

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

UNIVERSITY OF NOTRE DAME,

Plaintiff,

v.

**KATHLEEN SEBELIUS, in her official
capacity as Secretary of the U.S.
Department of Health and Human
Services; HILDA SOLIS, in her official
capacity as Secretary of the U.S.
Department of Labor, TIMOTHY
GEITHNER, in his official capacity as
Secretary of the U.S. Department of
Treasury; U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
U.S. DEPARTMENT OF LABOR; and
U.S. DEPARTMENT OF TREASURY.**

Defendants.

CASE No.:

COMPLAINT AND DEMAND FOR JURY TRIAL

1. This lawsuit is about one of America’s most cherished freedoms: the freedom to practice one’s religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception. Those services are, and will continue to be, freely available in the United States, and nothing prevents the Government itself from making them more widely available. But the right to such services does not authorize the Government to force the University of Notre Dame (“Notre Dame”) to violate its own conscience by making it provide, pay for, and/or facilitate those services to others, contrary to its sincerely held religious beliefs. American history and tradition, embodied in the First

Amendment to the United States Constitution and the Religious Freedom Restoration Act, protects religious entities from such overbearing and oppressive governmental action. Notre Dame therefore seeks relief in this Court to protect this most fundamental of American rights.

2. This country was founded by those searching for religious liberty and freedom from religious persecution. And since the founding of this country, religious organizations such as Notre Dame have been free to fulfill their religious beliefs through service to all, including the underprivileged and underserved, without regard to the beneficiaries' religious views.

3. The U.S. Constitution and federal statutes protect religious organizations from governmental interference with their religious views—particularly minority religious views. As the Supreme Court has recognized, “[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority.” Through this lawsuit, Notre Dame does not seek to impose its religious beliefs on others. It simply asks that the government not impose its values and policies on Notre Dame, in direct violation of its religious beliefs.

4. Under current federal law described below (the “U.S. Government Mandate”), Notre Dame must provide, or facilitate the provision of, abortion-inducing drugs, sterilization, and contraceptive services to its employees in violation of the centuries’ old teachings of the Catholic Church. Ignoring broader religious exemptions from other federal laws, the Government has crafted a narrow, discretionary exemption to this U.S. Government Mandate for “religious employers.” Group health plans are eligible for the exemption only if they are “established or maintained by religious employers,” and only if the “religious employer” can convince the Government that it satisfies four criteria:

- “The inculcation of religious values is the purpose of the organization”;

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

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

5. Notre Dame’s health benefits plans may not qualify for this religious exemption, because, for example, while it is a nonprofit charitable organization that is firmly grounded in the tenets of Catholicism, it appears not to fall within section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

6. The U.S. Government Mandate, including the narrow exemption for certain “religious employers,” is irreconcilable with the First Amendment, the Religious Freedom Restoration Act, and other laws. The Government has not shown any compelling need to force Notre Dame to provide, pay for, and/or facilitate access to these objectionable services, or for requiring Notre Dame to submit to an intrusive governmental examination of its religious missions. The Government also has not shown that the U.S. Government Mandate is narrowly tailored to advancing its interest in increased access to these services, since these services are already widely available and nothing prevents the Government from making them even more widely available by providing or paying for them directly through a duly-enacted law. The Government, therefore, cannot justify its decision to force Notre Dame to provide, pay for, and/or facilitate access to these services in violation of its sincerely held religious beliefs.

7. If the Government can force religious institutions to violate their beliefs in such a manner, there is no apparent limit to the Government's power. Such an oppression of religious freedom violates Notre Dame's clearly established constitutional and statutory rights.

8. The First Amendment also prohibits the Government from becoming excessively entangled in religious affairs and from interfering with a religious institution's internal decisions concerning the organization's religious structure, ministers, or doctrine. The U.S. Government Mandate tramples all of these rights.

BACKGROUND

I. PRELIMINARY MATTERS

9. Plaintiff, Notre Dame, is a nonprofit Indiana corporation with a principal place of business in Notre Dame, Indiana. It is organized exclusively for charitable, religious, educational, and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. It is also an educational organization under Section 170(b)(1)(A)(ii) of the Internal Revenue Code.

10. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services. She is sued in her official capacity.

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

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

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

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

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

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

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

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

A. Background on Notre Dame

19. Notre Dame is an academic community of higher learning, organized as an independent, national Catholic research university located in Notre Dame, Indiana. Founded in 1842 by a priest of the Congregation of Holy Cross and officially chartered in 1844, it seeks to provide a Catholic educational environment that prepares students spiritually and intellectually for their future vocations and careers.

20. Notre Dame's Catholic educational mission is furthered by its leadership. Each of Notre Dame's seventeen Presidents has been a priest from the Congregation of Holy Cross, United States Province of Priests and Brothers. Current-President Rev. John I. Jenkins has articulated a vision of Notre Dame as a preeminent research university with a distinctive Catholic character and an unsurpassed commitment to undergraduate education.

21. Notre Dame has a two-tiered governance structure—the Fellows of the University and the Board of Trustees—that expressly includes both religious and lay leaders. The Fellows consist of twelve members: six of whom must be clerical members of the Congregation of Holy Cross, United States Province of Priests and Brothers, and six of whom are lay persons.

22. Notre Dame currently serves more than 11,500 undergraduate and graduate students annually and it is consistently rated one of the best universities in the country.

23. While committed to remaining a distinctly Catholic institution, Notre Dame opens its doors and its service programs to students, academics, prospective employees, and people in need, from all faiths and creeds.

24. Notre Dame maintains a faculty of nearly 1,100 professors, of whom 97% are lay persons, plus an additional 452 faculty members. Its faculty are recognized as among the leaders in their fields, and its alumni have gone on to distinguished careers in industry, medicine, law, and a host of other disciplines.

25. In total, Notre Dame employs over 5,000 full- and part-time employees and is the largest employer in St. Joseph County.

26. Nearly three-quarters of both undergraduate and graduate students receive some form of financial aid for a total of over \$300 million in 2009-2010.

27. According to some estimates, Notre Dame directly and indirectly accounts for 12,380 jobs and \$873 million in economic activity in St. Joseph County.

28. Notre Dame is also home to The University of Notre Dame Press, the largest Catholic university press in the world with 1,000 books in print and 60 new titles annually. The Press publishes scholarship in print and e-book formats in fields including theology, philosophy, medieval and early modern studies, religious history, Latin American studies, and fiction.

29. Offering over 60 undergraduate majors and 70 graduate programs, including the nation's oldest Catholic law school, Notre Dame pursues the highest academic achievement in every discipline, integrating faith and reason in pursuit of truth.

30. Notre Dame provides a distinctive voice in higher education that is at once rigorously intellectual and unapologetically committed to the moral principles and ethics of the Catholic Church.

31. Notre Dame serves others directly through the education of its students and its charitable acts.

32. As part of its stated mission, “the University seeks to cultivate in its students . . . a disciplined sensibility to the poverty, injustice and oppression that burden the lives of so many. The aim is to create a sense of human solidarity and concern for the common good that will bear fruit as learning becomes service to justice.”

33. Notre Dame has developed numerous programs designed to allow its faculty and students to serve others. These programs range from the Center for Social Concern’s International Summer Service Learning Program—where students learn to address the lack of basic resources, access to health, education, and employment for the poor in nations marred by political conflict and violence—to the Law School’s Center for Civil and Human Rights—where students have worked with domestic and international human rights NGOs, regional tribunals, legal aid clinics and academic centers in countries including China, Pakistan, Bangladesh, Uganda, Bolivia, and Costa Rica.

34. The Alliance for Catholic Education (“ACE”), a component of Notre Dame’s Institute for Educational Initiatives, helps sustain and strengthen Catholic schools. ACE’s Service through Teaching program recruits and trains high quality classroom teachers for service in under-resourced and high-need Catholic schools, many of which are located in urban and rural areas in the Southern United States. This program combines an intensive schedule of academic classes with two years of applied learning through teaching in classrooms. Through ACE, Notre

Dame has strengthened at-risk schools throughout the nation, bettering the educational experience for tens of thousands of children. Since ACE was founded in 1994, it has prepared and placed more than 1,500 teachers in over 400 Catholic schools.

35. ACE teachers are intentionally placed in under-resourced and high-need schools, often with predominantly low-income, and frequently predominantly minority, student populations. For the 2010/2011 academic year: (1) 82% of the schools in which ACE teachers were placed served students who qualified for Title I services, which are designated to assist schools with high percentages of economically disadvantaged students; (2) 85% of the schools in which ACE teachers were placed served students who qualified for the federal free or reduced lunch program; and (3) 70% of the schools in which ACE teachers were placed had a student population comprised of a majority of students from racial and ethnic minority groups.

36. Although ACE teachers serve Catholic schools, many of the students at those schools are not Catholic. Indeed, in many inner city Catholic schools, a majority of the students are not Catholic.

37. ACE also seeks to help Catholic schools and their students outside of the United States. Most notably, ACE is assisting in the recovery and the rebuilding of the educational infrastructure in Haiti after the devastating earthquake of January 12, 2010.

38. The Ford Family Program in Human Development Studies and Solidarity (the “Ford Program”), a program within Notre Dame’s Kellogg Institute for International Studies, promotes health and human development around the world. Beyond promoting academic study, the Ford Program engages with local citizens in third-world countries to develop solutions to development and health challenges.

39. For example, the Ford Program has partnered with residents and institutions in Nnindye, Uganda and Nairobi, Kenya to improve access to quality health care, promote food security and income generation through collective agriculture, improve safe water and sanitization, and promote education. The majority of the people served by the Ford Program are not Catholic.

40. Notre Dame's Kroc Institute for International Peace Studies is one of the world's principal centers for the study of the causes of violent conflict and strategies for sustainable peace. Faculty conduct research on violent conflict and strategies of peace; teach students in undergraduate and graduate programs in peace studies; and contribute to on-the-ground peace building worldwide. Many of the master program's students are not from North America, and the majority are not Catholic. To the contrary, the goal of the program is to create a tight-knit group of international leaders of different faiths and beliefs who will foster international peace.

41. These are just some of Notre Dame's service organizations and programs. Notre Dame is home to many other programs that help people of all faiths around the world in many ways.

B. Notre Dame's Health Insurance Plans.

42. Notre Dame offers health insurance plans to eligible employees and students.

43. Notre Dame operates self-insured employee health plans. That is, Notre Dame does not contract with a separate insurance company that pays for Notre Dame's employees' medical costs. Instead, Notre Dame functions as the insurance company underwriting its employees' medical expenses, with all funding coming from Notre Dame. Notre Dame carries no stop loss or catastrophic coverage to supplement its self-insured employee health plan.

44. Approximately 5,200 employees at Notre Dame are eligible for coverage under Notre Dame's self-insured health plans. Approximately 4,600 employees are covered, and approximately 11,000 individuals are covered, including dependents.

45. Notre Dame does not know how many of its employees are Catholic. It is unclear whether a simple majority of Notre Dame's employees are Catholic.

46. The Notre Dame employee health plans are administered by a Third Party Administrator, Meritain Health, Inc. ("Meritain"). Meritain handles the administrative aspects of Notre Dame's self-insured employee health plans, but Meritain bears none of the risks for benefits nor is it obligated to pay health care providers. Notre Dame pays Meritain administration fees based on the number of individuals covered by its plans.

47. Notre Dame has ensured that its employee health plan does not include coverage for abortifacients, sterilization, contraception, or related education and counseling.

48. Notre Dame's employee health plan year starts on January 1st. The next Notre Dame employee health plan year begins on January 1, 2013.

49. The Notre Dame employee health plans are not "grandfathered."

50. The Notre Dame employee health plan does not include a statement in any plan materials provided to participants or beneficiaries that it believes it is a grandfathered plan, as would be required to maintain the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

51. Notre Dame offers its students a fully-insured health plan through Aetna.

52. Approximately 11,902 students at Notre Dame are eligible for coverage under Notre Dame's student health plan. Approximately 2,582 students are covered, and approximately 2,715 individuals are covered, including dependents.

53. Notre Dame has ensured that its student health plan does not include coverage for abortifacients, sterilization, contraception, or related education and counseling.

54. Notre Dame's student health plan year starts on August 15th. The next Notre Dame student plan year begins on August 15, 2012.

55. The health plan Notre Dame offers its students is not "grandfathered." The Notre Dame student health plan does not include a statement in any plan materials provided to participants or beneficiaries that it believes it is a grandfathered plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

II. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Background

56. On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act (the "Affordable Care Act" or the "Act"). *See* Pub. L. No. 111-148, 124 Stat. 119.

57. The Affordable Care Act significantly amended the Public Health Service Act by establishing many new requirements for "group health plans," broadly defined as "employee welfare benefit plans" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1), that "provide[] medical care . . . to employees or their dependents." 42 U.S.C. § 300gg-91(a)(1).

58. The Act requires an employer's group health plan to cover certain women's "preventive care," leaving the definition of that term up to an agency within HHS. Specifically, it provided that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for—(4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources

and Services Administration for purposes of this paragraph.” Pub. L. No. 111-148 § 1001(5), 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13(a)(4)).

59. Because the Act prohibits “cost sharing requirements,” the health plan must pay for the full costs of these “preventive care” services without any deductible or co-payment.

60. Some provisions of the Affordable Care Act exempt individuals with religious objections. For example, individuals are exempt from the requirement to obtain health insurance if they are members of a “recognized religious sect or division” that conscientiously objects to acceptance of public or private insurance funds or are members of a “health care sharing ministry.” 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii) (conscientious objectors); 5000A(d)(2)(b)(ii) (“health care sharing ministry”).

61. Not every employer is required to comply with the U.S. Government Mandate. “Grandfathered” health plans are exempt from the “preventive care” U.S. Government Mandate. Interim Final Rules for Group Health plans and Health insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protections and Affordable Care Act, 75 Fed. Reg. 41,276, 41,731 (July 19, 2010); 42 U.S.C. § 18011. Such plans cannot undergo substantial change after March 23, 2010. *Id.* HHS estimates that “98 million individuals will be enrolled in grandfathered group health plans in 2013.” *Id.* at 41,732.

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

63. Under the Internal Revenue Code, employers who fail to provide all coverage required by the U.S. Government Mandate will be exposed to significant annual fines of \$2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1).

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

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

66. ERISA may provide for additional fines. Under ERISA, plan participants can bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(1)(B); *see also* Cong. Research Serv., RL 7-5700. Similarly, the Secretary of Labor may bring an enforcement action against group health plans of employers that violate the U.S. Government Mandate, as incorporated by ERISA. *See* 29 U.S.C. § 1132(b)(3); *see also* Cong. Research Serv., RL 7-5700 (asserting that these fines can apply to employers and insurers who violate the “preventive care” provision of the Affordable Care Act).

67. The Affordable Care Act limits the Government’s regulatory authority. The Act and an accompanying Executive Order reflect a clear intent to exclude abortion-related services from the Act and regulations implementing it. The Act itself provides that “nothing in this title shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year.” 42 U.S.C. §

18023(b)(1)(A)(i). The ability “[to] determine whether or not the plan provides coverage of” abortifacients is expressly reserved for “the issuer of a qualified health plan,” not the Government. *Id.* § 18023(b)(1)(A)(ii).

68. Likewise, the Weldon Amendment, which has been included in every HHS and Department of Labor appropriations bill since 2004, states that “[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V., § 507(d), 125 Stat 786, 1111 (2011).

69. The intent to exclude abortions was instrumental in the Affordable Care Act’s passage, as cemented by an Executive Order without which the Act would not have passed. Indeed, the Act’s legislative history could not show a clearer congressional intent to prohibit the executive branch from requiring group health plans to provide abortion-related services. For example, the House of Representatives originally passed a bill that included an amendment by Congressman Bart Stupak prohibiting the use of federal funds for abortion services. *See* H.R. 3962, 111th Cong. § 265 (Nov. 7, 2009). The Senate version, however, lacked that restriction. S. Amend. No. 2786 to H.R. 3590, 111th Cong. (Dec. 23, 2009). To avoid filibuster in the Senate, congressional proponents of the Act engaged in a procedure known as “budget reconciliation” that required the House to adopt the Senate version of the bill largely in its entirety. Congressman Stupak and other pro-life House members indicated that they would refuse to vote for the Senate version because it failed adequately to prohibit federal funding of

abortion. To appease these Representatives, President Obama issued an executive order providing that no executive agency would authorize the federal funding of abortion services. *See* Executive Order 13,535 (Mar. 24, 2010).

70. The Act was, therefore, passed based on the central premise that all agencies would uphold and follow “longstanding Federal laws to protect conscience” and to prohibit federal funding of abortion. *Id.*

71. That executive order was consistent with a 2009 speech that President Obama gave at Notre Dame, in which he indicated that his Administration would honor the conscience of those who disagree with abortion, and draft sensible conscience clauses.

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

72. Less than two years later, Defendants promulgated the U.S. Government Mandate, subverting the Act’s clear purpose to protect the rights of conscience. Over that time, they issued interim rules and press releases—none of which followed notice-and-comment rulemaking—that required the federal funding of abortifacients, sterilization services, contraceptives and related counseling services and commandeered religious organizations to facilitate those services as well.

73. Within four months of the Act’s passage, on July 19, 2010, Defendants issued their initial interim final rules concerning § 300gg-13(a)(4)’s requirement that group health plans provide coverage for women’s “preventive care.” Interim Final Rules, 75 Fed. Reg. at 41,276.

74. Defendants dispensed with notice-and-comment rulemaking for these rules.

75. Even though federal law had never required coverage of abortifacients, sterilization, or contraceptives, Defendants claimed both that the APA did not apply to the relevant provisions of the Affordable Care Act and that “it would be impracticable and contrary

to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed.” *Id.* at 41,730.

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

77. The interim final rules did not identify the women’s “preventive care” that the Defendants planned to require employer group health plans to cover, nor give any notice as to how it would identify those services. 42 U.S.C. § 300gg-13(a)(4). Instead, Defendants noted that “[t]he Department of HHS [was] developing these guidelines and expects to issue them no later than August 1, 2011.” Interim Final Rules, 75 Fed. Reg. at 41,731.

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

79. In response, several groups engaged in a lobbying effort to persuade Defendants to include various contraceptives and abortion-inducing drugs in the “preventive care” requirements for group health plans. *See, e.g.*, <http://www.plannedparenthood.org/about->

us/newsroom/press-releases/planned-parenthood-supports-initial-white-house-regulations-preventive-care-highlights-need-new-33140.htm.

80. Other commenters noted that “preventive care” could not reasonably be interpreted to include such practices. These groups explained that pregnancy was not a disease that needed to be “prevented,” and that a contrary view would intrude on the sincerely held beliefs of many religiously affiliated organizations by requiring them to pay for services that violate their religious beliefs. *See, e.g.*, Comments of United States Conference of Catholic Bishops, at 1-2 (Sept. 17, 2010), *available at* <http://old.usccb.org/ogc/preventive.pdf>.

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

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

83. The press release made clear that the guidelines were developed by a non-governmental “independent” organization, the Institute of Medicine (“IOM”). *See id.*

84. The IOM's own report, in turn, included a dissent that suggested that the IOM's recommendations were made on an unduly short time frame required by politicians without the appropriate transparency for all concerned persons.

85. The IOM also did not adhere to the rules governing federal agencies, including the notice-and-comment rulemaking process.

86. In stark contrast with the agreement essential to passage of the Affordable Care Act and President Obama's promise to protect religious liberty, the HHS's new guidelines required insurers and group health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* Health Res. Servs. Admin., Women's Preventive Services: Required Health Plan Coverage Guidelines, *available at* <http://www.hrsa.gov/womensguidelines/>.

87. FDA-approved contraceptives that qualify under these guidelines include drugs that induce abortions. For example, the FDA has approved "emergency contraceptives" such as the morning-after pill (otherwise known as Plan B), which operates by preventing a fertilized embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or Ella), which likewise can induce abortions of living embryos.

88. A few days later, on August 3, 2011, Defendants issued amendments to the interim final rules that they had previously enacted in July 2010. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011).

89. Defendants issued the amendments again without notice-and-comment rulemaking on the same grounds (namely that it would be "impracticable and contrary to the

public interest to delay” putting the rules into effect) that they had provided for bypassing the APA with the original rules. *See id.* at 46,624.

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

91. Defendants sought “to provide for a religious accommodation that respect[ed]” only “the unique relationship between a house of worship and its employees in ministerial positions.” *Id.*

92. Specifically, the regulatory “religious employer” exemption ignored definitions of religious employers already existing in federal law, and, instead, is available only to those employers whose purpose is to inculcate religious values, and who employ and serve primarily individuals with the same religious tenets. It provides in full:

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a “religious employer” is an organization that meets all of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. *Id.* at 46,626 (codified at 45 C.F.R. § 147.130(a)(iv)(A)-(B)).

93. The regulation delegates to the Government the job of issuing exemptions, on an *ad hoc* basis, based on a determination of whether an organization is sufficiently “religious” to qualify for the exemption.

94. The religious employer exemption mandates an unconstitutionally invasive inquiry into an organization’s religious purpose, beliefs, and practices.

95. Similarly, the religious employer exemption further mandates an impermissibly invasive inquiry into the private religious beliefs of the individuals that an organization employs and serves.

96. The religious employer exemption also uses impermissibly vague, undefined terms that extend the government’s broad discretion and fail to provide organizations with notice of their duties and obligations. There is no definition for the vague terms “inculcation of religious values,” “purpose of the organization,” “primarily,” and “religious tenets.” Similarly, there is no indication of whether an agency with multiple purposes can qualify and how much overlap there must be for religious tenets to be “share[d].”

97. The religious employer exemption does not appear to apply to educational organizations as defined in Section 170(b)(1)(A)(ii).

98. Defendants ignored all other religiously-affiliated employers and insurance issuers, excluding from the narrow exemption all religious organizations that view their missions as providing charitable, educational, and employment opportunities to all those who request it, regardless of the requesters’ religious faith.

99. When issuing this interim final rule, Defendants did not explain why they issued such a narrow religious exemption. Nor did Defendants explain why they refused to incorporate other “longstanding Federal laws to protect conscience” that President Obama’s executive order previously had promised to respect. *See* Executive Order 13535 (Mar. 24, 2010).

100. ERISA, for example, has long excluded “church plans” from its requirements, more broadly defined to cover civil law corporations, including organizations like Notre Dame, that share common religious bonds and convictions with a church. *See* 29 U.S.C. §§ 1002(33)(C)(iv), 1003.

101. Defendants did not identify any compelling interest to require religiously affiliated employers’ health plans to include services that violate the employers’ religious beliefs, nor did they appear to consider whether they could achieve their views of sound policy in a more religiously accommodating manner.

102. Suggesting that they were open to good-faith discussion, the Defendants once again permitted parties to provide comments to the amended rules. Numerous organizations expressed the same concerns that they had before, noting that the religious exemption was “narrower than any conscience clause ever enacted in federal law, and narrower than the vast majority of religious exemptions from state contraceptive mandates.” Comments of United States Conference of Catholic Bishops, at 1-2 (Aug. 31, 2011), *available at* <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf>.

103. Notre Dame’s President, Rev. John Jenkins, also noted that religious organizations such as Notre Dame should not be required “to participate in, pay for, or provide coverage for certain services that are contrary to our religious beliefs or moral convictions.”

Letter of Rev. John Jenkins to Defendant Sebelius (Sept. 28, 2011), *available at* http://president.nd.edu/assets/50056/comments_from_rev_john_i_jenkins_notre_dame_3_.pdf.

104. On October 10, 2011, within two weeks after Rev. Jenkins respectfully requested an exemption from the U.S. Government Mandate for Notre Dame, Defendant Sebelius spoke at a fundraiser for NARAL Pro-Choice America. She told the pro-choice audience that “we are in a war,” apparently with opponents of either federal funding of abortion-related services or federal mandates requiring coverage for abortion-related services in health care plans.

105. Three months later, allegedly “[a]fter evaluating [the new] comments” to the interim final rules, the Defendants gave their response. They did not request further discussion or attempts at compromise. Nor did they explain the basis for their decision. Instead, Defendant Sebelius issued a short, Friday-afternoon press release. *See* HHS, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, *available at* <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

106. The press release announced a one-year “safe harbor” from enforcement. With little analysis or reasoning, HHS opted to keep the exemption unchanged, but indicated that “[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law.” *Id.* The safe harbor also applies to student health plans. 77 Fed. Reg. 16,453, 16,457 (Mar. 21, 2012).

107. Taken together, these various rules and press releases amount to a U.S. Government Mandate that requires most religiously affiliated organizations to pay, sponsor and facilitate abortifacients, sterilization services, contraceptives and related counseling services

through their health plans. As noted by Cardinal Timothy Dolan, the “safe harbor” effectively gave objecting religious institutions “a year to figure out how to violate [their] consciences.”

C. The White House Has Refused to Expand the Exemption

108. On February 10, 2012, given the continued public outcry to the U.S. Government Mandate and its exceedingly narrow conscience protections, the White House held a press conference and issued another press release about the U.S. Government Mandate, announcing that it had come up with a “solution” to the religious objections based on First Amendment protections for religious freedom.

109. According to the White House, the Defendants planned to issue regulations at some unspecified date prior to August 1, 2013 to exempt religious organizations that have religious objections to providing abortifacients, sterilization, or contraception services from *directly* paying for those services under the terms of their health plans.

110. When such religious organizations provide health plans, the “insurance company will be required to directly offer . . . contraceptive care free of charge.” White House, Fact Sheet: Women’s Preventive Services and Religious Institutions (Feb. 10, 2012) *available at* <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>.

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

112. Notre Dame informed the White House that such a proposal would not help Notre Dame, which is self-insured, and would not protect its religious liberties.

113. Despite continued objections that this “accommodation” did nothing of substance to protect the right of conscience, when asked if there would be further room for compromise, White House Chief of Staff Jacob Lew responded: “No. This is our plan.” David Eldridge &

Cynthia Wetzstein, *White House says contraception compromise will stand*, THE WASHINGTON TIMES, Feb. 12, 2012, *available at* <http://www.washingtontimes.com/news/2012/feb/12/white-house-birth-control-compromise-will-stand/print/>.

114. Defendants have since finalized, “without change,” the interim rules containing the pre-accommodation version of the U.S. Government Mandate and issued guidelines regarding the previously announced “temporary enforcement safe harbor” for “non-exempted, non-grandfathered group health plans established and maintained by non-profit organizations with religious objections to contraceptive coverage.” Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012); Ctr. for Consumer Info. & Ins. Oversight, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012), *available at* <http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf>.

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

116. The U.S. Government Mandate is therefore the current, operative law.

117. On March 16, 2012, the Government announced an Advance Notice of Proposed Rulemaking (“ANPRM”), seeking comment on various ways to structure the proposed accommodation. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501 (Mar. 21, 2012). The Government has indicated that a similar arrangement will apply to student health plans. 77 Fed. Reg. at 16,457.

118. The ANPRM launches a 90-day comment period, to be followed by several other steps in the rulemaking process; it offers no clear end date other than repeating the assurance that an accommodation will be in place by August 1, 2013. *See id.*

119. The ANPRM's recurring theme is that the Government has not found a solution to the problems it created when it promulgated its U.S. Government Mandate.

120. In fact, the ANPRM contains little more than a recitation of proposals, hypotheticals, and "possible approaches." It offers almost no analysis of the relative merits of the various proposals. It is, in essence, an exercise in public brainstorming.

121. This "regulate first, think later" approach is not an acceptable method of rulemaking when the Government is regulating in a way that may require monumental changes of the regulated entities.

122. The ANPRM does not alter existing law. It merely states that it may do so at some point in the future. But a promise to change the law, whether issued by the White House or in the form of an ANPRM, does not, in fact, change the law.

123. Nor does the ANPRM alter the scope of the narrow religious employer exemption.

124. In promulgating the U.S. Government Mandate, the Government rationalized that the time-sensitive nature of the issue justified dispensing with notice and comment. This justification is inconsistent with the Government's subsequent delays in implementing the Mandate.

125. The ANPRM does nothing of substance to avoid involving Notre Dame in the subsidy, provision, and/or facilitation of abortifacients, sterilization services, contraceptives and related counseling services or otherwise eliminate the constitutional infirmity of the U.S. Government Mandate.

126. The U.S. Government Mandate is already causing serious, ongoing hardship to Notre Dame that merits judicial relief now.

127. Moreover, the uncertainty surrounding the implementation of the U.S. Government Mandate has increased the harm Notre Dame is incurring. With the regulatory landscape so unsettled, it is impossible for Notre Dame to develop its future health plans.

128. Health plans do not take shape overnight. Many analyses, negotiations, and decisions must occur before Notre Dame can implement health plans for its employees and students.

129. Under normal circumstances, in which Notre Dame is making only minor changes to its employee health plans, the Compensation and Benefits department (“C&B”) needs more than eight months lead time to analyze, vet, and implement plan changes. Generally, C&B starts planning for the next plan year in late-Winter and early-Spring. Because Notre Dame’s employee health plans are self-insured, C&B must analyze historical data, evaluate potential changes, work with consultants to model and analyze potential changes, and compare potential change options. C&B must then develop options to be presented to a committee of employees that is responsible for benefits issues. The potential changes are discussed and debated with the committee into late Summer, and a proposal must be finalized in the Fall in order for the new plan to be implemented by the start of the plan year, January 1st.

130. The planning process for Notre Dame’s student health plans is similarly complex. Preparing for the next plan year requires extensive analysis, discussion, and negotiations, which must be completed in time to implement all changes by August 15th.

131. Thus, implementing even basic changes to Notre Dame’s employee and student health plans requires substantial lead time.

132. The U.S. Government Mandate, however, may require Notre Dame to make significant, and likely revolutionary changes, to its employee and student health coverage. Notre

Dame, moreover, may need to restructure its programs or health plans to fit within the U.S. Government Mandate's requirements. Such changes will require substantially more lead time.

133. Even assuming Notre Dame is entitled to the benefit of the safe harbor, Notre Dame must be prepared to implement its modified health coverage, whatever that may end up being, in August of 2013 for its student health plan and January 1, 2014 for its employee health plans.

134. By the time any new rule is finalized, if ever, it will be too late for Notre Dame to bring its health plans into compliance with the law.

135. In addition, if Notre Dame does not comply with the U.S. Government Mandate, Notre Dame may be subject to huge annual government fines and penalties. Notre Dame's fiscal year starts in July and budgeting for major expenses starts approximately one year in advance. Notre Dame thus needs to understand the potential cost of the U.S. Government Mandate by the Fall of 2012.

136. The U.S. Government Mandate thus imposes a present and ongoing hardship on Notre Dame.

III. THE MANDATE, THE PROPOSED ACCOMMODATION, AND THE RELIGIOUS EMPLOYER EXEMPTION VIOLATE NOTRE DAME'S RELIGIOUS BELIEFS

A. The U.S. Government Mandate Violates Notre Dame's Religious Beliefs

137. Faith is at the heart of Notre Dame's educational mission. In accordance with the apostolic constitution *Ex Corde Ecclesiae*, which governs and defines the role of Catholic colleges and universities, Notre Dame embraces the richness of the Catholic intellectual tradition, "consecrat[ing] itself without reserve to the cause of truth." It aims to provide a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with the arts, sciences, and every other area of human scholarship.

138. In accordance with the apostolic constitution *Ex Corde Ecclesiae*, Notre Dame believes and teaches that “besides the teaching, research and services common to all Universities,” it must “bring[] to its task the inspiration and light of the Christian message.” “Catholic teaching and discipline are to influence all university activities,” and “[a]ny official action or commitment of the University [must] be in accord with its Catholic identity.” “In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative.”

139. The Catholic Church’s well-established religious beliefs are articulated in the Catechism of the Catholic Church. One of the central tenets of the Catholic faith is belief in the sanctity of human life and the dignity of all persons. Thus, the Church believes that the “dignity of the human person is rooted in his creation in the image and likeness of God.” Catechism of the Catholic Church ¶ 1700.

140. One outgrowth of belief in human life and dignity is the Church’s well-established belief that “[h]uman life must be respected and protected absolutely from the moment of conception.” *Id.* ¶ 2270. As a result, the Church believes that abortion is prohibited and that it cannot facilitate the provision of abortifacients. *Id.* ¶¶ 2271-72.

141. Catholic teachings prohibit any action which “render[s] procreation impossible” and, more specifically, regard direct sterilization as “unacceptable.” *Id.* ¶¶ 2370, 2399.

142. Notre Dame’s employee and student health plans are consistent with the Church’s teachings on abortifacients and sterilization.

143. Catholic teachings also prohibit the use of contraceptives to impede conception. Consequently, artificial contraception and sterilization cannot be used for the purpose of impeding procreation. *Id.* ¶ 2370.

144. The Church, however, does not oppose the use of drugs commonly used as contraceptives when a physician prescribes the medication not for the purpose of acting as a contraceptive, but rather with the intent of remedying another medical condition.

145. Consistent with Church teachings, Notre Dame's employee and student health plans cover drugs commonly used as contraceptives only when prescribed with the intent of treating another medical condition, not with the intent to prevent pregnancy. All claims for drugs commonly used as contraceptives must be supported by documentation from the prescribing physician regarding the intended use of the medication.

146. Notre Dame cannot, without violating its sincerely held religious beliefs, subsidize, facilitate, and/or sponsor coverage for abortifacients, sterilization services, contraceptives and related counseling services, which are inconsistent with the teachings of the Catholic Church.

147. The U.S. Government Mandate irreconcilably conflicts with Notre Dame's well-established, sincerely held beliefs that strictly forbid the subsidy, facilitation, and/or sponsorship of abortifacients, sterilization, and contraception that the U.S. Government Mandate forces upon it.

148. The U.S. Government Mandate requires Notre Dame, as a group health plan provider, to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive

capacity.” See Health Res. Servs. Admin., Women’s Preventive Services: Required Health Plan Coverage Guidelines, *available at* <http://www.hrsa.gov/womensguidelines/>.

149. Many contraceptives approved by the FDA that qualify under these guidelines cause abortions. For example, the FDA has approved “emergency contraceptives” such as the morning-after pill (otherwise known as Plan B), which operates by preventing a fertilized embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or Ella), which likewise can induce abortions of living embryos.

150. All of the required “contraceptive methods” and “sterilization procedures” violate Notre Dame’s well-established and sincerely-held religious beliefs that prohibit contraception and sterilization to inhibit procreation.

151. As Notre Dame’s employee health plans are self-insured, Notre Dame would be paying directly for contraception and sterilization in direct conflict with its religious beliefs.

152. Refusal or failure to provide these drugs and services to employees can expose Notre Dame to substantial fines. See Cong. Research Serv., RL 7-5700 (analyzing some of the available fines).

153. This unprecedented, direct assault on the religious beliefs of Notre Dame and all Catholics is irreconcilable with American law.

154. Since the founding of this country, one of the basic freedoms central to our society and legal system is that individuals and institutions are entitled to freedom of conscience and religious practice. See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 1 (1785).

155. Requiring Notre Dame to provide, subsidize, and/or facilitate devices, drugs, procedures, or services that violate its beliefs constitutes a substantial burden on Notre Dame's free exercise of religion.

156. The Government has no compelling interest in forcing Notre Dame to violate its sincerely held religious beliefs by requiring it to provide, pay for, or facilitate access to abortion-inducing drugs, sterilizations, and contraceptives. The Government itself has relieved numerous other employers from this requirement by exempting grandfathered plans and plans of employers it deems to be sufficiently religious. Moreover, these services are widely available in the United States. The U.S. Supreme Court has held that individuals have a constitutional right to use such services. And nothing that Notre Dame does inhibits any individual from exercising that right.

157. Furthermore, the U.S. Government Mandate is not narrowly tailored to promoting a compelling governmental interest. Even assuming the interest was compelling, the Government has numerous alternatives to furthering that interest other than forcing Notre Dame to violate its religious beliefs.

158. For example, the Government could provide or pay for the objectionable services through expansion of its existing network of family planning clinics funded by HHS under Title X or through other programs established by a duly enacted law. Or, at a minimum, it could create a broader exemption for religious employers, such as those found in numerous state laws throughout the country and in other federal laws.

159. The Government therefore cannot possibly demonstrate that requiring Notre Dame to violate its consciences is the least restrictive means of furthering its interest.

B. The U.S. Government Mandate’s Religious Employer Exemption Aggravates the Constitutional and Statutory Violations

160. The constitutional and statutory violations of the U.S. Government Mandate are aggravated, not alleviated, by its “religious employer” exemption.

161. The religious employer exemption substantially burdens Notre Dame’s religious exercise. The exemption forces Notre Dame to choose between its religious beliefs (that abortifacients, sterilization, and contraception are strictly forbidden), its mission (educating, servicing, and employing individuals of all faith traditions to enrich and enlighten), and obeying the law.

162. The U.S. Government Mandate also seeks to compel Notre Dame to fund “patient education and counseling for all women with reproductive capacity.” It therefore compels Notre Dame to pay for, provide, and/or facilitate speech that is contrary to its firmly held religious beliefs.

163. In addition to believing in the sanctity of human life from conception, Notre Dame believes that devotion to God is demonstrated through devotion to fellow man and service of others; the two are so closely related and dependent upon each other that they cannot be separated. Catholic doctrine recognizes that, “[l]iving faith ‘work[s] through charity.’” Catechism of the Catholic Church ¶ 1814.

164. To effectuate this religious belief, Notre Dame—like the Catholic Church that inspires its work—is committed to serving anyone in need, regardless of religion.

165. In addition to serving individuals of all faiths, Notre Dame also educates and employs individuals of all faiths.

166. Although the Government exempts some religious institutions from the U.S. Government Mandate, it has crafted such a narrow exemption that thousands of sincere religious

institutions are being forced to make the unconscionable “choice” between violating their religious beliefs or violating the law.

167. Both the Constitution and RFRA protect religious institutions, whether or not their purpose is the “inculcation of religious values” and whether or not they “primarily” serve and employ people with shared “religious tenets.”

168. However, only institutions with such a narrow purpose and with such limitations on employees and services qualify for the religious employer exemption under the U.S. Government Mandate.

169. Forcing Notre Dame to choose between violating its religious beliefs or violating the law constitutes a substantial burden on Notre Dame’s exercise of religion, which is protected by the Constitution and RFRA.

170. The Government also has not provided any process by which Notre Dame can determine whether it fits within the exemption.

171. It is unclear whether Notre Dame qualifies for the exemption

172. It is unclear how the Government defines or will interpret religious “purpose.”

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

174. It is unclear how the Government will ascertain the “religious tenets” of a university, those it employs, and those it serves.

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

176. Although the President of Notre Dame encourages all faculty and staff to “remain committed to [Notre Dame’s] core values,” which include “support[ing] the Catholic mission of the University,” it is unclear how the Government will view their religious tenets.

177. Any attempt by Notre Dame to qualify for the narrow religious employer exemption by restricting its charitable and educational mission to Catholics would have devastating effects on the communities Notre Dame serves.

178. The limited and ill-defined religious exemption provided in the U.S. Government Mandate conflicts with the Constitution and RFRA.

C. The U.S. Government Mandate’s Religious Employer Exemption Excessively Entangles the Government In Religion, Interferes With Religious Institutions’ Religious Doctrine, and Discriminates Against and Among Religions

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

180. In order to determine whether Notre Dame—or any other religious organization—qualified for the exemption, the Government would have to decide Notre Dame’s “religious tenets” and determine whether “the purpose” of the organization is to “inculcate” people into those tenets.

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

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

183. Regardless of outcome, this inquiry is unconstitutional, and Notre Dame strongly objects to such an intrusive governmental investigation into its religious mission.

184. The religious employer exemption is based on an improper Government determination that “inculcation” is the only legitimate religious purpose.

185. The Government should not base an exemption on an assessment of the “purity” or legitimacy of an institution’s religious purpose.

186. By limiting that legitimate purpose to inculcation, at the expense of other sincerely held religious purposes, the U.S. Government Mandate interferes with religious autonomy. Notre Dame has the right to determine its own religious purpose, including religious purposes broader than inculcation, without Government interference and without losing its religious liberties.

187. Likewise, the exemption seeks to improperly limit the definition of legitimate religious organizations to those who primarily employ and serve “persons who share the religious tenets of the organization.” 45 C.F.R. § 147.130(a)(iv)(B)(2)-(3). This is inconsistent with the definition of religion under the Constitution and RFRA.

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

189. The U.S. Government Mandate and its extremely narrow religious employer exemption discriminate against Catholic religious institutions.

190. Most obviously, as an educational organization under Section 170(b)(1)(A)(ii) of the Internal Revenue Code, Notre Dame appears to be ineligible for the exemption.

191. The U.S. Government Mandate targets Notre Dame precisely because of its religious opposition to abortifacients, sterilization and contraception.

192. The religious employer exemption targets Notre Dame precisely because of its commitment to educate, serve, and employ people of all faiths.

193. Notre Dame cannot be forced to give up its beliefs on abortifacients, sterilization or contraception, nor its devotion to serving all mankind, without violating its religious beliefs and compromising its religious purpose.

194. The U.S. Government Mandate and its extremely narrow religious employer exemption discriminate among religions. The U.S. Government Mandate favors religions that do not oppose abortifacients by putting the Government imprimatur on those beliefs as correct.

195. Similarly, the religious employer exemption favors religions that do not believe in serving all humanity, by exempting them from its requirements.

196. As a result of such discrimination, the U.S. Government Mandate is subject to the strictest scrutiny, under the Constitution, as well as RFRA.

D. The U.S. Government Mandate is Not a Neutral Law of General Applicability

197. The U.S. Government Mandate is not a neutral law of general applicability. It offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for abortion-inducing drugs, sterilization, contraception, and related education and counseling; for example, all “grandfathered” plans are exempted from its requirements. Moreover, the legislative history indicates that the U.S. Government Mandate was implemented at the behest of individuals and organizations who disagree with certain religious beliefs regarding abortifacients and contraception, and thus it targets religious organizations for disfavored treatment.

198. The Government has also crafted a religious exemption to the U.S. Government Mandate that favors certain religions over others. As noted, it applies only to plans sponsored by religious organizations that have, as their “purpose,” the “inculcation of religious values”; that

“primarily” serve individuals that share those religious tenets; and that “primarily” employ such individuals. 45 C.F.R. § 147.130(a)(iv)(B)(1).

199. The U.S. Government Mandate, moreover, was promulgated by Government officials, and supported by non-governmental organizations, who strongly oppose Catholic teachings and beliefs regarding marriage and family. For example, on October 5, 2011, after Defendants announced the interim final rule but before they announced the final rule, Defendant Sebelius spoke at a fundraiser for NARAL Pro-Choice America. Defendant Sebelius has long been a staunch supporter of abortion rights and a vocal critic of Catholic teachings and beliefs regarding abortifacients and contraception. NARAL Pro-Choice America is a pro-abortion organization that likewise opposes many Catholic teachings. At that fundraiser, Defendant Sebelius criticized individuals and entities whose beliefs differed from those held by her and the other attendees of the NARAL Pro-Choice America fundraiser, stating: “Wouldn’t you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much.”

200. Consequently, on information and belief, Notre Dame alleges that the purpose of the U.S. Government Mandate, including the narrow exemption, is to discriminate against religious institutions and organizations that oppose contraception and abortifacients.

201. An actual, justiciable controversy exists between Notre Dame and Defendants. Absent a declaration resolving this controversy and the validity of the U.S. Government Mandate and Exemption, Notre Dame is uncertain as to its rights and duties in planning, negotiating, and/or implementing its group health plans, and it is threatened with the impossible choice between paying for prescriptions and procedures in violation of the Catholic Church’s moral teaching, or discontinuing its health plans in violation of the Catholic Church’s social teaching.

IV. CAUSES OF ACTION

COUNT I **Substantial Burden on Religious Exercise** **in Violation of RFRA**

202. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

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

206. Abortifacients, sterilization, and contraception violate the Catholic beliefs and tenets to which Notre Dame must adhere according to the Church's magisterial teachings and the Catechism of the Catholic Church.

207. Notre Dame's religious beliefs preclude it from offering health care plans to its employees and students that include or facilitate coverage for abortifacients, sterilization, and contraception, or related education and counseling about those practices.

208. Notre Dame has exercised its religious beliefs by refusing to offer health care plans to its employees and students that include or facilitate coverage for abortifacients, sterilization, and contraception, or related education and counseling about those practices.

209. The U.S. Government Mandate requires Notre Dame to provide, pay for, and/or facilitate practices and speech that are contrary to its religious beliefs concerning abortifacients, sterilization, and contraception.

210. The U.S. Government Mandate exposes Notre Dame to substantial monetary fines if it refuses to abandon its religious beliefs by offering an employee health care plan that includes or facilitates coverage for abortifacients, sterilization, contraception, and related education and counseling about those practices.

211. In order to qualify for the narrow exemption to the U.S. Government Mandate, Notre Dame would have to submit to an intrusive and burdensome governmental inquisition into whether its “purpose” is the “inculcation of religious values,” whether it “primarily” employs Catholics, and whether it “primarily” serves Catholics. And Notre Dame may not meet those standards.

212. Notre Dame appears to be ineligible for the religious employer exemption.

213. The U.S. Government Mandate substantially burdens Notre Dame’s exercise of religion.

214. The Government has no compelling governmental interest to require Notre Dame to comply with the U.S. Government Mandate.

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

216. By enacting and threatening to enforce the U.S. Government Mandate against Notre Dame, the Government has violated RFRA.

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

218. To require Notre Dame's student health plan to include services that violate its religious beliefs substantially burdens Notre Dame's exercise of religion.

219. The Government has no compelling government interest to require Notre Dame's student health plan to include services that violate its religious beliefs.

220. Requiring Notre Dame's student health plan to include services that violate its religious beliefs is not the least restrictive means of furthering a compelling government interest.

221. Defendants have also violated RFRA by requiring Notre Dame's student health plan to include services that violate its religious beliefs.

222. Notre Dame has no adequate remedy at law.

223. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

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

224. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

227. Abortifacients, sterilization, and contraception violate the Catholic beliefs and tenets to which Notre Dame must adhere to according to the Church's magisterial teachings and the Catechism of the Catholic Church.

228. Notre Dame's religious beliefs preclude it from offering health care plans to its employees and students that include or facilitate coverage for abortifacients, sterilization, contraception, or related education and counseling about those practices.

229. Notre Dame has exercised its religious beliefs by deciding not to offer its employees and students health care plans that include or facilitate coverage for abortifacients, sterilization, and contraception, or related education and counseling about those practices.

230. The U.S. Government Mandate requires Notre Dame to provide, pay for, and/or facilitate practices and speech that are contrary to its religious beliefs concerning abortifacients, sterilization, and contraception.

231. The U.S. Government Mandate exposes Notre Dame to substantial monetary fines if it refuses to abandon its religious beliefs by offering health care plans that include or facilitate coverage for abortifacients, sterilization, contraception, and related education and counseling about those practices.

232. In order to qualify for the narrow exemption to the U.S. Government Mandate, Notre Dame would have to submit to an intrusive and burdensome governmental inquisition into whether its "purpose" is the "inculcation of religious values," whether it "primarily" employs Catholics, and whether it "primarily" serves Catholics. And Notre Dame may not meet those standards.

233. Notre Dame appears to be ineligible for the religious employer exemption.

234. The U.S. Government Mandate therefore substantially burdens Notre Dame's exercise of religion.

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

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

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

238. The Government has no compelling governmental interest to require Notre Dame to comply with the U.S. Government Mandate.

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

240. By enacting and threatening to enforce the U.S. Government Mandate, the Government has burdened Notre Dame's religious exercise in violation of the Free Exercise Clause of the First Amendment. The Government is also requiring student health plans, including the one currently offered by Notre Dame, to include abortion-inducing drugs, sterilization, and contraception, and related education and counseling.

241. To require Notre Dame’s student health plan to include services that violate its religious beliefs substantially burdens Notre Dame’s exercise of religion.

242. The Government has no compelling government interest to require Notre Dame’s student health plan to include services that violate its religious beliefs.

243. Requiring Notre Dame’s student health plan to include services that violate its religious beliefs is not the least restrictive means of furthering a compelling government interest.

244. Defendants have also violated the Free Exercise Clause of the First Amendment by requiring Notre Dame’s student health plan to include services that violate its religious beliefs.

245. Notre Dame has no adequate remedy at law.

246. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT III

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

247. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

250. In order to qualify for the exemption to the U.S. Government Mandate for “religious employers,” entities must submit to an invasive government investigation into an

organization's religious beliefs, including whether the organization's "purpose" is the "inculcation of religious values" and whether the organization "primarily employs" and "primarily serves" individuals who share the organization's religious tenets.

251. It is unclear how the Government will determine whether an organization meets the U.S. Government Mandate's definition of a sufficiently "religious" organization, leading to the Government's unbridled discretion to determine whether to exempt an organization.

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

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

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

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

256. Notre Dame has no adequate remedy at law.

257. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT IV

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

258. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

259. The First Amendment mandates the equal treatment of all religious faiths and institutions without discrimination or preference.

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

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

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

263. The U.S. Government Mandate grants a government entity unbridled discretion as to whether to exempt religious institutions that meet the stated criteria.

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

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

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

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

268. Notre Dame has no adequate remedy at law.

269. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT V

Excessive Interference in Matters of Internal Governance in Violation of the Free Exercise and Establishment Clauses of the First Amendment

270. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

273. 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.

274. Notre Dame is a religious organization under the general control and direction of the Roman Catholic Church.

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

276. Notre Dame has abided and must continue to abide by the decision of the Catholic Church on these issues.

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

278. The Government may not interfere with the Catholic Church's affiliated religious organizations, including Notre Dame, with regard to their religious beliefs on abortifacients, sterilization, and contraception.

279. In accordance with this Catholic doctrine, Notre Dame has made the internal decision that its employee and student health plans may not cover, subsidize, or facilitate abortifacients, sterilization, or contraception.

280. The U.S. Government Mandate interferes with Notre Dame's internal decisions concerning its structure and mission by requiring it to either facilitate practices that directly conflict with Catholic tenets or face substantial penalties.

281. As a University with a publicly stated goal to ensure that its Catholic character informs all its endeavors, Notre Dame is an integral part of the Catholic Church.

282. The U.S. Government Mandate and its religious employer exemption interfere with the organizational structure of Notre Dame as part of the Church by requiring Notre Dame to include or facilitate coverage for practices that directly conflict with its Catholic tenets but purporting to exempt the Church.

283. Because the U.S. Government Mandate interferes with the internal decision-making and organizational structure of Notre Dame in a manner that affects its faith and mission, the U.S. Government Mandate violates the Establishment Clause and the Free Exercise Clause of the First Amendment.

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

285. Defendants have again violated the Establishment Clause and the Free Exercise Clause of the First Amendment by requiring Notre Dame's student health plan to include services that violate its religious beliefs, and thereby interfering with the internal decisionmaking and organizational structure of Notre Dame in a manner that affects its faith and mission.

286. Notre Dame has no adequate remedy at law.

287. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

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

288. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

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

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

293. Notre Dame consistently holds and publicly proclaims that abortion, sterilization, and contraception violate fundamental tenets of its Catholic religion.

294. The U.S. Government Mandate would compel Notre Dame to provide or sponsor health care plans for its employees and students that include or facilitate coverage for abortifacients, sterilization, and contraception services, practices that violate their religious beliefs.

295. The U.S. Government Mandate would compel Notre Dame to subsidize, promote, and facilitate education and counseling services to its employees and students on abortifacients, sterilization, and contraception services.

296. By imposing the U.S. Government Mandate, the Defendants are compelling Notre Dame to publicly subsidize or facilitate the activity and speech of private entities that are contrary to its religious beliefs.

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

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

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

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

301. Defendants are violating the Free Speech Clause of the First Amendment by requiring Notre Dame's student health plan to include services that violate Notre Dame's religious beliefs, and thereby compelling Notre Dame to publicly subsidize or facilitate the activity and speech of private entities that are contrary to Notre Dame's publicly stated positions and religious beliefs.

302. Notre Dame has no adequate remedy at law.

303. The U.S. Government Mandate imposes an immediate and ongoing harm on Notre Dame that warrants relief.

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

304. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

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

308. Defendants, instead, wholly delegated their responsibilities for issuing preventive care guidelines to a non-governmental entity, the IOM (the Institute of Medicine).

309. When crafting its guidelines recommendations, 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.

310. 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.

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

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

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

314. The Defendants have since undertaken the first step toward a prolonged notice and comment process to promulgate amended regulations, which undermines their claims that good cause warranted abandoning notice and comment for the current regulations.

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

316. Notre Dame has no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

317. Notre Dame has no adequate remedy at law.

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

COUNT VIII
Arbitrary and Capricious Action in Violation of the APA

319. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

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

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

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

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

324. Defendants failed to consider the suggestion of many commenters that abortifacient, contraceptive, and sterilization services as well as counsel and education for these services could not be viewed as “preventive care.”

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

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

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

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

329. Defendants’ promulgation of the U.S. Government Mandate violates the APA.

330. For the same reasons, Defendants’ requirement that student health plans like Notre Dame’s must include abortion-inducing drugs, sterilization, and contraception, and related education and counseling, also violates the APA.

331. Notre Dame has no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

332. Notre Dame has no adequate remedy at law.

333. The U.S. Government Mandate imposes an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT IX
Acting Illegally in Violation of the APA

334. Notre Dame repeats and realleges each of the foregoing allegations in this Complaint.

335. The APA requires that all government agency action, findings, and conclusions be “in accordance with law.”

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

337. The Weldon Amendment states that “[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V., § 507(d), 125 Stat 786, 1111 (2011).

338. The Affordable Care Act states that “nothing in this title shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year.” 42 U.S.C. § 18023(b)(1)(A)(i). It adds that “the

issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion.]” *Id.* § 18023(b)(1)(A)(ii).

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

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

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

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

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

344. Defendants violate RFRA by requiring student health plans offered through a health insurance issuer to include abortion-inducing drugs, sterilization, and contraception, and related education and counseling.

345. Defendants violate the First Amendment by requiring student health plans offered through a health insurance issuer to include abortion-inducing drugs, sterilization, and contraception, and related education and counseling.

346. The Affordable Care Act states that, “nothing in this title (or an amendment made by this title) shall be construed to prohibit an institution of higher education . . . from offering a

student health insurance plan” *Id.* § 1560(c). This provision has been interpreted as prohibiting any law, which would have the effect of prohibiting an institution of higher education from offering a student health plan. Student Health Insurance Coverage, 76 Fed. Reg. 7,767, 7,769 (Feb. 11, 2011).

347. Defendants violate the Affordable Care Act by requiring student health plans offered through a health insurance issuer to include abortion-inducing drugs, sterilization, and contraception, and related education and counseling.

348. Defendants violate 5 U.S.C. § 706(2)(A) by requiring student health plans offered through a health insurance issuer to include abortion-inducing drugs, sterilization, and contraception, and related education and counseling.

349. Notre Dame has no adequate or available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

350. Notre Dame has no adequate remedy at law.

351. The enactment of the U.S. Government Mandate that is not in accordance with law and its impending enforcement impose an immediate and ongoing harm on Notre Dame that warrants relief.

V. PRAYER FOR RELIEF

WHEREFORE, Notre Dame respectfully pray that this Court:

1. Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame’s rights under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame’s rights under the First Amendment;
3. Enter a declaratory judgment that the U.S. Government Mandate was promulgated in violation of the APA;

4. Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against Notre Dame;
5. Enter an order vacating the U.S. Government Mandate;
6. Award Notre Dame attorneys' and expert fees under 42 U.S.C. § 1988; and
7. For all other relief as the Court may deem just and proper.

VI. JURY DEMAND

1. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Notre Dame hereby demands a trial by jury of all issues so triable.

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

By: Matthew A. Kairis

Matthew A. Kairis (OH No. 55502)
Eric E. Murphy (OH No. 83284)
Brandy H. Ranjan (OH No. 86984)*
JONES DAY
325 John H. McConnell Blvd.
Suite 600
P.O. Box 165017
Columbus, OH 43216
(614) 469-3939

Carol A. Hogan (IL No. 06202430)*
Brian J. Murray (IL No. 6272767)
JONES DAY
77 West Wacker Drive
Chicago, IL 60601
(312) 782-8585

Leon F. DeJulius, Jr. (PA No. 90383)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2514
(412) 391-3939

Marianne Corr (DC No. 358051)*
UNIVERSITY OF NOTRE DAME
Vice President and General Counsel
203 Main Building
Notre Dame, IN 46556
(574) 631-5000

Counsel for Notre Dame

* pending *pro hac vice* admission