. Plaintiff is not affiliated or associated with any one particular church, though it characterizes its beliefs as "Evangelical Protestant." [41] at 10. All members of Plaintiff's "community," *i.e.*, its employees and students, "assent to [Plaintiff's] religious beliefs, including its beliefs about the sanctity of life." *Id*. at 3. Pursuant to its beliefs about the sanctity of life, Plaintiff opposes contraceptive methods that "may act by killing a human embryo," including emergency contraception like Plan B and ella. *Id.* "As part of its religious convictions, [Plaintiff] promotes the well-being and health of its students and employees * * * [by] provi[ding] generous health services and health insurance." [1] ¶ 38. The health insurance that Plaintiff currently offers covers some contraceptives but not those to which Plaintiff is religiously opposed. See [41] at 5. Plaintiff offers its health insurance pursuant to six plans: two insured HMO plans, a PPO plan,[2] two self-funded prescription drug plans, and an insured student health plan. See *id*. at 4. The "plan year" for Plaintiff's insurance plans begins on July 1, 2014. [1] ¶¶ 46, 155.

The Seventh Circuit recently provided a comprehensive discussion of the genesis and mechanics of the ACA, the Mandate, and the exemption and accommodation at issue here in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014). As the parties are familiar with – and generally in agreement about – these matters, and the Court anticipates addressing them more robustly in its upcoming summary judgment ruling, the Court incorporates the Seventh Circuit's discussion by reference and includes here only those background details most pertinent to the resolution of the instant motion.

[2] Plaintiff's PPO plan is "grandfathered" for purposes of the ACA, such that it is not subject to the Mandate.

The ACA requires employers with 50 or more full-time employees to provide health insurance for their full-time employees or pay a penalty on their federal tax return. See 26 U.S.C. § 4980H. The ACA also requires that non-exempt group health plans offer coverage for certain preventive services without cost-sharing requirements. See 42 U.S.C. § 300gg-13. These preventive services include "with respect to women, such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg-13(a)(4). The HRSA's guidelines include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HHS, Women's Preventive Health Services Guidelines, http://www.hrsa.gov/womenshealthguidelines. Failure to provide the required coverage for contraception results in a variety of negative tax consequences to the employer, including a daily tax of $100 per day per individual "to whom such failure relates." 26 U.S.C. §§ 4980D(a), (b)(1). Employers who do not provide insurance at all (despite being required to do so) face an annual tax of $2,000 per full-time employee. See 26 U.S.C. § 4980H. Plaintiff avers that it faces up to $34.8 million in annual tax penalties under these provisions.

As the Seventh Circuit explained in *Notre Dame*, "the government, some months after the enactment of the Affordable Care Act, created by administrative regulation an exemption from the guidelines." *Notre Dame*, 743 F.3d at 550. The exemption applies only to "religious employers," those that are "organized and operate[] as a non-profit entity and [are] referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). After some pushback from religious entities that did not fall within the scope of the narrow exemption, the Government promulgated new regulations implementing the

accommodation at issue here. See 78 Fed. Reg. 39870, 39875-90 (July 2, 2013); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b). Per those regulations, which Plaintiff alleges were promulgated in contravention of the APA, religious organizations that do not fall within the ambit of the exemption may seek an accommodation from the Mandate on religious grounds. An organization seeking the accommodation must satisfy four requirements:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

45 C.F.R. § 147.131(b). There is no dispute that Plaintiff satisfies requirements (1)-(3); its objection is to the self-certification required by 45 C.F.R. § 147.131(b)(4).

Employers seeking the accommodation must execute the self-certification form and furnish a copy to their health insurance issuers or third-party administrators. The recipient "issuers" "may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such." 45 C.F.R. § 147.131(c)(1). The recipient issuers are required to "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and [p]rovide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries so long as they remain enrolled in the plan." *Id.* § 147.131(c)(2)(i). Additionally, issuers are barred from imposing any cost-sharing requirements

"on the eligible organization, the group health plan, or plan participants or beneficiaries," and must "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." *Id.* § 147.131(c)(2)(ii). The regulations prohibit accommodated entities from "(1) [d]irectly or indirectly interfering with a third party administrator's efforts to provide or arrange separate payments for contraceptive services for participants or beneficiaries in the plan and (2) directly or indirectly seeking to influence a third party administrator's decision to provide or arrange such payments," 78 Fed. Reg. 39870, 39879-80 (July 2, 2013); a footnote clarifies that "[n]othing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." *Id*. at 39880 n.41.

Plaintiff contends that "signing and the delivering EBSA Form 700 to its insurer and TPA [third-party administrator] would make it morally complicit in the wrongful destruction of human life." [41] at 6. Plaintiff further contends that the self-certification form would give its TPA "the legal authority to provide contraceptives to Wheaton's employees at no costs" and would undermine the contract between Plaintiff and its TPA because Plaintiff "is the plan administrator and fiduciary, and Wheaton's TPA has no authority to change the terms of the plan without Wheaton's express permission." [41] at 5. Plaintiff also argues that complying with the regulations barring it from interfering with or seeking to influence the TPA's provision of contraception, which Plaintiff terms the "gag rule," "would prevent Wheaton from speaking freely about its objections to life-ending emergency contraceptives or instructing its TPA to provide some contraceptives but not others." *Id.* at 6. Yet, if Plaintiff does not comply with the Mandate and associated regulations, or complete and submit to its TPA the self-certification form, Plaintiff will be subject to a sizeable tax. Plaintiff seeks preliminary injunctive relief from

this conundrum under the Religious Freedom and Restoration Act ("RFRA"), the First Amendment's religion and free speech clauses, and the Administrative Procedure Act.

II. Legal Standard

"To obtain a preliminary injunction, the moving party must show that it has '(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits.'" *Wis. Right to Life, Inc. v. Barland*, --- F.3d ---, 2014 WL 1929619, at *23 (7th Cir. May 14, 2014) (quoting *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011)). The threshold for establishing likelihood of success is relatively low. *Mich. v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011). The moving party must only "present a claim plausible enough that (if the other preliminary injunction factors cut in their favor), the entry of a preliminary injunction would be an appropriate step." *Id.* at 783.

"If this showing is made, 'the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest.'" *Wis. Right to Life*, 2014 WL 1929619, at *23 (quoting *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013)). "The 'equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor.'" *Id.* (quoting *Korte*, 735 F.3d at 665). In First Amendment cases such as this one, the likelihood of success on the merits is usually the determinative factor. *Id.* at *24. The loss or impingement of freedoms protected by the First Amendment "unquestionably constitutes irreparable injury," *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)), and "injunctions protecting First Amendment freedoms are always in the public interest." *Id.* at 590 (quoting *Christian Legal*

Soc'y v. Walker, 453 F.3d 853, 859 (7th Cir. 2006)); see also *Smith v. Executive Director of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 286 (7th Cir. 2014).

III. Analysis

A. Likelihood of Success on the Merits

1. RFRA

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (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(b). A plaintiff states a prima facie case under RFRA by demonstrating that governmental action substantially burdens its sincere religious exercise. See *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 428 (2006); *Notre Dame*, 743 F.3d at 554. If the plaintiff clears that hurdle, the burden shifts to the government to demonstrate that the challenged action was taken in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. See *Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013).

Here, Plaintiff contends that its sincere religious exercise will be substantially burdened if it is required to complete the EBSA Form 700. Plaintiff argues that it "cannot execute the self-certification form the government has provided without making itself morally complicit in the government's scheme," [41] at 20, because doing so would "facilitate use of emergency contraceptives in violation of its sincere beliefs," *id.* at 22, and would materially alter its contractual relationship with its TPA by imposing upon the TPA a duty to become a plan administrator with respect to the objected-to contraceptives. See *id.* at 22-23. Plaintiff also

contends that the Government cannot shoulder its burden of demonstrating that enforcement of the Mandate is the least restrictive means of advancing a compelling governmental interest.

Although there is no dispute that Plaintiff's religious beliefs are sincere, the Court concludes that Plaintiff has no likelihood of success in establishing a substantial burden on its religious exercise, at least as the law in this and the only other circuit to have directly engaged the issue currently stands. In *Notre Dame*, the Seventh Circuit squarely rejected the University of Notre Dame's contention that "filling out the form and sending it to the companies * * * 'triggers' their coverage of the contraception costs of the university's female employees and students, and that this makes the university an accomplice in the provision of contraception." *Notre Dame*, 743 F.3d at 554. As the Seventh Circuit explained, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." *Id.* The Sixth Circuit recently came to the same conclusion in *Michigan Catholic Conference & Catholic Family Services v. Burwell*, --- F.3d ---, 2014 WL 2596753, at *8-10 (6th Cir. June 11, 2014). These cases strongly suggest that, unless the Supreme Court's rulings in *Hobby Lobby* or *Conestoga* significantly change the legal landscape, Plaintiff's likelihood of demonstrating that the accommodation process substantially burdens its religious exercise is insufficient to meet the threshold required to warrant a preliminary injunction on this basis.[3]

The Court is not persuaded at this juncture that Plaintiff's situation (or legal arguments) are distinguishable from those rejected in *Notre Dame* and *Michigan Catholic Conference*.

[3] The Court is aware that the *Notre Dame* panel decision was not unanimous and that Judge Flaum filed a well-reasoned dissenting opinion explaining why he would have granted a preliminary injunction forbidding the government from penalizing the university for refusing to comply with the self-certification requirement. See *Notre Dame*, 743 F.3d at 562 (Flaum, J., dissenting). However, because that view did not prevail with the panel majority and the petition for rehearing and rehearing en banc was denied, Plaintiff is swimming against the tide of controlling law in this circuit, which this Court is duty-bound to apply.

Plaintiff rightly points out that, unlike Notre Dame, it has not yet signed the EBSA Form 700. But that is of little moment, since Plaintiff's theory rises and falls on the appeals court's conclusion that federal law, not Plaintiff's execution of the EBSA Form 700, is the source of the TPA's and health insurer's obligations. Plaintiff *is* distinguishable from Notre Dame in that it has furnished the Court with (excerpts of) its insurance contracts and argues that the provisions of the contracts would be materially altered if it executes and delivers the self-certification. See [41-4]; *Notre Dame*, 743 F.3d at 555. However, even though the Seventh Circuit did not comprehensively address the contract argument in *Notre Dame* due to Notre Dame's forfeiture and failure to present evidence "that its contract with Meritain forbids the latter to be a plan fiduciary," the court nonetheless pronounced Notre Dame's argument "unconvincing." *Notre Dame*, 743 F.3d at 555. In reaching this conclusion, the Seventh Circuit explained that "the university has not been told to name Meritain as a plan fiduciary. Rather, the signed form '*shall be treated* [by the government] *as* a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered.'" *Id.* (quoting 29 C.F.R. § 2510.3-16(b)). The Seventh Circuit appears to have been drawing a distinction between treating an insurer or TPA as a plan administrator for some purposes and formally imbuing the entity with full fiduciary responsibilities. The Court finds this distinction persuasive, particularly in light of the dearth of authority in support of Plaintiff's argument and the broader principle that parties in many circumstances cannot contract around statutory obligations. See *United States v. Lupton*, 620 F.3d 790, 800 (7th Cir. 2010) ("Parties cannot contract around definitions provided in criminal statutes."); *Equal Employment Opportunity Comm'n v. Ind. Bell Tel. Co.*, 256 F.3d 516, 532 (7th Cir. 2001) (en banc) (Flaum, C.J., concurring in part and dissenting in part) ("It is uncontested that employers cannot use

collective bargaining agreements to contract around anti-discrimination laws like Title VII."). Accordingly, the Court concludes that Plaintiff has not established a likelihood of success on the merits of its RFRA claim at this time.

2. First Amendment Religion Clauses

Plaintiff next contends that "[t]he Mandate violates the Religion Clauses because it impermissibly discriminates among religious institutions asserting the exact same religious objection. Some favored 'religious employers' are exempt from the Mandate and the requirement to execute EBSA Form 700. Yet others like Wheaton, who wish to engage in the exact same religious exercise as 'religious employers,' are forced to comply or pay massive penalties." [41] at 9. Plaintiff asserts that the Government's implementation of the exemption and accommodation draws "explicit and deliberate distinctions between different religious organizations" and "violate[s] both the Free Exercise and Establishment Clause." *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 246 n. 23 (1982)).

The Seventh Circuit expressly rejected Plaintiff's argument in *Notre Dame*. There, Notre Dame argued that the exemption violated the Establishment Clause by "favor[ing] certain types of religious organizations (churches or other houses of worship) over others (like Notre Dame)." *Notre Dame*, 743 F.3d at 560. The Seventh Circuit observed that "religious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities without these advantages being thought to violate the establishment clause." *Id.* (citations omitted). The court further noted that the distinction was not based on denomination, and held that the Establishment Clause "does not require the government to equalize the burdens (or benefits) that laws of general applicability impose on religious institutions." *Id.* The Sixth Circuit likewise rejected a similar challenge to the exemption and accommodation in *Michigan*

Catholic Conference. See 2014 WL 2596753, at *16-17. The Sixth Circuit quoted the same Supreme Court case that Plaintiff does here for the proposition that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," *id.* at *16 (quoting *Larson*, 456 U.S. at 244), and concluded that "[t]he line that the exemption and accommodation framework draws between eligibility for the exemption and for the accommodation is based on organizational form and purpose, not religious denomination." *Id.* The Sixth Circuit also persuasively distinguished *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), on which Plaintiff relies here. See *Michigan Catholic Conference*, 2014 WL 2596753, at *16; [41] at 9-10; [52] at 5-6. The Court finds particularly compelling the Sixth Circuit's observation that some of the Catholic plaintiffs in *Michigan Catholic Conference* were eligible for the exemption and some for the accommodation; this is a clear indication that denomination is not the relevant metric for the exemption. See *Michigan Catholic Conference*, 2014 WL 2596753, at *16.

The "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245. And here, Plaintiff does not separate out its Religion Clause contentions. See [41] at 9-12. To the extent that Plaintiff is alleging that the Mandate is not neutral or generally applicable, the Court finds persuasive the Sixth Circuit's contrary conclusion. See *Michigan Catholic Conferenc*, 2014 WL 2596753, at *14-16. Plaintiff also makes the additional argument that the Government violated its First Amendment rights by "press[ing] ahead with its narrow church-focused exemption in the face of" evidence from Plaintiff and other religious colleges that their full-time administrators

and faculty[4] share the faith of the institutions. See [41] at 12. Notre Dame raised essentially the same point, however, see *University of Notre Dame v. Sebelius*, Case No. 13-3853, Dkt. No. 20, at 15 (7th Cir. Jan. 13, 2014), and the Seventh Circuit implicitly concluded that this fact "add[ed] nothing to [Notre Dame's] RFRA arguments" and did not "warrant discussion." *Notre Dame*, 743 F.3d at 560. The Court finds itself constrained by controlling circuit precedent to reach the same conclusion at this juncture.

3. APA

The APA authorizes federal courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiff contends that the Government's enactment of the Mandate, exemption, and accommodation framework should be set aside as violative of the APA because it "ignored key aspects of the problem before them, relied on misinterpretations of the facts and laws, and relied on false assumptions about the religious beliefs of employees at Evangelical Protestant institutions like Wheaton." [41] at 13-14. Namely, Plaintiff argues that the Mandate was enacted in contravention of the APA because the Government declined to widen the scope of the exemption to include Plaintiff even after Plaintiff informed the Government that its employees (its faculty and administrators, at least) embrace its religious views. See *id.* at 13-14.

Plaintiff's APA argument is not persuasive. First, as Plaintiff recognizes in its brief, see [41] at 12, the APA argument is very closely related to the religion clauses argument discussed above. Both theories fundamentally challenge the line that the Government has drawn between the exemption and the accommodation. (Notably, however, Plaintiff does not directly contend that the Mandate violates the APA because it is unconstitutional. See [41] at 12-14.) In light of

[4] The statement from the Council for Christian Colleges and Universities said nothing about the universities' lower-level employees or students necessarily sharing their religious beliefs. See [41] at 12; [41-11].

the Seventh Circuit's clear rejection of the constitutional argument, it is difficult to envision a scenario in which Plaintiff could prevail on its closely related APA argument, which affords the Government a significantly more deferential standard of review. Second, to the extent that Plaintiff's APA argument is distinct from its religion clauses arguments, the Court is not convinced at this time that it has any likelihood of success on the merits. Plaintiff essentially contends that because the Government ignored or failed to consider a single piece of evidence when drafting regulations, the resultant regulations necessarily are contrary to the evidence. This argument conflates a single piece of evidence with "the evidence" as a whole. In most every contentious case or rule-making process, the decision-maker is presented with conflicting evidence and is tasked with rendering a decision in accordance with the evidence overall, not merely a single piece. Here, Plaintiff asserts that the Government disregarded its evidence and relied instead on a purportedly faulty assumption that the "church-focused religious employer exemption was justified because church employees were more likely than the employees of other religious non-profits to agree with their employers' religious views." [41] at 13. Plaintiff's evidence may have supported the contrary conclusion (at least as to high-level employees at the signatory colleges), but there is no indication at this time that the bulk of other submitted evidence did as well. The Government is required only to provide a "concise general statement" of a rule's basis and purpose, 5 U.S.C. § 553(c), not to furnish a detailed explanation that specifically addresses every single evidentiary submission made to it during a notice-and-comment period. Accordingly, Plaintiff has not demonstrated a likelihood of success on the merits of its APA claim.

4. First Amendment Free Speech Clause

Plaintiff contends that the Mandate violates the First Amendment's free speech clause because the Mandate "forces Wheaton to speak against its will, and in a way that contradicts its beliefs." [41] at 14. The first prong of Plaintiff's argument is that the requirement that it complete the self-certification form is tantamount to the Government mandating speech that Plaintiff otherwise would not make. See *id.* (citing *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006)). Plaintiff asserts that the EBSA Form 700 "triggers payments for the use of abortifacient drugs and services, including for 'education and counseling' about those products to Wheaton's plan participants." *Id.* As discussed above, the Seventh Circuit has squarely rejected the "trigger" theory. Indeed, both the Seventh and Sixth Circuits have concluded that the self-certification form "triggers the entities' *disassociation* from what they deem to be objectionable coverage." *Michigan Catholic Conference*, 2014 WL 2596753, at *13; see *Notre Dame*, 743 F.3d at 557-58. To the extent that Plaintiff's free speech argument is predicated on the "trigger" theory, it cannot succeed absent a change in the controlling law.

Plaintiff also contends that the so-called "gag rule" violates its free speech rights by prohibiting it from "request[ing] that its TPAs not use its plans to provide emergency contraceptives." [41] at 17. Plaintiff rightly points out that the Seventh Circuit's ruling in *Notre Dame* does not foreclose this argument. To the contrary, the Seventh Circuit recognized that "most speech or writing intended to influence someone else's decision – to persuade someone to do or not do something – *is* protected" by the First Amendment, *Notre Dame*, 743 F.3d at 560, and was "troubled by the seeming vagueness of the regulation as drafted and as further muddied in the footnote in the commentary." *Id.* at 561. The Seventh Circuit did not provide further guidance, however, because "the parties have failed to place the issue in focus." *Id.* The

Seventh Circuit noted that Notre Dame "hasn't told us what it wants to say but fears to say (except that it at least wants to be able to tell Meritain not to provide contraceptive coverage at all – which sounds like urging civil disobedience) and the government hasn't clearly embraced an interpretation of the regulation that would give rise to the concerns we've expressed." *Id.* The Sixth Circuit found similar impediments to making a merits ruling on this point in *Michigan Catholic Conference*. See *Michigan Catholic Conference*, 2014 WL 2596753, at *14. Plaintiff here has spelled out in some detail the contours of what it wishes to say but fears that it cannot without running afoul of the regulation.

The Government responds that the "gag rule" is "meant only to prevent a self-certifying organization from using its economic power into not fulfilling its legal obligation to provide contraceptive coverage." [49] at 13. Plaintiff and the Government each have pointed to one district court case supporting their view. See *Roman Catholic Archbishop of Washington v. Sebelius*, --- F. Supp. 2d ---, 2013 WL 6729515, at *38 (D.D.C. Dec. 20, 2013) (Plaintiff); *Michigan Catholic Conference v. Sebelius*, --- F. Supp. 2d ---, 2013 WL 6838707, at *11 (W.D. Mich. Dec. 27, 2013) (Government).

Based on the record currently before it, the Court concludes that Plaintiff has demonstrated some likelihood of success on the merits of its "gag rule" claim. That being said, however, it is clear from Plaintiff's briefing and its proposed order that what it seeks in the way of immediate and preliminary relief is an injunction barring the Government from enforcing the Mandate and requiring Plaintiff to sign the EBSA Form 700. It is unclear to the Court how an injunction as to enforcement of the "gag rule" could give Plaintiff this relief; it would still need to fill out the form. The Court will explore with counsel at the next status hearing whether Plaintiff wishes to pursue preliminary injunctive relief on the "gag rule" aspects of the

regulations or whether it is content to await the Court's forthcoming summary judgment ruling on that issue. In either case, the Court may request supplemental briefing to ascertain the parties' views on the content of any injunction order to which Plaintiff may be entitled on this issue. See Fed. R. Civ. P. 65(d)(1)(B) (requiring courts to state terms of an injunction order "specifically").

B. Remaining Factors

Because the majority opinion in *Notre Dame* stands squarely in the path of the principal relief that Plaintiff seeks, Plaintiff cannot demonstrate the requisite likelihood of success on the merits of its claims. Accordingly, the motion for preliminary injunction must be denied. See, *e.g., Cox v. City of Chi.*, 868 F.2d 217, 223 (7th Cir. 1989). In the interest of completeness, however, the Court will briefly address the other factors that are considered at the preliminary injunction stage.

The other two threshold elements that Plaintiff must prove to support the issuance of a preliminary injunction are that it (1) has no adequate remedy at law and (2) will suffer irreparable harm if the injunction is not issued. These two requirements tend to merge. See *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984). "The question is then whether the plaintiff will be made whole if he prevails on the merits and is awarded damages." *Id.* An injury is "irreparable" when it is of such a nature that the injured party cannot be adequately compensated in damages or when damages cannot be measured by any pecuniary standard. *Meridian Mut. Ins. Co. v. Meridian Ins. Grp., Inc.*, 128 F.3d 1111, 1120 (7th Cir. 1997). Here, there is no question that Plaintiff has made these showings. The loss or impingement of freedoms protected by the First Amendment "unquestionably constitutes irreparable injury," *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012)

(quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)), and such an injury cannot be remedied by the receipt of damages.

The Court likewise concludes that at least in the short term – that is, between today and the time by which the Court will be in position to rule on the summary judgment motions with the benefit of the parties' views on *Hobby Lobby* and *Conestoga* – the balance of harms strongly weighs in Plaintiff's favor. See *Korte*, 735 F.3d at 665 ("[T]he court weights the competing harms to the parties if an injunction is granted or denied and also considers the public interest."). The potential harms to Plaintiff are substantial. If *Hobby Lobby* and *Conestoga* do not substantially change the legal landscape, Plaintiff will be faced with the Hobson's choice of adhering to its religious beliefs or being subjected to steep financial penalties. The short-run costs to the Government, on the other hand, are purely financial and will be minimal in the time frame referenced above. The Government would at most lose for a short period of time its ability to collect tax penalties from Plaintiff, an ability that it currently lacks as to many similarly situated entities whose insurance "plan years" happen to begin later in the year. See 78 Fed. Reg. 39872. Nonetheless, these considerations do not come into play in light of Plaintiff's current inability to demonstrate that it is likely to prevail on the merits of its claims.

IV. Conclusion

For the reasons stated above, the Court respectfully denies Plaintiff's motions for preliminary injunction [57], [58]. To the extent that *Hobby Lobby* and *Conestoga* call into question any material aspect of the Seventh Circuit's controlling decision in *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), any party may file a motion for reconsideration of this order. This order is also subject to reconsideration on the Court's own motion. This matter is set for a telephonic status conference on 6/30/2014 at 10:00 a.m.

Dated: June 23, 2014

Robert M. Dow, Jr.
United States District Judge

SHORT RECORD
NO. 14-2396
FILED 6/26/14

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

WHEATON COLLEGE, *Plaintiff*, v. SYLVIA M. BURWELL, *et al.*, *Defendants*	NO. 1:13-CV-08910 **NOTICE OF APPEAL**

Notice is hereby given this 26th day of June, 2014, that Wheaton College, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order of this Court entered in this action June 23rd, 2014: Docket 62, denying Wheaton College's motion for preliminary injunction.

Respectfully submitted this 26th day of June, 2014,

/s/ *Mark Rienzi*
Mark Rienzi, DC Bar No. 494336*
Adèle Auxier Keim, DC Bar No. 989528*
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
Tel.: (202) 955-0095
Fax: (202) 955-0090
mrienzi@becketfund.org

Counsel for Plaintiff Wheaton College
**admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, the foregoing notice of appeal was served on counsel for Defendants via ECF.

/s/ *Mark Rienzi*
Mark Rienzi, DC Bar No. 494336*
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
Tel.: (202) 955-0095
Fax: (202) 955-0090
mrienzi@becketfund.org

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 27, 2014

By the Court:

WHEATON COLLEGE, Plaintiff-Appellant,		] Appeal from the United] States District Court for] the Northern District of
No. 14-2396	v.	] Illinois, Eastern Division.]
SYLVIA MATHEWS BURWELL, Secretary of Health and Human Services, et al., Defendants-Appellees.		] No. 1:13-cv-08910]] Robert M. Dow, Jr., Judge.

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291.

A notice of appeal filed before the district court issues its ruling on a timely Rule 59 motion is ineffective until the order disposing of the motion is entered on the district court's civil docket. Fed. R. App. P. 4(a)(4).

In the present case, plaintiff-appellant Wheaton College filed a Motion for Reconsideration of Preliminary Injunction Request on June 24, 2014, within 28 days of entry of the order denying the preliminary injunction. This may be a timely Rule 59 motion. *See Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). As such, this appeal may be premature, because it appears that the district court has not disposed of the motion and entered its order on the district court's civil docket. Accordingly,

IT IS ORDERED that plaintiff-appellant Wheaton College shall file, on or before July 11, 2014, a brief memorandum stating why this appeal should not be STAYED pending the entry of the order disposing of the motion. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

No. 14-2396

In the United States Court of Appeals for the Seventh Circuit

WHEATON COLLEGE, an Illinois non-profit corporation,

Appellant—Movant,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees—Respondents.

On Appeal from the United States District Court
for the Northern District Of Illinois Eastern Division
No. 1:13-cv-08910, Judge Robert M. Dow, Jr., Presiding

EMERGENCY MOTION—RELIEF REQUESTED BY JUNE 30 ON UNDERLYING MOTION

JURISDICTIONAL MEMORANDUM

Christian Poland
BRYAN CAVE LLP
161 N. Clark St., Suite 4300,
Chicago, IL 60601-3315
(312) 602-5085 (tel.)
Christian.Poland@bryancave.com

Mark Rienzi
Luke Goodrich
Adèle Auxier Keim
Diana M. Verm
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K Street, N.W., Suite 220
Washington, D.C. 20007
(202) 955-0095
lgoodrich@becketfund.org

Counsel for Wheaton College

June 27, 2014

Wheaton College's Jurisdictional Memorandum

This Court has jurisdiction over Wheaton College's appeal from the district court's order denying a preliminary injunction (Dkt. 62) under 28 U.S.C. § 1292(a)(1), which states that "courts of appeals shall have jurisdiction of appeals from . . . interlocutory orders of the district courts of the United States . . . refusing . . . injunctions." This appeal was not filed under 28 U.S.C. § 1291 (referred to in the Court's order today) but under section 1292.

Wheaton College's district court motion for reconsideration, or in the alternative, injunction pending appeal (Dkt. 64) does not deprive this Court of jurisdiction over Wheaton College's appeal. Under Federal Rule of Civil Procedure 62(c), "[w]hile an appeal is pending from an interlocutory order" that "denies an injunction" the district court "may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Furthermore, Federal Rule of Appellate Procedure 8 affirmatively requires appellants to move first in the district court for an injunction pending appeal.

Wheaton College's motion for reconsideration or injunction pending appeal was not filed under Federal Rule of Civil Procedure 59, referred to in the Court's order today. Wheaton College's motion for reconsideration is not a "motion to alter or amend a judgment" under Rule 59 because there was no entry of judgment in the district court.

For the reasons set forth in Wheaton's Emergency Motion, Wheaton respectfully requests that the Court remove the stay and enter an injunction pending appeal in order to preserve the status quo while Wheaton College's appeal proceeds.

Respectfully submitted,

s/*Luke Goodrich*

Mark Rienzi
Luke Goodrich
Adèle Auxier Keim
Diana Verm
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K St. N.W., Suite 220
Washington, DC 20007
(202) 955-0095
mrienzi@becketfund.org

Christian Poland
BRYAN CAVE LLP
161 N. Clark St., Suite 4300,
Chicago, IL 60601-3315
(312) 602-5085 (tel.)
Christian.Poland@bryancave.com

Counsel for Wheaton College

CERTIFICATE OF SERVICE

I certify that on June 27, 2014, I caused the foregoing *Jurisdictional Memorandum* to be served by CM/ECF to the following parties, who have consented in writing to service in this manner:

Julie Saltman, Julie.saltman@usdoj.gov
Patrick Nemeroff, Patrick.G.Nemeroff@usdoj.gov
Alisa Klein, Alisa.Klein@usdoj.gov
Adam Jed, Adam.C.Jed@usdoj.gov
Mark Stern, Mark.Stern@usdoj.gov

U.S. Department of Justice

Counsel for Respondents

Respectfully submitted,

s/ *Luke Goodrich*
Luke Goodrich
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K St. N.W., Suite 220
Washington, DC 20007
(202) 955-0095
lgoodrich@becketfund.org

Counsel for Wheaton College

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE, *Plaintiff*, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMANSERVICES; THOMAS PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	Civ. Action No. _____ Jury Demanded

COMPLAINT

Comes now Plaintiff, Wheaton College, by and thr**o**ugh its attorneys, and states as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations issued under the 2010 "Affordable Care Act" that force employee and student health insurance plans to provide free coverage of contraceptives, sterilizations, and drugs and devices that cause early abortions (the "Final Mandate").

2. Plaintiff, Wheaton College ("Wheaton"), is a Christian liberal arts college located in Wheaton, Illinois. Wheaton's religious beliefs forbid it from participating in, providing access to, paying for, designating others to pay for, training others to engage in, or otherwise supporting abortion. Wheaton is among the many American religious organizations that hold these beliefs.

3. In light of these religious beliefs, Wheaton cannot participate in the government's regulatory scheme to promote, encourage, and subsidize the use of drugs and devices that cause abortions. Under the Final Mandate, however, Wheaton faces millions of dollars in fines for this religious exercise.

4. Defendants have exempted thousands of plans, covering tens of millions of employees, from the Final Mandate. These exemptions have been granted for a wide variety of reasons, from the purely secular exemption for plans in existence before a certain date ("grandfathered plans") to a narrow religious exemption for certain "religious employers."

5. Despite its obvious religious nature, Wheaton does not qualify for any exemptions. While "religious employers" are exempted, Defendants have limited that exemption to protect only "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order." That is because, in the eyes of the government, Wheaton's work educating students "For Christ and His Kingdom" is not an "exclusively religious activity."

6. The regulations do offer Wheaton and other non-exempt religious organizations what Defendants have labeled an "accommodation." But the "accommodation" still requires Wheaton to play a central role in the government's scheme, because it must designate an agent to pay for the objectionable services on Wheaton's behalf, and it has to take steps to trigger and

facilitate that coverage. Wheaton cannot take these actions to facilitate this coverage without violating its religious beliefs.

7. The supposed "accommodation" also continues to treat Wheaton as a second-class religious organization, not entitled to the same religious freedom rights as other religious organizations, including any religious schools that are "integrated auxiliaries" of churches.

8. The "accommodation" also creates administrative hurdles and other difficulties for Wheaton, forcing it to seek out and contract with companies willing to provide the very drugs and services it speaks out against.

9. If Wheaton does not compromise its religious convictions and comply with the regulations, however, it faces severe penalties that could exceed $25.7 million each year.

10. By placing Wheaton in this impossible position, Defendants have violated the Religious Freedom Restoration Act, as well as the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment of the United States Constitution, The Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act.

11. Wheaton therefore respectfully requests declaratory and permanent injunctive relief.

JURISDICTION AND VENUE

12. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1.

13. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). A substantial part of the events or omissions giving rise to the claim occurred in this district, and Plaintiff resides in this district.

IDENTIFICATION OF PARTIES

14. Plaintiff Wheaton College is a liberal arts college in Wheaton, Illinois. Founded in 1860 by abolitionist Jonathan Blanchard, Wheaton's mission is to "serve[] Jesus Christ and advance[] his kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide." Wheaton's motto is "For Christ and His Kingdom."

15. Defendants are appointed officials of the United States government and the United States governmental agencies responsible for issuing the Mandate.

16. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.

17. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

18. Defendant Thomas Perez is the Secretary of the United States Department of Labor. In this capacity, he has responsibility for the operation and management of the Department of Labor. Perez is sued in his official capacity only.

19. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

20. Defendant Jacob Lew is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department of the Treasury. Lew is sued in his official capacity only.

21. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

FACTUAL ALLEGATIONS

I. Wheaton's Religious Beliefs and Practices Related to Insurance for Abortion

22. Wheaton is a liberal arts college located in Wheaton, Illinois. It was founded in 1860 by abolitionist Jonathan Blanchard.

23. Today, Wheaton "is an institution of higher learning, a rigorous academic community that takes seriously the life of the mind." See http://www.wheaton.edu/About-Wheaton/Community-Covenant. Wheaton offers 59 undergraduate degree programs and 22 graduate degree programs, including five doctoral programs.

24. Faith is central to the education mission of Wheaton. Wheaton aspires "to live, work, serve, and worship together as an educational community centered around the Lord Jesus Christ." Wheaton College, Community Covenant, http://www.wheaton.edu/about-wheaton/community-covenant.

25. Wheaton's purpose is expressed in its mission statement: "Wheaton College serves Jesus Christ and advances his kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide."

26. Wheaton's motto is "For Christ and His Kingdom."

27. In order to further its mission, Wheaton has a longstanding conviction that appropriate "institutional standards" help to "foster the kind of campus atmosphere most

conductive to becoming the Christian community of living, learning, and serving that Wheaton College aspires to be."

28. Each year, all Wheaton students and full-time employees voluntarily commit themselves to this community by signing Wheaton's Community Covenant.

29. In addition to signing the Community Covenant, Wheaton's Board of Trustees, faculty, and staff annually reaffirm Wheaton's doctrinal statement, which provides a summary of biblical doctrine that is consonant with Evangelical Christianity. See http://www.wheaton.edu/About-Wheaton/Statement-of-Faith-and-Educational-Purpose.

30. Wheaton's Community Covenant recognizes that Scripture condemns the taking of innocent life. (Wheaton College, Community Covenant, http://www.wheaton.edu/about-wheaton/community-covenant.)

31. Wheaton holds religious beliefs that include traditional Christian teachings on the sanctity of life. Wheaton believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Wheaton therefore believes and teaches that abortion ends a human life and is a sin.

32. Wheaton is registered as a tax-exempt organization under 26 U.S.C. § 501(c)(3).

33. Wheaton is not a church, an integrated auxiliary of a church, or a convention or association of churches as defined by 26 U.S.C. § 6033(a)(3)(A)(i).

34. Wheaton is not a religious order as defined by 26 U.S.C. § 6033(a)(3)(A)(iii).

35. Wheaton is not a church or a convention or association of churches as defined by 26 U.S.C. § 414(e).

36. Wheaton has about 2,400 undergraduate and 600 graduate students.

37. Wheaton has about 709 full-time and 161 part-time employees as of December 2, 2013.

38. As part of its religious convictions, Wheaton promotes the well-being and health of its students and employees. This includes provision of generous health services and health insurance for its students and employees.

39. Wheaton's religious beliefs prohibit it from deliberately providing insurance coverage for drugs, procedures, or services inconsistent with its faith, in particular abortion-inducing drugs, abortion procedures, and related services.

40. It is similarly a violation of Wheaton's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a plan administrator and not by Wheaton.

41. Wheaton has no religious objection to providing coverage for contraceptive drugs and devices that prevent conception (as opposed to interfering with the continued survival of a human embryo).

42. Wheaton's employees and students choose to work at or attend Wheaton because they share its religious beliefs and wish to help Wheaton further its mission. Wheaton would violate their implicit trust in the organization and detrimentally alter its relationship with them if it were to violate its religious beliefs regarding abortion.

43. Wheaton has expended significant resources working with its insurers and plan administrators to ensure that its health insurance policies reflect Wheaton's religious beliefs.

44. On September 27, 2011, Wheaton submitted public comments on the Interim Final Rule on Preventative Services published on August 3, 2011 (76 Fed. Reg. 46621).[1] Wheaton's comments expressed its concern that the interim final rule failed to recognize it as a religious employer and that the rule violates Wheaton's rights of conscience.

45. On June 19, 2012, Wheaton submitted public comments on the Advance Notice of Proposed Rulemaking on Preventative Services published on March 21, 2012 (77 Fed. Reg. 16501). Wheaton's comments reiterated its concerns about the interim final rule, particularly Defendants' refusal to provide it and similar religious employers with the same exemption afforded to churches.

46. The plan year for Wheaton's employee insurance plans began on July 1, 2013 and a new plan year will begin on July 1, 2014.

47. Wheaton made certain changes to its employee insurance plans effective April 1, 2012, that render Wheaton healthcare plans ineligible for grandfathered status. *See* 45 C.F.R. § 147.140(a)(1)(i), 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i). In particular, Wheaton removed coverage for prescription drugs from two of its employee insurance plans and created new drug benefit plans for employees. None of these plans are grandfathered.

II. The Affordable Care Act and Preventive Care Mandate

48. In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act."

[1] Letter from President Philip G. Ryken, President, Wheaton College, to IRS Commissioner Douglas H. Shulman (Sept. 27, 2011), available at http://www.regulations.gov/#!documentDetail;D=IRS-2010-0017-0975.

49. The Affordable Care Act regulates the national health insurance market by directly regulating "group health plans" and "health insurance issuers."

50. One provision of the Act mandates that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain preventive care services. 42 U.S.C. § 300gg-13(a).

51. The services required to be covered include medications, screenings, and counseling given an "A" or "B" rating by the United States Preventive Services Task Force;[2] immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention; and "preventive care and screenings" specific to infants, children, adolescents, and women, as to be "provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(1)-(4).

52. The statute specifies that all of these services must be provided without "any cost sharing." 42 U.S.C. § 300gg-13(a).

[2] The list of services that currently have an "A" or "B" rating include medications like aspirin for preventing cardiovascular disease, vitamin D, and folic acid; screenings for a wide range of conditions such as depression, certain cancers and sexually-transmitted diseases, intimate partner violence, obesity, and osteoporosis; and various counseling services, including for breastfeeding, sexually-transmitted diseases, smoking, obesity, healthy dieting, cancer, and so forth. *See* U.S. Preventive Services Task Force, USPSTF A and B Recommendations, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Dec. 2, 2013) (Ex. A); *see also* 75 Fed. Reg. 41726, 41740 (2010).

The Interim Final Rule

53. On July 19, 2010, HHS[3] published an interim final rule promulgating directives concerning the Affordable Care Act's requirement for coverage of preventive services without cost sharing. 75 Fed. Reg. 41726, 41728 (2010).

54. The interim final rule was enacted without prior notice of rulemaking or opportunity for public comment, because Defendants determined for themselves that "it would be impracticable and contrary to the public interest to delay putting the provisions . . . in place until a full public notice and comment process was completed." 75 Fed. Reg. at 41730.

55. Although Defendants suggested in the Interim Final Rule that they would solicit public comments after implementation, they stressed that "provisions of the Affordable Care Act protect significant rights" and therefore it was expedient that "participants, beneficiaries, insureds, plan sponsors, and issuers have certainty about their rights and responsibilities." *Id*.

56. Defendants stated they would later "provide the public with an opportunity for comment, but without delaying the effective date of the regulations," demonstrating their intent to impose the regulations regardless of the legal flaws or general opposition that might be manifest in public comments. *Id*.

57. In addition to reiterating the Affordable Care Act's preventive services coverage requirements, the Interim Final Rule provided further guidance concerning the Act's restriction on cost sharing.

58. The Interim Final Rule made clear that "cost sharing" refers to "out-of-pocket" expenses for plan participants and beneficiaries. 75 Fed. Reg. at 41730.

[3] For ease of reading, references to "HHS" in this Complaint refer to all Defendants, unless context indicates otherwise.

59. The Interim Final Rule acknowledged that, without cost sharing, expenses "previously paid out-of-pocket" would "now be covered by group health plans and issuers" and that those expenses would, in turn, result in "higher average premiums for all enrollees." *Id.*; *see also id*. at 41737 ("Such a transfer of costs could be expected to lead to an increase in premiums.").

60. In other words, the prohibition on cost-sharing was simply a way "to distribute the cost of preventive services more equitably across the broad insured population." 75 Fed. Reg. at 41730.

61. After the Interim Final Rule was issued, numerous commenters warned against the potential conscience implications of requiring religious individuals and organizations to include certain kinds of services—specifically contraception, sterilization, and abortion services—in their health care plans.

62. HHS directed a private health policy organization, the Institute of Medicine (IOM), to make recommendations regarding which drugs, procedures, and services should be considered in comprehensive guidelines for preventive care for women.

63. IOM was not tasked with making insurance coverage recommendations and explicitly excluded cost considerations and other considerations relevant to coverage recommendations from its determinations regarding effective preventive care for women.

64. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), John Santelli, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America, and Sara Rosenbaum.

65. No religious groups or other groups that opposed government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.

66. On July 19, 2011, the IOM published its preventive care guidelines for women, including a recommendation that preventive services include all "Food and Drug Administration approved contraceptive methods [and] sterilization procedures." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, at 102-10 and Recommendation 5.5 (2011).

67. FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices such as IUDs; Plan B (also known as the "morning-after pill"); ulipristal (also known as "ella" or the "week-after pill"); and other drugs, devices, and procedures.

68. Some of these drugs and devices—including the "emergency contraceptives" Plan B, ella, and certain IUDs—are known abortifacients, in that they can cause the death of an embryo by preventing it from implanting in the wall of the uterus.

69. Indeed, the FDA's own Birth Control guide states that both Plan B and ella can work by "preventing attachment (implantation) to the womb (uterus)."[4]

70. Although it mentioned emergency contraceptives in passing, the IOM Report included no separate analysis of known abortifacients like Plan B and ella. *See generally* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, at 102-10 and Recommendation 5.5 (2011).

71. The conditions under which the IOM Report was prepared prompted one member of the drafting committee to file a dissent, in which he stated that "the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the

[4] FDA, Birth Control: Medicines to Help You, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Dec. 2, 2013) (Ex. B).

committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps,* at 232-233 (2011). The dissent deemed the evidence evaluation process a "fatal flaw" and concluded that "the committee erred [in] their zeal to recommend something despite the time constraints and a far from perfect methodology" and "failed to demonstrate [transparency and strict objectivity] in the Report." *Id.*

72. On August 1, 2011, thirteen days after IOM issued its recommendations, HHS's Health Resources and Services Administration ("HRSA") issued guidelines adopting them in full.[5]

The "Religious Employers" Exemption

73. That same day, HHS promulgated an additional Interim Final Rule. 76 Fed. Reg. 46621 (published Aug. 3, 2011).

74. This Second Interim Final Rule granted HRSA "*discretion* to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46621, 46623 (emphasis added). The term "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "serves primarily persons who share the religious tenets of the organization"; and (4) "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." 76 Fed. Reg. at 46626.

[5] HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/ womensguidelines (last visited Dec. 2, 2013) (Ex. C).

75. The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and the "exclusively religious activities of any religious order." 26 U.S.C.A. § 6033.

76. Thus, the "religious employers" exemption was severely limited to formal churches, their integrated auxiliaries, and religious orders whose purpose is to inculcate faith and that hire and serve primarily people of their own faith tradition.

77. HRSA exercised its discretion to grant an exemption for religious employers via a footnote on its website listing the Women's Preventive Services Guidelines. The footnote states that "guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers."[6]

78. Although religious organizations like Wheaton share the same religious beliefs and concerns as objecting churches, their integrated auxiliaries, and objecting religious orders, HHS deliberately ignored the regulation's impact on their religious liberty, stating that the exemption sought only "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46623.

79. Thus, thousands of religious organizations that cannot comply with the mandate for religious reasons were excluded from the "religious employers" exemption.

80. Like the original Interim Final Rule, the Second Interim Final Rule was made effective immediately, without prior notice or opportunity for public comment.

[6] HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/ womensguidelines (Ex. C).

81. Defendants acknowledged that "while a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations," they had "good cause" to conclude that public comment was "impracticable, unnecessary, or contrary to the public interest" in this instance. 76 Fed. Reg. at 46624.

82. Upon information and belief, after the Second Interim Final Rule was put into effect, over 100,000 comments were submitted opposing the narrow scope of the "religious employers" exemption and protesting the contraception mandate's gross infringement on the rights of religious individuals and organizations.

83. HHS did not take into account the concerns of religious organizations in the comments submitted before the Second Interim Rule was issued.

84. Instead the Second Interim Rule was unresponsive to the concerns, including claims of statutory and constitutional conscience rights, stated in the comments submitted by religious organizations.

The Safe Harbor

85. The public outcry for a broader religious employer exemption continued for many months and, on January 20, 2012, HHS issued a press release acknowledging "the important concerns some have raised about religious liberty" and stating that religious objectors would be "provided an additional year . . . to comply with the new law."[7]

86. On February 10, 2012, HHS formally announced a "safe harbor" for non-exempt nonprofit religious organizations that objected to the Mandate. *See* HHS Center for Consumer Information and Insurance Oversight, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers (Feb. 10, 2012); *see also* HHS Center for Consumer Information and

[7] Press Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press /2012pres/01/20120120a.html (Ex. D).

Insurance Oversight, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers (Aug. 15, 2012) (changing the safe harbor eligibility criteria).

87. Under the safe harbor, HHS agreed it would not take any enforcement action against an eligible organization during the safe harbor, which would remain in effect until the first plan year beginning on or after August 1, 2013. HHS later extended the safe harbor to the first plan year beginning on or after January 1, 2014. HHS Center for Consumer Information and Insurance Oversight, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers (June 28, 2013).

88. HHS also indicated it would develop and propose changes to the regulations to accommodate the objections of non-exempt, nonprofit religious organizations following August 1, 2013.

89. Despite the safe harbor and HHS's accompanying promises, on February 15, 2012, HHS published a final rule "finaliz[ing], without change," the contraception and abortifacient mandate and narrow religious employers exemption. 77 Fed. Reg. 8725-01 (published Feb. 15, 2012).

The Advance Notice of Proposed Rulemaking

90. On March 21, 2012, HHS issued an Advance Notice of Proposed Rulemaking (ANPRM), presenting "questions and ideas" to "help shape" a discussion of how to "maintain the provision of contraceptive coverage without cost sharing," while accommodating the religious beliefs of non-exempt religious organizations. 77 Fed. Reg. 16501, 16503 (2012).

91. The ANPRM conceded that forcing religious organizations to "contract, *arrange*, or pay for" the objectionable contraceptive and abortifacient servicers would infringe their "religious liberty interests." *Id*. (emphasis added).

92. In vague terms, the ANPRM proposed that the "health insurance issuers" for objecting religious employers could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." *Id.*

93. For self-insured plans, the ANPRM suggested that third party plan administrators "assume this responsibility." *Id.*

94. For the first time, and contrary to the earlier definition of "cost sharing," Defendants suggested in the ANPRM that insurers and third party administrators could be prohibited from passing along their costs to the objecting religious organizations via increased premiums. *See id.*

95. "[A]pproximately 200,000 comments" were submitted in response to the ANPRM. 78 Fed. Reg. 8456, 8459 (published February 6, 2013). Many of these comments reiterated previous comments that the ANPRM's proposals would not resolve conscientious objections, because the objecting religious organizations, by providing a health care plan in the first instance, would still be coerced to arrange for and facilitate access to religiously-objectionable drugs and services.

The Notice of Proposed Rulemaking

96. On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM) purportedly addressing the comments submitted in response to the ANPRM. 78 Fed. Reg. 8456.

97. The NPRM proposed two changes to the then-existing regulations. 78 Fed. Reg. 8456, 8458-59.

98. First, it proposed revising the religious employers exemption by eliminating the requirements that religious employers have the purpose of inculcating religious values and primarily employ and serve only persons of their same faith. 78 Fed. Reg. at 8461

99. Under this proposal a "religious employer" would be one "that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or [](iii) of the Internal Revenue Code." 78 Fed. Reg. at 8474.

100. HHS emphasized, however, that this proposal "would 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.

101. In other words, religious organizations like Wheaton that are not formal churches would continue to be excluded from the exemption.

102. Second, the NPRM reiterated HHS's intention to "accommodate" non-exempt, nonprofit religious organizations by making them "designate" their insurers to provide plan participants and beneficiaries with free access to contraceptive and abortifacient drugs and services.

103. The proposed "accommodation" did not resolve the concerns of religious organizations like Wheaton because it continued to force them to deliberately provide health insurance and take actions that would trigger access to religiously-objectionable drugs and related education and counseling.

104. In issuing the NPRM, HHS requested comments from the public by April 8, 2013. 78 Fed. Reg. at 8457.

105. "[O]ver 400,000 comments" were submitted in response to the NPRM, 78 Fed. Reg. 39870, 39871 (published July 2, 2013), with religious organizations again overwhelmingly decrying the proposed accommodation as a gross violation of their religious liberty because it would conscript their health care plans as the main cog in the government's scheme for expanding access to contraceptive and abortifacient services.

106. Wheaton submitted comments on the NPRM, stating essentially the same objections stated in this complaint.[8]

107. On April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius answered questions about the contraceptive and abortifacient services requirement in a presentation at Harvard University.

108. In her remarks, Secretary Sebelius stated:

> We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities *will be providing coverage* to their employees starting August 1st. . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese *will be included* in the benefit package.[9]

109. It is clear from the timing of these remarks that Defendants gave no consideration to the comments submitted in response to the NPRM's proposed "accommodation." It is also clear that the Secretary recognizes that even under the accommodation, "religious entities" like Wheaton "will be providing coverage" for the drugs required by the Mandate.

The Final Mandate

110. On June 28, 2013, Defendants issued a final rule (the "Final Mandate"), which ignores the objections repeatedly raised by religious organizations and continues to co-opt objecting religious employers into the government's scheme of expanding free access to contraceptive and abortifacient services. 78 Fed. Reg. 39870.

[8] Letter from President Philip G. Ryken, President, Wheaton College, to HHS Secretary Kathleen Sebelius (April 8, 2013) (Ex. E).

[9] The Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (last visited Dec. 2, 2013) (from 51:20 to 53:56) (emphases added) . A permanent link to the relevant section of Sec. Sebelius' remarks is available here: http://www.youtube.com/watch?v=py6aSwQl-2g&feature=youtu.be (last visited Dec. 2, 2013).

111. Under the Final Mandate, the discretionary "religious employers" exemption, which is still implemented via footnote on the HRSA website, Ex. C, remains limited to formal churches and religious orders "organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39874.

112. All other religious organizations, including Wheaton, are excluded from the exemption.

113. The Final Mandate creates a separate "accommodation" for certain non-exempt religious organizations. 78 Fed. Reg. at 39874.

114. An organization is eligible for the accommodation if it (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874.

115. The self-certification must be executed "prior to the beginning of the first plan year to which an accommodation is to apply." 78 Fed. Reg. at 39875.

116. The Final Rule extends the current safe harbor through the end of 2013. 78 Fed. Reg. at 39889; *see also* HHS Center for Consumer Information and Insurance Oversight, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers (June 28, 2013) (extending the safe harbor to the first plan year that begins on or after January 1, 2014).

117. Thus, an eligible organization would need to execute the self-certification prior to its first plan year that begins on or after January 1, 2014, and deliver it to the organization's insurer or, if the organization has a self-insured plan, to the plan's third party administrator. 78 Fed. Reg. at 39875.

118. By the terms of the accommodation, Wheaton will be required to execute the self-certification and deliver it to its insurers and plan administrators before July 1, 2014.

119. By delivering its self-certification to its insurers and third-party administrators, Wheaton would trigger their obligations to "provide[] payments for contraceptive services," including abortion-causing contraceptives like Plan B and Ella. 78 Fed. Reg. at 39876 (insurers) *see also id.* at 39879 (third party administrators).

120. In the case of its self-insured plan, Wheaton's self-certification acts as "a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879.

121. The administrator or insurer would be required to "provide payments for contraceptive services for plan participants and beneficiaries." 78 Fed. Reg. at 39876 (insurers); *see also id.* at 39879 (third-party administrators).

122. In order for this obligation to be effective, Wheaton would have to identify its employees to the insurer or third-party administrator for the distinct purpose of enabling the government's scheme to facilitate free access to contraceptive and abortifacient services.

123. The insurer's obligation to make direct payments for contraceptive and abortion services would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. at 39876.

124. Thus Wheaton would have to coordinate with its insurer or third-party administrator regarding when it was adding or removing employees and beneficiaries from its healthcare plan and, as a result, from the abortifacient services payment scheme.

125. Insurers and third-party administrators would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to

the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in coverage . . . ." 78 Fed. Reg. at 39880 (third-party administrators); *see also id.* at 39876 (insurers).

126. This would also require Wheaton to coordinate the notices with its insurers and administrators.

127. Thus, even under the accommodation, Wheaton and every other non-exempt objecting religious organization would continue to play a central role in facilitating free access to abortifacient drugs.

128. The insurer would be required to provide the contraceptive benefits "in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 39876-77.

129. Thus, any payment or coverage disputes presumably would be resolved under the terms of Wheaton's existing plan documents.

130. Under the accommodation, group health insurance issuers "may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), *or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly*, on the eligible organization." 78 Fed. Reg. at 39896 (emphasis added).

131. For all other preventive services, including non-contraceptive preventive services for women, only cost-sharing (*i.e.*, out-of-pocket expense) is prohibited. There is no restriction on passing along costs via premiums or other charges.

132. Defendants state that they "continue to believe, and have evidence to support," that providing payments for contraceptive and abortifacient services will be "cost neutral for issuers," because "[s]everal studies have estimated that the costs of providing contraceptive

coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health." 78 Fed. Reg. at 39877.

133. On information and belief, the studies Defendants rely upon to support this claim are severely flawed.

134. Nevertheless, even if the payments were—over time—to become cost neutral, it is undisputed that there will be up-front costs for making the payments. *See, e.g.,* 78 Fed. Reg. at 39877-78, 39880 (addressing ways insurers and administrators can cover up-front costs).

135. Moreover, if cost savings arise that make insuring an employer's employees cheaper, the savings would have to be passed on to employers through reduced premiums, not retained by insurance issuers.

136. HHS suggests that, to maintain cost neutrality, issuers may simply ignore this fact and "set the premium for an eligible organization's large group policy as if no payments for contraceptive services had been provided to plan participants." 78 Fed. Reg. at 39877.

137. This encourages issuers to artificially inflate the eligible organization's premiums.

138. Under this methodology—even assuming its legality—the eligible organization would still bear the cost of the required payments for contraceptive, sterilization, and abortifacient services in violation of its conscience, as if the accommodation had never been made.

139. Defendants have suggested that "[a]nother option" would be to "treat the cost of payments for contraceptive services . . . as an administrative cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." 78 Fed. Reg. at 39878.

140. There is no legal authority for forcing third parties to pay for services provided to eligible organizations under the accommodation.

141. Furthermore, under the Affordable Care Act, Defendants lack authority in the first place to coerce insurers to directly purchase contraceptive, sterilization, and abortifacient services for an eligible organization's plan participants and beneficiaries.

142. Thus, the accommodation fails to protect objecting religious organizations for lack of statutory authority.

143. Currently, Wheaton operates a self-insured prescription drug plan administered by Blue Cross Blue Shield of Illinois. Because under the Affordable Care Act Wheaton would be required to identify and designate an administrator willing to administer the abortifacient services, Wheaton's religious beliefs preclude it from complying with the accommodation.

144. For all these reasons, the accommodation does nothing to relieve non-exempt religious organizations—such as Wheaton—from being co-opted as the central cog in the government's scheme to expand access to free abortifacient services.

145. The Final Rule sets forth complex means through which a third party administrator may seek to recover its costs incurred in making payments for contraceptive and abortifacient services.

146. The third party administrator must identify an issuer who participates in the federal exchanges established under the Affordable Care Act and who would be willing to make payments on behalf of the third party administrator.

147. Cooperating issuers would then be authorized to obtain refunds from the user fees they have paid to participate in the federal exchange as a means of being reimbursed for making payments for contraceptive and abortifacient services on behalf of the third party administrator.

148. Issuers would be required to pay a portion of the refund back to the third party administrator to compensate it for any administrative expenses it has incurred.

149. These machinations, ostensibly employed only to shift the *cost* of the Final Mandate, are severely flawed.

150. There is no way to ensure that the cost of administering the contraceptive and abortifacient services would not be passed on to religious organizations through the third party administrator's fees.

151. Moreover, taking the user fees intended for funding the federal exchanges and using them to provide contraceptive and abortifacient services to employees not participating in the federal exchanges would violate the statute authorizing the user fees. *See* 78 Fed. Reg. 15410, 15412 (published March 11, 2013); 31 U.S.C. § 9701.

152. In sum, for non-exempt religious organizations like Wheaton, the accommodation is nothing more than a shell game that attempts to disguise the religious organization's role as the central cog in the government's scheme for expanding access to abortifacient services.

153. Despite the accommodation's convoluted machinations, a religious organization's decision to offer health insurance and its self-certification continue to serve as the sole triggers for creating access to free abortifacient services.

154. Wheaton cannot participate in or facilitate the government's scheme in this manner without violating its religious convictions.

Wheaton's Health Care Plan and Its Religious Objections

155. The plan year for Wheaton's student healthcare plan begins on July 1 of each year.

156. Wheaton's student health care plan consists of an insured plan issued by Companion Life Insurance Company.

157. The Final Mandate declares that the rules concerning contraceptive, sterilization, and abortifacient services will "apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer." 78 Fed. Reg. at 39897.

158. Thus, beginning on or about July 1, 2014, Wheaton faces the choice of either including free coverage for abortifacient services in its student health plan or else forcing its insurance issuer to provide the exact same services.

159. The next plan year for Wheaton's employee healthcare plan begins on July 1, 2014. Wheaton provides three health insurance plans to its full-time employees. Those plans include two HMO plans offered through BlueCross/BlueShield of Illinois and one PPO plan, which is self-funded and administered by BlueCross/BlueShield of Illinois. As a supplement to the HMO plans, Wheaton now offers two self-funded prescription drug plans.

160. Wheaton's self-insured PPO insurance plan has not changed significantly since March 23, 2010, and meets the definition of a "grandfathered" plan. *See* 45 C.F.R. § 147.140(a)(1)(i); 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i).

161. However, Wheaton's insured HMO plans and its self-funded prescription drug plans have changed significantly since March 23, 2010, and due to the changes they have not included the statements regarding grandfathered status required under federal law. Thus, Wheaton's insured HMO healthcare plans do not meet the definition of a "grandfathered" plan.

See 45 C.F.R. § 147.140(a)(1)(i); 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i).

162. Thus, beginning on or about July 1, 2014, Wheaton faces the choice of either including free coverage for abortifacient services in its insured HMO employee health plans and its self-funded prescription drug plans or else designating its administrator to provide the exact same services.

163. Wheaton has no objection to including, and already does include, free coverage for women's preventive services such as mammograms. It also has no conscientious objection to providing access contraceptives that do not inhibit implantation of an embryo, and currently covers those drugs.

164. However, Wheaton's religious convictions forbid it from including free coverage for abortifacient drugs in any of its healthcare plans.

165. Wheaton's religious convictions equally forbid it from hiring or designating its insurer to provide free access to abortifacient drugs.

166. From Wheaton's perspective, there is little difference between forcing its insurance issuer to provide free access to abortifacient drugs and directly providing that access.

167. Wheaton's religious convictions forbid it from participating in any way in the government's scheme to promote and provide free access to abortifacient drugs through Wheaton's health care plans.

168. Wheaton is not eligible for the religious employers exemption because it is not an organization "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46626.

169. Because Wheaton is unable to comply with the Final Mandate as a result of its religious beliefs, and because it is unable to force its insurer to carry out the Final Mandate by submitting a self-certification, it faces crippling fines of $100 each day, for "each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1).

170. Dropping its insurance plans would unfairly and severely burden Wheaton's employees and students, and would place Wheaton at a severe competitive disadvantage in its efforts to recruit and retain employees and students.

171. Wheaton would also face fines of $2000 per year for each of its employees for dropping its insurance plans.

172. Although the government has recently announced that it will postpone implementing the annual fine of $2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. This postponement does not delay the crippling daily fines under 26 U.S.C. § 4980D.

173. Wheaton's Christian faith compels it to promote the spiritual and physical well-being of its students and employees by providing them with generous health services.

174. The Final Mandate forces Wheaton to violate its religious beliefs or incur substantial fines for either excluding objectionable coverage without forcing its insurance issuer to provide the same coverage, or terminating its employee and student health insurance coverage altogether.

175. The Final Mandate forces Wheaton to deliberately provide health insurance that would facilitate free access to abortifacient drugs regardless of the ability of insured persons to obtain these drugs and services from other sources.

176. The Final Mandate forces Wheaton to facilitate government-dictated education and counseling concerning abortion-causing drugs that are incompatible with its religious beliefs and teachings.

177. Facilitating this government-dictated speech is incompatible and irreconcilable with the express speech and messages concerning the sanctity of life that Wheaton seeks to convey.

The Lack of a Compelling Government Interest

178. The government lacks any compelling interest in coercing Wheaton to facilitate access to abortifacient drugs.

179. The required abortifacient drugs are already widely available at non-prohibitive costs.

180. There are multiple ways in which the government could provide access without co-opting religious employers and their insurance plans in violation of their religious beliefs.

181. For example, the government could pay for the objectionable services through its existing network of family planning services funded under Title X, through direct government payments, or through tax deductions, refunds, or credits.

182. The government could also simply exempt all religious organizations, just as it has already exempted nonprofit religious employers referred to in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

183. HHS claims that its "religious employers" exemption does not undermine its compelling interest in making abortifacient services available for free to women because "houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people who are of the same faith and/or

adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39887.

184. Wheaton's employees and students commit to further its mission of serving "Christ and his kingdom," and its students and faculty members voluntarily sign its community covenant, which affirms their shared commitment to "uphold the God-given worth of human beings, from conception to death, as the unique image-bearers of God (Gen. 1:27; Psalm 8:3-8; 139:13-16)."

185. Because of Wheaton's religious obligation under its Community Covenant to proclaim Christian teaching regarding the sanctity of life, the students and employees that have chosen to join the Wheaton community are just as likely as employees of exempt organizations to adhere to the same values, and thus are less likely than other people to use the objectionable drugs.

186. In one form or another, the government also provides exemptions for (1) grandfathered plans, 42 U.S.C. § 18011; 75 Fed. Reg. 41726, 41731 (2010); (2) small employers with fewer than 50 employees, 26 U.S.C. § 4980H(c)(2)(A); and (3) certain religious denominations, 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

187. These broad exemptions further demonstrate that the government has no compelling interest in refusing to include religious organizations like Wheaton within its religious employers exemption.

188. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

189. Indeed, HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of medium-sized employers with between 50 and 100 employees may do likewise. 75 Fed. Reg. 34538 (published June 17, 2010).[10]

190. According to the administration, 96% of American employers are exempt from the employer mandate because they employ fewer than 50 people.[11]

191. The government's recent decision to postpone the mandatory insurance requirement of the Affordable Care Act—i.e., the annual fine of $2000 per employee for not offering any insurance—also demonstrates that there is no compelling interest in coercing universal compliance with the Final Mandate concerning contraceptive and abortifacient services, since employers can now simply drop their insurance without any penalty, at least for one additional year.

192. These broad exemptions also demonstrate that the Final Mandate is not a generally applicable law entitled to judicial deference, but rather is constitutionally flawed.

193. The government's willingness to exempt various secular organizations and postpone the employer mandate, while adamantly refusing to provide anything but the narrowest

[10] *See also* Centers for Medicare & Medicaid Services, Amendment to Regulation on "Grandfathered" Health Plans under the Affordable Care Act, https://www.cms.gov/CCIIO/Resources/Files/factsheet_grandfather_amendment.html (noting that amendment to regulations "will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the grandfathering regulation") (last visited Dec. 2, 2013) (Ex. F).

[11] WhiteHouse.Gov, The Affordable Care Act Increases Choice and Saving Money for Small Business at 2, http://www.whitehouse.gov/files/documents/ health_reform_for_small_businesses.pdf (Ex. G).

of exemptions for religious organizations also shows that the Final Mandate is not neutral, but rather discriminates against religious organizations because of their religious commitment to promoting the sanctity of life.

194. Indeed, the Final Mandate was promulgated by government officials, and supported by non-governmental organizations, who strongly oppose Wheaton's religious teachings and beliefs regarding marriage and family.

195. Defendant Sebelius, for example, has long been a staunch supporter of abortion rights and a vocal critic of religious teachings and beliefs regarding abortion and contraception.

196. On October 5, 2011, six days after the comment period for the original interim final rule ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war."[12]

197. On July 16, 2013, Secretary Sebelius further compared opponents of the Affordable Care Act generally to people who opposed civil rights legislation in the 1960s, stating that upholding the Act requires the same action as was shown "in the fight against lynching and the fight for desegregation."[13]

198. Consequently, on information and belief, Wheaton alleges that the purpose of the Final Mandate, including the restrictively narrow scope of the religious employers exemption, is to discriminate against religious organizations that oppose abortion.

[12] William McGurn, *The Church of Kathleen Sebelius*, Wall St. J., Dec. 13, 2011, *available at* http://online.wsj.com/news/articles/ SB10001424052970203518404577094631979925326 (Ex. H).

[13] *See* Kathleen Sebelius, Remarks at the 104th NAACP Annual Conference, July 16, 2013, http://www.hhs.gov/secretary/about/speeches/sp20130716.html (Ex. I).

CLAIMS

COUNT I

Violation of the Religious Freedom Restoration Act
Substantial Burden

199. Wheaton incorporates by reference all preceding paragraphs.

200. Wheaton's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to abortifacients, or to related education and counseling. Wheaton's compliance with these beliefs is a religious exercise.

201. The Final Mandate creates government-imposed coercive pressure on Wheaton to change or violate its religious beliefs.

202. The Final Mandate chills Wheaton's religious exercise.

203. The Final Mandate exposes Wheaton to substantial fines for its religious exercise.

204. The Final Mandate exposes Wheaton to substantial competitive disadvantages, in that it will no longer be permitted to offer health insurance.

205. The Final Mandate imposes a substantial burden on Wheaton's religious exercise.

206. The Final Mandate furthers no compelling governmental interest.

207. The Final Mandate is not narrowly tailored to any compelling governmental interest.

208. The Final Mandate is not the least restrictive means of furthering Defendants' stated interests.

209. The Final Mandate and Defendants' threatened enforcement of the Final Mandate violate Wheaton's rights secured to it by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

210. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT II
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Burden

211. Wheaton incorporates by reference all preceding paragraphs.

212. Wheaton's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to abortifacients, or to related education and counseling. Wheaton's compliance with these beliefs is a religious exercise.

213. Neither the Affordable Care Act nor the Final Mandate is neutral.

214. Neither the Affordable Care Act nor the Final Mandate is generally applicable.

215. Defendants have created categorical exemptions and individualized exemptions to the Final Mandate.

216. The Final Mandate furthers no compelling governmental interest.

217. The Final Mandate is not the least restrictive means of furthering Defendants' stated interests.

218. The Final Mandate creates government-imposed coercive pressure on Wheaton to change or violate its religious beliefs.

219. The Final Mandate chills Wheaton's religious exercise.

220. The Final Mandate exposes Wheaton to substantial fines for its religious exercise.

221. The Final Mandate exposes Wheaton to substantial competitive disadvantages, in that it will no longer be permitted to offer health insurance.

222. The Final Mandate imposes a burden on Wheaton's religious exercise.

223. The Final Mandate is not narrowly tailored to any compelling governmental interest.

224. The Final Mandate and Defendants' threatened enforcement of the Final Mandate violate Wheaton's rights secured to it by the Free Exercise Clause of the First Amendment of the United States Constitution.

225. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT III
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination

226. Wheaton incorporates by reference all preceding paragraphs.

227. Wheaton's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to abortifacients, or to related education and counseling. Wheaton's compliance with these beliefs is a religious exercise.

228. Despite being informed in detail of these beliefs beforehand, Defendants designed the Final Mandate and the religious employer exemption to the Final Mandate to target religious organizations like Wheaton because of their religious beliefs.

229. Defendants promulgated both the Final Mandate and its religious employer exemption in order to suppress the religious exercise of Wheaton and others.

230. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate Wheaton's rights secured to it by the Free Exercise Clause of the First Amendment of the United States Constitution.

231. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT IV
Violation of the First Amendment to the United States Constitution
Free Exercise and Establishment Clauses
Discrimination Among Religions and Religious Institutions

232. Wheaton incorporates by reference all preceding paragraphs.

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

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

235. The Final Mandate's narrow exemption for "religious employers" but not others discriminates among religions and religious institutions on the basis of religious views or religious status.

236. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate Wheaton's rights secured to it by the First Amendment of the United States Constitution.

237. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT V
Violation of the First Amendment to the United States Constitution
Selective Burden (*Larson* v. *Valente*)

238. Wheaton incorporates by reference all preceding paragraphs.

239. By design, Defendants imposed the Final Mandate on some religious organizations but not on others, resulting in a selective burden on Wheaton.

240. The Final Mandate and Defendants' threatened enforcement of the Final Mandate therefore violate Wheaton's rights secured to it by the First Amendment of the United States Constitution.

241. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

242. The Final Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

COUNT VI

Interference in Matters of Internal Religious Governance Free Exercise Clause and Establishment Clause

243. Wheaton incorporates by reference all preceding paragraphs.

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

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

246. 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.

247. Wheaton has made an internal decision, dictated by its Christian faith, that any health plans it makes available to its employees and students may not subsidize, provide, or facilitate access to abortifacient drugs or related services.

248. The Final Mandate interferes with Wheaton's internal decisions concerning its structure and mission by requiring it to subsidize, provide, and facilitate practices that directly conflict with its Christian beliefs.

249. The Final Mandate's interference with Wheaton's internal decisions affects its faith and mission by requiring it to subsidize, provide, and facilitate practices that directly conflict with its religious beliefs.

250. Because the Final Mandate interferes with Wheaton's internal decision making in a manner that affects its faith and mission, it violates the Establishment Clause and Free Exercise Clause of the First Amendment.

251. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT VII
Religious Discrimination
Violation of the First and Fifth Amendments to the United States Constitution
Establishment Clause and Due Process

252. Wheaton incorporates by reference all preceding paragraphs.

253. By design, Defendants imposed the Final Mandate on some religious organizations but not on others, resulting in discrimination among religious objectors.

254. Religious liberty is a fundamental right.

255. The "religious employer" exemption protects many religious objectors, but not Wheaton.

256. The "accommodation" provides no meaningful protection for Wheaton.

257. The Final Mandate and Defendants' threatened enforcement of the Final Mandate therefore violate Wheaton's rights secured to it by the Establishment Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

258. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT VIII
Violation of the Fifth Amendment to the United States Constitution
Due Process and Equal Protection

259. Wheaton incorporates by reference all preceding paragraphs.

260. The Due Process Clause of the Fifth Amendment mandates the equal treatment of all religious faiths and institutions without discrimination or preference.

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

262. The Final Mandate's narrow exemption for "religious employers" but not others discriminates among religions on the basis of religious views or religious status.

263. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate Wheaton's rights secured to it by the Fifth Amendment of the United States Constitution.

264. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT IX

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech and Compelled Silence

265. Wheaton incorporates by reference all preceding paragraphs.

266. Wheaton teaches that abortion and contraception that interferes with the survival of a human embryo violate its religious beliefs.

267. The Final Mandate would compel Wheaton to subsidize activities that Wheaton teaches are violations of its religious beliefs.

268. The Final Mandate would compel Wheaton to provide education and counseling related to abortifacients.

269. Defendants' actions thus violate Wheaton's right to be free from compelled speech as secured to it by the First Amendment of the United States Constitution.

270. The Final Mandate also prevents Wheaton from speaking to its third-party administrator about its religious beliefs and preference that the administrator not provide the services at issue.

271. The Final Mandate's speech restrictions are not narrowly tailored to a compelling governmental interest.

272. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT X

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Expressive Association

273. Wheaton incorporates by reference all preceding paragraphs.

274. Wheaton teaches that contraception, sterilization, and abortion violate its religious beliefs.

275. The Final Mandate would compel Wheaton to facilitate activities that Wheaton teaches are violations of its religious beliefs.

276. The Final Mandate would compel Wheaton to facilitate access to government-dictated education and counseling related to abortifacients.

277. Defendants' actions thus violate Wheaton's right of expressive association as secured to it by the First Amendment of the United States Constitution.

278. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XI

Violation of the First Amendment to the United States Constitution Free Exercise Clause and Freedom of Speech Unbridled Discretion

279. Wheaton incorporates by reference all preceding paragraphs.

280. By stating that HRSA "may" grant an exemption to certain religious groups, the Final Mandate vests HRSA with unbridled discretion over which organizations can have its First Amendment interests accommodated.

281. Defendants have exercised unbridled discretion in a discriminatory manner by granting an exemption via footnote in a website for a narrowly defined group of "religious employers" but not for other religious organizations like Wheaton.

282. Defendants have further exercised unbridled discretion by indiscriminately waiving enforcement of some provisions of the Affordable Care Act while refusing to waive enforcement of the Final Mandate, despite its conflict with the free exercise of religion.

283. Defendants' actions therefore violate Wheaton's right not to be subjected to a system of unbridled discretion when engaging in speech or when engaging in religious exercise, as secured to it by the First Amendment of the United States Constitution.

284. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XII

Violation of the Administrative Procedure Act Lack of Good Cause, Failure to Follow Notice and Comment Rulemaking, and Improper Delegation

285. Wheaton incorporates by reference all preceding paragraphs.

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

287. 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 with which group health plans and insurers must comply. 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.

288. Defendants promulgated the "preventive care" guidelines without engaging in formal notice-and-comment rulemaking in a manner prescribed by law. Defendants, instead, wholly delegated their responsibilities for issuing preventive care guidelines to a non-governmental entity, the IOM.

289. 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.

290. 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.

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

292. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."

293. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented." This failure prejudiced Wheaton.

294. Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule or the NPRM.

295. Therefore, Defendants have taken agency action not in observance with procedures required by law, and Wheaton is entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

296. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XIII

Violation of the Administrative Procedure Act
Arbitrary and Capricious Action

297. Wheaton incorporates by reference all preceding paragraphs.

298. In promulgating the Final Mandate, Defendants failed to consider the constitutional and statutory implications of the Final Mandate on Wheaton and similar organizations.

299. Defendants' explanation for its decision not to exempt Wheaton and similar religious organizations from the Final Mandate runs counter to the evidence submitted by religious organizations during the comment period.

300. Defendant Secretary Sebelius, in remarks made at Harvard University on April 8, 2013, essentially conceded that Defendants completely disregarded the religious liberty concerns submitted by thousands of religious organizations and individuals.

301. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rules fail to consider the full extent of their implications and they do not take into consideration the evidence against them.

302. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XIV

Violation of the Administrative Procedure Act
Agency Action Without Statutory Authority

303. Wheaton incorporates by reference all preceding paragraphs.

304. Defendants' authority to enact regulations under the Affordable Care Act is limited to the authority expressly granted them by Congress.

305. Defendants lack statutory authority to coerce insurance issuers and third party administrators to pay for contraceptive and abortifacient services for individuals with whom they have no contractual or fiduciary relationship.

306. Defendants lack statutory authority to prevent insurance issuers and third party administrators from passing on the costs of providing contraceptive and abortifacient services via higher premiums or other charges that are not "cost sharing."

307. Defendants lack statutory authority to allow user fees from the federal exchanges to be used to purchase contraceptive and abortifacient services for employees not participating in the exchanges.

308. Because the Final Mandate's "accommodation" for non-exempt, nonprofit religious organizations lacks legal authority, it is arbitrary and capricious and provides no legitimate protection of objecting organization's First Amendment rights.

309. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XV

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Weldon Amendment
Religious Freedom Restoration Act
First Amendment to the United States Constitution

310. Wheaton incorporates by reference all preceding paragraphs.

311. The Final Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. 110-117, 123 Stat. 3034 (Dec. 16, 2009).[14]

312. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

313. The Final Mandate requires issuers, including Wheaton, to deliberately provide health insurance that facilitates access to all Federal Drug Administration-approved contraceptives.

314. Some FDA-approved contraceptives cause abortions.

315. As set forth above, the Final Mandate violates RFRA and the First Amendment.

[14] *Available at* http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect/publaw111_117_123_stat_3034.pdf (Ex. J).

316. Under 5 U.S.C. § 706(2)(A), the Final Mandate is contrary to existing law, and is in violation of the APA.

317. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

COUNT XVI

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Affordable Care Act

318. Wheaton incorporates by reference all preceding paragraphs.

319. The Final Mandate is contrary to the provisions of the Affordable Care Act.

320. Section 1303 of the Affordable Care Act 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."

321. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

322. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

323. The Final Mandate requires group health plans to provide coverage of all Federal Drug Administration-approved contraceptives.

324. The Final Mandate requires third-party administrators, like Wheaton's, to provide or contract to provide coverage of all Federal Drug Administration-approved contraceptives.

325. Some FDA-approved contraceptives cause abortions.

326. Under 5 U.S.C. § 706(2)(A), the Final Mandate is contrary to existing law, and is in violation of the APA.

327. Absent injunctive and declaratory relief against the Final Mandate, Wheaton has been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, Wheaton requests that the Court:

a. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against Wheaton violate the First Amendment of the United States Constitution;

b. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against Wheaton violate the Fifth Amendment of the United States Constitution;

c. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against Wheaton violate the Religious Freedom Restoration Act;

d. Declare that the Final Mandate was issued in violation of the Administrative Procedure Act;

e. Issue a permanent injunction prohibiting Defendants from enforcing the Final Mandate against Wheaton and other organizations that object on religious grounds to providing insurance coverage for abortifacient contraceptives and related education and counseling;

f. Award Wheaton the costs of this action and reasonable attorney's fees, including but not limited to awarding fees pursuant to 42 U.S.C. § 1988(b); and

g. Award such other and further relief as it deems equitable and just.

JURY DEMAND

Wheaton requests a trial by jury on all issues so triable.

Dated: December 13, 2013

Respectfully submitted,

s/ Christian Poland

Christian Mark Poland (N.D. Ill. Bar No. 90784475)
Bryan Cave LLP
161 North Clark Street, Suite 4300
Chicago, Illinois 60601-3315
(312) 602-5085
christian.poland@bryancave.com

Mark Rienzi (DC Bar No. 494336)
(*pro hac vice* application to be filed)
Adèle Auxier Keim (VA Bar No. 76476)
(*pro hac vice* application to be filed)
The Becket Fund for Religious Liberty
3000 K St. NW, Suite 220
Washington, DC 20007
(202) 955-0095
(202) 955-0090
mrienzi@becketfund.org

Counsel for Plaintiff, Wheaton College

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE, *Plaintiff*, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*.	No. 1:13-cv-8910 Judge Robert M. Dow, Jr. Magistrate Judge Sidney I. Schenkier

DECLARATION OF DR. PHILIP G. RYKEN

DECLARATION OF DR. PHILIP G. RYKEN

1. My name is Philip G. Ryken. I am over the age of 18 and have personal knowledge of the contents of this declaration. I am the current President of Wheaton College. I have served as the College's President since July 1, 2010.

2. Like other employees of Wheaton College, my family and I depend upon Wheaton's health insurance. I make this declaration not only as a college president, but as an employee, a husband and father. The loss of Wheaton's insurance plan would not only be a professional crisis, but a deep personal concern for my family.

3. I make this declaration in support of Wheaton's request for a preliminary injunction protecting it from regulations that, as of July 1, 2014, will deny Wheaton its religious freedom to decide which contraceptive methods will be included in its health plan, and to decide whether or not to designate or authorize its insurer and third-party administrator to pay for such drugs in connection with Wheaton's health plans.

4. I understand that if Wheaton refuses to comply with the relevant mandates, it could face as much as $34.8 million in annual fines—along with potential penalties and lawsuits. As a college president, I know the kind of strain that this would place on a small liberal arts college. As the president of a Christian college, I know that our responsibility is to the faith that animates us, the reason Wheaton College exists.

I. Wheaton's History and Beliefs

5. Wheaton College is a Christian liberal arts college in Wheaton, Illinois. It was founded at the dawn of the Civil War by abolitionist Jonathan Blanchard. Since its earliest days, it has been self-supported, not tied to any one denomination. Wheaton has always recognized and valued the

contributions of women to society and to the church, granting its first degree to a female graduate in 1862.

6. Wheaton's purpose is expressed in its mission statement: "Wheaton College serves Jesus Christ and advances His kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide."

7. Wheaton's motto is "For Christ and His Kingdom."

8. Today, Wheaton College is an institution of higher learning, a rigorous academic community that takes seriously the life of the mind. Wheaton offers 59 undergraduate degree programs and 22 graduate degree programs, including five doctoral programs.

9. Wheaton College is affiliated with the Evangelical Christian tradition. Although it remains closely associated with the many churches that shares its beliefs, it does not have close financial or administrative ties to any one church or denomination, but draws its students, faculty and staff from a variety of Christian traditions. Wheaton's students include Catholics, Orthodox Christians, and members of at least 55 different Protestant denominations.

10. Wheaton's non-denominational identity is typical of Evangelical Christian institutions. Since at least the nineteenth century, Evangelicals in America have favored non-denominational organizations because of their ability to foster cooperation between members of different churches that share Evangelical beliefs.

11. Faith is central to the educational mission of Wheaton College. The College aspires to live, work, serve, and worship together as an educational community centered on the Lord Jesus Christ.

12. Wheaton's mission as an academic community is not merely the transmission of information; rather, it is the development of whole and effective Christians who will impact the church and society worldwide "[f]or Christ and His Kingdom."

13. In order to further its mission, Wheaton has a longstanding conviction that appropriate "institutional standards" help to "foster the kind of campus atmosphere most conductive to becoming the Christian community of living, learning, and serving that Wheaton College aspires to be."

14. Each year, all Wheaton College students and employees voluntarily commit themselves to this community by signing Wheaton College's Community Covenant. A true and correct copy of the Community Covenant is attached hereto as Exhibit A-1.

15. In addition to signing the Community Covenant, Wheaton's Board of Trustees, faculty, and staff annually reaffirm the College's doctrinal statement, which provides a summary of biblical doctrine that is consonant with Evangelical Christianity. A true and correct copy of the Statement of Faith and Educational Purpose is attached hereto as Exhibit A-2.

16. Wheaton College's Community Covenant specifically recognizes that Scripture condemns the taking of innocent life.

II. Wheaton's Beliefs and Teachings on Abortion

17. Wheaton College affirms that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. As Genesis 1 says, "God created mankind in his own image." Genesis 1:27a (NIV). And as Psalm 139 says, "For you [God] created my inmost being; you knit me together in my mother's womb. . . . all the days ordained for me were written in your book before one of them came to be." Psalm 139:13, 16 (NIV).

18. Wheaton College affirms that Scripture condemns the taking of innocent human life, (Exodus 20:13 (NIV)) and commands Christians to protect the weak and vulnerable. As the Scriptures say, we are to "[d]efend the weak and the fatherless," "[r]escue the weak and the needy,"

and "speak up for those who cannot speak for themselves." Psalm 82:3-4b (NIV); Proverbs 31:8a (NIV).

19. These beliefs are consonant with traditional Christian teachings on the sanctity of life. Wheaton believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Wheaton College therefore believes and teaches that abortion ends a human life and is a sin.

III. Wheaton's Insurance Policies

20. As part of its religious convictions, Wheaton College promotes the well-being and health of its students and employees. This includes provision of generous health services and health insurance for its students and employees.

21. As of January 1, 2014, Wheaton had about 690 full-time employees and 167 part-time employees. The overwhelming majority of these full-time employees and their families rely upon Wheaton's health insurance plans.

22. Wheaton offers two kinds of health plans to its full-time employees. Those plans include two fully-insured HMO plans offered through BlueCross/BlueShield of Illinois and a PPO plan, which is self-funded. As a supplement to the HMO plans, Wheaton offers two self-funded prescription drug plans. The PPO plan is grandfathered, while the HMO plans (including the self-funded prescription plans that form part of the HMO plans) are no longer grandfathered.

23. All of Wheaton's self-funded plans—the grandfathered PPO and both of the self-funded prescription plans—are administered by BlueCross/BlueShield of Illinois, which is the third party administrator for the plans. Under the contract between Wheaton and BlueCross/BlueShield of Illinois, Wheaton is the plan administrator and fiduciary, and BlueCross/BlueShield of Illinois has no authority to change the terms of the plans without Wheaton's express permission.

24. The next ERISA plan year for each of Wheaton College's employee plans begins on July 1. The next plan year for Wheaton College's student plan begins on August 1.

25. Wheaton's HMO plans and the accompanying prescription drug plans are not eligible for grandfather status. Wheaton did not include a notice of grandfather status with these plans in 2011, 2012 or 2013. Nor is its student plan eligible for grandfather status.

26. Wheaton's PPO plan is currently grandfathered. Wheaton has included a notice of grandfather status with this plan in 2011, 2012, and 2013.

27. Our HMO plans have been, and continue to be, the most popular insurance option for Wheaton employees and their families. As of January 1, 2014, 402 of our 690 eligible employees use one of our HMO plans. Another 191 use the PPO plan.

28. Wheaton College wishes to continue to provide high-quality, affordable health insurance for its employees. Doing so is consistent with our religious commitment to support our faculty, staff, and their families.

29. Wheaton also wishes to continue to provide access to affordable health insurance to its students. Wheaton's student plan, which is an insured plan, currently covers about 550 students.

30. If Wheaton had to terminate its student plan, it would leave its students without access to the excellent health coverage provided by its current student plan, creating a serious hardship for some students.

31. If Wheaton had to terminate its employee health insurance coverage, it would be a serious hardship on most faculty and staff, including me and my family.

32. If Wheaton had to terminate its health insurance coverage, it would suffer serious competitive disadvantages in recruiting and retaining faculty and staff.

33. If Wheaton had to terminate its health insurance, it is inevitable that, due to the loss of competitive advantage, the quality of its programs and instruction would suffer.

IV. The HHS Mandate

34. In September 2011, I first learned of the HHS Mandate through a letter from a fellow Christian college president. I was deeply concerned that this government regulation could force Wheaton to violate its religious beliefs.

35. Wheaton has raised this issue with HHS directly. For example, in September 2011, the College submitted public comments on the Interim Final Rule on Preventive Services published on August 3, 2011 (76 Fed. Reg. 46621). Wheaton's comments expressed its concern that the interim final rule failed to recognize it as a religious employer and that the rule violates the College's rights of conscience. Wheaton implored HHS to broaden the existing "religious employer" exemption to cover Wheaton and similar religious organizations.

36. I am aware of the Mandate's exemption provision for religious employers. Wheaton cannot qualify for this exemption. Wheaton is not 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. Specifically, it is not a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order.

37. Because Wheaton does not qualify for an exemption to the Mandate, the College sincerely hoped HHS would decide to broaden the exemption to cover religious institutions like Wheaton.

38. To that end, Wheaton has continued to attempt to publicly persuade HHS to provide a broad exemption from the Mandate. In June 2012, Wheaton College submitted comments on the Advance Notice of Proposed Rulemaking on Preventive Services published on March 21, 2012 (77 Fed. Reg. 16501). Wheaton's comments reiterated its concerns about the interim final rule,

particularly the Defendants' refusal to provide it and similar religious employers with the same exemption afforded to churches.

39. On July 2, 2013, HHS published its final amendments to the Mandate. 78 Fed. Reg. 39870 ("Final Rule"). Despite over 400,000 comments filed by Wheaton College and others, HHS did not abolish the distinction between churches and religious institutions like Wheaton College. Instead, HHS adopted an "accommodation" that requires Wheaton to designate and authorize others to provide products Wheaton cannot provide itself.

40. The Final Rule also extends the current safe harbor—which is a temporary halt on government (but not private) enforcement of the Mandate—to plan years beginning before December 31, 2013. *See* 78 Fed. Reg. at 39889. Wheaton will be required to comply with the Mandate when its next plan year begins on July 1, 2014.

V. The Mandate's Impact on Wheaton

41. Wheaton has no objection to providing coverage for contraceptives that act before fertilization. Thus, for example, Wheaton has no objection to providing coverage for standard birth control pills. Wheaton therefore asks no relief concerning such contraceptive methods.

42. In light of Wheaton's religious beliefs about the sanctity of human life, Wheaton has come to understand that emergency contraceptives such as Plan B and ella—drugs taken after intercourse and often after standard contraception has failed—may work after fertilization by destroying a human embryo, causing what Wheaton understands to be an abortion.

43. Up until now, Wheaton has exercised its freedom to consider and apply its religious beliefs to these questions by working with its insurer and third party administrator to adjust its health plans in accordance with its conscience. Beginning on July 1, 2014, however, we will no longer

be permitted to make religious decision about whether or not to participate in the distribution of these products.

44. Wheaton cannot, in good conscience, participate in the government's scheme to distribute, encourage, facilitate, and/or reduce the cost of emergency contraceptives.

45. Instead, we will be forced to either (a) provide coverage for emergency contraceptives, or (b) sign a self-certification form and deliver that form to our insurers and third party administrators. The form is called EBSA Form 700.

46. EBSA Form 700 instructs Wheaton's insurers and third party administrators that they are authorized and obligated to offer emergency contraceptives to Wheaton's employees.

47. Thus, Wheaton would need to execute the self-certification prior to July 1, 2014, and deliver it to Wheaton's insurer and third party administrator, BlueCross/BlueShield of Illinois. 78 Fed. Reg. at 39879. Delivery of the self-certification would trigger an obligation on the part of BlueCross/BlueShield of Illinois to begin providing Wheaton employees with payment coverage for emergency contraceptives. Wheaton would be arranging for this coverage to be "outsourced" to BlueCross/BlueShield of Illinois.

48. With respect to the self-funded prescription drug plans that are provided with Wheaton's HMO plans, Wheaton must refrain from "[d]irectly or indirectly interfering with a third party administrator's efforts to provide or arrange separate payments for contraceptive services for participants or beneficiaries in the plan" or "directly or indirectly seeking to influence a third party administrator's decision to provide or arrange such payments." 78 Fed. Reg. at 39879-80.

49. The Mandate assumes that once it has received the self-certification, Wheaton's self-funded prescription drug plan administrator BlueCross/BlueShield of Illinois will be willing to

make "separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. at 39880.

50. However, I understand that HHS has acknowledged that "there is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities." 78 Fed. Reg. at 39880.

51. Thus, the burden remains on Wheaton to find a third party administrator that will agree to provide free access to the same emergency contraceptives that Wheaton cannot provide.

52. Moreover, the Mandate requires that, in the case of self-insured plans, even if the third party administrator consents, the religious organization—via its self-certification—must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879.

53. The self-certification must specifically notify the third party administrator of its "obligations set forth in the[] final regulations, and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39879.

54. Because the designation makes the third party administrator a plan administrator with fiduciary duties, EBSA Form 700 alters the existing contract between Wheaton and its third party administrator BlueCross/BlueShield of Illinois. Wheaton's existing contract says:

> [N]otwithstanding anything contained in the Plan or any other employee welfare benefit plan document of the Employer, the Employer agrees that no allocation or delegation of any fiduciary or non–fiduciary responsibilities under the Plan or any other employee welfare benefit plan of the Employer is effective with respect to or accepted by [BlueCross/BlueShield of Illinois].

A true and complete copy of the sections of the Administrative Services Agreement cited in this Declaration is attached hereto as Exhibit A-3.

55. Moreover, the designation would introduce a required term—coverage for emergency contraceptives—into Wheaton's relationship with its employees.

56. Wheaton's religious beliefs preclude it from soliciting, contracting with, or designating a third party to provide emergency contraceptives to its employees and students. From Wheaton's perspective, designating, incentivizing, or authorizing its insurer or third party administrator to provide free access to emergency contraceptives is no morally different than directly providing that access. Wheaton cannot outsource its conscience.

57. Because Wheaton would be required to identify and designate an insurer or third party administrator willing to administer the emergency contraceptive benefits, Wheaton's religious beliefs preclude it from complying with the accommodation.

58. With respect to both its insured HMO plans and its complementary self-insured prescription drug plans, Wheaton would have to identify its employees to the insurer and third party administrator for the distinct purpose of assisting the government's scheme to provide free access to emergency contraceptives.

59. The insurer or third party administrator's obligation to make direct payments for emergency contraceptives would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. 39876 (discussing insured plans).

60. Thus, Wheaton would have to coordinate with its insurer or third party administrator regarding when it was adding or removing employees and beneficiaries from its healthcare plan and, as a result, from the emergency contraceptives payment scheme.

61. Insurers and third party administrators would be required to use information from Wheaton's plan to notify plan participants and beneficiaries of Wheaton's plan of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application

materials distributed in connection with enrollment" in a group health plan. 78 Fed. Reg. at 39876, 39880.

62. This would also require Wheaton to coordinate the notices with its insurers and third party administrators.

63. Thus, even under the accommodation, Wheaton and every other non-exempt objecting religious organization would continue to play a central role in facilitating free access to emergency contraceptives.

64. Moreover, because the Mandate also requires funding for "education and counseling" related to emergency contraceptives, Wheaton would also be forced to facilitate speech which contradicts its public witness about the sanctity of life.

65. Wheaton wants to continue to provide high-quality health care coverage for its employees. It has no objections to providing almost all of the mandated services, including gestational diabetes screenings, well-woman visits, and most prescription contraceptives. It asks only that it be permitted to follow its beliefs by refusing to pay for, provide access to, or designate someone else to provide access to emergency contraceptives that can interfere with implantation of a human embryo.

VI. Wheaton's Choice

66. On July 1, 2014, Wheaton will face an unconscionable choice: either violate the law, or violate its faith.

67. If Wheaton chooses to violate the law—by ceasing to offer employee health insurance altogether, or by offering ungrandfathered insurance without the objectionable coverage—then it will be penalized with fines of at least $2000 per employee per year, or roughly $1.3 million per year, every year (I understand that the relevant statute excludes thirty employees from this calculation). It could also face other regulatory penalties and potential lawsuits.

68. A $1.3 million fine alone would be a severe hardship for any college, and particularly so for a small liberal arts college like Wheaton. It would mean staff and program reductions that would decrease our ability to fulfill our spiritual and educational mission.

69. In addition to this per-employee fine, Wheaton could also face tax penalties of at least $100 per day for each "individual to whom . . . failure [to cover emergency contraceptives] relates," as well as regulatory action and lawsuits, if it continued to seek to conform its insurance offerings to its religious convictions. Although I understand that the government has not provided clear guidance about how to calculate these fines, they are potentially enormous. For example, if the $100 per day fines were applied to the 402 full time employees that use Wheaton's ungrandfathered HMO plans, the total could be up to $14.7 million a year. If applied to Wheaton's student health plans (which covered about 550 students in 2013-14), the $100 per day fines could be over $20.1 million a year. In total, Wheaton could be liable for as much as $34.8 million in tax penalties each year under this provision.

70. I understand that Wheaton cannot force all of its employees who have chosen our HMO plans to join our grandfathered PPO plan, because this would jeopardize the grandfathered status of the PPO plan under federal regulations. For the same reason, if Wheaton loses the ability to offer its HMO plans, its PPO plan will likely lose its grandfathered status. If this happened, Wheaton could be forced to drop all of its employee health insurance plans.

71. Even if it were legally possible, forcing all of our employees who have deliberately chosen our HMO plans to switch over to the PPO plan they have previously rejected would be burdensome and costly for Wheaton and its employees. For example, there are currently about 214 employees who have chosen family coverage through one of Wheaton's two HMOs. The vast majority of those families (190) are in Wheaton's lowest cost HMO plan. For these families, we would be

forcing them to switch to an insurance plan they do not want and possibly forcing them to switch doctors. And even if it were legally possible, it would be very expensive for our employees. The PPO is much more costly to use than HMOs because the PPO includes a deductible, co-insurance, and a higher out of pocket limit than either of the HMO plans.

72. In addition to the costs borne by employees, based on 2014 costs, Wheaton itself would incur about $1,354,000 in additional premium costs to switch all insureds off of their chosen HMO plans and onto the PPO plan.

73. Forcing Wheaton to undertake this type of expensive and burdensome restructuring of its insurance offerings, and forcing Wheaton's employees to pay more money, change insurance, and possibly change doctors, is a severe burden on Wheaton, its employees, and their families.

74. Wheaton does not have a real choice in this matter. Its religious beliefs are deep, longstanding, and sincere.

VII. The Need for Immediate Action

75. Wheaton must begin planning now for the upcoming insurance plan year.

76. Every year, Wheaton works with its insurer and plan administrator to negotiate its plans for the coming year. The process is time consuming: Wheaton's HR department must negotiate and work with its insurer and administrator on plan changes and on the production and distribution of plan materials and employee insurance cards. This process typically takes Wheaton College three to four months.

77. Knowing that we are facing the end of the safe harbor, we have been exploring alternatives to our current plans, none of which appear viable. In any event, any major changes—such as the termination of one or all plans—must be known to Wheaton as soon as possible, and certainly no later than June 1, to allow employees, students, and administrators to take appropriate action.

78. Denial of an injunction will force Wheaton to choose between its religious beliefs and the prospects of crippling fines, regulatory penalties, and lawsuits.

79. If Wheaton is forced by the government's penalties to cancel its insurance policies, the consequences for Wheaton's employees would be severe. If Wheaton ends up having to drop all of its insurance plans and my family's insurance plan is cancelled, we will be forced to seek policies on the health insurance exchanges or the private market. This is particularly troubling for us, because my daughter has three chronic medical conditions that require frequent—and expensive—treatments.

80. I am not alone. As Wheaton confronts the looming deadline, employees are worried about their insurance and their livelihood. Over the course of this litigation, I have been approached by employees who have expressed fears for themselves and their families about what would happen if Wheaton is forced to stop offering health insurance.

81. This uncertainty affects Wheaton's ability to recruit new employees. I understand that prospective employees ask about the status of Wheaton's lawsuit and some tell us they cannot accept an offer of employment unless Wheaton is able to offer them health insurance.

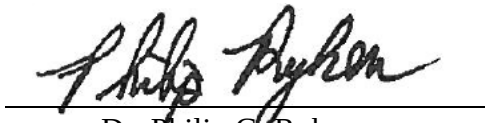
82. The same uncertainty affects Wheaton's ability to retain the employees we have. One current employee told me that "if the college stops providing medical insurance, then [he] won't be able to work here anymore." He told me that his pregnant wife and young child rely on his coverage through Wheaton, and that his wife "burst into tears" when he told her that the mandate put this coverage in jeopardy.

83. Other employees have asked me how they will afford to continue with expensive medical treatments if Wheaton is forced to cancel coverage.

84. My answer to them is that I hope we will not have to make that choice. I hope that we will have relief from the Mandate prior to July 1.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on April 22, 2014 in Wheaton, Illinois.



Dr. Philip G. Ryken
(Original signature on file with filing counsel)

Exhibit A-3

BlueCross BlueShield of Illinois

ADMINISTRATIVE SERVICES AGREEMENT

The Effective Date of this Agreement is January 1, 2013.

For Employer Group Number(s): P90014, ORX312, ORX313.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year specified below.

BLUE CROSS AND BLUE SHIELD OF ILLINOIS,
a Division of Health Care Service Corporation,
a Mutual Legal Reserve Company

By:
Title: Divisional Vice President
Date: February 18, 2013

WHEATON COLLEGE

ACCOUNT #993046

By: Karen Keller
Title: Director, Human Resources
Date: 6/29/13

13.3 ***Notice of termination to Covered Employees.*** If this Agreement is terminated pursuant to this Section 13, the Employer agrees to notify all Covered Employees. The parties agree that the Employer will give such notice because the Employer maintains direct and ongoing communication with, and maintains current addresses for, all such Covered Employees.

SECTION 14: RELATIONSHIP OF PARTIES

14.1 ***Regarding the parties.*** The Claim Administrator is an independent contractor with respect to the Employer. Neither party shall be construed, represented or held to be an agent, partner, associate, joint venturer nor employee of the other.

Further, nothing in this Agreement shall create or be construed to create the relationship of employer and employee between the Claim Administrator and the Employer; nor shall the Employer's agents, officers or employees be considered or construed to be considered employees of the Claim Administrator for any purpose whatsoever.

14.2 ***Regarding non–parties.*** It is understood and agreed that nothing contained in this Agreement shall confer or be construed to confer any benefit on persons who are not parties to this Agreement including, but not limited to, employees of the Employer and their dependents.

14.3 ***Exclusivity.*** The Employer agrees not to engage any other party to perform the same services that the Claim Administrator performs hereunder while this Agreement is in effect, unless the Employer gives notice of termination pursuant to the terms of this Agreement.

14.4 ***Assignment.*** Notwithstanding anything to the contrary in Section 3 of this Agreement, no part of this Agreement, or any rights, duties or obligations described herein, shall be assigned or delegated without the prior express written consent of both parties. Any such attempted assignment shall be null and void. The Claim Administrator's standing contractual arrangements for the acquisition and use of facilities, services, supplies, equipment and personnel shall not constitute an assignment under this Agreement.

SECTION 15: ERISA

15.1 ***In relation to the Plan.*** The Employer hereby acknowledges (i) that an employee welfare benefit plan must be established and maintained through a separate plan document which may include the terms hereof or incorporate the terms hereof by reference, and (ii) an employee welfare benefit plan document may provide for the allocation and delegation of responsibilities thereunder. However, notwithstanding anything contained in the Plan or any other employee welfare benefit plan document of the Employer, the Employer agrees that no allocation or delegation of any fiduciary or non–fiduciary responsibilities under the Plan or any other employee welfare benefit plan of the Employer is effective with respect to or accepted by the Claim Administrator.

15.2 ***In relation to the Plan Administrator/Named Fiduciary(ies).*** The Claim Administrator is not the plan administrator of the Employer's separate employee welfare benefit plan as defined under ERISA. It is understood and agreed that (i) the Employer has a named Plan Administrator and a Named Fiduciary within the meaning of § 414(g) of the Internal Revenue Code of 1986, as amended; (ii) said Plan Administrator serves within the meaning of § 3(16)(A) of ERISA; and (iii) the Claim Administrator is not a fiduciary of the Employer, the Plan Administrator or of the Plan.

15.3 ***In Relation to Claim Administrator's Responsibilities.*** The Claim Administrator's responsibilities hereunder are intended to be limited to those of a contract claims administrator rendering advice to and administering claims on behalf of the plan administrator of the Employer's plan. As such, the Claim Administrator is intended to be a service provider but not a fiduciary with respect to the Employer's ERISA employee welfare benefit plan. The Employer represents that its ERISA employee welfare benefit plan contains the plan procedure described above regarding the designation of responsibilities under a plan and, accordingly, the Claim Administrator may, pursuant to Sections 402(c)(2) and 405(c)(1)(B) of ERISA, render advice with respect to claims and administer claims on behalf of the plan administrator of the Employer's ERISA welfare benefit plan. The Claim Administrator has no other authority or responsibility with respect to Employer's ERISA employee welfare benefit plan.

Exhibit B-2

Women's Preventive Services Guidelines

Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being

The Affordable Care Act – the health insurance reform legislation passed by Congress and signed into law by President Obama on March 23, 2010 – helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Women's Preventive Services Guidelines Supported by the Health Resources and Services Administration

Under the Affordable Care Act, women's preventive health care – such as mammograms, screenings for cervical cancer, prenatal care, and other services – generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS commissioned an IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depending on a woman's health status, health needs, and other risk factors.* (see note)
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for

Learn More

Clinical Preventive Services for Women: Closing the Gaps Institute of Medicine report

HealthCare.gov

Prevention

		pregnant women identified to be at high risk for diabetes.
Human papillomavirus testing.	High-risk human papillomavirus DNA testing in women with normal cytology results.	Screening should begin at 30 years of age and should occur no more frequently than every 3 years.
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.
Counseling and screening for human immune-deficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.	As prescribed.
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.	

** Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs, Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.*

*** The guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF - 327 KB)*

Exhibit B-3

For Consumers

Birth Control: Medicines To Help You

Introduction

If you do not want to get pregnant, there are many birth control options to choose from. No one product is best for everyone. The only sure way to avoid pregnancy and sexually transmitted infections (STIs or STDs) is not to have any sexual contact (abstinence). This guide lists FDA-approved products for birth control. Talk to your doctor, nurse, or pharmacist about the best method for you.

There are different kinds of medicines and devices for birth control:

Barrier Methods

Hormonal Methods

Emergency Contraception

Implanted Devices

Permanent Methods

Some things to think about when you choose birth control:

- Your health.
- How often you have sex.
- How many sexual partners you have.
- If you want to have children in the future.
- If you will need a prescription or if you can buy the method over-the-counter.
- The number of pregnancies expected per 100 women who use a method for one year. For comparison, about 85 out of 100 sexually active women who do not use any birth control can expect to become pregnant in a year.
- This booklet lists pregnancy rates of **typical use**. Typical use shows how effective the different methods are during actual use (including sometimes using a method in a way that is not correct or not consistent).
- For more information on the chance of getting pregnant while using a method, please see Trussell,J. (2011)."Contraceptive failure in the United States." Contraception 83(5):397-404.[1] [2]

Tell your doctor, nurse, or pharmacist if you:

- Smoke.
- Have liver disease.
- Have blood clots.
- Have family members who have had blood clots.
- Are taking any other medicines, like antibiotics.
- Are taking any herbal products, like St. John's Wort.

To avoid pregnancy:

- No matter which method you choose, it is important to follow all of the directions carefully. If you don't, you raise your chance of getting pregnant.
- The best way to avoid pregnancy and sexually transmitted infections (STIs) is to practice total abstinence (do not have any sexual contact).

BARRIER METHODS: Block sperm from reaching the egg

3

Male Condom

What is it?

- A thin film sheath placed over the erect penis.

How do I use it?

- Put it on the erect penis right before sex.
- Pull out before the penis softens.
- Hold the condom against the base of the penis before pulling out.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, 18 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions (If you are allergic to latex, you can try condoms made of polyurethane).

Does it protect me from sexually transmitted infections (STIs)?

- Yes. Except for abstinence, latex condoms are the best protection against HIV/AIDS and other STIs.

Female Condom

What is it?

- A thin, lubricated pouch that is put into the vagina. It is created from man-made materials. It is not made with natural rubber latex.

How do I use it?

- Put the female condom into the vagina before sex.
- Follow the directions on the package to be sure the penis stays within the condom during sex and does not move alongside the condom.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter or online.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 21 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions

Does it protect me from sexually transmitted infections (STIs)?

- Yes.
- Natural rubber latex condoms for men are highly effective at preventing sexually transmitted infections, including HIV/AIDS, if used correctly. If you are not going to use a male condom, you can use the female condom to help protect yourself and your partner.

Diaphragm with Spermicide
Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A dome-shaped flexible disk with a flexible rim.
- Made from latex rubber or silicone.
- It covers the cervix.

How do I use it?

- You need to put spermicidal jelly on the inside of the diaphragm before putting it into the vagina.
- You must put the diaphragm into the vagina before having sex.
- You must leave the diaphragm in place at least 6 hours after having sex.
- It can be left in place for up to 24 hours. You need to use more spermicide every time you have sex.

How do I get it?

- You need a prescription.
- A doctor or nurse will need to do an exam to find the right size diaphragm for you.
- You should have the diaphragm checked after childbirth or if you lose more than 15 pounds. You might need a different size.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 12 may get pregnant.

Some Risks

- Irritation, allergic reactions, and urinary tract infection.
- If you keep it in place longer than 24 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Sponge with spermide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A disk-shaped polyurethane device with the spermicide nonoxynol-9.

How do I use it?

- Put it into the vagina before you have sex.
- Protects for up to 24 hours.
- You do not need to use more spermicide each time you have sex.
- You must leave the sponge in place for at least 6 hours after having sex.
- You must take the sponge out within 30 hours after you put it in. Throw it away after you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)O

- Out of 100 women who use this method, 12 to 24 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the sponge may not fit as well.

Some Risks

- Irritation
- Allergic reactions
- Some women may have a hard time taking the sponge out.
- If you keep it in place longer than 24-30 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Cervical Cap with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A soft latex or silicone cup with a round rim, which fits snugly around the cervix.

How do I use it?

- You need to put spermicidal jelly inside the cap before you use it.
- You must put the cap in the vagina before you have sex.
- You must leave the cap in place for at least 6 hours after having sex.
- You may leave the cap in for up to 48 hours.
- You do NOT need to use more spermicide each time you have sex.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 17 to 23 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the cap may not fit as well.

Some Risks

- Irritation, allergic reactions, and abnormal Pap test.
- You may find it hard to put in.
- If you keep it in place longer than 48 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No

Spermicide Alone
Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A foam, cream, jelly, film, or tablet that you put into the vagina.

How do I use it?

- You need to put spermicide into the vagina 5 to 90 minutes before you have sex.
- You usually need to leave it in place at least 6 to 8 hours after sex; do not douche or rinse the vagina

for at least 6 hours after sex.
- Instructions can be different for each type of spermicide. Read the label before you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 28 may get pregnant.
- Different studies show different rates of effectiveness.

Some Risks

- Irritation
- Allergic reactions
- Urinary tract infection
- If you are also using a medicine for a vaginal yeast infection, the spermicide might not work as well.

Does it protect me from sexually transmitted infections (STIs)? No.

HORMONAL METHODS: Prevent Pregnancy by interfering with ovulation and possibly fertilization of the egg

Oral Contraceptives (Combined Pill)
"The Pill"

What is it?

- A pill that has two hormones (estrogen and progestin) to stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- Changes in your cycle (period)
- Nausea
- Breast tenderness
- Headache

Less Common Serious Side Effects

- It is not common, but some women who take the pill develop high blood pressure.
- It is rare, but some women will have blood clots, heart attacks, or strokes.

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Progestin-only)

"The Mini Pill"

What is it?

- A pill that has only one hormone, a progestin.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- Less often, it stops the ovaries from releasing eggs.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

- Irregular bleeding
- Headache
- Breast tenderness
- Nausea
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Extended/Continuous Use)
"Pill"

What is it?

- A pill that has two hormones (estrogen and progestin) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.
- These pills are designed so women have fewer or no periods.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss one or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Risks are similar to other oral contraceptives with estrogen and progestin.
- You may have more light bleeding and spotting between periods than with 21 or 24 day oral contraceptives.
- It may be harder to know if you become pregnant, since you will likely have fewer periods or no periods.

Does it protect me from sexually transmitted infections (STIs)? No.

Patch

What is it?

- This is a skin patch you can wear on the lower abdomen, buttocks, or upper arm or back.
- It has two hormones (estrogen and progestin) that stop the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put on a new patch and take off the old patch once a week for 3 weeks (21 total days).
- Don’t put on a patch during the fourth week. Your menstrual period should start during this patch-free week.
- If the patch comes loose or falls off, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 9 may get pregnant.

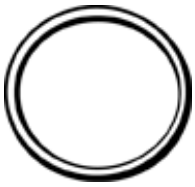
Some Risks

- It will expose you to higher levels of estrogen compared to most combined oral contraceptives.
- It is not known if serious risks, such as blood clots and strokes, are greater with the patch because o

the greater exposure to estrogen.

Does it protect me from sexually transmitted infections (STIs)? No.

Vaginal Contraceptive Ring



What is it?

- It is a flexible ring that is about 2 inches around.
- It releases two hormones (progestin and estrogen) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put the ring into your vagina.
- Keep the ring in your vagina for 3 weeks and then take it out for 1 week. Your menstrual period should start during this ring-free week.
- If the ring falls out and stays out for more than 3 hours, replace it but use another method of birth control, like a condom, until the ring has been in place for 7 days in a row.
- Read the directions and talk to your doctor, nurse or pharmacist about what to do.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Vaginal discharge, discomfort in the vagina, and mild irritation.
- Other risks are similar to oral contraceptives (combined pill).

Does it protect me from sexually transmitted infections (STIs)? No.

Shot/Injection

What is it?

- A shot of the hormone progestin, either in the muscle or under the skin.

How does it work?

- The shot stops the ovaries from releasing eggs
- It also thickens the cervical mucus, which keeps the sperm from getting to the egg.

How do I get it?

- You need one shot every 3 months from a healthcare provider.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, including women who don't get the shot on time, 6 may get pregnant.

Some Risks

- You may lose bone density if you get the shot for more than 2 years in a row.
- Bleeding between periods
- Headaches
- Weight gain
- Nervousness
- Abdominal discomfort

Does it protect me from sexually transmitted infections (STIs)? No.

EMERGENCY CONTRACEPTION: May be used if you did not use birth control or if your regular birth control fails. It should not be used as a regular form of birth control

Plan B, Plan B One- Step and Next Choice (Levonorgestrel)

What is it?

- These are pills with the hormone progestin.
- They help prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping the release of an egg from the ovary. It may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the womb (uterus).
- For the best chance for it to work, you should start taking the pill(s) as soon as possible after unprotected sex.
- You should take emergency contraception within three days after having unprotected sex.

How do I get it?

- You can buy **Plan B One-Step** over-the-counter. You do not need a prescription.
- You can buy Plan B and Next Choice over-the-counter if you are age 17 years or older. If you are younger than age 17, you need a prescription.

Chance of getting pregnant

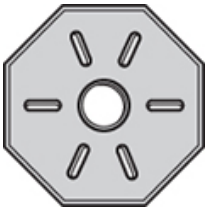
- Seven out of every 8 women who would have gotten pregnant will not become pregnant after taking Plan B, Plan B One-Step, or Next Choice.

Some Risks

- Nausea, vomiting, abdominal pain, fatigue and headache

Does it protect me from sexually transmitted infections (STIs)? No.

Ella (ulipristal acetate)



What is it?

- A pill that blocks the hormone progesterone.
- It helps prevent pregnancy after birth control failure or unprotected sex.
- It works mainly by stopping or delaying the ovaries from releasing an egg. It may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation).

How do I use it?

- For the best chance for it to work, you should take the pill as soon as possible after unprotected sex.
- You should take Ella within five days after unprotected sex.

How do I get it?

- You need a prescription.

Chance of getting pregnant

- Six or 7 out of every 10 women who would have gotten pregnant will not become pregnant after taking ella.

Some Risks

- Headache
- Nausea
- Abdominal pain
- Menstrual pain
- Tiredness
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED DEVICES: Inserted/implanted into the body and can be kept in place for several years

Copper IUD

What is it?

- A T-shaped device containing copper that is put into the uterus by a healthcare provider.

How does it work?

- The IUD prevents sperm from reaching the egg, from fertilizing the egg, and may prevent the egg from attaching (implanting) in the womb (uterus).
- It does not stop the ovaries from making an egg each month.
- The Copper IUD can be used for up to 10 years.

- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

- A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Cramps
- Irregular bleeding

Uncommon Risks

- Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

IUD with progestin

What is it?

- A T-shaped device containing a progestin that is put into the uterus by a healthcare provider.

How does it work?

- It may thicken the mucus of your cervix, which makes it harder for sperm to get to the egg, and also thins the lining of your uterus.
- After a doctor or other healthcare provider puts in the IUD, it can be used for up to 3 to 5 years, depending on the type.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

- A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Irregular bleeding
- No periods
- Abdominal/pelvic pain
- Ovarian cysts

Uncommon Risks

- Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus
- Life-threatening infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Implantable Rod

What is it?

- A thin, matchstick-sized rod that contains the hormone progestin.
- It is put under the skin on the inside of your upper arm.

How does it work?

- It stops the ovaries from releasing eggs.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- It can be used for up to 3 years.

How do I get it?

- After giving you local anesthesia, a doctor or nurse will put it under the skin of your arm with a specia needle.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

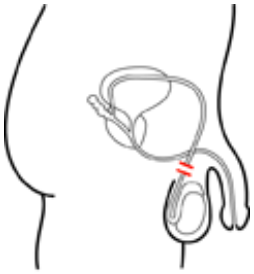
- changes in bleeding patterns
- weight gain
- breast and abdominal pain

Does it protect me from sexually transmitted infections (STIs)? No.

PERMANENT METHODS: For people who are sure they never want to have a child or do not want any more children.

Sterilization Surgery for Men (Vasectomy)

This method is for men who are sure they never want to have a child or do not want any more children. If you are thinking about reversal, vasectomy may not be right for you. Sometimes it is possible to reverse the operation, but there are no guarantees. Reversal involves complicated surgery that might not work.



What is it?

- This is a surgery a man has only once.
- It is permanent

How does it work?

- A surgery blocks a man's vas deferens (the tubes that carry sperm from the testes to other glands).
- Semen (the fluid that comes out of a man's penis) never has any sperm in it.
- It takes about three months to clear sperm out of a man's system. You need to use another form of birth control until a test shows there are no longer any sperm in the seminal fluid.

How do I get it?

- A man needs to have surgery.
- Local anesthesia is used.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women whose partner has had a vasectomy, less than 1 may get pregnant.

Some Risks

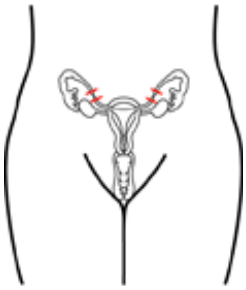
- Pain
- Bleeding
- Infection

Does it protect me from sexually transmitted infections (STIs)? No.

The success of reversal surgery depends on:

- The length of time since the vasectomy was performed.
- Whether or not antibodies to sperm have developed.
- The method used for vasectomy
- Length and location of the segments of vas deferens that were removed or blocked.

Sterilization Surgery for Women
Surgical Implant (also called trans-abdominal surgical sterilization)



What is it?

- A device is placed on the outside of each fallopian tube.

How does it work?

- One way is by tying and cutting the tubes — this is called tubal ligation. The fallopian tubes also can be sealed using an instrument with an electrical current. They also can be closed with clips, clamps, or rings. Sometimes, a small piece of the tube is removed.
- The woman's fallopian tubes are blocked so the egg and sperm can't meet in the fallopian tube. This stops you from getting pregnant.
- This is a surgery a woman has only once.
- It is permanent.

How do I get it?

- This is a surgery you ask for.
- You will need general anesthesia.

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- Infection or other complications after surgery
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

Sterilization Implant for Women (Transcervical Surgical Sterilization Implant)

What is it?

- Small flexible, metal coil that is put into the fallopian tubes through the vagina.
- The device works by causing scar tissue to form around the coil. This blocks the fallopian tubes and stops you from getting pregnant.

How does it work?

- The device is put inside the fallopian tube with a special catheter.
- You need to use another birth control method during the first 3 months. You will need an X-ray to make sure the device is in the right place.
- It is permanent.

How do I get it?

- The devices are placed into the tubes using a camera placed in the uterus.

- Once the tubes are found, the devices are inserted. No skin cutting (incision) is needed.
- You may need local anesthesia.
- Since it is inserted through the vagina, you do not need an incision (cutting).

Chance of getting pregnant with typical use (Number of pregnancies expected per 100 women who use this method for one year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Mild to moderate pain after insertion
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)? No.

To Learn More:
This guide should not be used in place of talking to your doctor or reading the label for your product. The product and risk information may change.

To get the most recent information for your birth control go to:

Drugs:

http://www.accessdata.fda.gov/scripts/cder/drugsatfda[4] (type in the name of your drug)

Devices:

http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm[5]
(type in the name of your device)

Updated May 2013

Page Last Updated: 08/27/2013
Note: If you need help accessing information in different file formats, see Instructions for Downloading Viewers and Players.

Links on this page:

1. http://www.kupferkette.info/downloads/contraceptive-failure-in-the-united-states-

--2.pdf

2. http://www.fda.gov/AboutFDA/AboutThisWebsite/WebsitePolicies/Disclaimers/default.htm
3. javascript:void(0);/*1343680975526*/
4. http://www.accessdata.fda.gov/scripts/cder/drugsatfda
5. http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm

Exhibit B-4

EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____
Signature of the individual listed above

_____
Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

Exhibit B-5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, et al.,	)	
Plaintiffs,	)	Case No.:
vs.	)	12-cv-02542(BMC)
KATHLEEN SEBELIUS, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
By and Through Its Designee
GARY M. COHEN
Washington, D.C.
Tuesday, April 16, 2013

Reported by: John L. Harmonson, RPR
Job No. 59521

G. COHEN

April 16, 2013

10:07 a.m.

Videotaped Deposition of GARY M. COHEN, as designee of U.S. Department of Health and Human Services, held at the offices of Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C., pursuant to Notice, before John L. Harmonson, a Registered Professional Reporter and Notary Public of the District of Columbia.

the Department could have selected?

A. I think the Department has now proposed an alternative means that's different from what was in the final rule, yes.

Q. At the time that -- just staying within our February time frame. At the time of the issuance of the February rule, were there other alternative means that would have been available to get the same result?

A. Well, I think -- I think in the final rule we instituted a temporary enforcement safe harbor for a year, and we said we were going to look into whether there were alternative means that might further the government's interests but also accommodate the objections of religious employers who were not exempted under the final rule. So I don't know if we had come up with an alternative means at that moment but we were going to try to find an alternative means.

Q. I understand.

When did you start looking into the question of alternative means? When the rule was first issued back in August of 2010?

A. I think that we made a decision to

seek out alternative means in the course of reviewing comments for the amended interim final rule. And by the time we published the final rule we had made that commitment that we would seek out alternative means. I don't know that we had begun trying to figure out what that means might be until subsequently.

Q. And why would -- What was the evidentiary basis for the conclusion that individuals who work for entities like ArchCare and Catholic Health Services of Long Island are more likely not to object to the use of contraceptives and therefore are more likely to use contraceptives?

A. I think that conclusion was based on just logic and common sense on the one hand and, secondly, on the evidence that a very large majority -- I've seen figures up to 95 percent of sexually active women in the United States use contraceptives at one point or another.

Q. So there was no evidence particular to those types of institutions?

A. No, I don't believe so.

Q. If you look at page 13 in the response

G. COHEN

THE VIDEOGRAPHER: This is the end of the videotaped deposition. Off the record at 12:13 p.m.

(Deposition adjourned at 12:13 p.m.)

_____

GARY M. COHEN

Subscribed and sworn to before me this ____ day of _____, 2013.

_____

G. COHEN

C E R T I F I C A T E

DISTRICT OF COLUMBIA

I, JOHN L. HARMONSON, a Notary Public within and for the District of Columbia, do hereby certify:

That GARY M. COHEN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of April, 2013.

_____

JOHN L. HARMONSON, RPR

My commission expires: 11/14/15

Exhibit B-7

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., TRUETT-MCCONNELL COLLEGE, INC., GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-13-1092-D
KATHLEEN SEBELIUS, SECRETARY OF U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS E. PEREZ, SECRETARY OF U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF LABOR, JACOB J. LEW, SECRETARY OF THE TREASURY, SECRETARY OF THE TREASURY,	)	
Defendants.	)	

* * * * * * *

TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 16, 2013

BEFORE THE HONORABLE TIMOTHY D. DEGIUSTI

U.S. DISTRICT JUDGE, PRESIDING

* * * * * * *

CHRISTINA L. CLARK, RPR, CRR
United States Court Reporter
200 N.W. Fourth Street, Suite 5419
Oklahoma City, Oklahoma 73102
christina_clark@okwd.uscourts.gov - ph(405)609-5123

A P P E A R A N C E S

Mr. Mark Rienzi, Ms. Adèle Leim, and Mr. Daniel Blomberg, THE BECKET FUND, 3000 K St. NW, Suite 220, Washington, DC 20007-5153, appearing for the plaintiffs

Mr. J. Dillon Curran, CONNER & WINTERS, 1700 One Leadership Square, 211 North Robinson, Oklahoma City, Oklahoma 73102-7101, appearing for the plaintiffs

Mr. Carl C. Scherz and Mr. Seth M. Roberts, LOCKE LORD, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201, appearing for the plaintiffs

Mr. Benjamin L. Berwick, U.S. DEPARTMENT OF JUSTICE, 20 Massachusetts Avenue, Washing DC 20530, appearing for the defendants

important to explain what that provision does and does not prevent. So -- one moment, your Honor.

The agencies included as a footnote to the preamble, when discussing that provision, the language "Nothing in these final regulations prohibits an eligible organization from expressing its opposition to the use of contraception."

So, as I said before, your Honor, the plaintiffs can tell their TPA, can tell anyone else that the regulations don't require the TPA to provide contraceptive coverage. They can inform their TPA. In fact, to comply -- to be eligible for an accommodation, they must inform their TPA that they have a religious objection to providing this coverage. They can tell anyone else that they have religious objection to providing the coverage. The only thing that the noninterference provision prohibits is essentially threats to the TPA that would cause the TPA to -- to forgo providing this coverage when they otherwise would have.

Here, it's a little complicated because, as we've said, they're really not required to do so in the first place. But let's take Highmark as an example. If we assumed that Highmark says, No, we understand we're not required to do it, we are going to do it anyway and we believe we have the authority to do it and we are going to go ahead and do it, the noninterference provision would, presumably, prevent plaintiff from saying something like, Don't do this or we're going to

fire you, from threatening them.

And, your Honor, we would argue that is -- that comports with the First Amendment, consistent with *NLRB v. Gissel Packing*, which I believe we cite in our briefs. It's 395 US 575, where the Supreme Court considered a similar provision in the *NLRB* context.

I would add, your Honor, that if the Court were to decide, over the government's objection, that this noninterference provision violated the First Amendment, the remedy would be to strike that provision -- that specific provision. Again, it would not be to invalidate the entire -- the entire statutory scheme.

And the government believes that the scheme can certainly continue without that -- that specific provision. Again, we don't recommend that course of action. We don't think it would be appropriate to strike that down. But that would be the remedy if the Court disagreed.

That's all I have, your Honor, unless you have any more questions.

THE COURT: No.

MR. BERWICK: Thank you.

THE COURT: Thank you.

Plaintiffs, I'll allow you to have the last word since it's your motion.

MR. RIENZI: Thank you, your Honor.

* * * * * * *

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

s/CHRISTINA L. CLARK
Christina L. Clark, RPR, CRR

CHRISTINA L. CLARK, RPR, CRR
United States Court Reporter
200 N.W. Fourth Street, Suite 5419
Oklahoma City, Oklahoma 73102
christina_clark@okwd.uscourts.gov - ph(405)609-5123

Exhibit B-8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, et al.,	:	
	:	Docket No.: CV 13-1441
Plaintiffs,	:	
	:	Washington, DC
vs.	:	10:05 a.m., Friday
	:	November 22, 2013
KATHLEEN SEBELIUS, et al.,	:	
	:	
Defendants.	:	
	X	

REPORTER'S OFFICIAL TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: NOEL J. FRANCISCO, ESQ.
DAVID T. RAIMER, ESQ.
ANTHONY DICK, ESQ.
ERIC S. DREIBAND, ESQ.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939

For the Defendant: JACEK PRUSKI, ESQ.
SHEILA LIEBER, ESQ.
BENJAMIN L. BERWICK, ESQ.
MICHAEL POLLACK, ESQ.
U.S. Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20530
(202) 616-2035

The Court Reporter: CHANTAL M. GENEUS, RPR, CRR
Certified Realtime Reporter
Registered Professional Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001

Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(Whereupon, at 10:05 a.m. the proceedings commenced and the following ensued:)

THE COURTROOM DEPUTY: Your Honor, calling Civil Action 13-1441, the *Roman Catholic Archbishop of Washington, et al., v. Kathleen Sebelius, et al.*

Counsel, please approach the lectern and identify yourself for the record and the parties you represent.

MR. FRANCISCO: Good morning, Your Honor. Noel Francisco for plaintiffs.

At counsel table with me is Jane Belford, Chancellor of the Archdiocese of Washington; Cynthia DeSimone, the general counsel for the Archdiocese of Washington; and then my Jones Day colleagues, David Raimer, Anthony Dick, and Eric Dreiband.

THE COURT: All right. Good morning.

MR. FRANCISCO: Good morning.

MR. PRUSKI: Good morning, Your Honor. Jacek Pruski for the defendants. Joining me at counsel table are Sheila Lieber, Benjamin Berwick, and Michael Pollack.

THE COURT: All right. Good morning.

We're here today on plaintiffs' challenge to regulations promulgated by the Department of Health

they lack regulatory authority to require their TPAs to make the payments. However, the accommodation is still available to these plaintiffs, so they must still complete the self-certification requirement and once they do that, they have complied with the contraceptive coverage requirement. However, their TPA isn't required to provide the separate payments.

So to the extent they're claiming an injury based on facilitating access to contraceptive coverage, that injury simply doesn't exist here, and it certainly isn't a substantial burden on their religious exercise.

THE COURT: So the self-certification won't accomplish -- won't inexorably lead, as they say, to the provision of coverage to their employees?

MR. PRUSKI: No. Their TPAs aren't required to make the payments. The regulations don't require their TPAs to do anything. However, the accommodation is still available to them, so they will have met -- because the statutory requirement is still applicable to those seven plaintiffs.

THE COURT: But if they made the choice to self-insure otherwise, then that would be covered and then the next steps would flow?

MR. PRUSKI: If I understand Your Honor's

question, you're asking if they left the Archdiocese's plan and self-insured otherwise, then, yes, then the accommodation would still be available to them, but if they completed the self-certification requirement and provide it to their TPA, their TPA would then be required to make the payments by the regulations.

THE COURT: Why didn't this come up in your first pleading in response to their motion for preliminary injunction when you moved to dismiss and moved for summary judgment yourself, that this didn't come up until two or three pleadings down the road?

MR. PRUSKI: Your Honor, it did come up in our reply brief, which was our second brief, and it wasn't -- this issue wasn't raised in their complaint or in their brief, and I didn't notice it, frankly, in writing the opening brief. But we raised it as soon as I became aware of it when reading their statement of facts and then referring back to their affidavits.

Because the Court had consolidated with the merits, we were primarily responding to the arguments they made in the brief in the preliminary injunction, but we raised the issue as soon as we became aware of it. And that's been true in all of the similar cases like this.

THE COURT: All right. Well, let me ask you

some foundational questions, because I really think what it is that these regulations actually do, as opposed to how the parties characterized the regulations, is -- has to be the foundation for my ruling.

The regulations divide the eligible employers into two categories: Those insured under a group health insurance plan, in which case, under the regulations, the coverage has to be expressly excluded from the plan, and then it's the insurer who becomes obligated to provide the services without passing the costs along in any way.

That much is correct.

MR. PRUSKI: Right.

THE COURT: Okay. Then there are those who are self-insured, in which case, it's the third-party administrator that's obligated to arrange for separate payments for the contraceptive services without any cost to the eligible organization.

So the third-party administrator's duty is triggered by his own agreement to contract with the religious organization, having been advised of the religious organization's objection, right?

MR. PRUSKI: I wouldn't put it in terms of an agreement to contract with. They're already in a

relationship with the self-insured employer.

They are not required, upon receiving the self-certification, to make the payments. They can walk away from the relationship entirely. But if they remain in the relationship, then, yes, upon receiving the self-certification form, the third-party administrator -- I'll just called them the TPA going forward -- the TPA is then -- becomes a plan administrator solely for the purpose of providing the separate payments, and it is the TPA's responsibility entirely to make those payments for contraceptive coverage. And as Your Honor referenced, the TPA is not permitted to charge, and in fact is expressly prohibited from charging the employer any premium or costs associated with those payments.

THE COURT: But his duty to do that only arises by virtue of the fact that he has a contract with the religious organizations?

MR. PRUSKI: Yes. They become a plan administrator and are required to make these payments by virtue of the fact that they receive the self-certification form from the employer.

THE COURT: All right. So if the regulations permit the -- I've got "third-party administrator" written in my notes all over the place,

so I'm not going to say "TPA." I might, but I don't think so.

If the regulations permit them, once they receive the self-certification, to decline to be in the contractual relationship, what happens then? Is the employer obligated to go out and find another one?

MR. PRUSKI: The employer is not obligated to find another TPA, no. An employer might find it convenient to do that. Perhaps they prefer to have a TPA rather than to administer everything about the plan themselves, but they are not obligated to find a new TPA.

THE COURT: Now, wait a minute.

They have somebody administering their health care plan, and when they go to them and say, oh, by the way, we absolutely don't want to have anything to do with the contraceptive part of health care; that's your responsibility. And he says, well, then, I don't want to be your TPA anymore, then they have to get another one.

MR. PRUSKI: And if they do get another one, then they need to provide -- and they provide the self-certification form to that TPA, it would be the same. That TPA would become responsible for making the separate payments for the coverage.

THE COURT: But ultimately, they're the ones who have to shop around for the person whose job it is to give the employees the contraceptive services, isn't it?

MR. PRUSKI: Well, we don't have an indication in this case that their TPA is resistant to --

THE COURT: That's not my question.

MR. PRUSKI: If they -- if their TPA says, I want out of this relationship, and they want to then find another TPA, then, yes, in a sense, they -- if they find another TPA, that TPA is faced with the same choice. If it receives a self-certification form, and it stays in the relationship, it's required, then, to provide the contraceptive coverage.

THE COURT: So whoever they choose ultimately has to do it? Their only choice is: Do we forgo one, or do we have one?

MR. PRUSKI: When you say "they," you mean --

THE COURT: The religious organizations either have a third-party administrator, or they don't. But if they have one, it has to be one that provides these services.

MR. PRUSKI: If they have one and they want

MR. PRUSKI: Defendant's interpretation of the reg would be that it would not violate that provision, but -- so the defendants' position is that they can say that.

They can't, though, on the other hand, turn around and say, if you don't stop providing the payments, we're going to fire you. So in that sense, yes -- to Your Honor's earlier point about is that speech, yes, those are words that they say, but that kind of conduct, the threatening, is what the court in *Gisell Packing* said is not protected by the First Amendment.

THE COURT: Let's say I think you constitutionally can prohibit threats and coercion, but I don't think you can constitutionally prohibit speech, and I think this regulation is broad enough to cover both because you didn't say "threaten, coerce, impede, obstruct"; you said "directly or indirectly influence," which is much, much broader. And you're saying we're not going to interpret it in a way that violates the constitution, but if it, on its face, is broad enough to violate the constitution, what am I supposed to do?

MR. PRUSKI: Well, I think if Your Honor believes that it -- interpretations of it or aspects

REPORTER'S CERTIFICATE

I, Chantal M. Geneus, a Certified Realtime Reporter and Registered Professional Reporter of the United States District Court for the District of Columbia, do hereby certify that I stenographically reported the proceedings in the matter of CV 13-1441, on Friday, November 22, 2013, in the United States District Court for the District of Columbia, before the Honorable Amy Berman Jackson, United States District Judge.

I further certify that the Page Numbers 1 through 107 constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter.

In witness whereof, I have affixed my signature on December 5, 2013.

/s/ Chantal M. Geneus
Chantal M. Geneus, RPR, CRR
Official Court Reporter

Exhibit B-9

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Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans

The Affordable Care Act gives American families and businesses more control over their health care by providing greater benefits and protections for family members and employees. It also provides the stability, and also the flexibility, that families and businesses need to make the choices that work best for them.

During the health reform debate, President Obama made clear to Americans that "if you like your health plan, you can keep it." He emphasized that there is nothing in the new law that would force them to change plans or doctors. Today, the Departments of Health and Human Services, Labor, and Treasury issued a new regulation for health coverage in place on March 23, 2010 that makes good on that promise by:

- Protecting the ability of individuals and businesses to keep their current plan;
- Providing important consumer protections that give Americans – rather than insurance companies – control over their own health care.
- Providing stability and flexibility to insurers and businesses that offer insurance coverage as the nation transitions to a more competitive marketplace in 2014 where businesses and consumers will have more affordable choices through Exchanges.

The rule announced today preserves the ability of the American people to keep their current plan if they like it, while providing new benefits, by minimizing market disruption and putting us on a glide path toward the competitive, patient-centered market of the future. While it requires all health plans to provide important new benefits to consumers, it allows plans that existed on March 23, 2010 to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status. Plans will lose their "grandfather" status if they choose to significantly cut benefits or increase out-of-pocket spending for consumers – and consumers in plans that make such changes will gain new consumer protections.

Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today. Large employer-based plans already offer most of the comprehensive benefits and consumer protections that the Affordable Care Act will provide to all Americans this year – such as preventing lifetime limits on coverage – and in the future.

People who work in smaller firms – which change insurers more often due to annual fluctuations in premiums – and people who purchase their own insurance in the individual market– a group that frequently changes coverage – will enjoy all of the benefits of the Affordable Care Act when they choose a new plan. These Americans also will benefit from the new competitive Exchanges that will be established in 2014 to offer individuals and workers in small businesses with greater choice of plans at more affordable rates – the same choice of plans as members of Congress.

Protecting Patients' Rights in All Plans

All health plans – whether or not they are grandfathered plans – must provide certain benefits to their customers for plan years starting on or after September 23, 2010 including:

- No lifetime limits on coverage for all plans;

- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their application;
- Extension of parents' coverage to young adults under 26 years old; and the

For the vast majority of Americans who get their health insurance through employers, additional benefits will be offered, irrespective of whether their plan is grandfathered, including:

- No coverage exclusions for children with pre-existing conditions; and
- No "restricted" annual limits (e.g., annual dollar-amount limits on coverage below standards to be set in future regulations).

Additional Consumer Protections Apply to Non-Grandfathered Plans

Grandfathered health plans will be able to make routine changes to their policies and maintain their status. These routine changes include cost adjustments to keep pace with medical inflation, adding new benefits, making modest adjustments to existing benefits, voluntarily adopting new consumer protections under the new law, or making changes to comply with State or other Federal laws. Premium changes are not taken into account when determining whether or not a plan is grandfathered.

Plans will lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs to consumers. If a plan loses its grandfathered status, then consumers in these plans will gain additional new benefits including:

- Coverage of recommended prevention services with no cost sharing; and
- Patient protections such as guaranteed access to OB-GYNs and pediatricians.

Under the Affordable Care Act, these requirements are applicable to all new plans, and existing plans that choose to make the following changes that would cause them to lose their grandfathered status.

Compared to their polices in effect on March 23, 2010, grandfathered plans:

- **Cannot Significantly Cut or Reduce Benefits**. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
- **Cannot Raise Co-Insurance Charges.** Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- **Cannot Significantly Raise Co-Payment Charges.** Frequently, plans require patients to pay a fixed-dollar amount for doctor's office visits and other services. Compared with the copayments in effect on March 23, 2010, grandfathered plans will be able to increase those co-pays by no more than the greater of $5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a plan raises its copayment from $30 to $50 over the next 2 years, it will lose its grandfathered status.
- **Cannot Significantly Raise Deductibles.** Many plans require patients to pay the first bills they receive each year (for example, the first $500, $1,000, or $1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-to-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a $1,000 annual deductible, this would mean if they had a hike of $190 or $200 from 2010 to 2011, their plan could then increase the deductible again by another $50 the following year.
- **Cannot Significantly Lower Employer Contributions.** Many employers pay a portion of their employees' premium for insurance and this is usually deducted from their paychecks. Grandfathered plans cannot decrease the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers' share of premium from 15% to 25%).
- **Cannot Add or Tighten an Annual Limit on What the Insurer Pays.** Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as grandfathered plans, plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit (which is more protective of high-cost enrollees).

- **May Change Insurance Companies.** An employer with a group health plan can switch plan administrators as well as buy insurance from a different insurance company without losing grandfathered status--provided the plan does not make any of the above six changes to its cost or benefits structure.*

* Previously, one way an employer group health plan could lose its grandfather status was to change issuers--switch from one insurance company to another. The original regulation allowed only self-funded plans to change third-party administrators without necessarily losing their grandfathered plan status. On November 15, the regulation was amended to allow all group health plans to switch insurance companies and shop for the same coverage at a lower cost while maintaining their grandfathered status, as long as the structure of the coverage doesn't violate one of the other rules for maintaining grandfathered plan status.

Protecting Against Abuse of Grandfathered Health Plan Status

To prevent health plans from using the grandfather rule to avoid providing important consumer protections, the regulation provides for:

- Promoting transparency by requiring a plan to disclose to consumers every time it distributes materials whether the plan believes that it is a grandfathered plan and therefore is not subject to some of the additional consumer protections of the Affordable Care Act. This allows consumers to understand the benefits of staying in a grandfathered plan or switching to a new plan. The plan must also provide contact information for enrollees to have their questions and complaints addressed;
- Revoking a plan's grandfathered status if it forces consumers to switch to another grandfathered plan that, compared to the current plan, has less benefits or higher cost sharing as a means of avoiding new consumer protections; or
- Revoking a plan's grandfathered status if it is bought by or merges with another plan simply to avoid complying with the law.

Projected Impact on Consumers and Plans

Large Employer Plans

The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers) —who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered – more than three-quarters of firms in 2011 – based on the way they changed cost sharing from 2008-2009. Most of these plans already offer the patient protections applied to grandfathered plans such as no pre-existing condition exclusions for children and no rescissions of coverage when a person gets sick. In addition, they are likely to already give their workers and families protections like a choice of OB-GYN and pediatrician and access to emergency rooms in other states without prior authorization. Based on past patterns of behavior, it is expected that large employers will continue to make adjustments to the health plans they offer from year to year so that, by the time the health insurance Exchanges are established in 2014, fewer – but still most – large employer plans will have grandfather status. However, the assumed market changes depend on the choices large employers make in the future.

Small Business Plans

The roughly 43 million people insured through small businesses will likely transition from their current plan to one with the new protections over the next few years. Small plans tend to make substantial changes to cost sharing, employer contributions, and health insurance issuers more frequently than large plans. As such, we estimate that 70% of plans will be grandfathered in the first year, but depending on the choices these employers make, this could drop to about one-third over several years. To help sustain small business coverage, the Affordable Care Act also includes a tax credit for up to 35% of their premium contributions.

Individual Health Market

The 17 million people who are covered in the individual health insurance market, where switching of plans and substantial changes in coverage are common, will receive the new protections of the Affordable Care Act sooner rather than later. Roughly 40 percent to two-thirds of people in individual market policies change plans within a year. Given this "churn," the transition for the 17 million people in this market will be swift. In the short run, individuals whose plan changes and is no longer grandfathered will gain access to free preventive services, protections against restricted annual limits, and patient protections such as improved access to emergency rooms. These Americans also will benefit from the Health Insurance Exchanges that will be established in 2014 to offer individuals and workers in small businesses a much greater choice of plans at more affordable rates.

People in Special Types of Health Plans

Fully-insured health plans subject to collective bargaining agreements will be able to maintain their grandfathered status until their agreement terminates. After that point, they are subject to the same rules as other health plans; in other words, they will lose their grandfathered status if they make any of the substantial changes described above. Retiree-only and "excepted health plans" such as dental plans, long-term care insurance, or Medigap, are exempt from the Affordable Care Act insurance reforms.

Projections of Employer Plans Remaining Grandfathered, 2011-2013

There is considerable uncertainty about what choices employers will make over the next few years as the market prepares for the establishment of the competitive Exchanges and other market reforms such as new consumer protections, middle-class tax credits and other steps to expand affordabilty and choice for millions more Americans. This rule estimates the likely decisions of employers based on assumptions and extrapolations of recent market behavior, including the decisions by employers to change their health plans in 2008 and 2009. The table below depicts the results of this analysis:

Type of Plan	Enrollees	Employer Plans Remaining Grandfathered		Explanation
		2011	2013	
Allowable Percent Change in Co-Payments from 2010		Medical inflation* (4%) + 15% = 19%	Medical inflation* ($4\%^3$ = 12%) + 15% = 27%	Deductibles, copayments can increase faster than medical inflation over time
Large Employer	133 million	Low: 87% remain grandfathered Mid-range: 82% remain grandfathered High: 71% remain grandfathered	Low: 66% remain grandfathered Mid-range: 55% remain grandfathered High: 36% remain grandfathered	Large plans are more stable and often self-insured. Regulation permits plans to make routine changes needed to keep premium growth in check.
Small Employer	43 million	Low: 80% remain grandfathered Mid-range: 70% remain grandfathered High: 58% remain grandfathered	Low: 51% remain grandfathered Mid-range: 34% remain grandfathered High: 20% remain grandfathered	Small businesses typically buy commercial insurance and frequently make changes in insurers and coverage. Limited purchasing power and high overhead often force a trade-off between dramatic changes in benefits and cost sharing and affordable premiums.

* Assumes medical inflation at 4%

The "low" percentage is based on the mid-range percentages plus plans that could stay grandfathered with small premium changes.

The "mid-range" percentage is based on assumptions of the number of plans that would lose their grandfathered status if they made changes consistent with the changes that they made in 2008 and 2009 that would not lead to premium increases.

The "high" percentage assumes that some plans would not be able to make the adjustments to employer premium contribution they would need to keep premiums the same while keeping their other cost-sharing parameters within the grandfathering rules. The estimates in this case assume these plans will choose to relinquish their grandfathered status instead.

Choices in 2014 and Subsequent Years

In 2014, small businesses and individuals who purchase insurance on their own will gain access to the competitive market Exchanges. These Exchanges will offer individuals and workers in small businesses with a much greater choice of plans at more affordable rates – the same choice as members of Congress. In fact, the Congressional Budget Office (CBO) has estimated that, on an apples-to-apples basis, premiums will be 14- 20 percent lower than they would be under current law in 2016 due to competition, lower insurance overhead, and increased pooling and purchasing power. Small

businesses also will have more affordable options. CBO has estimated that a family policy for small businesses would be available in the Exchanges at a premium that is $4,000 lower than under current law in 2016.

These reduced premiums do not take into account the tax credits available to small businesses and middle-class families to help make insurance affordable. These additional new choices may further lower the likelihood that small businesses workers will remain in grandfathered health plans. Consumers insured through large employers are more likely to remain in grandfathered plans in 2014 and beyond.

Read the Press Release at: http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

Read the Questions and Answers on the Regulation at http://www.healthreform.gov/about/grandfathering.html.

You can view the Regulation at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2010_register&docid=DOCID:fr17jn10-25.pdf.

Posted: June 14, 2010

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE, *Plaintiff,* v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants.*	No. 1:13-cv-8910 Judge Robert M. Dow, Jr. Magistrate Judge Sidney I. Schenkier

WHEATON COLLEGE'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AND STATEMENT OF ADDITIONAL FACTS

Pursuant to Local Civil Rule 56.1, Plaintiff Wheaton College submits the following response to the Defendants' Statement of Material Facts.

Preliminary Statement. The factual claims set forth in the Defendants' Statement of Material Facts ("Defendants' Statement") largely consists of legal conclusions. This is improper, as the statement is supposed to contain "facts" not legal conclusions. *See* L.R. 56.1; *Pamado, Inc. v. Hedinger Brands, LLC*, 785 F. Supp. 2d 698, 700 n.1 (N.D. Ill. 2011) ("Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider that statement."). Sections of the Federal Code and the Federal Register speak for themselves.

To the extent Defendants' Statement concerns actual facts, those facts are largely based on either (a) hearsay statements from the Defendants' own documents, or (b) hearsay statements from third parties (including the IOM report). This approach is improper. Factual assertions in the statement are supposed to be "supported by admissible record evidence." *Pamado*, 785 F. Supp. 2d at 700 n.1; LR 56.1. The Court cannot rely on Defendants' inadmissible hearsay assertions for the truth of the matter asserted, either at trial, Fed. R. Evid. 802, or on summary judgment. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009) ("a court may consider only admissible evidence in assessing a motion for summary judgment").

Furthermore, any reliance on the purported administrative record before discovery begins would be improper for a second reason: Wheaton College has not yet had an opportunity to conduct discovery to determine whether the proffered administrative record is complete and accurate. As set forth in Wheaton's Rule 56(d) Motion, serious questions

have been raised about the record in this Court. Pre-discovery summary judgment in reliance on the proffered record is premature.

Subject to and including the objections set forth above, Wheaton's further responses to particular statements are set forth below:

1. Plaintiff Wheaton College alleges that it is a Christian liberal arts college in Wheaton, Illinois. Compl. at ¶ 14.

Response: Undisputed but incomplete. *See* Ryken Decl. ¶¶ 5-16 and Wheaton's Statement of Additional Facts ¶ 1-7.

2. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). Comp. at ¶ 16.

Response: Undisputed.

3. Defendant HHS is an executive agency of the United States government. Compl. at ¶ 17.

Response: Undisputed.

4. Defendant Thomas Perez is the Secretary of the United States Department of Labor. Compl. at ¶ 18.

Response: Undisputed.

5. Defendant Department of Labor is an executive agency of the United States government. Compl. at ¶ 19.

Response: Undisputed.

6. Defendant Jacob Lew is Secretary of the Department of Treasury. Compl. at ¶ 20.

Response: Undisputed.

7. Defendant Department of Treasury is an executive agency of the United States government Compl. at ¶ 21.

Response: Undisputed.

8. Plaintiff alleges that this Court has subject-matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1336. Compl. at ¶ 12. Defendants allege that this Court lacks subject matter jurisdiction over Count XIV of plaintiff's complaint.

Response: Undisputed that Wheaton has alleged facts sufficient to prove jurisdiction and that Defendants contest subject matter jurisdiction. Disputed that this Court lacks subject matter jurisdiction over Count XIV of Wheaton's Complaint.

9. Venue is proper in this district because Plaintiff alleges that it resides in this district, and a substantial part of the events giving rise to the claim occurred in this district. Compl. at ¶ 13.

Response: Undisputed.

Defendants' Statement of Material Facts and Wheaton's Response

10. In 2010, the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, established certain additional minimum standards for group health plans as well as health insurance issuers that offer coverage in the group and individual health insurance markets.

Response: This is a conclusion of law, not a statement of fact. The statute speaks for itself.

11. The Act requires non-grandfathered group health plans, and health insurance issuers offering non-grandfathered health insurance coverage, to cover four categories of recommended preventive-health services without cost sharing—that is, without requiring

plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. § 300gg-13.

Response: This is a conclusion of law, not a statement of fact. The statute speaks for itself.

12. As relevant here, these services include preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) (a component of the Department of Health and Human Services (HHS)). *Id.* § 300gg-13(a)(4).

Response: This is a conclusion of law, not a statement of fact. The statute speaks for itself.

13. Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS requested the assistance of the Institute of Medicine (IOM) in developing such comprehensive guidelines for coverage of preventive services for women. 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012), AR at 213.

Response: Disputed and unsupported. The IOM Report includes a statement of its charge from HHS and that statement does not include any discussion of coverage issues. AR 300. Rather, the HHS charge simply deals with assessing preventive health guidelines, and expressly excludes factors such as cost-effectiveness and community-based solutions. AR 300-01 ("The cost-effectiveness of screenings or services could not be a factor for the committee to consider in its analyses leading to its recommendations."). IOM also acknowledged that it did *not* "conduct a USPSTF-style systematic review for any single preventable health condition or determinant of well-being." AR 294. Indeed, IOM expressly recommended to HHS that it should "establish

a commission to recommend coverage of new preventive services for women to be covered under the ACA" and that commission should "[d]esign and implement a coverage decision making methodology to consider information from evidence review bodies (and other clinical guideline bodies) and coverage factors (e.g. cost, cost-effectiveness, legal, ethical)." AR 311.

Furthermore, Wheaton disputes: (1) the propriety of HHS abdicating its authority for creating preventive care guidelines by adopting IOM's recommendations wholesale even though those recommendations did not account for coverage-related issues like cost effectiveness; (2) the impartiality of the IOM committee that was formulated to recommend guidelines; (3) the methods the IOM committee employed; and (4) the merits of IOM's recommendations. Specifically, HHS outsourced deliberations to the IOM, which in turn created a "Committee on Preventive Services for Women" that invited presentations from several "pro-choice" groups, such as Planned Parenthood and the Guttmacher Institute (named for a former president of Planned Parenthood), without inviting presentations from groups with religious objections to forced participation in the distribution of contraceptives, sterilization, and abortion-inducing drugs. AR 516-19.

In addition, the dissent to IOM reports that the IOM committee was tasked to act on an "unacceptably short time frame" in which to conduct meaningful scientific review, and that the IOM committee should not have made recommendations simply to keep pace with "the ACA-mandated rapidity with which the committee was confronted." AR 529-530. "[T]he committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's

composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* Ultimately, "the committee erred [in] their zeal to recommend something despite the time constraints and a far from perfect methodology" and "failed to demonstrate [transparency and strict objectivity] in the Report." AR 530-31 (deeming evidence evaluation process a "fatal flaw" in the report).

14. After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, among other things, well-woman visits; breastfeeding support; domestic violence screening; and, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." See INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 10-12 (2011) ("IOM REP."), AR at 308-10.

Response: Undisputed that the quoted text appears in the IOM Report, but disputed that IOM's review was "extensive" and "science-based." Wheaton incorporates its response to Paragraph 13 *supra*. The report did not recommend that "HRSA guidelines include" anything, but rather recommended the drugs, devices, procedures, and related advice "for consideration as a preventive service for women." AR 308.

15. These include the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), *id.* at 10, AR at 308, which the IOM found can greatly decrease the risk of unwanted pregnancies, adverse pregnancy outcomes, and other adverse health consequences, and vastly reduce medical expenses for women, *see id.* at 102-10, AR at 400-08.

Response: Disputed and unsupported. Wheaton incorporates its response to paragraphs 13 and 14 *supra*. The "full range" of "contraceptive methods" includes emergency contraceptives.

16. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access to such services, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. *See id.* at 102-03, AR at 400-01.

Response: Disputed and unsupported. The cited pages of the IOM Report do not discuss coverage of contraception without cost-sharing at all, much less that such coverage is "necessary to increase access to such services" or avoid bad outcomes. *See also* AR 1290 ("The scarcity of studies on [negative health effects of unintended pregnancy] is surprising, given that the prevention of unintended pregnancy has been a major rationale for the funding and provision of family planning"); AR 1291 ("The scarcity of studies on the effects of unintended pregnancy on the physical and mental health of men and women . . . must be noted."). Moreover, the cited pages do not address emergency contraceptives. AR 400-01.

17. On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), AR at 283-84.

Response: Undisputed that HRSA adopted the cited guidelines. This was done, however, via press release and website announcement, *see* AR 283-84, and without following notice and comment rulemaking.

18. In the 2011 amended interim final regulations, group health plans established or maintained by these religious employers (and associated group health insurance coverage) are exempt from any requirement to cover contraceptive services consistent with HRSA's guidelines. HRSA Guidelines, AR 283-84.; 45 C.F.R. ¶ 147.131(a).

Response: This is a disputed proposition of law. Undisputed that HRSA's webpage and the C.F.R. contain provisions addressing this topic. Disputed that Defendants have employed a proper definition of "religious employer," in that Wheaton *is* a religious employer and should be treated as such under the law. *See, e.g.*, Wheaton's Statement of Additional Facts at ¶¶ 1-7, 18.

19. In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the 2011 amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). *See* 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012), AR at 213-14.

Response: Undisputed

20. The government committed to undertake a new rulemaking during the safe harbor period to adopt new regulations to further accommodate non-grandfathered non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8727, AR at 215.

Response: Undisputed that the government undertook new rulemaking, but disputed that the rulemaking "accommodated" non-grandfathered non-profit religious organizations' religious objections to forced participation in the government scheme. *See* Wheaton's Statement of Additional Facts at ¶¶ 9, 13-14 (noting that Wheaton cannot comply with the new rule.)

21. The regulations challenged here (the "2013 final rules") represent the culmination of that process. *See* 78 Fed. Reg. 39,869 (July 2, 2013), AR at 1-31; *see also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (Advance Notice of Proposed Rulemaking (ANPRM)), AR at 186093; 78 Fed. Reg. 8456 (Feb. 6, 2013) Notice of Proposed Rulemaking (NPRM)), AR at 165-85.

Response: Undisputed, but see Response 20.

22. Under the 2013 final rules, a "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended," which refers to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. 45 C.F.R § 147.131(a). The changes made to the definition of religious employer in the 2013 final rules are intended to ensure "that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer hires or serves people of different religious faiths." 78 Fed. Reg. at 39,874, AR at 6.

Response: This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

23. The 2013 final rules also establish accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations" (and group health insurance coverage provided in connection with such plans). *Id.* at 39,875-80, AR at 7-12; 45 C.F.R. § 147.131(b).

Response: This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

24. An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation . . . applies.

45 C.F.R. § 147.131(b); *see* 78 Fed. Reg. at 39,874-75, AR at 6-7.

Response: This is a legal conclusion, not a statement of fact. The regulation speaks for itself.

25. Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6.

Response: This is a legal conclusion, not a statement of fact. The regulation speaks for itself. Disputed and unsupported. As set forth in Wheaton's Complaint, Motion for Summary Judgment, and supporting declarations, the regulations require Wheaton to

take numerous steps to contract, arrange, pay for, or refer for the relevant coverage. *See, e.g.*, Ryken Decl. ¶¶ 44-63; *see also* Compl. at ¶¶ 6-8, 119-154.

26. To be relieved of these obligations, it need only complete a self-certification form stating that it is an eligible organization and provide a copy to its health insurance company or TPA. *Id.* at 39,878-79, AR at 10-11.

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

27. The participants and beneficiaries of the eligible organization's health plan, however, typically still benefit from access to contraceptive services without cost sharing. *Id.* at 39,874, AR at 6.

Response: This is a legal conclusion, not a statement of fact. The regulations speak for themselves. *See also* Response 16.

28. In the case of an eligible organization with an insured group health plan the organization's insurance issuer is required to provide or arrange separate payments for contraceptive services to plan participants and beneficiaries. 45 C.F.R. § 147.131(c)(2).

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself. The insurance issuer is required to arrange the payments only once it "receives a copy of the self-certification" 45 C.F.R. § 147.131.

29. The issuer may not impose any premium, fee, or other charge, directly or indirectly, on the eligible organization or the group health plan with respect to the issuer's payments for contraceptive services. *Id.* § 147.131(c)(2)(ii), (f).

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

30. In the case of an organization with a self-insured group health plan, the organization's TPA, upon receipt of the self-certification, must provide or arrange separate payments for contraceptive services for participants or beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. 78 Fed. Reg. at 39,879-89, AR at 11-12.

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

31. Any costs incurred by the TPA will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See id.* at 39,880, AR at 12.

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

32. Indeed, the accommodations are what enable eligible organizations' issuers or TPAs to comply with their independent legal obligation to cover contraceptive services. *See id.* § 147.131(c)(2)(i) (cross-referencing 45 C.F.R. § 147.130(a)(1)).

Response: This is a conclusion of law, not a statement of fact. The regulations speak for themselves. As set forth in Wheaton's Complaint, Motion for Summary Judgment, and supporting declarations, the regulations require Wheaton to take numerous steps to contract, arrange, pay for, or refer for the relevant coverage. *See, e.g.*, Ryken Decl. ¶¶ 44-63; *see also* Compl. at ¶¶ 6-8, 119-154. Thus, the legal obligation to cover contraceptive services is not "independent" of Wheaton.

33. The issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the . . . plan," *id.* §

147.131(c)(2)(i)(A), and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services," *id.* § 147.131(c)(2)(ii).

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

34. An eligible organization that opts out of providing contraceptive coverage has no obligation to inform plan participants and beneficiaries of the availability of these separate payments made by third parties. Instead, the organization's issuer provides this notice, and does so "separate from" materials that are distributed in connection with the eligible organization's group health coverage. *Id.* § 147.131(d).

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself.

35. That notice must make clear that the eligible organization is neither administering nor funding the contraceptive coverage. *Id.*

Response: This is a characterization of the law, not a statement of fact. The regulation speaks for itself. Undisputed that the notice must state that Wheaton "will not administer or fund" contraceptive coverage. Disputed that this is, in truth, the actual effect of the regulations or that the regulations satisfy Wheaton's conscience. *See* Wheaton's Statement of Additional Facts at ¶¶ 13-18.

36. Plaintiff provides health insurance through six plans, five of which are not grandfathered: one insured student health plan, two insured employee group health plans through Blue Cross Blue Shield of Illinois, and two self-funded prescription drug plans. Compl. at ¶¶ 159-161.

Response: Undisputed but incomplete. For a full description of Wheaton's health plans, see Wheaton's Statement of Additional Facts ¶ 21-28.

Wheaton's Statement of Additional Material Facts

1. Wheaton College is a Christian liberal arts college in Wheaton, Illinois. Ryken Decl. ¶ 5.

2. Founded by abolitionist Jonathan Blanchard, Wheaton is not tied to any church or denomination, but is affiliated with the Evangelical Christian tradition. It draws its students, faculty, and staff from a variety of Christian traditions. Ryken Decl. ¶¶ 5, 9.

3. Wheaton's non-denominational identity is one that is often favored by Evangelical Christian institutions because of its ability to foster cooperation between members of different churches that share common religious convictions. Ryken Decl. ¶ 10.

4. Wheaton's mission statement is as follows "Wheaton College serves Jesus Christ and advances His kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide." Wheaton's motto is "For Christ and His Kingdom." Ryken Decl. ¶¶ 6-7.

5. In order to further its mission, Wheaton maintains a Community Covenant that describes the scriptural standards the community sets for itself. Signed each year by all students and employees, the Community Covenant specifically recognizes that Scripture condemns the taking of innocent life. Ryken Decl. ¶¶ 14, 16.

6. In addition to the Community Covenant, Wheaton's Board of Trustees, faculty, and staff annually reaffirm the College's doctrinal statement, which provides a summary of biblical doctrine that is consonant with Evangelical Christianity. Ryken Decl. ¶ 15.

7. As an Evangelical institution, Wheaton College holds traditional Christian beliefs about the sanctity of life. Wheaton College affirms that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. Wheaton affirms that "we are to '[d]efend the weak and the fatherless," "[r]escue the weak and the needy," and "speak up for those who cannot speak for themselves." Psalm 82:3-4b (NIV); Proverbs 31:8a (NIV). Wheaton therefore believes and teaches that abortion ends a human life and is a sin. Ryken Decl. ¶¶ 17-19.

8. FDA-approved contraceptive methods required by the Mandate include "emergency contraception" such as Plan B (the "morning after" pill) and ella (the "week after" pill). FDA Birth Control Guide (August 2012), Ex. B-3 at 11-13. The FDA's Birth Control Guide notes that these drugs may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. *Id.*

9. Wheaton cannot provide or facilitate insurance for emergency contraceptives because these drugs may kill a human embryo. *Id.*; *see also* Ryken Decl. ¶¶ 17-19, 42.

10. Wheaton does not object to providing coverage for standard contraception that does not harm a newly-created human life. Ryken Decl. ¶ 41.

11. Nor does Wheaton object to providing any of the other mandated services, including well-woman visits and gestational diabetes screening. Ryken Decl. ¶ 65.

12. Wheaton's religious convictions require it to promote the well-being and health of its students and employees by providing generous health insurance for its employees and students. Ryken Decl. ¶ 20.

13. Wheaton cannot, in good conscience, participate in the government's scheme to distribute, encourage, facilitate, and/or reduce the cost of emergency contraceptives. Ryken Decl. ¶ 44.

14. Wheaton cannot, in good conscience, sign, submit, or facilitate the transfer of the government-required certification at issue in this case. Ryken Decl. ¶¶ 56-57.

15. On the back of the self-certification, EBSA Form 700, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." Ex. B-4. It is these regulations that require that "the third party administrator shall provide or arrange payments for" the abortifacient drugs and devices. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A.

16. Wheaton cannot provide such services or authorize someone else to do so; they must avoid participating in any system involving the provision of such services. Ryken Decl. ¶¶ 44, 56.

17. Because of its religious beliefs, Wheaton cannot do the following and objects to: Signing the self-certification form that on its face authorizes and mandates another organization to deliver emergency contraceptives to employees and other beneficiaries; Delivering the self-certification form to another organization that could then rely on it as an authorization to deliver these emergency contraceptives to employees and beneficiaries; Agreeing to refrain from speaking to other organizations and instructing or asking them not to deliver emergency contraceptives to employees and students; Creating a provider-

insured relationship (between plan beneficiaries and a third-party administrator), the sole purpose of which would be to provide access to contraceptives to employees and students; Coordinating with its third party administrator and insurer to provide information about its plan enrollment for the purpose of providing emergency contraceptives to its employees and students; Participating in a scheme, the sole purpose of which is to provide emergency contraceptives to employees, students, and other beneficiaries. Ryken Decl. ¶¶ 41-65; Defendant's Statement of Material Facts ¶ 27.

18. Because the designation makes the third party administrator a plan administrator with fiduciary duties, EBSA Form 700 alters the existing contract between Wheaton and its third party administrator BlueCross/BlueShield of Illinois. Wheaton's existing contract says:

> [N]otwithstanding anything contained in the Plan or any other employee welfare benefit plan document of the Employer, the Employer agrees that no allocation or delegation of any fiduciary or non–fiduciary responsibilities under the Plan or any other employee welfare benefit plan of the Employer is effective with respect to or accepted by [BlueCross/BlueShield of Illinois].

Ex. A-3 (Administrative Services Agreement at 15).

19. Wheaton does not qualify as an exempt "religious employer" because it is not a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order. Ryken Decl. ¶ 36.

20. Wheaton is currently protected under the current safe harbor, which has been extended to plan years beginning before December 31, 2013. 78 Fed. Reg. at 39889. Ryken Decl. ¶ 40.

Wheaton's Insurance Plans

21. Wheaton offers two HMO plans through BlueCross/BlueShield of Illinois and a PPO plan, which is self-funded. As a supplement to the HMO plans, Wheaton offers two self-funded prescription drug plans. The PPO plan is grandfathered, while the HMO plans and the self-funded prescription drug plans are no longer grandfathered. Ryken Decl. ¶¶ 22, 25-26. Wheaton also offers an insured student health plan, which is not grandfathered. Ryken Decl. ¶ 25.

22. All of Wheaton's self-funded plans—the grandfathered PPO and both of the self-funded prescription plans—are administered by BlueCross/BlueShield of Illinois, which is the third party administrator for the plan. Ryken Decl. ¶ 23.

23. Wheaton is the plan administrator and fiduciary of its self-funded plans, and BlueCross/BlueShield of Illinois has no authority to change the terms of the plans without Wheaton's express permission. Ryken Decl. ¶ 23.

24. The next ERISA plan year for each of Wheaton College's employee plans begins on July 1. Ryken Decl. ¶ 24. The next plan year for Wheaton College's student plan begins on August 1, 2014. Ryken Decl. ¶ 24.

25. Wheaton has approximately 690 full time employees, and has approximately 550 students on its student insurance plan. Ryken Decl. ¶¶ 21, 27, 29. About 402 of Wheaton's employees have chosen coverage through one of Wheaton's ungrandfathered HMO plans and the self-funded prescription plans. Ryken Decl. ¶ 27.

26. Wheaton could face tax penalties of $100 per day per "individual to whom . . . failure [to cover emergency contraceptives] relates," as well as regulatory action and lawsuits, if it continued to seek to conform its insurance offerings to its religious

convictions. 26 U.S.C. § 4980D(b)(1). Although Defendants have not provided clear guidance about how the $100 per day fines in 26 U.S.C. § 4980D are calculated or how they apply to student plans, they are potentially enormous. For example, if the $100 per day fines were applied to the 402 full time employees that use Wheaton's ungrandfathered HMO plans, the total could be up to $14.7 million a year. Ryken Decl. ¶ 69. If applied to Wheaton's student health plans (which covered about 550 students in 2013-14), the $100 per day fines could be over $20.1 million a year. Ryken Decl. ¶ 69. In total, Wheaton could be liable for as much as $34.8 million in tax penalties each year under this provision. Ryken Decl. ¶ 69.

27. Dropping its insurance would subject Wheaton to fines of $2000 per employee per year, or roughly $1.3 million per year beginning in 2015. 26 U.S.C. § 4980H; Ryken Decl. ¶ 68. Dropping its insurance would also impose a serious hardship on Wheaton faculty and staff, and would create a serious competitive disadvantage for Wheaton in recruiting and retaining faculty and staff. Ryken Decl. ¶¶ 71-73, 79-83.

28. Wheaton is unable to drop its HMO plans in favor of its grandfathered PPO plans, because transferring the 402 employees currently using the HMO plans to the PPO would jeopardize the grandfathered status of the PPO plan. Ryken Decl. ¶ 70; 45 C.F.R. § 147.140(b)(2)(ii). It would also be a severe burden on Wheaton's employees. Ryken Decl. ¶ 72.

29. Defendants estimate that plans covering an estimated 87 million people are grandfathered. Ex. B-9 at 7.

30. Defendants estimate that approximately 34 million individuals work for employers with fewer than fifty employees. Ex. B-10 at 2.

31. Defendant Sebelius said at a fundraiser in October 2011—shortly after the Mandate had been announced but before any of the exemptions had been announced—that "we are in a war" over emergency contraception. *See, e.g.*, Robin Marty, *Sebelius: 'We Are In A War,'* RH Reality Check, Oct. 6, 2011, http://rhrealitycheck.org/article/2011/10/06/sebelius-0/.

32. In September 2011, Wheaton College submitted public comments on the Interim Final Rule on Preventive Services, 76 Fed. Reg. 46621 (Aug. 3, 2011), expressing concern that it was not considered a religious employer and that the rule violated Wheaton's rights of conscience. Wheaton asked HHS to broaden the existing "religious employer" exemption to cover Wheaton and similar organizations. Ryken Decl. ¶ 35.

33. In June 2012, Wheaton College submitted comments on the Advance Notice of Proposed Rulemaking on Preventative Services published on March 21, 2012 (77 Fed. Reg. 16501). Ryken Decl. ¶ 38. Wheaton's comments reiterated its concerns about the interim final rule, particularly the Defendants' refusal to provide it and similar religious employers with the same exemption afforded to churches. Ryken Decl. ¶ 38.

34. During the comment period for the Defendants' Notice of Proposed Rulemaking, 78 Fed. Reg. 8456 (Feb. 6, 2013), Defendants also received comments from the Council for Christian Colleges and Universities ("CCCU"), which represents 120 Evangelical Protestant colleges and universities, including Wheaton (which is nearly 15% of the 900 religiously-affiliated institutions of higher education in the United States). CCCU, Profile of U.S. Post-Secondary Education, https://www.cccu.org/about; CCCU, Members and Affiliates, https://www.cccu.org/members_and_affiliates.

35. CCCU pointed out that the Defendants' rationale did not apply to CCCU's Evangelical Protestant members like Wheaton College:

> The CCCU is particularly frustrated by that rationale for the exemption-accommodation paradigm, because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution. Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.

Ex. B-6 (CCCU NPRM Comments at 4-5 (Apr. 8, 2013)), AR CMS-2012-0031-82670-A1.

36. Defendant Sebelius announced the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the many substantive objections to the final rule. In that presentation, Sebelius stated:

> We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities *will be providing coverage* to their employees starting August 1st . . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese *will be included* in the benefit package.

The Forum, *A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services* (April 8, 2013) *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (last visited Apr. 22, 2014) (see 51:30-52:00).

Respectfully submitted,

/s Mark Rienzi

Mark Rienzi
Adèle Auxier Keim
Diana Verm
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Ste. 220
Washington, DC 20007
(202) 955-0095 (tel.)
(202) 955-0090 (fax)

Christian Poland
BRYAN CAVE LLP
161 N. Clark St., Suite 4300,
Chicago, IL 60601-3315
(312) 602-5085 (tel.)
Christian.Poland@bryancave.com

Attorneys for Plaintiff Wheaton College

Certificate of Service

I hereby certify that the foregoing document was electronically filed with the Court's ECF system on April 22, 2014, and was thereby electronically served on counsel for Defendants.

s/ Mark L. Rienzi
Mark L. Rienzi
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

WHEATON COLLEGE, Plaintiff, v. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.* Defendants.	)	Case No. 1:13-CV-08910

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

In accordance with Local Civ. Rule 56.1(b)(3), and in light of the fact that defendants have filed a combined memorandum in opposition to plaintiff's motion for summary judgment and in support of defendants' motion to dismiss or, in the alternative, for summary judgment, defendants submit the following responses and objections to Wheaton College's Response to Defendants' Statement of Material Facts and Statement of Additional Facts. *See* ECF No. 42 ("Pl. Statement").

In its responses to several of defendants' factual allegations, plaintiff claims it disputes the fact, but merely rehashes its disagreements with defendants' regulatory process and the content of the regulations. *See* Pl. Statement at ¶¶ 13-18, 20-21, 25, 32, 35. These unsubstantiated legal arguments or generalized complaints do not create genuine issues of material fact, and defendants respond to these arguments in their Motion to Dismiss or, in the Alternative, For Summary Judgment, s*ee* Def. Mtn. at 5-6, and their Opposition to Plaintiff's Motion for Summary Judgment, *see* Def. Opp'n at 10-11, 18-20.

Plaintiff's Statement of Additional Material Facts

1. Wheaton College is a Christian liberal arts college in Wheaton, Illinois. Ryken Decl. ¶ 5.

Defendants' Response: Undisputed.

2. Founded by abolitionist Jonathan Blanchard, Wheaton is not tied to any church or denomination, but is affiliated with the Evangelical Christian tradition. It draws its students, faculty, and staff from a variety of Christian traditions. Ryken Decl. ¶¶ 5, 9.

Defendants' Response: Undisputed.

3. Wheaton's non-denominational identity is one that is often favored by Evangelical Christian institutions because of its ability to foster cooperation between members of different churches that share common religious convictions. Ryken Decl. ¶ 10.

Defendants' Response: Undisputed.

4. Wheaton's mission statement is as follows "Wheaton College serves Jesus Christ and advances His kingdom through excellence in liberal arts and graduate programs that educate the whole person to build the church and benefit society worldwide." Wheaton's motto is "For Christ and His Kingdom." Ryken Decl. ¶¶ 6-7.

Defendants' Response: Undisputed.

5. In order to further its mission, Wheaton maintains a Community Covenant that describes the scriptural standards the community sets for itself. Signed each year by all students and employees, the Community Covenant specifically recognizes that Scripture condemns the taking of innocent life. Ryken Decl. ¶¶ 14, 16.

Defendants' Response: Undisputed.

6. In addition to the Community Covenant, Wheaton's Board of Trustees, faculty, and staff annually reaffirm the College's doctrinal statement, which provides a summary of biblical doctrine that is consonant with Evangelical Christianity. Ryken Decl. ¶ 15.

Defendants' Response: Undisputed.

7. As an Evangelical institution, Wheaton College holds traditional Christian beliefs about the sanctity of life. Wheaton College affirms that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. Wheaton affirms that "we are to '[d]efend the weak and the fatherless," "[r]escue the weak and the needy," and "speak up for those who cannot speak for themselves." Psalm 82:3-4b (NIV); Proverbs 31:8a (NIV). Wheaton therefore believes and teaches that abortion ends a human life and is a sin. Ryken Decl. ¶¶ 17-19.

Defendants' Response: Undisputed.

8. FDA-approved contraceptive methods required by the Mandate include "emergency contraception" such as Plan B (the "morning after" pill) and ella (the "week after" pill). FDA Birth Control Guide (August 2012), Ex. B-3 at 11-13. The FDA's Birth Control Guide notes that these drugs may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. *Id*.

Defendants' Response: Undisputed.

9. Wheaton cannot provide or facilitate insurance for emergency contraceptives because these drugs may kill a human embryo. *Id*.; *see also* Ryken Decl. ¶¶ 17-19, 42.

Defendants' Response: Defendants dispute this paragraph to the extent that it suggests that the regulations at issue in this case require plaintiffs to "provide" or "facilitate" access to contraceptive services. Under the 2013 final rules, an eligible organization is not required "to

contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require that an eligible organization complete a self-certification form stating that it is an eligible organization and provide a copy of that self-certification to its health insurance issuer or third party administrator (TPA). *Id.* at 39,878-79, AR at 10-11.

Defendants also dispute this paragraph to the extent that it suggests that the regulations require coverage of "abortifacient drugs and devices." The challenged regulations do not require coverage of abortion or abortifacients. *See* HRSA Guidelines, AR at 283-84; IOM REP. at 22, AR at 320; HealthCare.gov, Affordable Care Act Rules on Expanding Access to Preventive Services for Women (August 1, 2011), available at http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html; 62 Fed. Reg. at 8611; 45 C.F.R. § 46.202(f); see also 62 Fed. Reg. at 8611 (noting that "emergency contraceptive pills are not effective if the woman is pregnant" and that there is "no evidence that [emergency contraception] will have an adverse effect on an established pregnancy"); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery."). Further, no FDA-approved contraceptive methods cause the demise of an early embryo as part of their mechanism of action. *See* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm; *see also* http://www.accessdata.fda.gov/scripts/cder/drugsatfda/ (drugs); http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm (devices).

10. Wheaton does not object to providing coverage for standard contraception that does not harm a newly-created human life. Ryken Decl. ¶ 41.

Defendants' Response: Defendants dispute plaintiff's characterization of the regulations as requiring coverage of drugs or devices that "harm a newly-created human life," since, no FDA-approved contraceptive methods cause the demise of an early embryo as part of their mechanism of action. *See* Def. Resp. at ¶ 9. Defendants do not dispute that plaintiff does not object to what it considers "standard" contraception, but that fact is not material.

11. Nor does Wheaton object to providing any of the other mandated services, including well-woman visits and gestational diabetes screening. Ryken Decl. ¶ 65.

Defendants' Response: Undisputed.

12. Wheaton's religious convictions require it to promote the well-being and health of its students and employees by providing generous health insurance for its employees and students. Ryken Decl. ¶ 20.

Defendants' Response: Undisputed but immaterial.

13. Wheaton cannot, in good conscience, participate in the government's scheme to distribute, encourage, facilitate, and/or reduce the cost of emergency contraceptives. Ryken Decl. ¶ 44.

Defendants' Response: This paragraph contains plaintiff's description and characterization of provisions of law, not a statement of fact. Defendants dispute this paragraph to the extent that it suggests that the regulations at issue in this case require plaintiffs to "distribute, encourage, facilitate and/or reduce the cost of emergency contraceptives," as this is simply plaintiff's characterization of what the challenged regulations require.

14. Wheaton cannot, in good conscience, sign, submit, or facilitate the transfer of the government-required certification at issue in this case. Ryken Decl. ¶¶ 56-57.

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 13.

15. On the back of the self-certification, EBSA Form 700, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that . . . [t]he obligations of the third party administrator are set forth in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2510.3-16, and 29 C.F.R. § 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." Ex. B-4. It is these regulations that require that "the third party administrator shall provide or arrange payments for" the abortifacient drugs and devices. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A.

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. Defendants also dispute this paragraph to the extent that it suggests that the regulations require coverage of "abortifacient drugs and devices" but do not dispute that plaintiff's believe they do. *See* Def. Resp. at ¶ 9.

16. Wheaton cannot provide such services or authorize someone else to do so; they must avoid participating in any system involving the provision of such services. Ryken Decl. ¶¶ 44, 56.

Defendants' Response: Defendants dispute this paragraph to the extent that it suggests that the regulations require that plaintiff provide coverage of "abortifacient drugs and devices," authorize a third party to do so, or participate in a system involving their provision.

17. Because of its religious beliefs, Wheaton cannot do the following and objects to: Signing the self-certification form that on its face authorizes and mandates another organization to deliver emergency contraceptives to employees and other beneficiaries; Delivering the self-certification form to another organization that could then rely on it as an authorization to deliver these emergency contraceptives to employees and beneficiaries; Agreeing to refrain from speaking to other organizations and instructing or asking them not to deliver emergency contraceptives to employees and students; Creating a provider-insured relationship (between plan beneficiaries and a third-party administrator), the sole purpose of which would be to provide access to contraceptives to employees and students; Coordinating with its third party administrator and insurer to provide information about its plan enrollment for the purpose of providing emergency contraceptives to its employees and students; Participating in a scheme, the sole purpose of which is to provide emergency contraceptives to employees, students, and other beneficiaries. Ryken Decl. ¶¶ 41-65; Defendant's Statement of Material Facts ¶ 27.

Defendants' Response: Defendants dispute this paragraph to the extent it contains description and characterization of provisions of law, not a statement of fact. Defendants dispute this paragraph to the extent that it suggests that the regulations at issue in this case require plaintiffs to "distribute, encourage, facilitate and/or reduce the cost of emergency contraceptives," as this is simply plaintiff's characterization of what the challenged regulations require. Under the 2013 final rules, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874, AR at 6. To be relieved of any such obligations, the 2013 final rules require that an eligible organization complete a self-certification form stating that it is an eligible organization

and provide a copy of that self-certification to its health insurance issuer or third party administrator (TPA). *Id.* at 39,878-79, AR at 10-11. *See* Def. Resp. at ¶ 9.

18. Because the designation makes the third party administrator a plan administrator with fiduciary duties, EBSA Form 700 alters the existing contract between Wheaton and its third party administrator BlueCross/BlueShield of Illinois. Wheaton's existing contract says:

> [N]otwithstanding anything contained in the Plan or any other employee welfare benefit plan document of the Employer, the Employer agrees that no allocation or delegation of any fiduciary or non–fiduciary responsibilities under the Plan or any other employee welfare benefit plan of the Employer is effective with respect to or accepted by [BlueCross/BlueShield of Illinois].

Ex. A-3 (Administrative Services Agreement at 15).

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 9.

19. Wheaton does not qualify as an exempt "religious employer" because it is not a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order. Ryken Decl. ¶ 36.

Defendants' Response: Undisputed, except to the extent this paragraph consists of plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 9..

20. Wheaton is currently protected under the current safe harbor, which has been extended to plan years beginning before December 31, 2013. 78 Fed. Reg. at 39889. Ryken Decl. ¶ 40.

Defendants' Response: Undisputed, except to the extent this paragraph consists of plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 9.

21. Wheaton offers two HMO plans through BlueCross/BlueShield of Illinois and a PPO plan, which is self-funded. As a supplement to the HMO plans, Wheaton offers two self-funded prescription drug plans. The PPO plan is grandfathered, while the HMO plans and the self-funded prescription drug plans are no longer grandfathered. Ryken Decl. ¶¶ 22, 25-26. Wheaton also offers an insured student health plan, which is not grandfathered. Ryken Decl. ¶ 25.

Defendants' Response: Undisputed.

22. All of Wheaton's self-funded plans—the grandfathered PPO and both of the self-funded prescription plans—are administered by BlueCross/BlueShield of Illinois, which is the third party administrator for the plan. Ryken Decl. ¶ 23.

Defendants' Response: Undisputed.

23. Wheaton is the plan administrator and fiduciary of its self-funded plans, and BlueCross/BlueShield of Illinois has no authority to change the terms of the plans without Wheaton's express permission. Ryken Decl. ¶ 23.

Defendants' Response: Undisputed except to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 9.

24. The next ERISA plan year for each of Wheaton College's employee plans begins on July 1. Ryken Decl. ¶ 24. The next plan year for Wheaton College's student plan begins on August 1, 2014. Ryken Decl. ¶ 24.

Defendants' Response: Undisputed.

25. Wheaton has approximately 690 full time employees, and has approximately 550 students on its student insurance plan. Ryken Decl. ¶¶ 21, 27, 29. About 402 of Wheaton's employees have chosen coverage through one of Wheaton's ungrandfathered HMO plans and the self-funded prescription plans. Ryken Decl. ¶ 27.

Defendants' Response: Undisputed.

26. Wheaton could face tax penalties of $100 per day per "individual to whom . . . failure [to cover emergency contraceptives] relates," as well as regulatory action and lawsuits, if it continued to seek to conform its insurance offerings to its religious convictions. 26 U.S.C. § 4980D(b)(1). Although Defendants have not provided clear guidance about how the $100 per day fines in 26 U.S.C. § 4980D are calculated or how they apply to student plans, they are potentially enormous. For example, if the $100 per day fines were applied to the 402 full time employees that use Wheaton's ungrandfathered HMO plans, the total could be up to $14.7 million a year. Ryken Decl. ¶ 69. If applied to Wheaton's student health plans (which covered about 550 students in 2013-14), the $100 per day fines could be over $20.1 million a year. Ryken Decl. ¶ 69. In total, Wheaton could be liable for as much as $34.8 million in tax penalties each year under this provision. Ryken Decl. ¶ 69.

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact.

27. Dropping its insurance would subject Wheaton to fines of $2000 per employee per year, or roughly $1.3 million per year beginning in 2015. 26 U.S.C. § 4980H; Ryken Decl. ¶ 68. Dropping its insurance would also impose a serious hardship on Wheaton faculty and staff, and would create a serious competitive disadvantage for Wheaton in recruiting and retaining faculty and staff. Ryken Decl. ¶¶ 71-73, 79-83.

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact.

28. Wheaton is unable to drop its HMO plans in favor of its grandfathered PPO plans, because transferring the 402 employees currently using the HMO plans to the PPO would jeopardize the grandfathered status of the PPO plan. Ryken Decl. ¶ 70; 45 C.F.R. § 147.140(b)(2)(ii). It would also be a severe burden on Wheaton's employees. Ryken Decl. ¶ 72.

Defendants' Response: Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. *See* Def. Resp. at ¶ 9.

29. Defendants estimate that plans covering an estimated 87 million people are grandfathered. Ex. B-9 at 7.

Defendants' Response: Disputed. Defendants estimated that a majority of group health plans would lose their grandfather status by 2013. See 75 Fed. Reg. 34,538, 34,552 (June 17, 2010); see also Kaiser Family Foundation and Health Research & Educational Trust, Employer Health Benefits 2012 Annual Survey at 7-8, 190 (indicating that 58 percent of firms had at least one grandfathered health plan in 2012, down from 72 percent in 2011, and that 48 percent of covered workers were in grandfathered health plans in 2012, down from 56 percent in 2011), AR at 663-64, 846.

30. Defendants estimate that approximately 34 million individuals work for employers with fewer than fifty employees. Ex. B-10 at 2.

Defendants' Response: Immaterial.

31. Defendant Sebelius said at a fundraiser in October 2011—shortly after the Mandate had been announced but before any of the exemptions had been announced—that "we

are in a war" over emergency contraception. See, e.g., Robin Marty, Sebelius: 'We Are In A War,' RH Reality Check, Oct. 6, 2011, http://rhrealitycheck.org/article/2011/10/06/sebelius-0/.

Defendants' Response: Defendants object to this paragraph because it relies on material not included in the Administrative Record, and because any "facts" it contains are not material. The introduction of this extra-record evidence is inappropriate and should not be considered by the Court. Plaintiffs are challenging agency regulations, and thus this Court's review is limited to the administrative record. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Furthermore, plaintiffs' selective quotation of the Secretary's remarks is incomplete.

32. In September 2011, Wheaton College submitted public comments on the Interim Final Rule on Preventive Services, 76 Fed. Reg. 46621 (Aug. 3, 2011), expressing concern that it was not considered a religious employer and that the rule violated Wheaton's rights of conscience. Wheaton asked HHS to broaden the existing "religious employer" exemption to cover Wheaton and similar organizations. Ryken Decl. ¶ 35.

Defendants' Response: Undisputed.

33. In June 2012, Wheaton College submitted comments on the Advance Notice of Proposed Rulemaking on Preventative Services published on March 21, 2012 (77 Fed. Reg. 16501). Ryken Decl. ¶ 38. Wheaton's comments reiterated its concerns about the interim final rule, particularly the Defendants' refusal to provide it and similar religious employers with the same exemption afforded to churches. Ryken Decl. ¶ 38.

Defendants' Response: Undisputed.

34. During the comment period for the Defendants' Notice of Proposed Rulemaking, 78 Fed. Reg. 8456 (Feb. 6, 2013), Defendants also received comments from the Council for Christian Colleges and Universities ("CCCU"), which represents 120 Evangelical Protestant

colleges and universities, including Wheaton (which is nearly 15% of the 900 religiously-affiliated institutions of higher education in the United States). CCCU, Profile of U.S. Post-Secondary Education, https://www.cccu.org/about; CCCU, Members and Affiliates, https://www.cccu.org/members_and_affiliates.

Defendants' Response: Undisputed.

35. CCCU pointed out that the Defendants' rationale did not apply to CCCU's Evangelical Protestant members like Wheaton College:

> The CCCU is particularly frustrated by that rationale for the exemption accommodation paradigm, because a requirement for membership in the CCCU is that full-time administrators and faculty at our institutions share the Christian faith of the institution. Obviously our administrators and faculty do share the deeply held religious convictions of their employers, contrary to the Department's view. Ironically, churches, on the other hand, some of which do not hire only Christians, remain exempt in this scheme. This exposes why this is not a coherent criterion – rather, the religious mission of the organization should drive the distinction.

Ex. B-6 (CCCU NPRM Comments at 4-5 (Apr. 8, 2013)), AR CMS-2012-0031-82670-A1.

Defendants' Response: Undisputed. Defendants dispute this paragraph to the extent it contains plaintiff's description and characterization of provisions of law, not a statement of fact. The full text of the CCCU NPRM comment speaks for itself.

36. Defendant Sebelius announced the content of the Final Rule the same day that the comment period closed, without taking the time to review—let alone consider—the many substantive objections to the final rule. In that presentation, Sebelius stated:

> We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities will be providing coverage to their employees starting August 1st . . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the benefit package.

The Forum, A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services (April 8, 2013) available at http://theforum.sph.harvard.edu/events/conversationkathleen-sebelius/ (last visited Apr. 22, 2014) (see 51:30-52:00).

Defendants' Response: Defendants object to this paragraph because it relies on material not included in the Administrative Record. The introduction of this extra-record evidence is inappropriate and should not be considered by the Court. Plaintiffs are challenging agency regulations, and thus this Court's review is limited to the administrative record. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963).

To the extent the Court considers this paragraph despite its reliance on extra-record evidence, it is immaterial. Furthermore, plaintiffs' selective quotation of the Secretary's remarks is incomplete. Defendants refer the Court to the full transcript, which speaks for itself.

Respectfully submitted this 15th day of May, 2014,

STUART F. DELERY
Acting Assistant Attorney General

ZACHARY T. FARDON
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Julie S. Saltman
JULIE S. SALTMAN (DC Bar No. 975015)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7111
Washington, D.C. 20530

Tel: (202) 532-4252
Fax: (202) 616-8470
Email: Julie.saltman@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
JULIE S. SALTMAN

Exhibit A

From: Saltman, Julie (CIV) [Julie.Saltman@usdoj.gov]

Sent: Monday, June 09, 2014 10:31 AM

To: Rienzi, Mark L

Cc: akeim@becketfund.org; dverm@becketfund.org; Poland, Christian

Subject: RE: Wheaton College notification

Dear Mark,

The Supreme Court's order in Little Sisters does not control this case. The order in Little Sisters states that it is based on the circumstances of that case, and that it is not an expression on the merits. Further, the 7th Circuit in Notre Dame denied a request for a preliminary injunction after the order came down in Little Sisters, in part because the plaintiffs in Little Sisters provided insurance through a church plan, against which the regulations are not enforceable. Wheaton College, like Notre Dame University, does not provide health insurance through a church plan. For these reasons, the injunction in Little Sisters of the Poor does not control this case. The regulations continue to apply to Wheaton College.

Please don't hesitate to contact me to discuss this or any issue in this case.

Best,

Julie

-----Original Message-----

From: Rienzi, Mark L [mailto:RIENZI@law.edu]

Sent: Friday, June 06, 2014 4:03 PM

To: Saltman, Julie (CIV)

Cc: akeim@becketfund.org; dverm@becketfund.org; Poland, Christian

Subject: Wheaton College notification

Dear Julie--In light of yesterday's email from Judge Dow's clerk, I am writing to you to provide you with the same notice that was prescribed by the Supreme Court for an injunction pending appeal in the Little Sisters of the Poor case. In that case, the Supreme Court allowed the Little Sisters to simply "inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services." The Court emphasized that "To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators." I have attached a PDF of the Supreme Court's order in that case. And below is a forwarded copy of the notice provided by the Little Sisters in that case.

With that background, I am writing on behalf of my client, Wheaton College, to notify your client, the Secretary of Health and Human Services, that Wheaton College is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for some of the contraceptive services described in the relevant rules (as described in its pleadings, Wheaton does not object to standard contraception such as "the pill").

In light of this notification, Wheaton seeks your clients' agreement that Wheaton does not need to execute and deliver Form EBSA-700. Can you please let me know by Monday morning whether you will accept this notification in lieu of requiring Wheaton to sign the form by July 1?

Thanks very much and best regards,

Mark

Mark L. Rienzi

The Catholic University of America

Columbus School of Law

(202) 319-4970

_____

From: Rienzi, Mark L

Sent: Monday, January 27, 2014 5:23 PM

To: Bennett, Michelle (CIV); bradley.p.humphreys@usdoj.gov<mailto:bradley.p.humphreys@usdoj.gov>

Cc: Roberts, Seth; Scherz, Carl; kevincwalsh@gmail.com<mailto:kevincwalsh@gmail.com>; akeim@becketfund.org<mailto:akeim@becketfund.org>; dblomberg@becketfund.org<mailto:dblomberg@becketfund.org>

Subject: Little Sisters of the Poor, et al. v. Sebelius, et al.; Civil Action No. 1:13-cv-2611 (D. Colo.)

Dear Michelle and Brad:

To comply with the Supreme Court's order from Friday afternoon, January 24 (Little Sisters of the Poor Home for the Aged, et al. v. Sebelius, et al., No. 13A691), our clients in the above-captioned matter hereby inform your client the Secretary of Health and Human Services that the employer applicants are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services.

Based on both the Court's order and the government's representations at the trial court concerning class certification, this will confirm that all members of the proposed class will now be treated as protected by the injunction pending appeal. Per our discussion this afternoon, I will begin working with Christian Brothers to get you a list of the employers who are in the proposed class.

Please note that this email is not and should not be construed as a plan document, does not authorize or direct any person to undertake any act or omit to take any act, and does not trigger duties or obligations on the part of any person to comply with the contraceptive mandate.

Best regards,

Mark

Mark L. Rienzi

The Catholic University of America

Columbus School of Law

(202) 319-4970

Counsel for Little Sisters of the Poor Home for the Aged, Denver, Colorado, a Colorado Non-Profit Corporation, Little Sisters Of The Poor, Baltimore, Inc., a Maryland Non-Profit Corporation, by themselves and on behalf of all others similarly situated, Christian Brothers Services, a New Mexico Non-Profit Corporation, and Christian Brothers Employee Benefit Trust

CERTIFICATE OF SERVICE

I certify that on June 26, 2014, I caused the foregoing *Addendum to Emergency Motion for Injunction Pending Appeal* to be served by email to the following parties, who have consented in writing to service in this manner:

Julie Saltman, Julie.saltman@usdoj.gov
Patrick Nemeroff, Patrick.G.Nemeroff@usdoj.gov
Alisa Klein, Alisa.Klein@usdoj.gov
Adam Jed, Adam.C.Jed@usdoj.gov
Mark Stern, Mark.Stern@usdoj.gov

U.S. Department of Justice

Counsel for Respondents

Respectfully submitted,

s/ *Luke Goodrich*
Luke Goodrich
THE BECKET FUND
FOR RELIGIOUS LIBERTY
3000 K St. N.W., Suite 220
Washington, DC 20007
(202) 955-0095
lgoodrich@becketfund.org

Counsel for Wheaton College

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

WHEATON COLLEGE, Plaintiff, v. SYLVIA M. BURWELL, Secretary, United States Department of Health and Human Services, *et al.* Defendants.	)	Case No. 1:13-CV-08910

DEFENDANTS' MEMORANDUM IN OPPOSITION TO WHEATON COLLEGE'S EMERGENCY MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, MOTION FOR INJUNCTION PENDING APPEAL

On June 23, 2014, this Court denied plaintiff Wheaton College's motion for a preliminary injunction, finding that plaintiff could not establish a likelihood of success on the merits of its claims under the Religious Freedom Restoration Act, the Free Exercise and Establishment Clauses of the First Amendment, the Administrative Procedure Act, and the Free Speech Clause of the First Amendment with respect to plaintiff's "compelled speech" claim. *See generally* Memorandum Opinion and Order [ECF No. 62] ("Order"). Although the Court found plaintiff could establish some likelihood of success on the merits of its Free Speech Clause challenge to the non-interference provision (what plaintiff calls "gag rule"), the Court correctly found that an injunction on that claim would only enjoin enforcement of that provision of the regulations against plaintiff, which was not the relief plaintiff sought in its motion. *Id*. at 15-17. Plaintiff again seeks a sweeping injunction of the entire regulatory scheme in its Emergency Motion to Reconsider or, in the Alternative, Motion for Injunction Pending Appeal ("Plaintiff's Motion"),

despite failing to establish any basis for reconsideration of the Court's order, and identifying no meritorious claim on which such relief could be granted. *See* Pl.'s Mot. [ECF No. 64]. The Court properly resolved plaintiff's claims in its thorough and well-reasoned opinion denying plaintiff relief, and plaintiff does not allege, nor can it show, that it meets the high bar for reconsideration of an interlocutory order.

Further, plaintiff makes no showing, nor can it, that it meets the standard for an injunction pending appeal, which is the same standard that applies to a request for preliminary injunctive relief under Federal Rule of Civil Procedure 65, because this Court found plaintiff could not establish a likelihood of success on the merits of its claims. Plaintiff's Motion is wholly meritless and should be denied.

ARGUMENT

I. Plaintiff cannot satisfy the demanding standard for reconsideration of an interlocutory order.

Plaintiff fails to identify the rule under which it moves for reconsideration. In fact, the Federal Rules of Civil Procedure do not provide for motions to reconsider interlocutory orders. *See* Fed. R. Civ. P. 59(e) (providing for motions to alter or amend a judgment); 60(b) (providing for relief from a "final judgment, order or proceeding"). Nevertheless, the Northern District of Illinois has recognized a "common law motion for reconsideration, which is not grounded upon any particular rule of procedure." *Neal v. Honeywell, Inc*., No. 93-C-1143, 1996 WL 627616, at *2 (N.D. Ill. Oct. 25, 1996) (citing to published decisions allowing motions to reconsider interlocutory orders). However, a motion to reconsider an interlocutory order is only permitted in the unlikely event that the Court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of

reasoning but of apprehension." *Id.* at *3, quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1192 (7th Cir. 1990). A motion to reconsider may also be based upon "a controlling or significant change in the law or facts since the submission of the issue to the Court," however, "[s]uch problems rarely arise and the motion to reconsider should be equally rare." *Id.*

Plaintiff does not address whether its motion to reconsider meets this high standard; in fact, plaintiff merely asks the Court to reconsider its decision on the basis of the preliminary injunction standard—"at least for a short period of time to allow for further consideration of these issues"—despite this court's finding no likelihood of success on the merits of plaintiff's "compelled speech" claim, and no availability of the relief it requested on its challenge to the non-interference provision. *See* Pl.'s Mot. at 5. A motion to reconsider should not allow plaintiff to seek the same relief it was already denied on the basis of the same facts and legal arguments; such a motion does not meet the high bar to reconsideration. *See Bank of Waunakee*, 906 F.2d at 1192. To the extent plaintiff does anything more that rehash the same unsuccessful arguments it has extensively briefed in this case, the Court should not consider any new legal theories, because "a motion for reconsideration is an improper vehicle to introduce evidence previously available or to tender new legal theories." *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986). Considerations of judicial efficiency advise against granting plaintiff reconsideration despite its failure to meet the standard for such relief. *See Continental Datalabel, Inc. v. Avery Dennison Corp.*, No. 09-C-5980, 2013 WL 1707945 at *6 (Apr. 19, 2013) (considerations of judicial efficiency preclude plaintiff from raising arguments in a motion for reconsideration it could have raised in summary judgment and did not). Because plaintiff cannot meet the high standard for reconsideration of an interlocutory order—and indeed plaintiff

has not even attempted to show that the standard is met—plaintiff's motion to reconsider should be denied.

II. In addition to failing to meet the standard for reconsideration, plaintiff's motion lacks any meritorious argument for reconsideration of the Court's order.

Even if the Court reconsiders its order, plaintiff's motion presents no meritorious basis on which to disturb the Court's order.

A. The Court correctly found that Wheaton cannot show a likelihood of success on the merits of its "compelled speech" claim.

Plaintiff seeks relief on its "compelled speech" claim, on the merits of which this Court found plaintiff had no likelihood of success. Plaintiff is, therefore, ineligible for the injunctive relief it seeks as a matter of law. The Court should not reconsider the merits of plaintiff's "compelled speech" claim, because plaintiff merely repeats the same arguments this Court rejected, as did every court to review a compelled speech challenge to the contraceptive-coverage regulations.[1] *See* Order at 15; *see also* Defs.' Mot. at 31, n. 25 (citing cases). Plaintiff's attempt to reframe the same argument previously rejected by this Court is unsuccessful; its argument remains that it objects to providing EBSA Form 700 to its TPA and insurer not because it disagrees with the statement on the form, but because it believes—incorrectly, as this Court found—that the form "triggers" provision of contraceptive coverage. In fact, this is speech in which plaintiff would engage even absent the contraceptive coverage requirement to ensure that it was not voluntarily covering contraceptives. Plaintiff concedes that

[1] Defendants incorporate by reference their arguments against this challenge submitted in their Memorandum in Support of their Motion to Dismiss, or In the Alternative, for Summary Judgment [ECF No. 26] ("Defs.' Mot."), and Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment, and Reply in Support of Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment [ECF No. 49].

it "has of course stated its religious objection both publicly and in this lawsuit," but claims that "[i]t is precisely because the Form contains *more* than a mere statement of religious objection that the Government so aggressively demands Wheaton sign the Form." Pl.'s Mot. at 8. Plaintiff claims it takes issue with—and defendants "believe the Form's importance derives from" — "the rest of the document," but points to no specific language in the rest of the document to which it has objections. The truth is that plaintiff is required to sign EBSA Form 700 and provide it to its TPA and insurer if it wants to opt out of providing contraceptive coverage, in accordance with the regulations. Plaintiff points to no language in the form to which it objects. Its objection to the form remains predicated on the "trigger" theory, as this Court found, so plaintiff can establish no likelihood of success on the merits of this claim.

Morever, compelling precedent supports the Court's decision. In *University of Notre Dame v. Sebelius*, the Seventh Circuit found this claim was one that did not "warrant discussion," 743 F.3d 547, 560 (7th Cir. 2014) (*Notre Dame II*), but affirmed the district court's order, which denied this claim, because "the government isn't forcing Notre Dame to do *or say* anything it wouldn't do or say otherwise . . . It can't be called compulsion for Notre Dame to do what it has done, does and will do anyway." *University of Notre Dame v. Sebelius*, --- F. Supp. 2d ---, 2013 Wl 6804773 at *20 (N.D. Ind. Dec. 20, 2013) (*Notre Dame I*). Similarly, the Sixth Circuit also rejected this claim on the basis that the plaintiffs' objection was based on the fallacy that the form "triggers" the provision of contraceptive coverage, and on the finding that the form "is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim." *Michigan Catholic Conf. v. Burwell*, --- F.3d ---, 2014 WL 2596753 at *13 (6th Cir. June 11, 2014). For these reasons, the Court should deny plaintiff's motion to reconsider its denial of relief on plaintiff's "compelled speech" claim.

B. This Court cannot grant plaintiff the relief it seeks on its Free Speech Clause challenge to the non-interference regulation.

In its June 23, 2014 Order, the Court found plaintiff had "some" likelihood of success on the merits of its Free Speech Clause challenge to 29 C.F.R. § 2590.715-2713A(b)(1)(iii)—the non-interference provision of the regulations (which plaintiff refers to as the "gag rule")—but correctly found that the only possible relief it could grant plaintiff on this claim would be limited to preliminarily enjoining the government from enforcing only that provision of the regulations. Yet the Court correctly refrained from granting such relief in the Order and should continue to do so now for several reasons.

First, while defendants respectfully disagree with the Court's finding that plaintiff established some likelihood of success on the merits of its claim regarding the non-interference provision, the Court correctly found that the only relief potentially available to plaintiff on this claim would be a narrow injunction against the enforcement of this specific provision, not the relief plaintiff sought in its motion, namely enjoining the government from enforcing the other regulatory requirements of the accommodation, such as signing the self-certification form and transmitting it to plaintiff's insurer and TPA, that are prerequisites to allowing plaintiff to opt out of providing contraceptive coverage. In seeking reconsideration, plaintiff still has not requested relief tailored to the non-interference provision—instead, it renews its request for an injunction against the entire accommodation. As explained below, plaintiff's challenge to the non-interference provision cannot justify such sweeping relief. And because plaintiff has declined to seek a narrower injunction against enforcement of the non-interference provision, the Court need not and should not consider whether such an injunction might be appropriate. In any event, plaintiff has not made the showing required to justify an injunction against enforcement of the

non-interference provision. For example, it is not clear that plaintiff intends to sign and transmit the self-certification form in the event that it fails to obtain a broader injunction from this Court or the Court of Appeals. But, if it does not do so, it will not be subject to the non-interference provision at all and so will have no basis for an injunction against the provision's enforcement.

Second, although plaintiff now asks the Court to grant it the broad relief it sought in its preliminary injunction motion on the basis of the Court's very narrow finding of some likelihood of success on the merits of on this one claim, plaintiff fails to identify any basis on which it is legally entitled to such relief.[2] To the extent plaintiff requests that the government be enjoined from enforcing the entire regulatory scheme to give the parties more time to further brief these issues—which have been exhaustively briefed before this Court, and were thoroughly addressed in the Court's Order—plaintiff's request meets none of the criteria for either reconsideration or injunctive relief.

Third, injunctive relief on plaintiff's non-interference provision claim is unwarranted. As defendants have explained in their previously filed memoranda, the non-interference provision does not regulate protected speech. Defendants interpreted the regulation only to proscribe a self-certifying organization from using its economic power to coerce or induce a third-party administrator into not fulfilling its independent legal obligations to provide contraceptive

[2] Plaintiff's only argument for granting the relief it requests seems to be that the Court should enjoin enforcement of the regulations to provide plaintiff an additional opportunity to brief this issue, because plaintiff alleges that questions of "remedy and severance for a likely First Amendment violation can be complicated." Pl.'s Mot. at 6. However, no further briefing on these questions is necessary. Even if, contrary to defendants' objections, the Court did enjoin defendants from enforcing the non-interference provision, all of the additional provisions that plaintiff challenged "will remain fully operative as a law and will still function in a way consistent with Congress' basic objectives in enacting the statute." *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (internal quotations omitted).

coverage. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency interpretations of their regulations must be accorded deference, even when expressed in a legal brief). Such "threat[s] of reprisal or force or promise[s] of benefit" are "without the protection of the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969); *see also United States v. Williams*, 553 U.S. 285, 298 (2008).

Plaintiff states that it "seeks the freedom to say things like" those noted in a list of hypothetical statements plaintiff has offered. Pl.'s Mot. at 3. To the extent plaintiff wishes to make assertions about the TPA's independent regulatory obligations, the non-interference provision would be inapplicable. To the extent plaintiff proposes to coerce the TPA by threatening economic reprisal if the TPA fulfills its independent legal obligations, however, the provision would apply and such application to economically coercive activity would raise no First Amendment concern. Regardless of what plaintiff says to its TPA, once plaintiff has opted out of providing contraceptive coverage by completing the self-certification form and providing it to its TPA—two prerequisites of the accommodation that this Court has upheld—plaintiff's current TPA, or any other TPA plaintiff chooses, is independently obligated to provide contraceptive coverage, by operation of law.

III. Plaintiff cannot establish eligibility for an injunction pending appeal.

Plaintiff moves for an injunction pending appeal "for the reasons stated [in its motion], the reasons stated in the prior preliminary injunction papers, and the reasons stated in the prior summary judgment papers." Pl.'s Mot. at 9. However, the standard for such relief is identical to the standard for the relief this Court denied to plaintiff in its order denying plaintiff's motion for a preliminary injunction. *See* Order. The Court properly found plaintiff's arguments insufficient to justify such relief, because, among other reasons, plaintiff is unlikely to succeed on the merits

of its claims challenging the regulations in full. So did the Seventh Circuit in *Notre Dame II* and the Sixth Circuit in *Michigan Catholic Conference* when faced with the same arguments. For the reasons set out in defendants' memorandum in opposition to plaintiff's motion for preliminary injunction, ECF No. 59, and for all the reasons set out in the Court's opinion denying that motion, plaintiff's motion for an injunction pending appeal should likewise be denied.

CONCLUSION

For the foregoing reasons, defendants respectfully ask that the Court deny plaintiff's emergency motion to reconsider or, in the alternative, motion for injunction pending appeal.

Respectfully submitted June 27, 2014,

STUART F. DELERY
Assistant Attorney General

ZACHARY T. FARDON
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Julie S. Saltman
JULIE S. SALTMAN (DC Bar No. 975015)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7111
Washington, D.C. 20530
Tel: (202) 532-4252
Fax: (202) 616-8470
Email: Julie.saltman@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
JULIE S. SALTMAN