UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation; (2) TRUETT-McCONNELL COLLEGE, INC., a Georgia nonprofit corporation; by themselves and on behalf of all others similarly situated, and (3) GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTSIT CONVENTION, a Texas nonprofit corporation, Plaintiffs, v. (4) KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; (5) UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; (6) THOMAS E. PEREZ, Secretary of the United States Department of Labor; (7) UNITED STATES DEPARTMENT OF LABOR; (8) JACOB J. LEW, Secretary of the United States Department of the Treasury; and (9) UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	)	Civil Case No. _____

CLASS ACTION COMPLAINT

Plaintiffs REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation, and TRUETT-MCCONNELL COLLEGE, INC. a Georgia nonprofit corporation, on behalf of themselves and all others similarly situated (collectively, including the putative class members, the "Plaintiffs"), and GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas nonprofit corporation, by and through their attorneys, allege and state as follows:

I. NATURE OF THE ACTION

1. This is a class action lawsuit on behalf of Christian employers who participate in the health benefits plan maintained by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention (the "GuideStone Plan") to provide health benefits to their employees. These employers are constrained by their religious convictions from participating in the federal government's regulatory scheme to promote, encourage, and subsidize the use of abortion-inducing drugs and devices (the "Final Mandate" as hereinafter defined).

2. The government defendants, however, have imposed regulatory requirements that require the class plaintiffs to provide health benefits to their employees that include coverage for, or access to, abortion-inducing drugs and devices.

3. The government defendants have exempted thousands of plans, covering tens of millions of employees, from the Final Mandate. These exemptions have been granted for a wide variety of reasons, from the purely secular exemption for plans in existence before a certain date

("grandfathered plans") to a narrow exemption for certain "religious employers." The class plaintiffs, however—despite their religious nature—do not qualify for these exemptions.

4. For example, plaintiff Reaching Souls International, Inc. ("Reaching Souls") is a nonprofit religious organization dedicated to "[p]roclaiming the Gospel to emerging nations by loving, reaching, training, equipping, and multiplying the laborers." Plaintiff Truett-McConnell College, Inc. ("Truett-McConnell") is a Georgia Baptist college whose mission is to "equip[] students to fulfill the Great Commission by fostering a Christian worldview through a biblically centered education." Like the other members of the class, these named plaintiffs are controlled by or associated with the Southern Baptist Convention and are guided by and operated in accordance with Christian teachings about the sanctity of all human life. Their religious beliefs forbid them from participating in the government's scheme to provide abortion-inducing drugs and devices. Yet the government refuses to exempt Reaching Souls and Truett-McConnell as "religious employers."

5. The result is that class members have been offered a stark choice: they must either abandon their Christian beliefs and participate in the Final Mandate, or they will be punished by the government with an array of fines and penalties unless and until they comply. The threat of such penalties imposes a substantial burden on the class members' religious exercise, because it "requires participation in an activity prohibited by a sincerely held religious belief," prevents participation in conduct motivated by a sincerely held religious belief, and "places substantial pressure on" the class members "to engage in conduct contrary to a sincerely

held religious belief." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *petition for cert. filed* (U.S. Sept. 19, 2013) (No. 13-354).

6. The Final Mandate also impermissibly coerces plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). GuideStone is operated according to Southern Baptist religious principles—indeed, GuideStone *exists* precisely to provide benefits to the class members and other affiliated institutions in accordance with those religious principles. Yet the Final Mandate effectively makes that mission largely illegal, and requires that GuideStone either participate in the government's scheme or dramatically reduce the work of providing employee benefits for religious institutions. In many circumstances, GuideStone's religious exercise of providing health benefits in accordance with Southern Baptist religious principles has been made illegal.

7. Fortunately, federal law forbids the government from forcing the Plaintiffs to face such penalties and harms for exercising their religion. In particular, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA") forbids such burdens on religious exercise unless the government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government cannot meet that standard, making it illegal to impose the Final Mandate on the Plaintiffs. The Final Mandate is likewise invalid under the First Amendment's Religion and Speech Clauses, the Fifth Amendment's Due Process Clause, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA").

8. Without judicial relief, the Final Mandate will take effect against the GuideStone Plan when its new plan year begins on January 1, 2014. Accordingly, all Plaintiffs—Reaching Souls and Truett-McConnell (on behalf of themselves and others similarly situated), and GuideStone—bring this action seeking injunctive and declaratory relief against the Final Mandate. For decades, the class members and GuideStone have worked together to provide health benefits to employees that are consistent with their mission as religious organizations. The defendants' attempt to make such behavior illegal should be rejected.

II. JURISDICTION AND VENUE

9. 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.

10. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). One of the Plaintiffs, Reaching Souls, resides in this district. Additionally, a substantial part of the events or omissions giving rise to the claims occurred in this district. Reaching Souls maintains a significant organizational presence in this district; Reaching Souls would be harmed by the application of the Final Mandate in this district by having to directly or indirectly provide benefits coverage for abortifacient drugs and devices and related counseling and education in violation of its religious beliefs and/or having to pay penalties as a result of its activities in this district; and application of the Final Mandate would violate Reaching Souls' religious beliefs, foreclose its religious exercise, and violate its Constitutional rights in this district.

III. IDENTIFICATION OF PARTIES

A. Plaintiffs

1. GuideStone

11. GuideStone, a Texas nonprofit corporation, sponsors the GuideStone Plan (as hereinafter defined) pursuant to a ministry assignment from the Southern Baptist Convention to "[a]ssist churches, denominational entities and other evangelical ministry organizations by making available . . . health coverage."

2. Reaching Souls

12. Reaching Souls is an Oklahoma not for profit corporation founded in 1986 by a Southern Baptist minister and evangelist with the mission of "training Africans to reach Africa." Reaching Souls has since expanded its ministry to India and Cuba. Its principal officers, President, Chief Executive Officer, Chief Operating Officer and Chief Financial Officer, are all ordained Southern Baptist ministers and the majority of its staff are members of Southern Baptist Churches. Reaching Souls currently provides training and support for over 1,000 missionaries in seven nations in Africa, 10 missionaries in India, and 40 missionaries in Cuba. In response to the orphan crisis created by AIDS, war, and famine, Reaching Souls began an orphan care program called "Reaching Generations." Currently, Reaching Generations cares for nearly 500 orphans in Africa and India.

13. All of Reaching Souls' employees share its commitment to "obey our Lord Jesus Christ and His Word," including the command to respect the sanctity of human life from conception to natural death. Each job description provided to current and prospective employees

of Reaching Souls requires that every individual holding a position at the ministry be a Christian, meaning they have a personal relationship with Jesus Christ. Further, it is formally stated in each job description provided that a person who follows Jesus Christ will follow His commands to: 1) love God with all their heart, soul, mind, and strength; 2) love their neighbors as themselves; and 3) go and make disciples. Reaching Souls believes the Bible teaches that all people are our neighbors, including the unborn.

14. As part of its religious belief that it must promote the spiritual and physical well-being of its employees, Reaching Souls provides them with comprehensive health benefits. Reaching Souls has adopted the GuideStone Plan (as hereinafter defined) to provide medical coverage for its employees that complies with its commitment to their well-being and to the sanctity of human life.

3. Truett-McConnell

15. Truett-McConnell is a private, Christian, coeducational liberal arts college in Cleveland, Georgia. It is a single member Georgia nonprofit corporation with the Georgia Baptist Convention as its sole member. As the sole member of Truett-McConnell, the Georgia Baptist Convention appoints the trustees of Truett-McConnell. The Georgia Baptist Convention is an association of Southern Baptist churches in the state of Georgia, and is one of the state conventions associated with the Southern Baptist Convention. Truett-McConnell has adopted the GuideStone Plan to provide medical coverage for its employees.

16. Truett-McConnell has adopted the Southern Baptist Convention's *Baptist Faith and Message 2000* described hereinafter in paragraph 34 as its own statement of faith. All of

Truett-McConnell's faculty and staff share its commitment to the sanctity of life from conception to natural death as outlined in the *Baptist Faith and Message 2000*.

17. As part of its religious belief that it must promote the spiritual and physical well-being of its employees, Truett-McConnell provides them with comprehensive health benefits. Truett-McConnell has adopted the GuideStone Plan (as hereinafter defined) to provide medical coverage for its employees that complies with its commitment to their well-being and to the sanctity of human life.

4. Class Action Plaintiffs

18. Reaching Souls and Truett-McConnell bring this action on behalf of themselves and all others similarly situated. The class consists of employers that: (i) have adopted or in the future adopt the GuideStone Plan to provide medical coverage for their "employees" or former employees and their dependents ("employees" for purposes of this requirement has the meaning set forth in section 414(e)(3)(B) of the Internal Revenue Code of 1986 (the "Code"); (ii) are or could be reasonably construed to be "eligible organizations" within the meaning of the Final Mandate (as hereinafter defined); and (iii) are not "religious employers" within the meaning of the Final Mandate.

B. Defendants

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

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

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

22. Defendant Thomas E. 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.

23. Defendant United States 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.

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

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

IV. FACTUAL ALLEGATIONS

A. Southern Baptist Convention

26. The Southern Baptist Convention, a Georgia nonprofit corporation, was organized in 1845 by "messengers from missionary societies, churches, and other religious bodies of the Baptist denomination." According to Article II of its Constitution, the Southern Baptist Convention was formed for the purpose of providing "a general organization for Baptists in the United States and its territories for the promotion of Christian missions at home and abroad and any other objects such as Christian education, benevolent enterprises, and social services which it may deem proper and advisable for the furtherance of the Kingdom of God."

27. Since its founding, the Southern Baptist Convention has grown into a national network of more than 45,000 churches and church-type missions with nearly 16 million members residing throughout the United States and its territories.

28. The Southern Baptist Convention does not control Southern Baptist churches. Rather, it serves as the coordinating body facilitating ministries which the churches voluntarily support.

29. Beginning with a landmark pro-life resolution in 1982, the Southern Baptist Convention at its annual meetings has passed Resolutions supporting the sanctity of life and condemning elective abortions in general and abortifacient drugs in particular. Relevant Resolutions adopted by the Southern Baptist Convention that are still in force provide as follows:

> 1988 – "we call upon all Southern Baptists to take an active stand in support of the sanctity of human life"

> 1991 – "we oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread"
>
> 1993 – "we oppose the testing, approval, distribution, marketing and usage in the United States of any abortion pills and urge U.S. corporations which are considering such business ventures to refuse to do so"
>
> 1994 – "we . . . condemn the blatant advocacy of RU 486 by the Clinton Administration, and oppose the testing, approval, manufacturing, marketing, and sale of the abortion pill in the United States"
>
> 2000 - "[we] reaffirm our abhorrence of elective abortion"

30. The *Baptist Faith and Message 2000* adopted by the Southern Baptist Convention is the statement of faith and message declared for the purpose of setting "forth certain teachings which we believe."

31. Article 15 of the *Baptist Faith and Message 2000*, which is titled, "The Christian and the Social Order," provides "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." (emphasis added)

B. GuideStone

32. The Southern Baptist Convention formed GuideStone in 1918 (then called "The Board of Ministerial Relief and Annuities of the Southern Baptist Convention") to provide relief, support, benefits, and annuities for ministers of the gospel and denominational workers, "within the bounds" of the Southern Baptist Convention. As a ministry of the Southern Baptist Convention, GuideStone shares the beliefs about the sanctity of human life stated in the Resolutions adopted by the Southern Baptist Convention in paragraph 25 and in the *Baptist Faith and Message 2000*.

33. In a November 9, 1934, determination letter, the Internal Revenue Service determined that GuideStone was a tax-exempt organization under section 103(6) of the Revenue Act of 1932 (a predecessor of current Code section 501(c)(3)).

34. The mission and ministry of GuideStone, as most recently set forth by the Southern Baptist Convention at its 2013 Annual Meeting, is as follows:

> GuideStone Financial Resources exists to assist the churches, denominational entities, and other evangelical ministry organizations by making available retirement plan services, life and health coverage, risk management programs, and personal and institutional investment programs.

35. The Southern Baptist Convention controls GuideStone by being its sole member and by having the sole authority to elect the members of the board of directors of GuideStone, which such directors by custom are generally referred to as "trustees."

36. GuideStone is a "church benefits board" within the meaning of Code section 414(e)(3)(A) and a Texas statute providing that the Texas Insurance Code does not apply to a "church benefits board or a program, plan, benefit, or activity of the board or a person affiliated with the board." TEX. BUS. ORGS. CODE § 22.409.

C. The GuideStone Plan

37. GuideStone, in carrying out the mission and ministries assigned to it by the Southern Baptist Convention, established the GuideStone Plan for adoption by religious organizations associated with the Southern Baptist Convention.

38. Pursuant to Texas state law, GuideStone holds the assets funding the GuideStone Plan in trust. *See id.* at § 22.404.

39. The GuideStone Plan is one of the largest "multiple employer" church health care plans in the country. It serves hundreds of employers (churches, denominational entities and other ministry organizations) and more than 78,000 participants (pastors, employees and their families).

40. The GuideStone Plan provides health and other welfare benefits for employees of adopting employers and, where applicable, their dependents.

41. Participation in the GuideStone Plan is limited to current and former employees of organizations (and the employees' dependents) that are "controlled by or associated with" the Southern Baptist Convention within the meaning of Code section 414(e)(3)(B).

42. The GuideStone Plan is a "church plan" within the meaning of section 414(e) of the Code (26 U.S.C. § 414(e)) and section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1002(33)).

43. The GuideStone Plan is not subject to ERISA because it has not made an election under Code section 410(d). *See* ERISA section 4(b)(2) (29 U.S.C. § 1003(4)(b)(2)).

44. The GuideStone Plan is a self-insured health plan, and, therefore, does not contract with an insurance company to fund the health benefits it provides.

45. The plan year for the GuideStone Plan begins on January 1st of each year.

46. The GuideStone Plan does not meet the definition of a "grandfathered" plan under the Affordable Care Act for multiple reasons, including, but not limited to, the following: (1) the GuideStone Plan does not include the required "disclosure of grandfather status" statement; (2) neither the GuideStone Plan nor the participating employers in the GuideStone Plan take the

position that the GuideStone Plan is a grandfathered plan and thus they do not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan; and (3) in certain cases the percentage cost-sharing requirement for some participants measured from March 23, 2010, increased in excess of certain specified limits. *See* 26 C.F.R. § 54.9815-1251T.

47. Consistent with the convictions of the Southern Baptist Convention, the GuideStone Plan does not pay or reimburse expenses associated with "elective termination of a pregnancy by any method," including oral and non-oral contraceptive drugs or devices that are abortive in nature.

48. Connecticut General Life Insurance Company, a Delaware corporation, and Highmark Health Services, a Pennsylvania corporation doing business as "Highmark Blue Cross Blue Shield"®, have entered into agreements with GuideStone to provide certain claims administration and other services with respect to medical benefits under the GuideStone Plan. Express Scripts, Inc., a Delaware corporation, has entered into a similar agreement with respect to pharmaceutical benefits.

V. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Background

49. In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (March 23, 2010), *amended by* the Health Care & Education Reconciliation Act, Pub. L. 111-152, 124 Stat. 1029 (March 30, 2010) ("Affordable Care Act" or the "Act").

50. The Affordable Care Act established many new requirements for "group health plan[s]" within the meaning of Code section 5000(b)(1), which include any "plan . . . of, or contributed to by, an employer . . . to provide health care (directly or otherwise) to the employees, former employees . . . or their families." 26 U.S.C. §§ 9815 & 9832.

51. As relevant here, the Act requires an employer's group health plan to cover certain "preventive care" for women. Specifically, it indicated 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)).

52. As discussed below, it is through these comprehensive guidelines supported by the Health Resources and Services Administration that the Departments are attempting to force

Plaintiffs to provide, contract for or otherwise facilitate coverage for or access to abortifacients and related education and counseling in violation of their religious beliefs.

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

54. Violations of the Affordable Care Act can subject an employer to substantial monetary penalties.

55. For employee benefit plans like the GuideStone Plan that are not subject to ERISA, these requirements are implemented through section 4980D of the Code, which requires "group health plans" to comply with 42 U.S.C. § 300gg-13(a)(4) and certain other provisions of the Public Health Services Act, as amended by the Affordable Care Act.

56. An employer offering a group health plan to its employees that fails to provide certain required coverage, including required contraceptive coverage, will be subject to an assessment of $100 per day for each affected individual beginning with the first plan year beginning on or after January 1, 2014. *See* 26 U.S.C. § 4980D(b) & (e)(1).

57. Additionally, certain employers that fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" will be exposed to significant annual excise tax penalties of $2,000 per full-time employee. *See id.* at § 4980H(a), (c)(1). The implementation of this requirement, which was required to take effect on January 1, 2014, has been delayed until 2015 by the Defendants.

B. Regulatory Background

1. The Initial Interim Final Rules and the IOM Guidelines

58. On July 19, 2010, the Departments published interim final rules (the "Interim Final Rules") "implementing the rules for group health plans and health insurance coverage . . . under provisions of the . . . Affordable Care Act regarding preventive health services." 75 Fed. Reg. 41726 (July 19, 2010). Among other things, the Interim Final Rules required group health plans and health insurers to cover preventive care for women as provided for in "guidelines supported by the Health Resources and Services Administration." 75 Fed. Reg. at 41756-59 (codified at 26 C.F.R. §54.9815-2713T(a)(1)(iv); 29 C.F.R. §2590.715-2713(a)(1)(iv) and 45 C.F.R. §147.130(a)(1)(iv)).

59. The Interim Final Rules were enacted without prior notice of rulemaking or opportunity for public comment. Even though federal law had never required coverage of abortion-inducing contraceptives, 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.

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

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

62. The Interim Final Rules made clear that "cost sharing" refers to "out-of-pocket" expenses for plan participants and beneficiaries. *Id.* at 41731.

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

64. 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." *Id.* at 41730.

65. After the Interim Final Rules were issued, numerous commenters warned against the potential conscience implications of requiring religious individuals and organizations to include certain kinds of services—specifically contraceptives, sterilizations, and abortion services—in their health care plans.

66. HHS directed a private health policy organization, the Institute of Medicine ("IOM"), to make recommendations regarding which drugs, procedures, and services should be considered in the development of comprehensive guidelines for preventive services for women. *See* http://www.hrsa.gov/womensguidelines (last visited Oct. 11, 2013) (attached as Exhibit 1).

67. HHS did not ask the IOM to make coverage recommendations and the IOM explicitly excluded cost considerations and other considerations relevant to coverage recommendations from its determinations regarding effective preventive care for women.

68. In developing its guidelines, IOM invited a select number of groups to make presentations on preventive care. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists, John Santelli, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America, and Sara Rosenbaum.

69. No religious groups or other groups that opposed government-mandated coverage of contraceptives (including contraceptives that are or could be abortifacients) and related education and counseling were among the invited presenters.

70. On July 19, 2011, the IOM published its preventive care guidelines for women, including a recommendation that preventive services include "the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, 102-10 and Recommendation 5.5 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Oct. 11, 2013).

71. On August 1, 2011, thirteen days after the IOM issued its recommendations, the Health Resources and Services Administration ("HRSA") issued guidelines tracking the language of the IOM report, defining preventive services exactly as the IOM report did. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); s*ee also* Exhibit 1, http://www.hrsa.gov/womensguidelines. HRSA did not explain how, if at all, its guidelines

accounted for various factors relevant to coverage decisions that IOM had declined to consider (including "cost effectiveness;" "established practice; patient and clinician preferences; availability; ethical, legal, and social issues; and availability of alternatives").

72. Food and Drug Administration ("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. *See* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Oct. 11, 2013) (attached as Exhibit 2).

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

74. Indeed, the FDA's own Birth Control Guide states under the heading "Emergency Contraceptives," that both Plan B and ella can work by "preventing attachment (implantation) to the womb (uterus)." Ex. B, at 11-12, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

75. Neither the HRSA guidelines nor the Interim Final Rule mentioned or purported to apply the Religious Freedom Restoration Act.

2. The Amended Interim Final Rules and the "Religious Employers" Exemption

76. On August 1, 2011, the Departments promulgated an amendment to the Interim Final Rules. *See* 76 Fed. Reg. 46621 (Aug. 3, 2011).

77. As amended, the Interim Final Rules granted the HRSA "*discretion* to exempt certain religious employers from the [IOM] Guidelines where contraceptive services are concerned." *Id.* at 46623 (emphasis added).

78. 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. 45 C.F.R. § 147.130(a)(1)(iv)(B) at 76 Fed. Reg. 46626.

79. The vast majority of religious organizations with conscientious objections to providing contraceptive or abortifacient products and related services were excluded from the "religious employers" exemption. Indeed, these religious employers fell outside of this definition if they primarily hired or served persons outside of their specific faith or if their purpose was not exclusively the inculcation of faith, thus excluding many religious organizations that served the sick or poor. This definition was also in conflict with the very nature of Southern Baptist and other evangelical organizations which exist to spread the Gospel to those outside the church.

80. HRSA exercised its discretion under the amended Interim Final Rules to grant an exemption for defined "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* Ex. A at n.**, http://www.hrsa.gov/womensguidelines.

81. Like the original Interim Final Rules, the amended Interim Final Rules were made effective immediately, without prior notice or opportunity for public comment. 76 Fed. Reg. at 46624.

3. The Safe Harbor

82. The public outcry for a broader religious employers' exemption continued for many months and, on January 20, 2012, HHS issued a press release acknowledging "the important concerns some have raised about religious liberty" and stating that religious objectors would be "provided an additional year . . . to comply with the new law." *See* Press Release, U.S. Department of Health and Human Services, Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Oct. 11, 2013) (attached as Exhibit 3).

83. Defendants then created a "temporary enforcement safe harbor," which is a self-imposed stay of enforcement of the contraceptive services mandate for certain qualified organizations. This "safe harbor" would remain in effect for a qualified organization until its first plan year that began on or after August 1, 2013. *See* HHS Guidance on Temporary Enforcement Safe Harbor (Feb. 10, 2012); 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012).

84. The "temporary enforcement safe harbor" applied to "group health plans sponsored by nonprofit organizations that, on and after February 10, 2012, do not provide some or all of the contraceptive coverage otherwise required . . . because of the religious beliefs of the organization." *See* 77 Fed. Reg. at 16502-03.

85. The Departments also indicated they would develop and propose changes to the regulations to accommodate the objections of non-exempt, nonprofit religious organizations following August 1, 2013. *Id.* at 16503.

4. The Advance Notice of Proposed Rulemaking

86. On March 21, 2012, the Departments 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. *Id.* at 16503.

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

5. The Notice of Proposed Rulemaking

88. On February 1, 2013, the Departments issued a Notice of Proposed Rulemaking ("NPRM") purportedly addressing the comments submitted in response to the ANPRM. *See* 78 Fed. Reg. 8456 (Feb. 6, 2013).

89. The NPRM proposed two changes to the then-existing Final Interim Rules. *Id.* at 8458-59.

90. First, it proposed revising the religious employers exemption to define a "religious employer" as 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." *Id.* at 8474.

91. The Departments 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 [Interim Final Rules]." *Id.* at 8461.

92. In other words, religious organizations like the Class Action Plaintiffs that are not formal churches, their integrated auxiliaries, or religious orders would continue to be excluded from the exemption.

93. Second, the NPRM reiterated the Departments' intention to "accommodate" non-exempt, nonprofit religious organizations by making them "designate" their insurers and third party administrators to provide plan participants and beneficiaries with free coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling. *Id.* at 8474-75.

94. The NPRM made no reference to the requirements of the RFRA.

95. The proposed "accommodation" did not resolve the concerns of religious organizations like the Class Action Plaintiffs because it continued to force them to deliberately provide coverage for, or access to, abortifacients and related education and counseling.

96. During the two months allowed for comments, "over 400,000 comments" were submitted in response to the NPRM, 78 Fed. Reg. 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 and abortifacient services.

97. On April 8, 2013, the Church Alliance, of which GuideStone is a member, submitted a 20-page comment letter on the NPRM, detailing how the expanded definition of "religious employer" excluded bona fide religious organizations, and how the proposed accommodation for "eligible organizations" was unworkable, particularly for multiple employer self-insured church plans like the GuideStone Plan. The Church Alliance is an organization composed of the chief executives of thirty-eight church benefit boards, covering mainline and evangelical Protestant denominations, two branches of Judaism, and Catholic schools and institutions. A copy of the Church Alliance's comment letter is available at http://church-alliance.org/initiatives/comment-letters (last visited Oct. 11, 2013).

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

99. 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 Kathleen Sebelius, Remarks at The Forum at Harvard School of Public Health (Apr. 8, 2013), *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (starting at 51:20) (last visited Oct. 11, 2013) (emphasis added).

100. It is clear from the timing of these remarks that Defendants gave no consideration to the comments submitted by the Church Alliance or others in response to the NPRM's proposed "accommodation."

6. The Final Mandate

101. On June 28, 2013, Defendants issued final rules that ignore the objections repeatedly raised by religious organizations and continue to require objecting religious employers to participate in the government's scheme of expanding free access to contraceptive and abortifacient services. *See* 78 Fed. Reg. 39870. The final rules assert, without explanation or analysis, that the mandate and the narrow exemption comply with the requirements of the RFRA. For convenience, we will refer to these rules, together with the comprehensive guidelines regarding preventive services for women supported by HRSA as the "Final Mandate."

102. Under the Final Mandate, HRSA's discretionary "religious employer" exemption, which is still implemented via footnote on its website, *see* Ex. A, http://www.hrsa.gov/womensguidelines, is limited to organizations "organized and operate[d]" as nonprofit entities and "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code," which means that it is limited to "churches, their integrated auxiliaries, and conventions and associations of churches" and the "exclusively religious activities or any religious order." 78 Fed. Reg. at 39896 (codified at 45 C.F.R. § 147.131(a)).

103. All other religious organizations, including the Class Action Plaintiffs, are excluded from the exemption.

104. Although religious organizations like the Class Action Plaintiffs share the same religious beliefs and concerns regarding sanctity of life as the Southern Baptist Convention, the Departments deliberately ignored the regulation's impact on their religious liberty, stating that the "simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement." 78 Fed. Reg. at 39874.

105. The Final Mandate creates a separate "accommodation" for certain non-exempt religious organizations defined as "eligible organizations". 78 Fed. Reg. at 39874 (codified at 45 C.F.R. § 147.131(b)&(c)).

106. An organization is an "eligible organization" and therefore 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 (codified at 45 C.F.R. § 147.131(b)).

107. The purpose or, at the very least, the impact of the Final Mandate, including the restrictively narrow scope of the religious employer exemption, is to discriminate against religious organizations that oppose contraception and abortion and to violate the Plaintiffs' rights to the free exercise of religion, the freedom of speech, expressive association under the First Amendment, the Establishment Clause of the First Amendment, equal protection of the law

guaranteed by the Fifth Amendment, and rights under RFRA. The Final Mandate is also generally invalid because its adoption violated the APA.

108. The Final Mandate applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014, except that the amendments to the religious employer exemption apply to plan years beginning on or after August 1, 2012. *See* 78 Fed. Reg. at 39870. Defendants also extended the "temporary enforcement safe harbor" to encompass plan years beginning on or after August 1, 2013, and before January 1, 2014. *Id.* at 39872.

109. An eligible organization seeking an "accommodation" must execute a self-certification "prior to the beginning of the first plan year to which an accommodation is to apply," and deliver it to the organization's insurer or, if the organization has a self-insured plan, to the plan's appropriate third party administrator. *Id.* at 39875.

110. 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. *Id.*

VI. APPLICATION OF THE FINAL MANDATE TO THE PLAINTIFFS

A. Class Action Plaintiffs

111. By definition, none of the Class Action Plaintiffs are "religious employers" eligible for exemption under the Final Mandate. Therefore, the Final Mandate forces the Class Action Plaintiffs to choose between incurring severe financial hardship or violating their religious beliefs in one of the four following courses of action.

1. Incur Financial Hardship or Violate Religious Beliefs By Continuing Participation in the GuideStone Plan

112. First, a Class Action Plaintiff could continue its participation in the GuideStone Plan. Doing so, however would force the Class Action Plaintiffs to choose between two unacceptable actions. The Class Action Plaintiffs could refuse to self-certify to any third party administrator under the GuideStone Plan to provide the coverage of drugs and devices and related counseling and education for their employees and dependents. For such refusal, however, each Class Action Plaintiff, regardless of its size, will be discriminated against for exercising its religious beliefs by being subject to a penalty beginning on January 1, 2014, under section 4980D of the Code, of $100 per day with respect to each individual to whom the failure to provide contraceptive services relates. *See* 26 U.S.C. §§ 4980D & 9815 (the latter section implements the preventive services requirements set forth in 42 U.S.C. § 300gg-13(a)(4)). The alternative course – to identify, begin a relationship with, and designate a third party administrator to provide the required contraceptive coverage in connection with the GuideStone Plan–would require the Class Action Plaintiffs to violate the requirements of their religion by contracting for, arranging for, and facilitating the coverage at issue.

a. Contracting or Arranging For

113. By delivering its self-certification to a third party administrator, a Class Action Plaintiff would trigger the third party administrator's obligation to "provide or arrange separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39880.

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

115. In the case of a third party administrator to an ERISA-covered plan, the Final Mandate apparently assumes this obligation is imposed on the third party administrator by virtue of ERISA, because the third party administrator is already required to comply with the provisions of ERISA applicable to group health plans subject to ERISA, including section 715 of ERISA, which was added by the Affordable Care Act to impose the contraceptive coverage requirement on ERISA-covered plans. 78 Fed. Reg. 39870, 39876-77 n. 28 and 39881 n. 42 (July 2, 2013). However, ERISA cannot furnish the basis for the third party administrator's obligations in the case of a plan like the GuideStone Plan that is not subject to ERISA. Accordingly, there can be no other basis for the third party administrator's obligation to provide for or arrange for payments for contraceptive services other than through its contract with the GuideStone Plan.

116. The third party administrator 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. Thus, any payment or coverage disputes presumably would have to be resolved under the terms of the GuideStone Plan—a state of affairs that violates the religious beliefs of both GuideStone and the Class Plaintiffs.

b. Facilitating

117. Initially, a Class Action Plaintiff would have to identify its employees to the appropriate third party administrator for the distinct purpose of enabling the government's scheme. The current third party administrators for the GuideStone Plan have not agreed to provide the drugs, devices and related services at issue to the Class Action Plaintiffs. Thus, GuideStone would have to seek out one or more administrators solely for the purpose of having the administrators provide the drugs, devices and related services at issue. After self-certifying to a third party administrator to provide the drugs and devices at issue, a Class Action Plaintiff would have to coordinate with the third party administrator regarding when it was adding or removing employees and beneficiaries from the GuideStone Plan and, as a result, from the contraceptive and abortifacient services payment scheme.

118. A Class Action Plaintiff would also have to coordinate with any appropriate third party administrator under the GuideStone Plan to provide notice to 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, again under the auspices of the GuideStone Plan. 78 Fed. Reg. at 39876.

c. Paying For

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

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

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

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

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

124. It is far from clear that there is a way to ensure that the cost of administering the coverage for, or access to, abortifacients and related education and counseling would not be passed on to the Class Action Plaintiffs through the third party administrator's fees.

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

2. Forced to Take Actions Contrary to Religious Beliefs and Incur Financial and Competitive Hardship By Discontinuing All Coverage

126. Second, a Class Action Plaintiff could discontinue participation in the GuideStone Plan and not seek replacement coverage. However, this choice would require the Class Action

Plaintiffs to compromise their religious beliefs and place themselves at a disadvantage because of the Final Mandate. The Class Action Plaintiffs' religious beliefs motivate them to promote the spiritual and physical well-being of their employees by providing them with health benefits within the construct of those beliefs; however, the Act and Final Mandate would present them with an all-or-nothing choice: either provide benefits that comply with the Final Mandate or cut benefits entirely. The Class Action Plaintiffs' present course—providing benefits for their employees and their families, but doing so without violating their religion—has been outlawed.

127. Similarly, by being forced to discontinue all coverage, the Class Action Plaintiffs would be forced to mistreat their employees, and would be placed at a severe competitive disadvantage in their efforts to hire and retain employees.

128. Additionally, discontinuing coverage would impose on a Class Action Plaintiff with an average of 50 or more full-time employees an excise tax penalty of $2,000 annually beginning in 2015 for each full-time employee if at least one full-time employee enrolls for and receives subsidized coverage on a Health Insurance Marketplace formed in response to the Act (commonly referred to as an "exchange").

3. Forced to Take Actions Contrary to Their Religious Beliefs by Replacing Coverage Under the GuideStone Plan With Group Insurance

129. Third, to avoid any penalties, a Class Action Plaintiff could discontinue participation in the GuideStone Plan and seek other coverage for its employees through group insurance that provides coverage for abortifacients and related education and counseling under the Act and Final Mandate. However, this would not be an acceptable alternative for a Class Action Plaintiff because it would require it to contract for, facilitate or pay for the provision of

abortifacient contraceptives and related education and counseling thereby infringing on its sincerely held religious beliefs.

a. Contracting or Arranging For

130. The Class Action Plaintiffs' religious convictions equally counsel against contracting with an insurance company that will provide free coverage for, or access to, contraceptives that are or could be abortifacients and related education and counseling, which would infringe their sincerely held religious beliefs.

131. Even if group insurance were an acceptable alternative, it is not a practical alternative. A change in coverage effective January 1, 2014, would require a Class Action Plaintiff to: (i) budget for the new coverage; (ii) select an insurer; (iii) negotiate a group contract with the insurer; and (iv) communicate the changes to its employees. There is insufficient time in which to do so.

132. The Affordable Care Act requires that participants in a group health plan be given a Summary of Benefits and Coverage that "accurately describes the benefits and coverage" of the plan. Pub. L. No. 111-148 § 1001(5), 124 Stat. 131 (codified at 42 U.S.C. § 300gg-9).

133. Additionally, plan participants must be given a written notice of any material change in the Summary of Benefits and Coverage at least 60 days' in advance notice of any such change. *See* 77 Fed. Reg. 8668, 8698-8705 (Feb. 14, 2012) (codified at 26 C.F.R. § 54.9815-2715(b), 29 C.F.R. § 2590.715-2715(b) and 45 C.F.R. § 147.200(b)).

134. Any change to a fully insured plan would likely constitute a material change in the information previously provided to covered employees of a Class Action Plaintiff in the Summary of Benefits and Coverage, which would require 60 days' advance notice to the

participants. 77 Fed. Reg. at 8698-8705. However, because of the lateness of the Final Mandate, there is inadequate time in which to change coverage within the law.

b. Facilitating

135. By having to take active steps to identify an insurance company that provides coverage for abortifacients and related education and counseling, to contract with that insurer, and to supply and adopt plan documentation and information that triggers coverage for those services (including the self-certification form), the Class Action Plaintiffs would be required to actively facilitate and promote the distribution of these products and services in ways that are constrained by their religious convictions.

c. Paying For

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

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

138. 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.*, *id.* at 39877-78 (addressing ways insurers can cover up-front costs).

139. 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.

140. The Departments 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." *Id.* at 39877.

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

142. Under this methodology—even assuming its legality—the eligible organization would still bear the cost of the required payments for contraceptive and abortifacient services contrary to its sincerely held religious beliefs, as if the accommodation had never been made.

4. Impinge Religious Beliefs by Adopting a Self-Insured Plan With a Third Party Administrator Willing to Provide or Arrange for Contraception Benefits

143. Fourth, a Class Action Plaintiff could discontinue participation in the GuideStone Plan and adopt its own self-insured employee benefit plan for its employees and appoint a "third party administrator" under the Final Mandate to provide or arrange for the provision of contraceptives that are or could be abortifacients and related education and counseling.

144. As with the third option, this, too, would not be an acceptable alternative to the Class Action Plaintiffs because it would impinge their religious freedom by causing them to contract or arrange for, facilitate and pay for the provision of abortifacients and related education and counseling.

a. Contracting or Arranging For

145. To comply with the Final Mandate in this manner, a Class Action Plaintiff would need to actively seek out and start a relationship with a third party administrator who is willing to provide the products and services at issue.

146. A Class Action Plaintiff would also need to send a self-certification to the third party administrator. By delivering its self-certification to the third party administrator of the new self-insured plan, a Class Action Plaintiff would trigger the third party administrator's obligation to "provide or arrange separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39880.

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

148. In the case of a third party administrator to an ERISA-covered plan, the Final Mandate apparently assumes this obligation is imposed on the third party administrator by virtue of ERISA, because the third party administrator is already required to comply with the provisions of ERISA applicable to group health plans subject to ERISA, including section 715 of ERISA, which was added by the Affordable Care Act to impose the contraceptive coverage requirement on ERISA-covered plans. 78 Fed. Reg. 39870, 39876-77 n. 28 and 39881 n. 42 (July 2, 2013). However, ERISA cannot serve as the basis for the third party administrator's obligations in the case of a self-insured church plan that is not subject to ERISA. Accordingly,

there can be no other basis for the third party administrator's obligation to provide for or arrange for payments of contraceptive services other than through its contract with the new plan.

149. The third party administrator would be also required to provide the contraceptive benefits "in a manner consistent" with the provision of other covered services. *Id*. at 39876-77. Thus, any payment or coverage disputes presumably would be resolved under the terms of the Class Action Plaintiff's plan documents.

150. As previously discussed, even if this alternative were an acceptable option, this would not be a practical alternative for a Class Action Plaintiff effective January 1, 2014. Class Action Plaintiffs would be required to: (i) budget for the new coverage; (ii) select a third party administrator willing to provide for or arrange contraceptive coverage; (iii) negotiate an administrative services agreement with the third party administrator; and (iv) communicate the plan changes to their employees.

151. For budgeting purposes, new single employer self-insured coverage may not be practical for a Class Action Plaintiff because it would impose a potential uncapped liability on the Class Action Plaintiff in light of the Act's prohibition on annual and lifetime limits. Pub. L. No. 111-148 § 1001(5), 124 Stat. 131 (codified at 42 U.S.C. § 300gg-11).

152. A Class Action Plaintiff would have to actively seek out a third party administrator willing to provide or arrange for contraception and other objectionable benefits. Defendants acknowledge "there is no obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities." 78 Fed. Reg. at 39880.

153. Additionally, there is inadequate time to provide any changes in plan documentation, including any Summary of Benefits and Coverage and notices of any material change in the Summary of Benefits and Coverage. *See* 77 Fed. Reg. at 8698-8705 (codified at 26 C.F.R. § 54.9815-2715(b), 29 C.F.R. § 2590.715-2715(b) and 45 C.F.R. § 147.200(b)).

b. Facilitating

154. Under this option, the Class Action Plaintiffs would be required to actively facilitate and promote the distribution of these services in ways that would infringe upon their religious beliefs. Initially, a Class Action Plaintiff would have to identify its employees to the third party administrator for the distinct purpose of enabling the government's scheme. Thereafter, a Class Action Plaintiff would have to coordinate with the third party administrator regarding when it was adding or removing employees and beneficiaries from its healthcare plan and, as a result, from the contraceptive and abortifacient services payment scheme. A Class Action Plaintiff would also have to coordinate with third party administrators to provide notice to 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, under the auspices of the Class Action Plaintiff's own self-funded plan. 78 Fed. Reg. at 39876.

c. Paying For

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

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

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

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

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

160. There is no way to ensure that the cost of administering the coverage for, or access to, contraceptives that are or could be abortifacients and related education and counseling would not be passed on to the Class Action Plaintiffs through the third party administrator's fees.

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

162. For all these reasons, the accommodation does not relieve non-exempt religious organizations like the Class Action Plaintiffs from facilitating free access to contraceptives that are or could be abortifacients and related education and counseling.

B. GuideStone

163. The Final Mandate forces GuideStone to choose between violating the shared religious beliefs of the Southern Baptist Convention and its participating employers regarding the sanctity of life or interfering with its ability to carry out its ministry assignment to provide health plans to churches and other ministry organizations. GuideStone has only three courses of action with respect to the coverage for employees of the Class Action Plaintiffs after December 31, 2013.

1. Continue Refusal to Provide Coverage for Abortifacient Contraceptives and Related Services

164. First, GuideStone Financial Services could continue to refuse to do anything that would provide coverage under the GuideStone Plan for contraceptives that are or could be abortifacient abortion-inducing drugs and devices and related education and counseling services. However, as discussed earlier, this would expose Class Action Plaintiffs that remain in the GuideStone Plan to the financially ruinous penalties under Code section 4980D of $100 per day for each affected individual. Alternatively, Class Action Plaintiffs may be financially forced to cancel their health care coverage for their employees, and this would have a substantial adverse financial impact on the GuideStone Plan and the remaining employers because there would be fewer participating employers to share the fixed costs of administration.

165. Pursuing this course could force the GuideStone to dramatically scale back the ministry it has been assigned by the Southern Baptist Convention to provide health insurance benefits to evangelical ministry organizations.

2. Provide Coverage for Abortifacient Contraceptives and Related Services Through an Accommodation

166. Second, at least in theory, a third party administrator of the GuideStone Plan could provide through an "accommodation" coverage for abortifacients and related education and counseling services. However, doing so would impinge the sincerely held religious beliefs GuideStone shares with the Southern Baptist Convention and the Class Action Plaintiffs, by causing it to enter into contracts with one or more third party administrators who in turn will have the responsibility to contract or arrange for, facilitate and pay for the provision of abortifacients and related education and counseling.

167. Additionally, the Final Mandate purports to restrict GuideStone from interfering with the accommodation thereby having its rights to free speech and the free exercise of its religious convictions curtailed. *See* 26 C.F.R. § 54.9815-2713A(b)(1)(B)(iii), *published* 78 Fed. Reg. 39870, 39892-93 (July 2, 2013) (prohibiting interference with the third party administrator's arrangements to provide contraceptive services).

168. Further, the mere fact that GuideStone may have a contractual relationship with one or more third party administrators that could be called upon to effectuate the accommodation impinges its sincerely held religious beliefs.

169. Class Action Plaintiffs may be forced to cancel their health care coverage for their employees for religious reasons to avoid the provision of objectionable coverage, and this would have a substantial adverse financial impact on employers and participants remaining in the GuideStone Plan because there would be fewer participating employers to share the fixed costs of administration.

3. Drop Coverage for All Class Action Plaintiffs

170. Third, effective January 1, 2014, GuideStone could seek to limit its coverage to only "religious employers" that are exempt from the Final Mandate. This would force GuideStone to stop a large part of its religious exercise, and would be counter to its ministry assignment from the Southern Baptist Convention to make available health coverage to those employers that share common bonds and convictions with the Southern Baptist Convention. This would also cause a severe disruption to the Class Action Plaintiffs who would be dropped from the GuideStone Plan, unless they wanted to drop employee health coverage altogether, they would be forced at this late date to seek other coverage beginning January 1, 2014. Finally, limiting coverage would also have an adverse impact on the employers and participants continuing to utilize the GuideStone Plan because there would be fewer participating employers to share the fixed costs of administration.

VII. RELIGIOUS FREEDOM RESTORATION ACT

171. Under RFRA, the Federal Government is prohibited from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

A. The Mandate Substantially Burdens Plaintiffs' Exercise of Religion

172. As previously discussed, forcing Plaintiffs to provide, contract or arrange for, pay for or otherwise facilitate access to contraceptives that are or could be abortifacients and related

education and counseling or suffer substantial adverse economic effects is a substantial burden on their exercise of religion.

173. As discussed earlier, the Southern Baptist Convention has passed Resolutions supporting the sanctity of life and condemning elective abortions in general and abortifacient drugs in particular. Relevant Resolutions adopted by the Southern Baptist Convention that are still in force provide as follows:

> 1988 – "we call upon all Southern Baptists to take an active stand in support of the sanctity of human life"
>
> 1991 – "we oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread"
>
> 1993 – "we oppose the testing, approval, distribution, marketing and usage in the United States of any abortion pills and urge U.S. corporations which are considering such business ventures to refuse to do so"
>
> 1994 – "we . . . condemn the blatant advocacy of RU 486 by the Clinton Administration, and oppose the testing, approval, manufacturing, marketing, and sale of the abortion pill in the United States"
>
> 2000 - "[we] reaffirm our abhorrence of elective abortion"

174. Article 15 of the *Baptist Faith and Message 2000*, which has the heading "The Christian and the Social Order," provides "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life <u>from conception</u> to natural death."

175. Reaching Souls, Truett-McConnell and the other Class Action Plaintiffs share the core convictions of the Southern Baptist Convention regarding the sanctity of life from conception to natural death. For example, Truett-McConnell has adopted the *Baptist Faith and Message 2000* as its official doctrinal statement and displays it on its website under the heading

"About Us." *See* http://www.truett.edu/abouttmc/baptist-faith-a-message.html (last visited Oct. 11, 2013.) The *Baptist Faith and Message 2000* is also listed in the Employee Handbook provided to all Truett-McConnell employees. Additionally, all full-time faculty have signed the document as part of their employment agreement since October 27, 2010. Therefore, Truett-McConnell believes that an abortion or other method that harms an embryo from the moment of conception/fertilization, ends a human life and is a sin. Reaching Souls and Truett-McConnell are dedicated to carrying out their missions and ministries in accordance with their religious principles. Accordingly, they have adopted the GuideStone Plan so that their employee health plan is consistent with these religious principles.

176. Consistent with the polity of the Southern Baptist Convention, which recognizes the autonomy and independence of the local church, no Southern Baptist church or Southern Baptist-church-affiliated organization is required to adopt the GuideStone Plan to provide benefits for its employees, but those that have adopted the GuideStone Plan have evidenced their commitment to provide an employee benefit plan that is consistent with their commitment to human life.

177. Reaching Souls and Truett-McConnell cannot participate in the government's system for providing coverage for abortion-inducing drugs, and related counseling and education, for its employees. They cannot pay for such benefits. They cannot provide paperwork that will trigger such benefits. They cannot designate another party to provide such benefits. They cannot make certifications that would create a duty for another entity to provide such benefits under their plan and through them. Simply put, as a matter of religious faith,

Reaching Souls and Truett-McConnell cannot participate in any way in the government's program to provide access to these services without violating their deeply held religious beliefs.

178. The other class members—all of whom share the core convictions of the Southern Baptist Convention regarding the sanctity of life from conception to natural death, and all of whom have chosen to provide health benefits through the GuideStone Plan, which is expressly designed to provide benefits in accordance with Southern Baptist Convention principles and does not provide abortifacient contraceptive coverage—likewise cannot participate in the government's program without violating their religious beliefs.

179. GuideStone is likewise operated in accordance with these religious teachings, and cannot participate in the government's program to provide access to these abortifacient services without violating its sincerely held religious beliefs. The Final Mandate would impinge its religious freedom by requiring it to enter into contracts with one or more third party administrators who in turn will have the responsibility to contract or arrange for, facilitate and pay for the provision of abortifacients and related education and counseling. As described above, the Final Mandate would require GuideStone to either compromise its religious beliefs or dramatically reduce its religious exercise of administering health benefits in accordance with Southern Baptist principles.

180. As set forth above, refusing to comply with the Final Mandate will result in severe financial consequences for the class members (in the form of massive fines and penalties) and for GuideStone (in the form of elimination of large portions of its ministry).

181. For all Plaintiffs, therefore, the Final Mandate "requires participation in an activity prohibited by a sincerely held religious belief," prevents participation in conduct motivated by a sincerely held religious belief, and "places substantial pressure on" the class members "to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013), *petition for cert. filed* (U.S. Sept. 19, 2013) (No. 13-354). This is the essence of a substantial burden on religion.

B. There is No Compelling Interest for the Application of the Final Mandate to Plaintiffs

182. The government lacks any compelling interest in coercing the Plaintiffs to promote and facilitate access to contraceptives that are or could be abortifacients and related education and counseling.

183. Many of these goods or services are already widely available at non-prohibitive costs.

184. The FDA has approved twenty contraceptive methods that fall under the Final Mandate. *Id*. at 1123. In this Complaint, Plaintiffs only object to four of the twenty currently FDA approved methods, an identical objection to that of the *Hobby Lobby* plaintiffs. *Id.* at 1125, namely: (1) ella; (2) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (3) the Copper IUD; and (4) the IUD with Progestin.

185. Among other things, the Departments claim that the "religious employers" exemption does not undermine its compelling interest in making contraceptive 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. Under this reasoning, the Class Action Plaintiffs should also be exempt. Because the Class Action Plaintiffs share the well-known views of the Southern Baptist Convention on abortifacients, the Class Action Plaintiffs' 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.

186. In one form or another, the government also provides exemptions for: (i) grandfathered plans, 42 U.S.C. § 18011; 75 Fed. Reg. at 41731; (ii) small employers with fewer than 50 employees, 26 U.S.C. § 4980H(c)(2)(A)[1]; (iii) members of certain religious sects or divisions that conscientiously object to acceptance of public or private insurance funds, 26 U.S.C. § 5000A(d)(2)(A)(i); and (iv) members of "health care sharing ministries" that meet certain criteria, 26 U.S.C. § 5000A(d)(2)(B)(i).

187. Although there are many requirements for maintaining grandfathered status, *see* 26 C.F.R. § 54.9815-1251T(g), if those requirements are met, a plan may be grandfathered for an indefinite period of time.

188. According to the Departments' "mid-range estimate," 55% of large-employer plans would remain grandfathered and 34% of small-employer plans would remain grandfathered for 2013. Defendants assumed that large-employer plans accounted for 133

[1] To be clear, although small employers are exempt from the penalties under Code section 4980H if they do not provide coverage, they <u>are</u> subject to the penalties under Code section 4980D if they do provide coverage that does not include coverage for abortifacient contraceptives and related services.

million enrollees, and small-employer plans accounted for 43 million enrollees, so their "mid-range" projections anticipated that roughly 88 million Americans would still be covered by grandfathered plans in 2013. 75 Fed. Reg. 34538, 34550 & 34553 (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 (last visited Oct. 11, 2013) (attached as Exhibit 4); 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") (attached as Exhibit 5).

189. In fact, these projections regarding the number of employees still covered by grandfathered plans may be low since they were based only on ERISA-covered plans and governmental plans, thus omitting non-ERISA church plans like the GuideStone Plan. 75 Fed. Reg. at 34550.

190. According to the United States Small Business Administration, in 2010, more than 31 million individuals are employed by firms with fewer than 50 employees. *See*, static_us(2).xlsx at http://www.sba.gov/advocacy/849/12162#susb (last visited Oct. 11, 2013) (attached as Exhibit 6).

191. These broad exemptions demonstrate that the government has no compelling interest in refusing to include religious organizations like the Class Action Plaintiffs within its religious exemption.

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

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

194. Indeed, the Final Mandate was promulgated by government officials, and supported by non-governmental organizations, who hold religious beliefs regarding marriage, family, and abortion that are firmly contrary to the Plaintiffs' beliefs.

195. Defendant Sebelius, for example, has long been a staunch supporter of abortion rights and a vocal critic of religious teachings and beliefs regarding abortion and contraception. On October 5, 2011, six days after the comment period for the original Interim Final Rules 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." *See* William McGurn, Op-Ed., *The Church of Kathleen Sebelius,* Wall St. J., Dec. 13, 2011, *available at* http://online.wsj.com/article/SB10001424052970203518404577094631979925326.html (last visited Oct. 11, 2013).

196. 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." *Id.*

197. On July 16, 2013, Secretary Sebelius further compared opponents of the Affordable Care Act generally to "people who opposed civil rights legislation in the 1960s," stating that upholding the Act requires the same action as was shown "in the fight against lynching and the fight for desegregation." *See* Kathleen Sebelius, U.S. Secretary of Health and Human Services, Address at the 104th NAACP Annual Conference (July 16, 2013), *available at* http://www.hhs.gov/secretary/about/speeches/sp20130716.html (last visited Oct. 11, 2013).

C. The Final Mandate is Not the Least Restrictive Means of Providing Contraceptive Services

198. There are multiple ways in which the government could provide access to contraceptives and related education and counseling without requiring religious employers such as the Class Action Plaintiffs to provide for such benefits through their employee benefit plans in violation of their religious beliefs.

199. For example, the government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow employees who want plans with drugs and devices at issue to access such plans in the new healthcare exchanges.

200. Plaintiffs in no way recommend these alternatives, and, indeed, oppose many or all of them as a matter of policy. But the fact that they remain available to the government demonstrates that the Final Mandate cannot survive the requirement of RFRA prohibiting the Federal Government from "substantially burden[ing] a person's exercise of religion," unless, among other things, it is the "least restrictive means of furthering" the government's compelling interest. 42 U.S.C. § 2000bb-1(b)(2).

VIII. CLASS ACTION ALLEGATIONS

201. Reaching Souls and Truett-McConnell (the "Class Representatives") bring this action on behalf of themselves and all others similarly situated as members of a proposed plaintiff class pursuant to Sections (a), (b)(1), and (b)(2) of Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, risk of incompatible standards, and cohesiveness requirements of those provisions.

202. The class is defined as those employers that: (i) have adopted or in the future will adopt the GuideStone Plan to provide medical coverage for their "employees" or former employees and their dependents ("employees" for purposes of this requirement has the meaning set forth in Code section 414(e)(3)(B)); (ii) are or could be reasonably construed to be "eligible organizations" within the meaning of the Final Mandate; and (iii) are not "religious employers" within the meaning of the Final Mandate.

203. The class members are all evangelical organizations operated in accordance with Southern Baptist principles and religious teachings, and that share the core convictions of the Southern Baptist Convention regarding the sanctity of life from conception to natural death. Currently, there are estimated to be more than 138 current class member employers in

approximately 26 states. The proposed class includes employers that are not currently known but may join the GuideStone Plan in the future. Accordingly, joinder is impracticable, and the disposition of the claims of these class members in a single class action will provide substantial benefits to all parties and to the Court. The claims of the representative Class Representatives are typical of the claims of the class in that the Class Representatives and all class members will be equally and similarly harmed by the Defendants' enforcement of the Affordable Care Act and Final Mandate. Furthermore, the factual bases of Defendants' actions are common to all class members. The class members share in the same religious beliefs regarding the sanctity of life from conception to natural death and, therefore, will suffer the same impact and violation of rights.

204. Most if not all of the questions of law and fact are common to the Class Representatives and the class members as set forth above. By definition none of the Class Action Plaintiffs are eligible for the religious employer exemption under the Final Mandate. Therefore, the Final Mandate forces the Class Action Plaintiffs to choose between incurring severe financial hardship or substantially burdening their sincerely held religious beliefs and suffering the infringement of their religious freedom by taking steps to invoke the "accommodation," in one of the four courses of action discussed above.

205. The Class Representatives will fairly and adequately protect the interests of the Class. The Class Representatives have retained counsel with substantial experience in litigating class action cases and in litigating violations of religious and constitutional rights. Plaintiffs and their counsel are committed to prosecuting this action vigorously on behalf of the Class, and

have the resources to do so. Upon information and belief, the Class Representatives do not have an interest adverse to those of the class.

206. This case is maintainable as a class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure. Because the Class Representatives seek injunctive relief and corresponding declaratory relief for the entire class, the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to Defendants and with respect to individual members of the class which would establish incompatible standards of conduct for Defendants. Further, separate adjudications with respect to individual class members would, as a practical matter, give rise to avoidable litigation over whether the separate adjudications are dispositive of the interests of other class members who are not parties and may impair and impede their ability to protect their interests.

207. This case is also maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure because Defendants have acted and refused to act on grounds generally applicable to the entire class under the same statute and regulations. All members of the class are entitled to a declaration that the Final Mandate violates the Class Action Plaintiffs' rights to the free exercise of religion, the freedom of speech, and expressive association under the First Amendment; violate the Establishment Clause of the First Amendment; deprive Class Action Plaintiffs of the equal protection of the law guaranteed by the Fifth Amendment; and violate the Religious Freedom Restoration Act. Further, all members of the class will be entitled to an injunction prohibiting Defendants from enforcing the Final Mandate against the Class Action Plaintiffs and from charging or assessing penalties against the Class Action Plaintiffs for failure

to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling.

IX. CAUSES OF ACTION

COUNT I

Violation of the Religious Freedom Restoration Act

208. The Plaintiffs incorporate by reference all preceding paragraphs.

209. Plaintiffs' sincerely held religious beliefs require them to speak on behalf of the unborn, contend for the sanctity of all human life from conception to natural death, uphold the conviction that an abortion or other method that harms an embryo from the moment of conception/fertilization, ends a human life and is a sin. The Final Mandate which requires Plaintiffs to promote and support—directly and/or indirectly—abortifacients and related education and counseling, including providing a health care plan that provides access to or the means of acquiring such products or services, impinges upon Plaintiffs' religious freedoms. Plaintiffs' compliance with their religious beliefs is a religious exercise.

210. The Final Mandate substantially burdens Plaintiffs' sincerely held religious beliefs.

211. The Final Mandate does not further any compelling governmental interest.

212. The Final Mandate is not the least restrictive means to accomplish any permissible governmental interest.

213. The Final Mandate creates government-imposed coercive pressure on the Plaintiffs to change, compromise, or violate their religious beliefs.

214. The Final Mandate chills the Plaintiffs' religious exercise.

215. The Final Mandate forces GuideStone to choose between suffering infringement upon its religious beliefs or dramatically reducing the scope of its ministry.

216. The Final Mandate exposes the Class Action Plaintiffs to substantial financial penalties for their religious exercise.

217. The Final Mandate exposes the Plaintiffs to substantial competitive disadvantages.

218. The Final Mandate imposes a substantial burden on the Class Action Plaintiffs' religious exercise.

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

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

221. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT II

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

222. The Plaintiffs incorporate by reference all preceding paragraphs.

223. The Final Mandate compels the Plaintiffs to subsidize and/or provide access to abortifacients and related education and counseling regarding contraceptives that are or could be abortifacients thereby infringing upon their sincerely held religious beliefs. Plaintiffs' compliance with these beliefs is a religious exercise.

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

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

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

227. The Final Mandate furthers no compelling governmental interest.

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

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

230. The Final Mandate chills Plaintiffs' religious exercise.

231. The Final Mandate exposes Class Action Plaintiffs to substantial fines for their religious exercise.

232. The Final Mandate exposes the Plaintiffs to substantial competitive disadvantages with respect to the hiring and retention of employees.

233. The Final Mandate imposes a substantial burden on the Plaintiffs' religious exercise.

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

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

236. Absent injunctive and declaratory relief against the Final Mandate, the Class Action Plaintiffs have been and will continue to be harmed.

COUNT III

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

237. The Plaintiffs incorporate by reference all preceding paragraphs.

238. The Plaintiffs' sincerely held religious beliefs prohibit them from deliberately subsidizing and/or providing to their employees access to abortifacients and related education and counseling regarding contraceptives that are or could be abortifacients. The Plaintiffs' compliance with these beliefs is a religious exercise.

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

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

241. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate the Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

242. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have 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

243. The Plaintiffs incorporate by reference all preceding paragraphs.

244. 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.

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

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

247. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate the Plaintiffs' rights secured to them by the First Amendment of the United States Constitution.

248. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have 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*)

249. The Plaintiffs incorporate by reference all preceding paragraphs.

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

251. The Final Mandate and Defendants' threatened enforcement of the Final Mandate therefore violate the Plaintiffs' rights secured to them by the Establishment Clause of the First Amendment of the United States Constitution.

252. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT VI

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

253. The Plaintiffs incorporate by reference all preceding paragraphs.

254. 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.

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

256. 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.

257. Each of the Plaintiffs has made an internal decision, based on religious convictions regarding the sanctity of life, that the health plans it makes available to its employer members and employees may not subsidize, provide, or facilitate access to contraceptives that are or could be abortifacients and related education and counseling.

258. The Final Mandate's interference with the Plaintiffs' internal decisions affects their faith and mission by requiring them to subsidize, provide, and facilitate practices that directly conflict with their religious beliefs.

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

260. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have 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

261. The Plaintiffs incorporate by reference all preceding paragraphs.

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

263. Religious liberty is a fundamental right.

264. The "religious employer" exemption in the Final Mandate protects many religious objectors, but not the Plaintiffs.

265. The "accommodation" in the Final Mandate provides no meaningful protection for the Plaintiffs.

266. The Final Mandate and Defendants' threatened enforcement of the Final Mandate therefore violate the Plaintiffs' rights secured to them by the Establishment Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

267. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT VIII

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

268. The Plaintiffs incorporate by reference all preceding paragraphs.

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

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

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

272. The Final Mandate and Defendants' threatened enforcement of the Final Mandate thus violate the Plaintiffs' rights secured to them by the Fifth Amendment of the United States Constitution.

273. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT IX

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

274. The Plaintiffs incorporate by reference all preceding paragraphs.

275. The Plaintiffs believe that the governmental requirement to provide abortifacients and related education and counseling violates their religious beliefs.

276. The Final Mandate would compel Plaintiffs to provide self-certifications, designations, or other written or spoken statements which, by law, will trigger payments for abortifacients and related services.

277. The Final Mandate also forbids Plaintiffs from speaking to third party administrators and encouraging them not to provide access to abortifacient contraceptives.

278. The Final Mandate would compel the Plaintiffs to facilitate access to government-dictated education and counseling related to contraceptives that are or could be abortifacients.

279. Defendants' actions thus violate the Plaintiffs' right to speak, and the Plaintiffs' right to be free from compelled speech, as secured to them by the First Amendment of the United States Constitution.

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

281. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT X

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

282. The Plaintiffs incorporate by reference all preceding paragraphs.

283. The Plaintiffs sincerely believe that contraceptives that are or could be abortifacients violate their religious beliefs.

284. The Final Mandate would compel the Plaintiffs to facilitate activities that they sincerely believe are violations of their religious beliefs.

285. The Final Mandate would compel the Plaintiffs to facilitate access to government-dictated education and counseling related to contraceptives that are or could be abortifacients.

286. Defendants' actions thus violate the Plaintiffs' right of expressive association as secured to them by the First Amendment of the United States Constitution.

287. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have 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

288. The Plaintiffs incorporate by reference all preceding paragraphs.

289. By stating that HHS, through the Health Resources and Services Administration, "may" grant an exemption to certain religious groups, the Final Mandate purports to vest HHS with unbridled discretion over which organizations can have their First Amendment interests accommodated.

290. Defendants have ignored federal religious liberty law and have instead 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 Plaintiffs.

291. 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.

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

293. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT XII

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

294. The Plaintiffs incorporate by reference all preceding paragraphs.

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

296. 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.

297. 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.

298. 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. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, 231 (2011), *available at* http://www.nap.edu/openbook.php?record_id=13181&page=231 (last visited Oct. 11, 2013).

299. 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. *See* 77 Fed. Reg. at 8725; *see also* Ex. A, http://www.hrsa.gov/womensguidelines.

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

301. 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."

302. 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."

303. Thereafter, Defendants did not consider or respond to the voluminous subsequent comments they received in opposition to the Interim Final Rules or the NPRM.

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

305. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT XIII

Violation of the Administrative Procedure Act
Arbitrary and Capricious Action

306. The Plaintiffs incorporate by reference all preceding paragraphs.

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

308. Defendants' explanation for their decision not to exempt the Plaintiffs and similar religious organizations from the Final Mandate runs counter to the evidence submitted by religious organizations during the comment periods.

309. Defendant Secretary Sebelius, in remarks made at Harvard University on April 8, 2013, essentially conceded that the Defendants completely disregarded the religious liberty concerns submitted by thousands of religious organizations and individuals. *See* Kathleen Sebelius, Remarks at The Forum at Harvard School of Public Health (Apr. 8, 2013), *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius (starting at 51:20) (last visited Oct. 11, 2013).

310. Thus, Defendants' issuance of the Final Mandate was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because they failed to consider the full implications of the Final Mandate and they did not take into consideration the evidence against it.

311. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT XIV

Violation of the Administrative Procedure Act
Agency Action Without Statutory Authority

312. The Plaintiffs incorporate by reference all preceding paragraphs.

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

314. Defendants lack statutory authority to coerce third party administrators to pay or provide for contraceptive abortifacients and related educational and counseling services for individuals with whom they have no contractual or fiduciary relationship.

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

316. Defendants lack statutory authority to allow user fees from the federal exchanges to be used to purchase contraceptive abortifacients and related educational and counseling services for employees not participating in the exchanges.

317. 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 Plaintiffs' First Amendment rights.

318. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have 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

319. The Plaintiffs incorporate by reference all preceding paragraphs.

320. The Final Mandate is contrary to the Weldon amendment, which has been included in every federal appropriations law since 2004. Section 507 of the most recent Appropriations Act provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and HHS] 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, Pub. L. No. 112-74, Division F, Title V, 125 Stat. 786, 1111 (2012).

321. The Final Mandate requires certain employers, including the Class Action Plaintiffs, to deliberately provide health benefits for their employees that facilitates access to all Federal Drug Administration-approved contraceptives, and as a possible result requires GuideStone Plan and GuideStone to elect whether they must also facilitate those acts.

322. Some FDA-approved contraceptives required to be provided by the Final Mandate cause abortions.

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

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

325. Absent injunctive and declaratory relief against the Final Mandate, the Plaintiffs have been and will continue to be harmed.

COUNT XVI

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

326. The Plaintiffs incorporate by reference all preceding paragraphs.

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

328. 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."

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

330. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; rather, only the issuer of the plan has that authority.

331. The Final Mandate requires certain employers, including the Class Action Plaintiffs, to deliberately provide health benefits for their employers that would facilitate access to coverage of all Federal Drug Administration-approved contraceptives, and as a possible result requires GuideStone Plan and GuideStone to elect whether they must also facilitate those acts.

332. Some FDA-approved contraceptives cause abortions.

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

334. Absent injunctive and declaratory relief against the Final Mandate, the Class Action Plaintiffs have been and will continue to be harmed.

Request for Preliminary Injunction

335. Plaintiffs repeat and reallege the allegations contained in the paragraphs above as if fully set forth herein.

336. Plaintiffs request a preliminary injunction prohibiting Defendants while this lawsuit is pending from enforcing the Final Mandate against the Plaintiffs, including Class Action Plaintiffs, GuideStone Financial Services and the GuideStone Plan and any of its third party administrators (acting on behalf of the aforementioned entities), and prohibiting the Defendants from charging or assessing penalties against the Class Action Plaintiffs for failure to offer or facilitate access to abortifacient contraceptives and related education and counseling, including those found in 26 U.S.C. §§ 4980D and 4980H, because (a) Plaintiffs and Class Action Plaintiffs will suffer immediate and irreparable injury, (b) other remedies available at law, such as monetary damages, are inadequate to fully compensate them for that injury, (c) there is a substantial likelihood that Plaintiffs and Class Action Plaintiffs will prevail on the merits, (d) the harm faced by Plaintiffs and Class Action Plaintiffs outweighs the harm that would be sustained by Defendants if a preliminary injunction were granted; (e) the issuance of a preliminary

injunction will not adversely affect the public interest and public policy, and (f) Plaintiffs are willing to post a bond in an amount the Court deems appropriate. FED. R. CIV. P. 65.

337. Moreover, class-wide injunctive relief is necessary to give GuideStone Financial Services effective relief. If Defendants enforce the Final Mandate against any members of the GuideStone Plan, GuideStone Financial Services would be exposed to the injuries and harm described in Section VI.B. above.

338. Plaintiffs respectfully request that the Court set a hearing on this request for a preliminary injunction at the earliest possible time and, after hearing, grant Plaintiffs' request for preliminary injunction.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs, on behalf of themselves and all others similarly situated, request that the Court:

1. Enter an order certifying the proposed plaintiff class, designating Reaching Souls and Truett-McConnell as named representative of the Class, and designating the undersigned as Class Counsel.

2. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against the Plaintiffs violate the Religious Freedom Restoration Act, and that no penalties can be charged or assessed against the Plaintiffs for failure to offer or facilitate access to contraceptives that are or could be abortifacients and

related education and counseling, including any penalties under 26 U.S.C. §§ 4980D and 4980H;

3. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against the Plaintiffs violate the First Amendment of the United States Constitution, and that no penalties can be charged or assessed against the Plaintiffs for failure to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling, including any penalties under 26 U.S.C. §§ 4980D and 4980 H;

4. Declare that the Final Mandate and Defendants' enforcement of the Final Mandate against the Plaintiffs violate the Fifth Amendment of the United States Constitution, and that no penalties can be charged or assessed against the Plaintiffs for failure to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling, including any penalties under 26 U.S.C. §§ 4980D and 4980H;

5. Declare that the Final Mandate was issued in violation of the Administrative Procedure Act, and that no penalties can be charged or assessed against the Class Action Plaintiffs for failure to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling, including any penalties under 26 U.S.C. §§ 4980D and 4980H;

6. Issue a preliminarily injunction and permanent injunction prohibiting Defendants from enforcing the Final Mandate against the Plaintiffs, including Class Action Plaintiffs, and prohibiting the Defendants from charging or assessing penalties against the Class Action Plaintiffs for failure to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling;

7. Award the Plaintiffs the costs of this action and reasonable attorney's fees; and

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

Respectfully submitted this 11th day of October, 2013.

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