

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FILED - 3
JULY 17 2013
FOR THE U.S. DISTRICT COURT
OF INDIANA

UNIVERSITY OF NOTRE DAME,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,

Defendants.

Case No. 3 : 13CV1276

COMPLAINT

1. This lawsuit is about one of America’s most cherished freedoms: the freedom to practice one’s religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception. Those services are, and will continue to be, freely available in the United States, and nothing prevents the Government itself from making them more widely available. But the right to such services does not authorize the Government to force the University of Notre Dame (“Notre Dame”) to pay for, facilitate access to, and/or become entangled in the provision of products, services, practices, and speech that are contrary to its sincerely held religious beliefs. It does not authorize the Government to coerce Notre Dame to participate in a program whose central financial premise—“cost neutrality” through reductions in the number of childbirths—is antithetical to Notre Dame’s faith. Finally, it

does not authorize the Government to require Notre Dame to facilitate and appear to endorse practices that Catholic doctrine considers morally wrong. *See, e.g.*, Advertisements of Colorado Consumer Health Initiative, including one depicting female youth next to male youth and stating “OMG he’s hot! Let’s hope he’s as easy to get as this birth control. My health insurance covers the pill, which means all I have to worry about is getting him between the covers.” (attached as Exhibit A). Notre Dame’s Catholic mission—particularly its mission as an educator of youth in a Catholic tradition—dictates that it avoid facilitation or affiliation with objectionable products, services, practices, and mores that are inextricably intertwined with the law challenged in this case. Because the U.S. Government Mandate requires Notre Dame pay for, facilitate access to, and/or become entangled in the provision of products, services, practices, and speech that are contrary to its sincerely held religious beliefs, the Mandate would require Notre Dame to commit scandal, which in Catholic theology is defined as leading by words or example others to engage in wrongdoing. Put simply, it offends Notre Dame’s sincerely held religious beliefs to play any role in the law from which the Government refuses to exempt Notre Dame.

2. Through this lawsuit, Notre Dame does not seek to impose its religious beliefs on others. It simply asks that Notre Dame be permitted to act according to its faith and in ways that articulate the moral standards to which it adheres. Notre Dame seeks only to protect its right to the free exercise of its religion, its right to be recognized as a religious institution, its right to avoid being forced to pay for, facilitate access to, and/or become entangled in the provision of products and services that violate its religious beliefs, and its right not to be compelled to speak, or to be silent, in a way that implies acceptance or endorsement of practices directly at odds with its religious teachings.

3. The U.S. Government Mandate that lies at the heart of this lawsuit has a well documented and tortured history of modifications, amendments, and changed enforcement policies. The reason the history is tortured is simple: the Mandate impinges on fundamental rights of religion and free speech, and the Government has been caught up in fruitless and unsuccessful attempts to work around those rights. But instead of recognizing the inalienable rights of all religious organizations, the Government has instead acknowledged and exempted only a small class of religious entities, and required the rest—like Notre Dame—to “certify” its beliefs in a way never before required, and nonetheless to participate and become entangled in a program antithetical to its faith. The now final U.S. Government Mandate continues to coerce Notre Dame to violate its beliefs, and Notre Dame has regrettably been forced to bring this lawsuit to protect its rights.

4. The U.S. Government Mandate also improperly attempts to sever Notre Dame from the Roman Catholic Church. Notre Dame sincerely believes in the unity of the Catholic Church, including that Catholic educational institutions, especially Notre Dame, are by definition the “heart of the church” or *Ex Corde Ecclesiae*. Notre Dame’s mission is just as central to Catholic faith and life as the mission of Catholic houses of worship. Yet, the U.S. Government Mandate would limit the definition of “religious employers” to houses of worship, attempting to sever the Church from its heart and to divide the unified Church. The U.S. Government Mandate would thus turn the broad right to Religious Exercise into a narrow Right to Worship.

5. The U.S. Government Mandate, including the narrow exemption for certain “religious employers,” is irreconcilable with the First Amendment, the Religious Freedom Restoration Act (“RFRA”), and other laws. The Government has not shown any compelling need to attempt to sever Notre Dame from the Church, nor to force Notre Dame to pay for,

facilitate access to, and/or become entangled in the provision of abortion-inducing drugs, sterilization, contraception, and related counseling services (the “objectionable products and services”).

6. Additionally, the Government has not shown a compelling need to force Notre Dame to be part of a vehicle that inevitably encourages and counsels members of a Catholic community to use these products and procedures at issue, in effect normalizing them. Nor has the Government shown a compelling need to force Notre Dame to accept a purported promise of “cost neutrality” that is expressly premised on reductions in the number of childbirths as a cost-saving measure—a premise antithetical to its sincerely held Catholic religious beliefs.

7. The Government also has not shown that the U.S. Government Mandate is narrowly tailored to advancing its interest in increasing access to these services, since these services are already widely available and nothing prevents the Government from making them even more widely available by providing or paying for them directly through a duly-enacted law.

8. The Government, therefore, cannot justify its decision to force Notre Dame, in violation of its sincerely held religious beliefs, to be an unwilling participant in the U.S. Government Mandate and the process through which it is implemented.

BACKGROUND

I. PRELIMINARY MATTERS

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

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

11. Defendant Thomas Perez is the Secretary of the U.S. Department of Labor. He is sued in his official capacity.

12. Defendant Jacob J. Lew is the Secretary of the U.S. Department of the Treasury. He is sued in his official capacity.

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

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

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

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

17. An actual, justiciable controversy currently exists between Plaintiff and Defendants. Absent a declaration resolving this controversy and the validity of the U.S. Government Mandate, Notre Dame will be required to be act in contravention of its sincerely held religious beliefs, as described below.

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

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

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

University of Notre Dame

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

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

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

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

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

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

Notre Dame's Religious Beliefs

27. Faith is at the heart of Notre Dame's educational mission. In accordance with the apostolic constitution *Ex Corde Ecclesiae*, which governs and defines the role of Catholic

colleges and universities, Notre Dame embraces the richness of the Catholic intellectual tradition, “consecrat[ing] itself without reserve to the cause of truth.” It aims to provide a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with the arts, sciences, and every other area of human scholarship.

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

29. To carry out that religious mission, Notre Dame both lives and teaches its students how to live Catholic moral teachings both inside and beyond the church doors. This religious mission is the heart of the Church and cannot be severed from it. Indeed, Notre Dame is the ideal fusion of Catholic worship (with daily and weekly Catholic mass) and living Catholic moral teachings (educating future leaders in a society of scholars that is enriched in every way by Catholic intellectual and cultural traditions). It would violate Notre Dame’s religious beliefs, including the beliefs articulated in *Ex Corde Ecclesiae*, to sever Notre Dame from the Catholic Church.

30. The Catholic Church’s well-established religious beliefs are articulated in the Catechism of the Catholic Church. One of the central tenets of the Catholic faith is belief in the sanctity of human life and the dignity of all persons. Thus, the Church believes that the “dignity

of the human person is rooted in his creation in the image and likeness of God.” *Catechism of the Catholic Church* ¶ 1700.

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

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

33. Catholic teachings also prohibit the use of contraceptives to impede conception. Consequently, artificial contraception and sterilization cannot be used for the purpose of impeding procreation. *Id.* ¶ 2370. The Church, however, does not oppose the use of drugs commonly used as contraceptives when a physician prescribes the medication for non-contraceptive purposes.

34. The Catholic moral tradition forbids “scandal,” which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. “Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor’s tempter.” *Id.* ¶ 2284. Scandal is particularly grave when associated with those “who by nature or office are obliged to teach and educate others.” *Id.* ¶ 2285. Scandal in this sense can be caused not only when an individual or institution deliberately acts to commit or condone some wrong-doing, but also when it *appears to do so* through its actions. It is Notre Dame’s sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to Catholic faith.

Notre Dame's Health Insurance Plans

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

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

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

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

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

40. Over 11,000 students at Notre Dame are eligible for coverage under Notre Dame's student health plan. The Notre Dame student health plan covers approximately 2,600 students and 2,700 total individuals, including dependents.

41. Consistent with Roman Catholic teachings, Notre Dame's employee and student health plans do not cover abortion-inducing products, contraceptives (when used for contraceptive purposes), or sterilization. Notre Dame's employee and student health plans cover drugs commonly used as contraceptives only when prescribed with the intent of treating another medical condition, not with the intent to prevent pregnancy.

42. Notre Dame’s employee and student health plans have undergone a number of changes and amendments since March 23, 2010, and, accordingly, do not meet the Affordable Care Act’s definition of a “grandfathered” health plan. Additionally, the Notre Dame plans have not included and do not include a statement in any plan materials provided to participants or beneficiaries that Notre Dame believes the plans are grandfathered, as is required to maintain the status of a grandfathered health plan. 26 C.F.R. § 54.9815-1251T(a)(2)(i).

43. Notre Dame does not appear to qualify as an entity described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. Accordingly, Notre Dame does not qualify as a “religious employer” under the exemption to the U.S. Government Mandate.

44. Notre Dame’s employee health plan year starts on January 1st.

45. Notre Dame’s student health plan year starts on August 15th.

II. STATUTORY AND REGULATORY BACKGROUND

Statutory Background

46. In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the “Affordable Care Act” or the “Act”). The Affordable Care Act established many new requirements for “group health plan[s],” broadly defined as “employee welfare benefit plan[s]” within the meaning of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1002(1), that “provide[] medical care . . . to employees or their dependents.” 42 U.S.C. § 300gg-91(a)(1).

47. As relevant here, the Act requires an employer’s group health plan to cover certain women’s “preventive care.” Specifically, it indicates that “[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for . . .

with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.” 42 U.S.C. § 300gg-13(a)(4). Because the Act prohibits “cost sharing requirements,” the health plan must pay for the full costs of these “preventive care” services without any deductible or co-payment.

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

49. Federal law provides several mechanisms to enforce the requirements of the Act, including the U.S. Government Mandate. For example:

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

b. Under the Internal Revenue Code, group health plans that fail to provide certain required coverage may be subject to a penalty of \$100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b); *see also* Jennifer Staman & Jon Shimabukuro,

Cong. Research Serv., RL 7-5700, Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act (2012) (asserting that this applies to employers who violate the “preventive care” provision of the Affordable Care Act).

c. Under ERISA, plan participants can bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(1)(B); *see also* Cong. Research Serv., RL 7-5700.

d. Similarly, the Secretary of Labor may bring an enforcement action against group health plans of employers that violate the U.S. Government Mandate, as incorporated by ERISA. *See* 29 U.S.C. § 1132(b)(3); *see also* Cong. Research Serv., RL 7-5700 (asserting that these penalties can apply to employers and insurers who violate the “preventive care” provision of the Affordable Care Act).

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

(1) The Original Mandate

50. On July 19, 2010, Defendants issued interim final rules addressing the statutory requirement that group health plans provide coverage for women’s “preventive care.” 75 Fed. Reg. at 41,726 (citing 42 U.S.C. § 300gg-13(a)(4)).

51. To develop the definition of “preventive care,” HHS outsourced its deliberations to the Institute of Medicine (“IOM”), a non-governmental “independent” organization. At the close of this process, on July 19, 2011, the IOM issued a final report recommending that “preventive care” for women be defined to include “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for [all] women with reproductive capacity.” Inst. Of Med., *Clinical Preventive Services for Women: Closing the Gaps*, at 218-19 (2011) (“IOM Report”).

52. Less than two weeks after the IOM Report was released, HHS issued a press release on August 1, 2011, announcing that it would adopt the IOM's definition of "preventive care," including all "FDA-approved contraception methods and contraceptive counseling." See U.S. Dept. of Health and Human Services, "Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost," *available at* <http://www.hhs.gov/news/press/2011pres/08/20110801b.html>. Under the final definition, the category of mandatory "preventive care" extends to "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." See HRSA: "Women's Preventive Services: Required Health Plan Coverage Guidelines," *available at* <http://www.hrsa.gov/womensguidelines>.

53. The Government's definition of mandatory "preventive care" also includes abortion-inducing products. For example, the FDA has approved "emergency contraceptives" such as the morning-after pill (otherwise known as Plan B), which can prevent an embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or ella), which likewise can induce abortions.

54. On August 3, 2011, shortly after announcing its definition of "preventive care," the Government proposed a narrow exemption from the Mandate for a small category of "religious employers" that met all of the following four criteria: "(1) The inculcation of religious values is the purpose of the organization"; "(2) The organization primarily employs persons who share the religious tenets of the organization"; "(3) The organization serves primarily persons who share the religious tenets of the organization"; and "(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the

Internal Revenue Code of 1986, as amended.” 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130(a)(iv)(B)).

55. As the Government itself admitted, this narrow exemption was intended to protect only “the unique relationship between a house of worship and its employees in ministerial positions.” *Id.* at 46,623. It provided no protection for religious universities, elementary and secondary schools, hospitals, and charitable organizations.

56. Despite pleas for expansion of the exemption, the Government at first refused to reconsider its position. Instead, the Government “finalize[d], without change,” the narrow exemption as originally proposed. 77 Fed. Reg. 8,456, 8,729 (Feb. 15, 2012). At the same time, the Government announced that it would offer “a one-year safe harbor from enforcement” for religious organizations that remained subject to the Mandate. *Id.* at 8,728.

57. A month later, under continuing public pressure, the Government issued an Advance Notice of Proposed Rulemaking (“ANPRM”) that, it claimed, set out a solution to the religious-liberty controversy created by the Mandate. 77 Fed. Reg. 16,501 (Mar. 21, 2012). The ANPRM did not revoke the Mandate, but instead offered hypothetical “possible approaches” that would, in the Government’s view, somehow solve the religious-liberty problem without granting an exemption for objecting religious organizations. *Id.* at 16,507.

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

(2) The Government’s Refusal To Recognize The Rights of Religious Organizations Like Notre Dame By Instead Subjecting Them To An “Accommodation” Antithetical To Notre Dame’s Religious Beliefs

59. On February 1, 2013, the Government issued a Notice of Proposed Rulemaking (“NPRM”), largely adopting the proposals contained in the ANPRM. The NPRM, like the Government’s previous proposals, was once again met with strenuous opposition, including over 400,000 comments. For example, the U.S. Conference of Catholic Bishops stated that “the ‘accommodation’ still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage. Such organizations and their employees remain deprived of their right to live and work under a health plan consonant with their explicit religious beliefs and commitments.” Comments of U.S. Conference of Catholic Bishop (Mar. 20, 2013) at 3, *available at* <http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf>.

60. Despite this opposition, on June 28, 2013, the Government issued a final rule that adopted substantially all of the NPRM’s proposal without significant change. *See* 78 Fed. Reg. 39870 (July 2, 2013) (“Final Rule”).

61. The Final Rule makes two primary changes to the Mandate. As described below, neither of these changes relieves the unlawful burdens placed on Notre Dame.

62. *First*, the Final Rule makes what the Government concedes to be a non-substantive, cosmetic change to the definition of “religious employer.” In particular, it eliminates the first three prongs of that definition, such that, under the new definition, an exempt “religious employer” is simply “an organization 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 of 1986, as amended.” 78 Fed. Reg. at 39,874 (codified at 45 C.F.R. § 147.131(a)). As the Government has admitted, this new definition does “not expand the universe of employer plans that would

qualify for the exemption beyond that which was intended in the 2012 final rules.” 78 Fed. Reg. at 8,461. Instead, it continues to “restrict[]the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders.” *Id.* In this respect, the Final Rule mirrors the intended scope of the original “religious employer” exemption, which focused on “the unique relationship between a house of worship and its employees in ministerial positions.” 76 Fed. Reg. at 46,623. Religious organizations that have a broader mission—such as Notre Dame—are still not, in the Government’s view, “religious employers.”

63. The “religious employer” exemption, moreover, creates an official, Government-favored category of religious groups that are exempt from the Mandate, while denying this favorable treatment to all other religious groups. The exemption applies only to those groups that are “referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.” This category includes only (i) “churches, their integrated auxiliaries, and conventions or associations of churches,” and (iii) “the exclusively religious activities of any religious order.” The IRS has adopted an intrusive fourteen (14)-factor test to determine whether a group meets these qualifications. *See Foundation of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009). Among these fourteen (14) factors is whether the group has “a recognized creed and form of worship,” “a definite and distinct ecclesiastical government,” “a formal code of doctrine and discipline,” “a distinct religious history,” “an organization of ordained ministers,” “a literature of its own,” “established places of worship,” “regular congregations,” “regular religious services,” “Sunday schools for the religious instruction of the young,” and “schools for the preparation of its ministers.” *Id.* Not only do these factors favor some religious groups at the expense of others, but they also require the Government to make intrusive

judgments regarding religious beliefs, practices, and organizational features to determine which groups fall into the favored category.

64. *Second*, the Final Rule establishes an illusory “accommodation” for certain non-exempt objecting religious entities that qualify as “eligible organizations.” To qualify as an “eligible organization,” a religious entity must (1) “oppose[] providing coverage for some or all of [the] contraceptive services”; (2) be “organized and operate[] as a non-profit entity”; (3) “hold[] itself out as a religious organization”; and (4) self-certify that it meets the first three criteria, and provide a copy of the self-certification either to its insurance company or, if the religious organization is self-insured, to its third party administrator. 26 C.F.R. § 54.9816-2713A(a). The provision of this self-certification then automatically requires the insurance issuer or the third party administrator to provide or arrange “payments for contraceptive services” for the organization’s employees, without imposing any “cost-sharing requirements (such as a copayment, coinsurance, or a deductible).” *Id.* § 54.9816-2713A(b)(2), (c)(2). The objectionable coverage, moreover, is directly tied to the organization’s health plan, lasting only as long as the employee remains on that plan. *See* 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.131(c)(2)(i)(B). In addition, self-insured organizations are prohibited from “directly or indirectly, seek[ing] to influence the[ir] third party administrator’s decision” to provide or procure contraceptive services. 26 C.F.R. § 54.9815–2713.

65. This so-called “accommodation”, which exists solely to avoid entities like Notre Dame’s rightful *exemption* from the Mandate, by definition binds Notre Dame to the process of providing the objectionable products and services and thereby fails to address Notre Dame’s sincerely held religious beliefs. The Catholic moral tradition requires avoiding “scandal,” which in the theological context is defined as leading by words or example other persons to engage in

wrongdoing. Scandal is particularly grave when associated with those “who by nature or office are obliged to teach and educate others.” *Catechism of the Catholic Church* ¶ 2285. Under the original version of the Mandate, a non-exempt religious organization’s decision to offer a group health plan resulted in the provision of coverage for abortion-inducing products, contraception, sterilization, and related counseling. Under the Final Rule, a non-exempt religious organization’s decision to offer a group health plan still results in the provision of coverage—now in the form of “payments”—for abortion-inducing products, contraception, sterilization, and related counseling. 26 C.F.R. § 54.9816-2713A(b)-(c). Some have argued that the accommodation in the Final Rule, unlike the original version, does not compel Notre Dame to act against its beliefs because third parties are purportedly “arranging” the “payments.” However, what is germane is that in both scenarios, Notre Dame’s decision to provide a group health plan, and execution of the self-certification, triggers the provision of “free” objectionable coverage to Notre Dame’s employees in a manner contrary to its beliefs. The provision of the objectionable products and services is directly tied to Notre Dame’s insurance policies and Notre Dame’s self-certification, and the objectionable “payments” are available only so long as an employee is on the Notre Dame’s health plan. *See* 29 C.F.R. § 2590.715-2713 (for self-insured employers, the third party administrator “will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan”); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers that offer insured plans, the insurance issuer must “[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan”). Moreover, the regulations compel Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of objectionable drugs and services in ways that will lead many to think Notre Dame condones

these services, and hence undermines the role of Notre Dame, a Catholic educational institution, to educate others on a matter of religious and moral significance. It is incumbent upon Notre Dame to extricate itself from any process that leads others to violate the faith. The accommodation does not extricate Notre Dame from the process.

66. For self-insured organizations, moreover, the self-certification constitutes the religious organization's "*designation* of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879 (emphasis added). The act and consequences of submitting the self-certification causes Notre Dame to become associated with the Mandate in a way that causes scandal in violation of its religious beliefs. Employer health plans offered by non-exempt religious organizations—such as Notre Dame's employee health plans—are the vehicle by which "free" abortion-inducing products, contraception, sterilization, and related counseling would be delivered to Notre Dame's employees.

67. By its Mandate, the Government requires, through threats of crippling fines and other pressure, Notre Dame to become entangled with and facilitate—through offering health care coverage and then certifying and appointing others to directly offer objectionable products and services—a process that creates an unacceptable burden to Notre Dame in carrying out its religious mission, and one contrary to Catholic beliefs. Should it do so, Notre Dame is then precluded from interfering with communications by its "designated agent" to participants regarding the access to and availability of morally objectionable products and services. By definition, these communications would occur due to Notre Dame's status as health plan sponsor and its decision to self-certify—a circumstance that would create scandal, according to the Catholic tradition, and lead some to believe that Notre Dame condones the objectionable

services. Nor, through coerced participation in this scheme, can Notre Dame ensure disassociation with targeted communications such as those advertised to Notre Dame's employee participants and students that seek to normalize practices contrary to Notre Dame's mission. *See, e.g.,* Advertisements of Colorado Consumer Health Initiative, including one depicting female youth next to male youth and stating "OMG he's hot! Let's hope he's as easy to get as this birth control. My health insurance covers the pill, which means all I have to worry about is getting him between the covers." (Exhibit A). Because such communications would result from Notre Dame's participation as plan sponsor and submission of its self-certification, Notre Dame would become associated with the Mandate in a way that causes scandal, and Notre Dame therefore cannot comply with the Mandate consistent with its religious beliefs.

68. Similarly, to avoid scandal, Notre Dame cannot appear to endorse the litany of concepts that underlie the Mandate and that are contrary to its religious beliefs: *e.g.,* (i) that it is a moral societal goal to encourage a reduction in the overall cost of health care by reducing the number of mothers or children who may require expensive post child birth care, (ii) that pregnancy is a condition for which there should be "preventive services", and (iii) that increased access to contraception, sterilization, and/or abortion-inducing drugs as proposed by the Government necessarily improves public health.

69. It is Notre Dame's sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to the Catholic faith. Notre Dame believes that its participation in the U.S. Government Mandate would cause scandal and therefore Notre Dame cannot comply with the Mandate consistent with its religious beliefs.

70. The U.S. Government Mandate also requires Notre Dame to subsidize the objectionable products and services, and thus directly participate in a way that causes scandal.

71. For organizations that procure insurance through a separate insurance provider (as Notre Dame does with its student health plans), the Government asserts that the cost of the objectionable products and services will be “cost neutral” and, therefore, that Notre Dame will not actually be paying for it. But this rests on the implausible assumption that “cost savings” from “fewer childbirths” will be at least as large as the direct costs of paying for contraceptive products and services and the costs of administering individual policies. 78 Fed. Reg. at 8,463.

72. Further, the premise underlying the Government’s entire theory of cost neutrality—that the cost to insurance companies of providing contraceptive coverage will be offset by reducing the costs those insurance companies would otherwise pay out for “pregnancies and childbirths” (which will allegedly occur at a lower rate due to the use of contraceptives)—is irreconcilable with Catholic doctrine regarding the immorality of artificial interference with procreation. 78 Fed. Reg. at 39,877; *Catechism of the Catholic Church* ¶¶ 2370, 2399.

73. More importantly, even if the Government’s “cost-neutral” assertion were true, it is irrelevant. Premiums previously paid by the objecting employers such as Notre Dame to cover, for example, “childbirths,” will now be redirected to pay for contraceptive products and services—the objectionable services. Thus, many will reasonably conclude that Notre Dame is still required to pay for the objectionable products and services.

74. For Notre Dame’s self-insured employee health plan, the Government’s “cost-neutral” assumption is likewise implausible. The Government asserts that third party administrators required to provide or procure the objectionable products and services will be compensated by reductions in user fees that they otherwise would pay for participating in

federally-facilitated health exchanges. *See* 78 Fed. Reg. at 39,882. Such fee reductions are to be established through a highly regulated and bureaucratic process for evaluating, approving, and monitoring fees paid in compensation to third party administrators. Such regulatory regimes, however, may not fully compensate the regulatory entities for the costs and risks incurred. As a result, few if any third party administrators are likely to participate in this regime, and those that do are likely to increase fees charged to the self-insured organizations.

75. Either way, as with insured plans, self-insured organizations likewise will be required to subsidize contraceptive products and services notwithstanding the so-called “accommodation.”

76. Moreover, Notre Dame is required to pay for prescriptions dispensed each month at the pharmacy at Notre Dame’s Wellness Center on campus. Notre Dame receives a credit for amounts it pays that are later reimbursed by third party insurers. If the U.S. Government Mandate were to be enforced, Notre Dame would have to pay its on-campus pharmacy for contraceptive products and would receive a credit for those payments only when Meritain paid for the products as directed by the Mandate. In other words, Notre Dame would be forced to “float” the cost of contraceptive products until those costs were reimbursed by Meritain. By absorbing the cost of the objectionable services until any subsequent reimbursement, Notre Dame would be forced to directly pay for the provision of these objectionable products and services in violation of its religious beliefs.

77. For all of these reasons, the U.S. Government Mandate continues to require Notre Dame to act in violation of its sincerely held religious beliefs.

78. In sum, the Final Rule fails to alleviate the burden that the U.S. Government Mandate imposes on Notre Dame’s religious beliefs.

III. THE U.S. GOVERNMENT MANDATE IMPOSES A SUBSTANTIAL BURDEN ON NOTRE DAME'S RELIGIOUS LIBERTY

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

79. Since the founding of this country, our law and society have recognized that individuals and institutions are entitled to freedom of conscience and religious practice. Absent a compelling reason, no government authority may compel any group or individual to act contrary to their religious beliefs. As noted by Thomas Jefferson, “[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority.”

80. The U.S. Government Mandate violates Notre Dame's right of conscience by forcing it to participate in an employer-based scheme to provide insurance coverage to which it strenuously objects on moral and religious grounds.

81. It is a core tenet of Notre Dame's religion that abortion, contraception, and sterilization are serious moral wrongs.

82. Notre Dame's Catholic beliefs, therefore, prohibit it from associating with, providing, paying for, and/or facilitating access to abortion-inducing products, contraception, or sterilization.

83. Notre Dame's religious beliefs are deeply and sincerely held.

84. The U.S. Government Mandate, therefore, requires Notre Dame to do precisely what its sincerely held religious beliefs prohibit—pay for, facilitate access to, and/or become entangled in the provision of objectionable products and services or else incur crippling sanctions.

85. The U.S. Government Mandate, therefore, imposes a substantial burden on Notre Dame's religious beliefs.

86. The U.S. Government Mandate's exemption for "religious employers" does not apply to Notre Dame.

87. The so-called "accommodation" also does not alleviate the burden the Mandate imposes on Notre Dame's religious freedom.

88. Notwithstanding the so-called "accommodation," Notre Dame is still financially penalized or required to pay for, facilitate access to, and/or become entangled in the provision of the objectionable products and services in violation of its sincerely held religious beliefs.

89. The unity of the Catholic Church is also a core tenet of Notre Dame's Catholic beliefs.

90. Notre Dame's Catholic beliefs in the unity of the Church includes its belief that it is the heart of the Church, performing and living a religious educational mission that is just as religious and just as significant as worship.

91. Notre Dame's Catholic beliefs, therefore, are violated by severing or attempting to sever it from the Catholic Church.

92. Notre Dame's beliefs in the unity of the Catholic Church are deeply and sincerely held.

93. The U.S. Government Mandate attempts to sever the Catholic Church, dividing it into a "worship" arm whose religious beliefs are respected and an "educational and charitable" arm whose religious beliefs are trampled.

94. The U.S. Government Mandate, therefore, imposes a substantial burden on Notre Dame's religious beliefs.

95. Finally, Notre Dame cannot avoid the U.S. Government Mandate without incurring crippling fines. If it eliminates its employee health plans, it is subject to annual fines of

\$2,000 per full-time employee. If Notre Dame keeps its health plans but refuses to provide or facilitate the objectionable coverage, it is subject to fines of \$100 a day per affected beneficiary. The fines, therefore, coerce Notre Dame into violating its religious beliefs.

96. If Notre Dame offers a student health plan consistent with its Catholic values, it is subject to fines of \$100 a day per affected beneficiary. Declining to offer a student health plan would negatively impact Notre Dame's efforts to recruit and retain students.

97. In short, while the President claims to have "found a solution that works for everyone" and that ensures that "religious liberty will be protected," his promised "accommodation" does neither. Unless and until this issue is definitively resolved, the U.S. Government Mandate does and will continue to impose a substantial burden on Notre Dame's religious beliefs.

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

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

99. For example, the U.S. Government Mandate exempts all "grandfathered" plans from its requirements, thus excluding tens of millions of people from the mandated coverage. As the Government has admitted, while the numbers are expected to diminish over time, "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. at 41,732. Elsewhere, the government has put the number at 87 million. *See* "Keeping the Health

Plan You Have” (June 14, 2010), *available at*

<http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html>. And according to one district court last year, “191 million Americans belong[ed] to plans which may be grandfathered under the ACA.” *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012).

100. Similarly, small employers (*i.e.*, those with fewer than 50 employees) are exempt from certain enforcement mechanisms to compel compliance with the Mandate. *See* 26 U.S.C. § 4980H(a) (exempting small employers from the assessable payment for failure to provide health coverage).

101. In addition, the U.S. Government Mandate exempts an arbitrary subset of religious organizations that qualify for tax-reporting exemptions under Section 6033 of the Internal Revenue Code. The Government cannot justify its protection of the religious-conscience rights of the narrow category of exempt “religious employers,” but not of Notre Dame and other religious organizations that remain subject to the Mandate.

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

abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much.” In addition, the Mandate was modeled on a California law that was motivated by discriminatory intent against religious groups that oppose contraception.

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

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

104. The U.S. Government Mandate is not narrowly tailored to serve a compelling governmental interest.

105. The Government has no compelling interest in forcing Notre Dame to violate its sincerely held religious beliefs by requiring it to participate in a scheme for the provision of abortion-inducing products, sterilization, contraceptives, and related education and counseling. The Government itself has relieved numerous other employers from this requirement by exempting grandfathered plans and plans of employers it deems to be sufficiently religious.

106. Moreover, abortion-inducing products, sterilization, contraceptives, and related education and counseling are widely available in the United States. The U.S. Supreme Court has held that individuals have a constitutional right to use such services. And nothing that Notre Dame does inhibits any individual from exercising that right.

107. Even assuming the interest was compelling, the Government has numerous alternative means of furthering that interest without forcing Notre Dame to violate its religious beliefs. For example, the Government could provide or pay for the objectionable services through expansion of its existing network of family planning clinics funded by HHS under Title X or through other programs established by a duly enacted law. Or, at a minimum, it could have

created a broader exemption for religious employers, such as those found in numerous state laws throughout the country and in other federal laws. The Government, therefore, cannot possibly demonstrate that requiring Notre Dame to violate its conscience is the least restrictive means of furthering its interest.

108. Accordingly, Notre Dame seeks a declaration that the U.S. Government Mandate cannot lawfully be applied to it, an injunction barring its enforcement, and an order vacating the Mandate.

IV. THE U.S. GOVERNMENT MANDATE THREATENS NOTRE DAME WITH IMMEDIATE INJURY THAT SHOULD BE REMEDIED BY A COURT

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

110. On June 28, 2013, Defendants finalized the U.S. Government mandate, including the narrow “religious employer” exemption and the so-called “accommodation” proposed in the NPRM. By the terms of the Final Rule and its transitional safe harbor, Notre Dame must comply with the Mandate by the beginning of the next plan year on or after January 1, 2014.

111. For Notre Dame’s employee healthcare plan, the next plan year begins on January 1, 2014.

112. For Notre Dame’s student healthcare plan, the next plan year begins on August 15, 2014.

113. Defendants have given no indication that they will not enforce the essential provisions of the Mandate that impose a substantial burden on Notre Dame’s rights. Consequently, absent the relief sought herein, Notre Dame will be required to pay for, facilitate access to, and/or become entangled in the provision of abortion-inducing products,

contraception, sterilization, and related education and counseling, in violation of their sincerely-held religious beliefs.

114. The U.S. Government Mandate and its uncertain legality, moreover, undermine Notre Dame's ability to hire and retain employees, thus placing them at a competitive disadvantage in the labor market relative to organizations that do not have a religious objection to the Mandate.

115. Notre Dame, therefore, needs judicial relief now in order to prevent the serious, ongoing harm that the U.S. Government Mandate is already imposing on it.

V. CAUSES OF ACTION

COUNT I
Substantial Burden on Religious Exercise
in Violation of RFRA

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

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

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

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

120. The U.S. Government Mandate requires Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of products, services, practices, and speech that are contrary to their religious beliefs.

121. The U.S. Government Mandate attempts to sever Notre Dame from the Church, in violation of Notre Dame's belief in the unity of the Church.

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

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

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

125. By enacting and threatening to enforce the U.S. Government Mandate against Notre Dame, Defendants have violated RFRA.

126. The U.S. Government Mandate also requires student health plans, including the one currently offered by Notre Dame, to facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling in a manner that is directly contrary to their religious beliefs.

127. To require Notre Dame's student health plan to facilitate access to services that violate Notre Dame's religious beliefs substantially burdens Notre Dame's exercise of religion.

128. The Government has no compelling interest to require Notre Dame's student health plan to facilitate access to services that violate Notre Dame's beliefs.

129. Requiring Notre Dame's student health plan to facilitate access to services that violate Notre Dame's religious beliefs is not the least restrictive means of furthering a compelling governmental interest.

130. Notre Dame has no adequate remedy at law.

131. Defendants are imposing an immediate and ongoing harm on Notre Dame that warrants relief.

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

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

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

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

135. The U.S. Government Mandate requires Notre Dame to become entangled with, pay for, and/or facilitate practices and speech that are contrary to its religious beliefs.

136. The U.S. Government Mandate attempts to sever Notre Dame from the Church, in violation of Notre Dame's belief in the unity of the Church.

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

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

139. The U.S. Government Mandate is not a neutral law of general applicability because it was passed with discriminatory intent.

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

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

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

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

144. The Government also requires student health plans, including the one currently offered by Notre Dame, to facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling in a manner that is directly contrary to its religious beliefs.

145. To require Notre Dame's student health plan to facilitate access to products and services that violate its religious beliefs substantially burdens Notre Dame's exercise of religion.

146. The Government has no compelling government interest to require Notre Dame's student health plan to facilitate access to products and services that violate Notre Dame's religious beliefs.

147. Requiring Notre Dame's student health plan to facilitate access to products and services that violate Notre Dame's religious beliefs is not the least restrictive means of furthering a compelling governmental interest.

148. Notre Dame has no adequate remedy at law.

149. Defendants are imposing an immediate and ongoing harm on Notre Dame that warrants relief.

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

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

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

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

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

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

155. The U.S. Government Mandate would compel Notre Dame to provide health care plans to its employees and students that include or facilitate access to products and services that violate its religious beliefs.

156. The U.S. Government Mandate would compel Notre Dame to become entangled with, subsidize, promote, and facilitate education and counseling services regarding these objectionable products and services.

157. The U.S. Government Mandate would compel Notre Dame to issue a certification of its beliefs that, in turn, would result in the provision of objectionable products and services to Notre Dame's employees and students. The issuance of the certification itself is compelled speech, the consequences of which cause Notre Dame to become entangled in the provision of products, services, and practices that violate its religious beliefs.

158. By imposing the U.S. Government Mandate, Defendants are compelling Notre Dame to become entangled with, publicly subsidize or facilitate the activity and speech of private entities that are contrary to its religious beliefs, and compelling Notre Dame to engage in speech that will result in the provision of objectionable products and services to Notre Dame's employees and students.

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

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

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

162. For the same reasons, Defendants' requirement that student health plans, like the one currently offered by Notre Dame, facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling, also violates the Free Speech Clause of the First Amendment.

163. Notre Dame has no adequate remedy at law.

164. Defendants are imposing an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT IV
Prohibition of Speech
in Violation of the First Amendment

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

166. The First Amendment protects the freedom of speech, including the right of religious groups to speak out to persuade others to refrain from engaging in conduct that may be considered immoral.

167. The Mandate violates the First Amendment freedom of speech by imposing a gag order that prohibits Notre Dame from speaking out in any way that might “influence,” “directly or indirectly,” the decision of a third party administrator to provide or procure contraceptive products and services to Notre Dame’s employees, or the means by which a third party administrator provides or procures these services.

168. Notre Dame has no adequate remedy at law.

169. Defendants are imposing an immediate and ongoing harm on Notre Dame that warrants relief.

COUNT V

Official “Church” Favoritism and Excessive Entanglement with Religion in Violation of the Establishment Clause of the First Amendment

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

171. The Establishment Clause of the First Amendment prohibits the Government from adopting an official definition of a “religious employer” that favors some religious groups while excluding others.

172. The Establishment Clause also prohibits the Government from becoming excessively entangled in the affairs of religious groups by scrutinizing their beliefs, practices, and organizational features to determine whether they meet the Government’s favored definition.

173. The “religious employer” exemption violates the Establishment Clause in two ways.

174. First, it favors some religious groups over others by creating an official definition of “religious employers.” Religious groups that meet the Government’s official definition receive favorable treatment in the form of an exemption from the Mandate, while other religious groups do not. Moreover, the “religious employer” discriminates in favor of religious

denominations that consist primarily of “houses of worship,” “integrated auxiliaries,” or “religious orders,” and against denominations, like the Catholic faith, that also exercise their religion through schools, health care facilities, charitable organizations, and other ministries.

175. Second, even if it were permissible for the Government to favor some religious groups over others, the “religious employer” exemption would still violate the Establishment Clause because it requires the Government to determine whether groups qualify as “religious employers” based on intrusive judgments about their beliefs, practices, and organizational features. The exemption turns on an intrusive fourteen (14)-factor test to determine whether a group meets the requirements of section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. These fourteen (14) factors probe into matters such as whether a religious group has “a distinct religious history” or “a recognized creed and form of worship.” But it is not the Government’s place to determine whether a group’s religious history is “distinct,” or whether the group’s “creed and form of worship” are “recognized.” By directing the Government to partake of such inquiries, the “religious employer” exemption runs afoul of the Establishment Clause prohibition on excessive entanglement with religion.

176. Notre Dame has no adequate remedy at law.

177. Defendants are imposing an immediate and ongoing harm on Notre Dame that warrants relief.


VI. PRAYER FOR RELIEF

WHEREFORE, Notre Dame respectfully prays that this Court:

1. Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame’s rights under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame’s rights under the First Amendment;

3. Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against Notre Dame;
4. Enter an order vacating the U.S. Government Mandate;
5. Enter a declaratory judgment that Defendants' requirement that student health plans facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling violates Notre Dame's rights under RFRA and the First Amendment; enter an injunction prohibiting the Defendants from enforcing that requirement against Notre Dame; and enter an order vacating the requirement;
6. Award Notre Dame's attorneys' and expert fees under 42 U.S.C. § 1988; and
7. Award all other relief as the Court may deem just and proper.

Respectfully submitted, this the 3rd day of December, 2013.

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