UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

AVE MARIA UNIVERSITY,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services;

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

THOMAS PEREZ, Secretary of the United States Department of Labor;

UNITED STATES DEPARTMENT OF LABOR;

JACOB LEW, Secretary of the United States Department of the Treasury; and

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

CIVIL NO. _____

2:13-cv-630-FtM-29 UAM

VERIFIED COMPLAINT

(JURY TRIAL DEMANDED)

(INJUNCTIVE RELIEF SOUGHT)

Plaintiff Ave Maria University, by and through its attorneys, alleges and states as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations issued under the 2010 Affordable Care Act that force Plaintiff Ave Maria University—along with a multitude of other religious organizations—to violate their deepest religious beliefs.

2. Ave Maria University was founded in 2003 to build an institution of Catholic higher education that would be publicly faithful to the authoritative teachings of the Catholic Church, in matters of both faith and morals. The University began as Ave Maria College in Ypsilanti, Michigan, and moved to its present campus in Naples, Florida, in 2003.

3. The University's sincere religious beliefs forbid it from facilitating, participating in, paying for, training others to engage in, or otherwise supporting contraception, sterilization, or abortion. The University is one of many American religious organizations that hold these beliefs.

4. Based on the teachings of the Catholic Church, and its own deeply held beliefs, the University does not believe that contraception, sterilization, or abortion are properly understood to constitute medicine, health care, or a means of providing for the well-being of persons. Indeed, the University believes these procedures involve gravely immoral practices, including the intentional destruction of innocent human life.

5. The University publicly speaks out against contraception, sterilization, and abortion, including abortion caused by emergency contraceptives.

6. The University cannot fulfill its mission of preparing students to impact the world by living their Christian values if it violates its own religious convictions by complying with the

challenged regulations and facilitating access to contraception, sterilization, or abortion, or related counseling and services.

7. The University qualifies for no exemption from the regulations. While "religious employers" are exempted, Defendants have limited that exemption to protect only "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order."

8. Thousands of other organizations remain exempt from the regulations *for purely secular reasons*. For example, organizations with plans in existence before March 2010 (i.e., "grandfathered" plans), small employers, and other favored organizations are exempt from the challenged regulations.

9. The regulations do offer the University and other non-exempt religious organizations a so-called "accommodation." But the "accommodation" is meaningless. It would still require the University to play a central role in the government's scheme to facilitate free access to contraceptive and abortion-inducing drugs and devices. Thus, the "accommodation" does nothing to resolve the University's objections.

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

11. If the University does not compromise its religious convictions and comply with the regulations, however, it faces severe penalties of up to $15,000 per day, or approximately $5.5 million each year.

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

13. The University therefore requests declaratory and permanent injunctive relief.

JURISDICTION AND VENUE

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

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

IDENTIFICATION OF PARTIES

16. Plaintiff Ave Maria University is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code and is principally located in Collier County, Florida.

17. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing and enforcing the challenged regulations.

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

19. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the challenged regulations.

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

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

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

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

FACTUAL ALLEGATIONS

I. The University's Faithfulness to the Catholic Church

24. Ave Maria University was founded to build an institution of Catholic higher education that would be faithful to the authoritative teachings of the Catholic Church, in matters of both faith and morals.

25. Faith is central to the identity and educational mission of the University. It is established as a Catholic University according to the guidelines of the Code of Canon Law.

The University adheres to the Apostolic Constitution *Ex Corde Ecclesiae* of Pope John Paul II, which is the relevant law of the Catholic Church for Catholic colleges and universities.

26. The University's faithfulness to the Catholic Church is evident in its bylaws, trustees, faculty, students, curriculum, and campus life.

27. Article I, § 1, of its bylaws states that the University's purpose is "[t]o educate students in the principles and truths of the Catholic Faith, including dogmatic, moral and social teachings, as expressed in Sacred Tradition, Sacred Scripture, and the living Magisterium of the Catholic Church."

28. In pursuit of this purpose, the bylaws require that all trustees be "practicing Catholics in good standing with the Church" and that "their public statements and writings exhibit faithful adherence to the Magisterium." Bylaws Art. III, § 8. Trustees can be removed "for cause" for "disavowal of any magisterial teaching of the Catholic Church." Bylaws Art. III, § 8.

29. The Board of Trustees, in turn, through the Faculty Handbook, intends that at least 75% of full-time faculty be practicing Catholics.

30. Approximately 90% of all full-time employees are practicing Catholics.

31. The University president, James Towey, personally interviews *all* candidates recommended for full-time employment—even if the prospective employee is not Catholic—to ensure they will embrace and advance the University's Catholic mission.

32. On occasion, President Towey has vetoed recommendations to hire based on his conclusion that employment of the particular candidates would be incompatible with the University's Catholic mission.

33. The local Ordinary—the Bishop of the Diocese of Venice of Florida—is an ex-officio member of the University's Board of Trustees and is assigned to overseeing conformance with Church teaching.

34. Professors of a theological discipline at the University must apply for and receive a "*mandatum*" from the Ordinary after interviewing with him to ensure authentic Catholic teaching.

35. All professors who teach disciplines pertaining to faith or morals must make a public Profession of Faith and take an Oath of Fidelity, in the presence of the Ordinary, at the University's annual Mass at the beginning of each academic year.

36. President Towey also was required to make the Profession of Faith and to take the Oath when he was inaugurated as the University's second president on October 7, 2011.

37. With respect to students, the University endeavors to produce faithful Catholic educators, leaders, and mentors and to equip them to bring the truths of the faith into all areas of culture.

38. To achieve this goal, the University challenges its faculty "to explicate the truths of the faith, and measure against them the evolving societal propositions or practices" in every arena, including politics, business, and the arts.

39. The University's required core curriculum includes twelve credits of Catholic theology—courses permeated with influences of the Catholic intellectual tradition.

40. The only graduate programs offered are a Masters and Doctoral program in theology.

41. Approximately 85% of University students are practicing Catholics.

42. In January 2013, approximately 25% of the University's students traveled to Washington, D.C. to participate in the March for Life.

43. In May 2013, a group of students traveled with President Towey to Calcutta, India, to work in the missions of Mother Teresa as a way to promote Catholic social teaching and the call to service.

44. Hundreds of students each year volunteer in impoverished communities near the University through the University's Service Learning Office, again as a means to live Catholic social teaching.

45. On campus, most of the six residence halls have a chapel with the Blessed Sacrament reposed there. There are three Masses a day at the campus Oratory, and there is perpetual Eucharist adoration on campus on weekdays when classes are in session.

46. In sum, a deep devotion to the Catholic faith is woven throughout every aspect of the University. In the University's own words:

> Founded in fidelity to Christ and His Church in response to the call of Vatican II for greater lay witness in contemporary society, Ave Maria University exists to further teaching, research, and learning at the undergraduate and graduate levels in the abiding tradition of Catholic thought in both national and international settings. The University takes as its mission the sponsorship of a liberal arts education curriculum dedicated, as articulated in the apostolic constitution *Ex Corde Ecclesiae*, to the advancement of human culture, the promotion of dialogue between faith and reason, the formation of men and women in the intellectual and moral virtues of the Catholic faith, and to the development of professional and pre-professional programs in response to local and societal needs. As an institution committed to Catholic principles, the University recognizes the importance of creating and maintaining an environment in which faith informs the life of the community and takes expression in all its programs. The University recognizes the central and indispensable role of the Ordinary of the Diocese of Venice in promoting and assisting in the preservation and strengthening of the University's Catholic identity.

II. Ave Maria University's Religious Beliefs and Practices Related to Contraception, Sterilization, and Abortion.

47. As one element of its faithfulness to the Catholic tradition, the University holds and actively professes traditional Christian teachings on the sanctity of life. It believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious from the moment of conception. The University therefore believes and teaches that abortion ends a human life and is a grave sin.

48. The University's religious beliefs also include traditional Christian teaching on the nature and purpose of human sexuality. In particular, the University believes, in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, that human sexuality has two primary purposes: to "most closely unit[e] husband and wife" and "for the generation of new lives."

49. Accordingly, the University believes and actively professes, with the Catholic Church, that "[t]o use this divine gift destroying, even if only partially, its meaning and its purpose is to contradict the nature both of man and of woman and of their most intimate relationship, and therefore it is to contradict also the plan of God and His Will."

50. Therefore, the University believes and teaches that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception and sterilization—is a grave sin.

51. Furthermore, the University subscribes to authoritative Catholic teaching about the proper nature and aims of health care and medical treatment. For instance, the University believes, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs

completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life."

52. The University has approximately 150 employees.

53. As part of its commitment to Catholic education, and in accordance with Catholic social teaching, the University promotes the well-being and health of its employees. In furtherance of these commitments, the University has striven over the years to provide its employees with health coverage superior to coverage generally available at Catholic peer institutions.

54. Moreover, as part of its religious commitment to the authoritative teachings of the Catholic Church, the University's insurance policies have never covered drugs, devices, services or procedures inconsistent with its faith. In particular, the University has taken great pains through the years to ensure that its insurance plans do not cover sterilization, contraception, or abortion.

55. The University cannot participate in any scheme to facilitate access to artificial contraception, sterilization, or abortion, or related education and counseling, without violating its deeply held religious beliefs.

56. The University cannot provide information or guidance to its employees about other locations at which they can access artificial contraception, sterilization, abortion, or related education and counseling, without violating its deeply held religious beliefs.

57. The University relies on donations from the public in order to make tuition affordable to its students. Donors who give to the University do so with an understanding of

its mission and with the assurance that the University will continue to follow and transmit reliable Catholic teachings on faith and morals.

58. The University cannot use donated funds for purposes known to be morally repugnant to its donors and in ways that violate the implicit trust of the purpose of their donations.

59. University's employees choose to work at or attend the University because they either share its religious beliefs and/or commit to help the University further its mission. The University would violate their implicit trust in the organization and detrimentally alter its relationship with them if it were to violate its religious beliefs regarding contraception, sterilization, or abortion.

II. The Affordable Care Act and Preventive Care Mandate

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

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

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

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

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

The Interim Final Rule

65. On July 19, 2010, HHS[2] published an interim final rule imposing regulations concerning the Affordable Care Act's requirement for coverage of preventive services without cost sharing. 75 Fed. Reg. 41726, 41728 (2010).

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

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[1] The list of services that currently have an "A" or "B" rating include medications like aspirin for preventing cardiovascular disease, vitamin D, and folic acid; screenings for a wide range of conditions such as depression, certain cancers and sexually-transmitted diseases, intimate partner violence, obesity, and osteoporitis; and various counseling services, including for breastfeeding, sexually-transmitted diseases, smoking, obesity, healthy dieting, cancer, and so forth. *See* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Aug. 6, 2013); *see also* 75 Fed. Reg. 41726, 41740 (2010).

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

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

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

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

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

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

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

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

74. HHS directed a private health policy organization, the Institute of Medicine (IOM), to make recommendations regarding which drugs, procedures, and services all health plans should cover as preventive care for women.

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

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

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

78. FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices such as IUDs; Plan B (also known as the "morning-after pill");

ulipristal (also known as "ella" or the "week-after pill"); and other drugs, devices, and procedures.

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

80. Indeed, the FDA's own Birth Control Guide states that both Plan B and ella can work by "preventing attachment (implantation) to the womb (uterus)." FDA, Office of Women's Health, Birth Control Guide at 16-17, *available at* http://www.fda.gov/ForConsumers/ ByAudience/ForWomen/ucm118465.htm (last visited Aug. 6, 2013) (attached as Exhibit A).

81. On August 1, 2011, thirteen days after IOM issued its recommendations, HRSA issued guidelines adopting them in full. *See http://www.hrsa.gov/womensguidelines* (attached as Exhibit A).

The "Religious Employers" Exemption

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

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

organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46626 (emphasis added).

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

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

86. HRSA exercised its discretion to grant an exemption for religious employers via a footnote on its website listing the Women's Preventive Services Guidelines. The footnote states that "guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers." *See http://www.hrsa.gov/womensguidelines* (last visited Aug. 6, 2013).

87. Although religious organizations like the University share the same religious beliefs and concerns as objecting churches, their integrated auxiliaries, and objecting religious orders, HHS deliberately ignored the regulation's impact on their religious liberty, stating that the exemption sought only "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46621, 46623.

88. Thus, the vast majority of religious organizations with conscientious objections to providing contraceptive, sterilization, and/or abortifacient services were excluded from the "religious employers" exemption.

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

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

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

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

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

The Safe Harbor

94. The public outcry for a broader religious employers exemption continued for many months and, on January 20, 2013, HHS issued a press release acknowledging "the important concerns some have raised about religious liberty" and stating that religious objectors would be "provided an additional year . . . to comply with the new law." *See* Jan. 20, 2013 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 (last visited Aug. 6, 2013).

95. February 10, 2012, HHS formally announced a "safe harbor" for non-exempt nonprofit religious organizations that objected to covering free contraceptive, sterilization, and abortifacient services.

96. Under the safe harbor, HHS agreed it would not take any enforcement action against an eligible organization during the safe harbor, which would remain in effect until the first plan year beginning after August 1, 2013.

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

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

The Advance Notice of Proposed Rulemaking

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

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

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

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

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

104. "[A]pproximately 200,000 comments" were submitted in response to the ANPRM, 78 Fed. Reg. 8456, 8459, largely reiterating previous comments that the ANPRM's proposals would not resolve conscientious objections, because the objecting religious organizations, by providing a health care plan in the first instance, would still be coerced to arrange for and facilitate access to contraception, sterilization, and abortifacient services.

The Notice of Proposed Rulemaking

105. On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM) purportedly addressing the comments submitted in response to the ANPRM. 78 Fed. Reg. 8456 (published Feb. 6, 2013).

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

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

108. Under this proposal a "religious employer" would be one "that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 8461.

109. HHS emphasized, however, that this proposal "would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. 8456, 8461.

110. In other words, religious organizations like the University that are not formal churches or religious orders would continue to be excluded from the exemption.

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

112. The proposed "accommodation" did not resolve the concerns of religious organizations like the University because it continued to force them to deliberately provide health insurance that would trigger access to contraceptive, sterilization, and abortifacient drugs and services, and related education and counseling.

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

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

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

116. In her remarks, Secretary Sebelius stated:

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

See The Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (episode 9 at 2:25) (last visited Aug. 6, 2013) (emphases added).

117. It is clear from the timing of these remarks that Defendants gave no consideration to the comments submitted in response to the NPRM's proposed "accommodation."

The Final Mandate

118. On June 28, 2013, Defendants issued a final rule (the "Final Mandate"), which ignores the objections repeatedly raised by religious organizations and continues to co-opt

objecting religious employers into the government's scheme of expanding free access to contraceptive, sterilization, and abortifacient services. 78 Fed. Reg. 39870.

119. Under the Final Mandate, the discretionary "religious employers" exemption, which is still implemented via footnote on the HRSA website, *see* http://www.hrsa.gov/womensguidelines (last visited Aug. 6, 2013), remains limited to formal churches and religious orders "organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39874.

120. All other religious organizations, including the University, are excluded from the exemption.

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

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

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

124. The Final Rule extends the current safe harbor through the end of 2013. 78 Fed. Reg. at 39889.

125. Thus, an eligible organization would need to execute the self-certification prior to its first plan year that begins on or after January 1, 2014, and deliver it to the organization's

insurance issuer or, if the organization has a self-insured plan, to the plan's third party administrator. 78 Fed. Reg. at 39875.

126. By the terms of the accommodation, the University will be required to execute the self-certification and deliver it to its insurance issuer before January 1, 2014.

127. By delivering its self-certification to its issuer, the University would trigger the issuer's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39875-76.

128. The University would have to identify its employees to the issuer for the distinct purpose of enabling the government's scheme to facilitate free access to contraceptive, sterilization, and abortifacient services.

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

130. Thus the University would have to coordinate with its issuer regarding when it was adding or removing employees and beneficiaries from its healthcare plan and, as a result, from the contraceptive, sterilization, and abortifacient services payment scheme.

131. The issuer would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application materials distributed in connection with enrollment" in a group health plan. 78 Fed. Reg. at 39876.

132. This would also require the University to coordinate the notices with its issuer.

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

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

135. Thus, even under the accommodation, the University and every other non-exempt objecting religious organization would continue to play a central role in facilitating free access to contraceptive, sterilization, and abortifacient services.

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

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

138. Defendants state that they "continue to believe, and have evidence to support," that providing payments for contraceptive, sterilization, and abortifacient services will be "cost neutral for issuers," because "[s]everal studies have estimated that the costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health." 78 Fed. Reg. at 39877.

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

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

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

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

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

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

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

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

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

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

149. The accommodation does nothing to relieve non-exempt religious organizations with insured plans from being co-opted as the central cog in the government's scheme to expand access to free contraceptive, sterilization, and abortifacient services.

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

151. The University cannot participate in or facilitate the government's scheme in this manner without violating its religious convictions.

The University's Health Care Plan and Its Religious Objections

152. The plan year for the University's employee healthcare plan begins on January 1 of each year.

153. Thus, beginning on or about January 1, 2014, the University faces the choice of either including free coverage for contraceptive, sterilization, and abortifacient services in its employee health plan or else causing its insurance issuer to provide the exact same services.

154. The University's religious convictions forbid it from including free coverage for contraceptive, sterilization, or abortifacient services in its employee healthcare plan.

155. The University's religious convictions equally forbid it from causing its insurance issuer to provide free access to abortifacient services.

156. From the University's perspective, forcing its insurance issuer to provide free access to contraceptive, sterilization, and abortifacient services is no different than directly providing that access.

157. The University's religious convictions forbid it from participating in any way in the government's scheme to provide free access to contraceptive, sterilization, and abortifacient services through the University's health care plan.

158. The University is not eligible for the religious employers exemption because it is not an organization "described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. 46621, 46626.

159. The University's employee healthcare plan does not meet the definition of a "grandfathered" plan.

160. If the University refuses to comply with the Final Mandate and refuses to force its insurer to carry out the Final Mandate by submitting a self-certification, it faces crippling fines of $100 each day, for "each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1).

161. Dropping its insurance plans would place the University at a severe competitive disadvantage in its efforts to recruit and retain employees.

162. The University would also face fines of $2000 per year for each of its employees for dropping its insurance plans.

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

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

165. The Final Mandate forces the University to violate its religious beliefs or incur substantial fines for either excluding objectionable coverage without designating its insurance issuer or terminating its employee insurance coverage altogether.

166. The Final Mandate forces the University to deliberately provide health insurance that would facilitate free access to contraceptive, sterilization, and emergency contraceptives, including Plan B and ella, regardless of the ability of insured persons to obtain these drugs from other sources.

167. The Final Mandate forces the University to facilitate government-dictated education and counseling concerning contraceptive, sterilization, and abortion that directly conflicts with its religious beliefs and teachings.

168. Facilitating this government-dictated speech directly undermines the express speech and messages concerning the sanctity of life that the University seeks to convey.

The Lack of a Compelling Government Interest

169. The government lacks any compelling interest in coercing the University to facilitate access to contraceptive, sterilization, and abortifacient services.

170. The required contraceptive, sterilization, and abortifacient drugs, devices, and services, and related education and counseling, are already widely available at non-prohibitive costs.

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

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

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

174. HHS claims that its "religious employers" exemption does not undermine its compelling interest in making contraceptive, sterilization, and abortifacient services available for free to women because "houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39887.

175. Because of the University's express mission of promoting the sanctity of life and opposing all contraception, sterilization, and abortion, the University's employees are just as likely as employees of exempt organizations to adhere to the same values, and thus are less likely than other people to use the objectionable drugs, devices, and services.

176. In one form or another, the government also provides exemptions for grandfathered plans, 42 U.S.C. § 18011; 75 Fed. Reg. 41,726, 41,731 (2010), small employers with fewer than 50 employees, 26 U.S.C. § 4980H(c)(2)(A), and certain religious denominations, 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

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

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

179. Indeed, HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of medium-sized employers with between 50 and 100 employees may do likewise. 75 Fed. Reg. 34538 (June 17, 2010); *See also* http://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/ factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (archived version) (last visited Aug. 7, 2013); https://www.cms.gov/CCIIO/Resources/Files/factsheet_grandfather_amendment.html (noting that amendment to regulations "will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the grandfathering regulation").

180. According to the United States census, more than 20 million individuals are employed by firms with fewer than 20 employees. http://www.census.gov/econ/smallbus.html.

181. It is reasonable to presume that millions more are employed by firms with between 20 and 50 employees.

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

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

184. The government's willingness to exempt various secular organizations and postpone the employer mandate, while adamantly refusing to provide anything but the narrowest of exemptions for religious organizations also shows that the Final Mandate is not neutral, but rather discriminates against religious organizations because of their religious commitment to promoting the sanctity of life.

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

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

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

188. She further criticized individuals and entities whose beliefs differed from those held by her and the others at the 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."

189. On July 16, 2013, Secretary Sebelius further compared opponents of the Affordable Care Act generally, including those with religious objections to the contraceptive mandate, to "people who opposed civil rights legislation in the 1960s," stating that upholding the Act requires the same action as was shown "in the fight against lynching and the fight for desegregation." *See* http://www.hhs.gov/secretary/about/speeches/sp20130716.html (last visited Aug. 7, 2013).

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

CLAIMS

COUNT I

Violation of the Religious Freedom Restoration Act
Substantial Burden

191. The University incorporates by reference all preceding paragraphs.

192. The University's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to contraception, sterilization, and abortion-inducing drugs or services or related education and counseling. The University's compliance with these beliefs is a religious exercise.

193. The Final Mandate creates government-imposed coercive pressure on the University to change or violate its religious beliefs.

194. The Final Mandate chills the University's religious exercise.

195. The Final Mandate exposes the University to substantial fines for its religious exercise.

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

197. The Final Mandate imposes a substantial burden on the University's religious exercise.

198. The Final Mandate furthers no compelling governmental interest.

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

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

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

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

COUNT II

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

203. The University incorporates by reference all preceding paragraphs.

204. The University's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to contraception, sterilization, or abortion or related education and counseling. The University's compliance with these beliefs is a religious exercise.

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

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

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

208. The Final Mandate furthers no compelling governmental interest.

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

210. The Final Mandate creates government-imposed coercive pressure on the University to change or violate its religious beliefs.

211. The Final Mandate chills the University's religious exercise.

212. The Final Mandate exposes the University to substantial fines for its religious exercise.

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

214. The Final Mandate imposes a substantial burden on the University's religious exercise.

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

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

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

COUNT III

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

218. The University incorporates by reference all preceding paragraphs.

219. The University's sincerely held religious beliefs prohibit it from deliberately providing health insurance that would facilitate access to contraception, sterilization, or abortion or related education and counseling. The University's compliance with these beliefs is a religious exercise.

220. Despite being informed in detail of these beliefs beforehand, Defendants designed the Final Mandate and its religious employers exemption to the Final Mandate to target religious organizations like the University because of their religious beliefs.

221. Defendants promulgated both the Final Mandate and its religious employers exemption to suppress the religious exercise of the University and others.

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

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

COUNT IV

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

224. The University incorporates by reference all preceding paragraphs.

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

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

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

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

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

COUNT V

Violation of the First Amendment to the United States Constitution
Establishment Clause
Selective Burden/Denominational Preference (*Larson v. Valente*)

230. The University incorporates by reference all preceding paragraphs.

231. By design, defendants imposed the Final Mandate on some religious organizations but not on others, resulting in a selective burden on the University.

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

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

COUNT VI

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

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

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

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

237. 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.

238. The University has made an internal decision, dictated by its Christian faith, that the health plans it makes available to its employees and students may not subsidize, provide, or facilitate access to contraceptive, sterilization, and abortifacient drugs, devices, or related services.

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

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

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

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

COUNT VII

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

243. The University incorporates by reference all preceding paragraphs.

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

245. Religious liberty is a fundamental right.

246. The "religious employer" exemption protects many religious objectors, but not the University.

247. The "accommodation" provides no meaningful protection for the University.

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

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

COUNT VIII

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

250. The University incorporates by reference all preceding paragraphs.

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

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

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

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

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

COUNT IX

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

256. The University incorporates by reference all preceding paragraphs.

257. The University teaches that contraception, sterilization, and abortion violate its religious beliefs.

258. The Final Mandate would compel the University to facilitate activities that the University teaches are violations of its religious beliefs.

259. The Final Mandate would compel the University to facilitate access to government-dictated education and counseling related to contraception, sterilization, and abortion.

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

261. The Final Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.

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

COUNT X

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

263. The University incorporates by reference all preceding paragraphs.

264. The University teaches that contraception, sterilization, and abortion violate its religious beliefs.

265. The Final Mandate would compel the University to facilitate activities that it teaches are violations of its religious beliefs.

266. The Final Mandate would compel the University to facilitate access to government-dictated education and counseling related to contraception, sterilization, and abortion.

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

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

COUNT XI

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

269. The University incorporates by reference all preceding paragraphs.

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

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

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

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

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

COUNT XII

Violation of the Administrative Procedure Act
Lack of Good Cause and Improper Delegation

275. The University incorporates by reference all preceding paragraphs.

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

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

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

279. 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.

280. 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.

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

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

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

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

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

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

COUNT XIII

Violation of the Administrative Procedure Act Arbitrary and Capricious Action

287. The University incorporates by reference all preceding paragraphs.

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

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

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

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

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

COUNT XIV

Violation of the Administrative Procedure Act
Agency Action Without Statutory Authority

293. The University incorporates by reference all preceding paragraphs.

294. Defendant's authority to enact regulations under the Affordable Care Act is limited to the authority expressly granted them by Congress.

295. Defendants lack statutory authority to coerce insurance issuers to pay for contraceptive, sterilization, and abortifacient services for individuals with whom they have no contractual or fiduciary relationship.

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

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

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

COUNT XV

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

299. The University incorporates by reference all preceding paragraphs.

300. The Final Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008).

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

302. The Final Mandate requires health care plans, including the University's, to deliberately provide health insurance that facilitates access to all Federal Drug Administration-approved contraceptives.

303. Some FDA-approved contraceptives cause abortions.

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

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

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

COUNT XVI

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

307. The University incorporates by reference all preceding paragraphs.

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

309. Section 1303(b)(1)(A) of the Affordable Care Act states that "nothing in this title"—*i.e.*, title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."

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

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

312. The Final Mandate requires issuers, including the University, to deliberately provide health insurance that would facilitate access to coverage of all Federal Drug Administration-approved contraceptives.

313. Some FDA-approved contraceptives cause abortions.

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

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

PRAYER FOR RELIEF

Wherefore, the University requests that the Court:

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

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

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

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

e. Issue a permanent injunction prohibiting Defendants from enforcing the Final Mandate against the University and other religious organizations that object to facilitating access to contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling;

f. Award the University the costs of this action and reasonable attorney's fees; and

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

JURY DEMAND

The University requests a trial by jury on all issues so triable.

Respectfully submitted this 29th day of August, 2013.

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VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on 29 August, 2013

H. James Towey*
President, Ave Maria University

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*