NOS. 14-1418, -1453, -1505, 15-35, -105, -119, & -191

In the Supreme Court of the United States

DAVID A. ZUBIK, ET AL.
v.
SYLVIA BURWELL, ET AL.

PRIESTS FOR LIFE, ET AL.
v.
DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.
v.
SYLVIA BURWELL, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL.
v.
SYLVIA BURWELL, ET AL.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.
v.
SYLVIA BURWELL, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL.
v.
SYLVIA BURWELL, ET AL.

GENEVA COLLEGE
v.
SYLVIA BURWELL, ET AL.

On Writ of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

JOINT APPENDIX VOLUME III OF III

PETITIONS FOR CERTIORARI FILED MAY 29, JUNE 9, JUNE 19, JULY 8, JULY 23, JULY 24, AUGUST 11, 2015
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[*Counsel listed on inside cover*]

DONALD B. VERRILLI, JR.
Counsel of Record
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave. NW
Washington, DC 20530
(202) 514-2217
supremectbriefs@usdoj.gov

Counsel for Respondents in Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

PAUL M. POHL
Counsel of Record
JONES DAY
500 Grant St., Suite 4500
Pittsburgh, PA 15219
(412) 391-3939
pmpohl@jonesday.com

Counsel for Petitioners in No. 14-1418

ROBERT JOSEPH MUISE
Counsel of Record
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MI 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

Counsel for Petitioners in No. 14-1453

NOEL J. FRANCISCO
Counsel of Record
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners in No. 14-1505

[*Additional counsel listed on next page*]

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
500 New Jersey Ave. NW
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioners in Nos. 15-35 & 15-105

DAVID A. CORTMAN
Counsel of Record
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@adflegal.org

Counsel for Petitioners in Nos. 15-119 & 15-191

TABLE OF CONTENTS

Page

VOLUME I
JOINT APPENDIX MATERIALS FOR NO. 14-1418
Docket Entries, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.) 1
Docket Entries, *Persico v. Sebelius*, No. 1:13-cv-00303 (W.D. Pa.) 15
Docket Entries, *Zubik v. Sebelius*, No. 14-1377 (3d Cir.) 27
Stipulation of Undisputed Facts 39
Deposition of Cardinal Timothy Dolan 68
Declaration of Susan Rauscher 74
Declaration of David S. Stewart 84
Declaration of Father Ronald Lengwin 92
Declaration of Father Scott Jabo 105
Declaration of Mary Maxwell 112
Declaration of David Murphy 121
Declaration of Father Scott Detisch 131
Additional Stipulated Facts 141
Excerpts from Transcript of Proceedings, Nov. 12, 2013 146
- Excerpts from Testimony of Bishop David A. Zubik 147
- Excerpts from Testimony of Susan Rauscher 158
- Excerpts of Testimony from Bishop Lawrence Persico 164
- Excerpts of Testimony from Father Scott Jabo 173
- Excerpts of Testimony from Mary Maxwell 178

Excerpts from Transcript of Proceedings, Nov. 13, 2013 185

JOINT APPENDIX MATERIALS FOR NO. 14-1453
Docket Entries, *Priests for Life v. U.S. Dep't Health & Human Servs.*, No. 1:13-cv-01261 (D.D.C.) 192
Docket Entries, *Priests for Life v. HHS*, No. 13-15368 (D.C. Cir.) 201
Declaration of Father Frank Pavone and Priests for Life 226
Declaration of Dr. Alveda King 272
Declaration of Janet Morana 280
Declaration of Robert J. Muise 288
Supplemental Declaration of Priests for Life 320
Supplemental Declaration of Robert J. Muise 324
JOINT APPENDIX MATERIALS FOR NO. 14-1505
Docket Entries, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:13-cv-01441 (D.D.C.) 339
Docket Entries, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 14-5021 (D.C. Cir.) .. 353
Excerpts from Complaint in *Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:13-cv-01441 (D.D.C.) 358
Affidavit of the Archdiocese of Washington 359
Affidavit of the Consortium of Catholic Academies of the Archdiocese of Washington, Inc. 366
Affidavit of Archbishop Carroll High School 371
Affidavit of Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc. 376
Affidavit of Mary of Nazareth Roman Catholic Elementary School, Inc. 381
Affidavit of Catholic Charities of the Archdiocese of Washington 386
Affidavit of Victory Housing, Inc. 391

Affidavit of Catholic Information Center, Inc. 396
Affidavit of the Catholic University of America... 401
Affidavit of Thomas Aquinas College 407
Comments of the U.S. Conference of Bishops (Mar. 20, 2013)..... 412
Affidavit of Reverend Carter Griffin..... 451
Supplemental Affidavit of the Archdiocese of Washington..... 459
Supplemental Affidavit of the Consortium of Catholic Academies of the Archdiocese of Washington, Inc..... 463
Supplemental Affidavit of Archbishop Carroll High School..... 467
Supplemental Affidavit of Don Bosco Cristo Rey High School of the Archdiocese of Washington, Inc..... 471
Supplemental Affidavit of Mary of Nazareth Roman Catholic Elementary School, Inc. 476
Supplemental Affidavit of Catholic Charities of the Archdiocese of Washington..... 480
Supplemental Affidavit of Victory Housing, Inc..... 484
Supplemental Affidavit of the Catholic Information Center, Inc. 488
Supplemental Affidavit of the Catholic University of America 492
Supplemental Affidavit of Thomas Aquinas College..... 494
Excerpts from District Court Motions Hearing (Nov. 22, 2013)..... 496
Comments of the Archdiocese of Washington (Apr. 4, 2013) 504
Excerpts from Institute of Medicine Report..... 539

VOLUME II
JOINT APPENDIX MATERIALS FOR NO. 15-35

Docket Entries, *East Texas Baptist University v. Sebelius*, No. 4:12-cv-03009 (S.D. Tex.) 586
Docket Entries, *East Texas Baptist University v. Burwell*, No. 14-20112 (5th Cir.) 603
Excerpts from First Amended Complaint in Intervention 636
Declaration of Samuel W. Oliver 640
Excerpts from East Texas Baptist University Policy and Procedures Manual 660
East Texas Baptist University Application for Admission 667
Bylaws of East Texas Baptist University 672
Report of the Baptist Faith and Message Study Committee to the Southern Baptist Convention .. 677
East Texas Baptist University Student Handbook, 2013-2014 693
The Ethics and Religious Liberty Commission 697
East Texas Baptist University Healthcare Benefits Plan 703
Congressional Testimony of Samuel W. Oliver 717
Letter from East Texas Baptist University to Kathleen Sebelius, Secretary Department of Health and Human Services 721
Supplemental Declaration of Samuel W. Oliver .. 726
Declaration of Dr. Robert B. Sloan 730
Excerpts from Houston Baptist University Website 748
Houston Baptist University Student Handbook, 2012-2013 751
The Ten Pillars: A 12 Year Vision for the Future of Houston Baptist University 760
Summary Plan Information 764

Preventive Care Schedule 772
"*Your* GuideStone Financial Resources" Pamphlet..... 779
Guidestone, PPACA Overview..... 784
Supplemental Declaration of Robert B. Sloan 789
Declaration of Jeffrey K. Jue 795
Charter Excerpts 811
JOINT APPENDIX MATERIALS FOR NO. 15-105
Docket Entries, Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius, No. 1:13-cv-02611 (D. Colo.)..... 818
Docket Entries, *Reaching Souls International Inc. v. Sebelius*, No. 5:13-cv-01092 (W.D. Okla.).. 836
Docket Entries, *Little Sisters of the Poor v. Burwell*, No. 13-1540 (10th Cir.)..... 843
Docket Entries, *Reaching Souls International v. Burwell*, No. 14-6028 (10th Cir.)..... 872
HRSA Web Page..... 897
FDA contraceptive guide..... 903
Press Release, Kathleen Sebelius, Health and Human Services Secretary, Jan. 20, 2012..... 934
LSP Comment on Proposed Rulemaking (Apr. 8, 2013) 937
Statement of the Little Sisters of the Poor on the HHS Mandate (Mar. 1, 2012) 945
Little Sisters of the Poor Mission, Vision, and Values, 2012..... 952
Declaration of Adèle A. Keim..... 954
Screenshots of government grandfathered information 956
CMS.gov screenshots..... 969
Estimate of small employers in United States..... 973
Declaration of Mother Loraine Marie Clare Maguire..... 975

Declaration of Brother Michael Quirk 991
United States Conference of Catholic Bishops, Ethical & Religious Directives for Catholic Healthcare Services..... 1015
Government's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction 1060
Supplemental Declaration of Mother Loraine Marie Clare Maguire..... 1085
Supplemental Declaration of Brother Michael Quirk..... 1092
Communication between White House and IRS re: Entities Eligible 1099

VOLUME III

Second Supplemental Declaration of Brother Michael Quirk (Nov. 22, 2013) 1107
Deposition of Gary M. Cohen 1110
Original EBSA Form 700 1113
Church Alliance Comments on Proposed Rulemaking 1117
Excerpt from Government Reply in Support of Motion to Dismiss or for Summary Judgment ... 1160
Excerpts of Transcript of Proceeding (Dec. 16, 2013) 1163
Declaration of Timothy E. Head 1171
Declaration of Joshua Wells 1190
Declaration of David Armstrong 1202
Declaration of Joseph Ormont 1215
Supplemental Declaration of Timothy E. Head . 1223

JOINT APPENDIX MATERIALS FOR NO. 15-119

Docket Entries, *Southern Nazarene University v. Sebelius*, No. 5:13-cv-01015 (W.D. Okla.) 1286
Docket Entries, *Southern Nazarene University v. Burwell*, No. 14-6026 (10th Cir.) 1293
Excerpts from Complaint in *Southern Nazarene University v. Sebelius*, No. 5:13-cv-01015 (W.D. Okla.) 1312
Joint Stipulation of Facts 1313

JOINT APPENDIX MATERIALS FOR NO. 15-191

Docket Entries, *Geneva College v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa.) 1326
Docket Entries, Geneva College v. Secretary U.S. Department of Health and Human Services, No. 14-6026 (3d Cir.) 1356
Second Amended Complaint 1376
Declaration of Timothy R. Baird 1394

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, *et al.*, *Plaintiffs*, v. KATHLEEN SEBELIUS, *et al.* *Defendants.*	Civil No. 1:13-cv-02611 **SECOND SUPPLEMENTAL DECLARATION OF BROTHER MICHAEL QUIRK**

SECOND SUPPLEMENTAL DECLARATION OF BROTHER MICHAEL QUIRK

I, Brother Michael Quirk, FSC, do hereby state and declare as follows:

1. My name is Michael Quirk. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements here are true and correct, and they are based on my personal knowledge and/or a review of the business records of Christian Brothers Services and Christian Brothers Employee Benefit Trust (the "Christian Brothers Trust" or "Trust"). If I were called upon to testify to these facts, I could and would competently do so.

2. Express Scripts, Inc. ("ESI") provides on behalf of Christian Brothers Services certain administrative services in connection with pharmaceutical benefits under the Christian Brothers Trust. It is not clear to Plaintiffs whether ESI is a third party administrator under the Mandate for the Christian Brothers Trust. It is also not clear to Plaintiffs whether or not ESI will provide contraceptives to employees (and beneficiaries of such employees) of employers that have adopted the Christian Brothers Trust and provide ESI with a copy of a self-certification form pursuant to 26 U.S.C. § 54.9815-2713A before December 31, 2013, or thereafter.

3. This great uncertainty with how contraceptive coverage may be handled under the Christian Brothers Trust is a matter of immediate and urgent concern for Plaintiffs.

4. On April 8, 2013, the Church Alliance, 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, including Christian Brothers Services, submitted a 20-page comment letter on the proposed regulations published at 78 Fed. Reg. 8456 et seq. (Feb. 6, 2013) 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 self-insured church plans like the Christian Brothers Employee Benefit Trust. A true and correct copy of the Church Alliance's comment letter is available at http://church-alliance.org/initiatives/comment-letters (last visited

September 23, 2013) and attached hereto as Exhibit A.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON NOVEMBER 22, 2013

/s/ Br. Michael Quirk
Br. Michael Quirk, FSC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

VIDEOTAPED DEPOSITION OF
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

By and Through Its Designee

GARY M. COHEN

Washington, D.C.

Tuesday, April 16, 2013

Reported by: John L. Harmonson, RPR

Job No. 59521

G. COHEN

April 16, 2013

10:07 a.m.

Videotaped Deposition of GARY M. COHEN, as designee of U.S. Department of Health and Human

Services, held at the offices of Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C., pursuant to Notice, before John L. Harmonson, a Registered Professional Reporter and Notary Public of the District of Columbia.

* * *

[Page 33]

Q.

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

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

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

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

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

A. No, I don't believe so.

* * *

EBSA FORM 700—CERTIFICATION

(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.	
Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	
I certify that, on account of religious objections, the	

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

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

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

_____

Signature of the individual listed above

_____

Date

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

to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

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

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

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

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

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. Each organizations that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal

requirement to cover certain contraceptive services without cost sharing is required to complete this self-certification from pursuant to 26 CFR 54.9815-2713A(a)(4) in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email *ebsa.opr@dol.gov* and reference the OMB Control Number 1210-0150.

Counsel: K&L Gates LLP
1601 K Street NW
Washington D.C. 20006
Tel (202) 778-9000
Fax (202) 778-9100

April 8, 2013

BY ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, SW.
Washington, DC 20201

Re: Notice of Proposed Rulemaking Regarding Preventive Services
CMS-9968-P
RIN 0938-AR42

Dear Sir or Madam:

The Church Alliance submits this comment in response to the notice of proposed rulemaking regarding preventive services ("NPRM") issued jointly by the Internal Revenue Service, the Department of Labor and the Department of Health and Human Services (HHS) (together, the "Departments") and published at 78 Fed. Reg. 8456 (Feb. 6, 2013). The Church Alliance commented twice previously on the topic of preventive services ("Earlier Comments"), first on the then interim final

rules published at 76 Fed. Reg. 46621 (Aug. 3, 2011) ("2011 Interim Final Rules"), and then on the advance notice of proposed rulemaking published at 77 Fed. Reg. 16501 (Mar. 21, 2012) ("ANPRM").[1]

Executive Summary

The Church Alliance appreciates the Departments' responsiveness and attentiveness to the Church Alliance's Earlier Comments in the NPRM to attempt to accommodate the religious beliefs of religious organizations. However, for the reasons explained below, the expanded definition of "religious employer" continues to exclude bona fide religious organizations, and the proposed accommodation for "eligible organizations" is unworkable, particularly for self-insured church plans. For these reasons the Church Alliance reiterates its suggestion in its Earlier Comments that the Departments abandon the employer-by-employer approach and adopt instead a broader plan-based exemption.

I. BACKGROUND ON THE CHURCH ALLIANCE

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. The Church Alliance members, listed on the left of this letterhead, provide medical coverage to approximately one

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[1] Copies of these Earlier Comments are available at http://church-alliance.org/initiatives/comment-letters (last visited April 3, 2013).

million participants (clergy and lay workers) serving over 155,000 churches, synagogues and affiliated organizations. These medical programs are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 414(e) of the Internal Revenue Code (the "Code").

All of the members of the Church Alliance share the common view that a church or an employer associated with a church should not have to face the choice of violating its religious tenets and beliefs or violating the law in order to maintain a health care plan for its workers.[2] This is true even though most of the health care plans associated with the members of the Church Alliance do not impose any specific restrictions on contraception coverage. A few programs, reflecting the religious beliefs of the churches with which they are associated, exclude coverage for all contraceptives. Other programs whose associated churches do not object to contraception but hold fundamental convictions against abortion, exclude coverage for contraceptives that are or could be abortifacients, such as the so-called "morning-after pills" or "emergency contraceptives."

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[2] If a religious employer, large or small, sponsors a medical plan for its employees, but the plan does not provide required contraception coverage, Code section 4980D will impose an excise tax equal to $100/day for each covered individual denied such coverage. If a religious employer with an average of 50 or more full-time employees discontinues its plan to avoid violating its religious tenets and beliefs, it will be subject to a penalty under Code Section 4980H of $3,000/year for each full-time employee.

II. EXEMPTION IN THE FINAL REGULATIONS FOR "RELIGIOUS EMPLOYERS"

A. Exemption

In the NPRM, HHS proposed the addition of a new 45 C.F.R. §147.131(a), defining the term "religious employers", which will read as follows:

> § 147.131 Exemption and accommodations in connection with coverage of preventive health services.
>
> (a) *Religious employers*. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended.

B. Improved, But Further Improvement Necessary

The Church Alliance is grateful that the Departments considered and responded to comments received in response to the ANPRM, and that the criteria for the religious employer exemption have been amended by the Departments "to ensure that an

otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths."[3]

The elimination of the first three prongs of the definition for "religious employer" contained in the 2011 Interim Final Rules is a significant improvement. However, the exemption for "religious employers" continues to exclude bona fide religious organizations because it continues to reference statutory exemptions set out in Code sections 6033(a)(3)(A)(i) and (iii) that were crafted for another purpose – specifically, to exempt churches, their integrated auxiliaries, conventions or associations of churches and the exclusively religious activities of a religious order from the annual Form 990 filing requirement under Code section 6033.

As other commenters have noted, the Form 990 filing requirement – the requirement from which Code sections 6033(a)(3)(A)(i) and (iii) carve out exemptions – serves a two-fold purpose: it provides the IRS with information necessary to administer the tax laws, and it makes tax-exempt organizations financially accountable to the IRS and the general public. The initial purpose of this filing requirement, in 1943, was to monitor organizations that were using an unrelated business income "loophole", to determine whether and how they should be taxed.[4]

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[3] 78 Fed. Reg. at 8459.

[4] Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church"*, 25 VAL. U.L. REV. 203, 211 (1991), *available at*

The exemptions from filing the annual Form 990 reflect congressional sensitivity to the church-state entanglement issues inherent in mandating financial reporting and accountability for churches and religious organizations.

The Form 990 filing exemptions, however, are unduly narrow when applied to exempt religious employers from the contraception coverage requirement. More importantly, they have no relevance whatsoever to church benefit plans (to which the contraception coverage requirement otherwise would apply), having been devised, as noted above, to serve an entirely different purpose.

The church-related organizations exempted by Code section 6033(a)(3)(A)(i) are described as "integrated auxiliaries." Since the Form 990 discloses an organization's income, it was logical to utilize a Form 990 filing exemption for integrated auxiliaries that is focused on the sources of the organizations' financial support.[5] However, basing an exemption from the contraception coverage requirement on the level of an employer's financial support from the church or convention or association of churches with which it is affiliated ignores the historic boundaries of churches and church conventions and effectively divides them into two categories of employers – those who are entitled to the exemption and those who are only entitled to the accommodation. This would be true despite the fact that they all share the same religious faith and beliefs with regard to the provision of

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http://scholar.valpo.edu/vulr/vol25/iss2/3/ (last visited Mar. 29, 2013).

[5] TD 8640, 1996-1 C.B. 289.

contraception coverage. There does not seem to be a rational basis for such a distinction.

As noted by the United States Conference of Catholic Bishops, the proposed test for deciding whether an organization is a "religious employer" bears no rational relationship to any legitimate governmental interest that the mandate or the exemption purports to advance.[6] The Form 990 filing exemptions, which have no relevance whatsoever to church welfare or benefit plans, were never intended to protect against a government requirement that may violate religious tenets and beliefs entitled to First Amendment protection. Additionally, the proposed exemption would run afoul of the Establishment Clause of the First Amendment because it would discriminate between various denominations depending on sources of financial support, which may depend on the denomination's polity (governance structure) or church members' affluence.[7]

---

[6] *See*, comment by United States Conference of Catholic Bishops dated March 20, 2013, *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf (last visited Apr. 2, 2013).

[7] *See*, *Lutheran Social Service of Minnesota v. United States*, 758 F.2d 1283, 288 n.5 (8th Cir. 1985) ("We necessarily construe the word 'church' in section 6033 to include both organizational forms of churches with respect to "churches and their integrated auxiliaries." Any other construction of the phrase—i.e., if "church" were construed as meaning only hierarchical churches such as the Catholic Church—would result in an unconstitutional construction of the statute because favorable tax treatment would be accorded to hierarchical churches while being denied to congregational churches, in violation of the first amendment.").

We urge instead a plan-based exemption for all employers participating in "church plans" as defined in ERISA section 3(33) and Code section 414(e). As noted in our Earlier Comments, exemptions based on "church plan" status have been in place for years under a variety of federal laws, including ERISA, the Code and federal securities laws. Thus, a plan-based exemption would be much less likely to be challenged on the basis of constitutionality.

A plan-based exemption would simplify the administration of large denominational benefit plans. Some of these plans have hundreds, some even thousands, of small religious employers. The plans are typically administered by a benefits board that strives to make the communications to employers and covered participants uniform across the country. The plans often provide the same information about the benefits and procedures of the plan to all participants regardless of the type of participating employer for which they work. A plan-based exemption, discussed above, would allow these practices to continue in an efficient manner.

In the absence of a plan-based exemption, a few unintended consequences could result. First, the expenses that the benefit board would have to undertake to make the determination of which participating employers are eligible organizations, and the expenses of complying with the accommodation would be borne in part by each participating exempt religious employer. This would happen because the funds in multiple employer church plans are typically commingled among all participating employers in the plan. This unintentionally subjects some exempt religious

employers to the expenses, though small, of complying with the accommodation for eligible organizations.

Second, the administrative burden of an employer-by-employer determination may also drive multiple employer church plans away from eligible organizations. Some benefit boards may be so concerned about contraception coverage that they may terminate the coverage of participating eligible organizations in favor of having a plan that only covers exempt religious employers. This may leave participating eligible organizations, and their employees, worse off. Alternatively, the benefit board maintaining a multiple employer plan, out of concern for the participating exempt religious organizations, may pass the cost of complying with the accommodation for eligible organizations on to those eligible organizations. This may cause friction between participating employers (exempt religious employers versus eligible organizations) or may cause participating eligible organizations, perhaps long participating in the multiple employer church plan, to depart the plan due to the higher cost, or may cause them to be more attracted to coverage through outside commercial insurance providers.

C. Continued Omission of Bona Fide Religious Organizations

The exclusion in Code section 6033(a)(3)(A)(i) has been defined in regulations as covering "a church, an interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church (as defined in

paragraph (h) of this section)."[8] Other church-related organizations also are excluded from the Form 990 filing requirement, but may not be included within either section 6033(a)(3)(A)(i) or (iii). These organizations include:

- an educational organization (below college level) that is described in Code section 170(b)(1)(A)(i), that has a program of a general academic nature, and that is affiliated with a church or operated by a religious order,
- a mission society sponsored by or affiliated with one or more churches or church denominations, more than one-half of the activities of which society are conducted in or directed at persons in foreign countries,
- an organization described in Code section 6033(a)(3)(C), which is a religious organization described in Code section 501(c)(3), other than a private foundation, the gross receipts of which in each taxable year are normally not more than $5,000,
- an organization described in Code section 501(c)(3), with gross receipts that are normally not more than $5,000 annually, and that is operated, supervised or controlled by or in connection with a religious organization described in section 6033(a)(3)(C)(i), and
- an organization exempt from filing Form 990 under the authority of Revenue Procedure 96-10, 1996-1 C.B. 577, which includes organizations operated, supervised or controlled by one or more churches, integrated

[8] Treas. Reg. §1.6033-2(g)(1)(i).

> auxiliaries or conventions or associations of churches and that are engaged exclusively in financing, funding the activities of, or managing the funds of such organizations, or that maintain retirement insurance programs primarily for such organizations and their employees; and organizations engaged in financing, funding or managing assets used exclusively for religious activities that are operated, supervised or controlled by one or more religious orders.[9]

These additional exemptions were created because of First Amendment concerns about subjecting religious organizations to financial oversight by the IRS. To the extent the religious employer exemption to the contraception coverage mandate continues to be based on the Form 990 filing exemptions, these same First Amendment concerns also justify the extension of the religious employer exemption to the above categories of religious organizations.

D. Additional Clarity Needed

Integrated auxiliaries are exempted from the Form 990 requirement under Code section 6033(a)(3)(A)(i). However, the term "integrated auxiliary" is unclear and has been subject to much controversy over its history, including litigation.[10] While the current regulatory definition of the term "integrated

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[9] Many organizations within the categories listed above (as outside section 6033(a)(3)(A)(i) or (iii)) also may qualify as integrated auxiliaries, and the inclusion of a religious organization in any of these categories is not intended to imply that the organization is not an integrated auxiliary.

[10] *See*, footnote 4, *supra.*

auxiliary" is more objective and less controversial than the prior definition used for that term, the "internal support" test within that definition remains hazy. That definition states that an organization is internally supported, unless it both:

- offers admissions, goods, services or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and
- normally receives more than fifty percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities and activities that are not unrelated trades or businesses.

The internal support test must be met for an organization to be considered an "integrated auxiliary." However, application of this test to some church-related organizations is unclear.

For some organizations, it is unclear whether their activities constitute an offer of sale and whether the receipts are from sales, such as when donations are requested in return for goods. At other times, it is unclear if items (especially in the case of intangible items) being "offered" are admissions, goods, services or facilities. And what is the "general public"? If the "offer" is being made to a very large church group that is open to the general public, is that an offer to the "general public"? Yet another question is whether contributions are received from a "public solicitation," when an appeal is made to the membership of a large church.

These questions on the definition of "integrated auxiliary" have existed for a number of years. However, in the near future, in addition to risking penalties for failure to file a Form 990 if the IRS deems an organization's interpretation of this term to be incorrect, the organization possibly may be subject to severe penalties for its "incorrect" interpretation, especially for those with self-insured plans, for which the requirements are still unclear.[11] So, for example, if the administrator of a large denominational benefit plan has determined that all employers participating in the plan are exempt religious employers, either as churches or integrated auxiliaries, and the IRS decides some of the employers are not exempt, severe penalties ($100 per day per participant) could be imposed for a plan's failure to meet the group health plan requirements imposed by section 2713 of the Public Health Service Act.[12] This seems especially severe when the test for exemption from the requirement is unrelated to the underlying requirement.

E. Comments Sought: Proposed Additional Exemption

In the Supplementary Information to the NPRM, the Departments proposed making the accommodation or the religious employer exemption available on an employer-by-employer basis and sought comments on this approach, including comments on alternative

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[11] *See*, footnote 2, *supra*.

[12] U.S. Congressional Research Service, Enforcement of the Preventive Health Care Services Requirements of the Patient Protection and Affordable Care Act (RL 7-5700; February 24, 2012), by Jennifer Staman and John Shimabukuro,

approaches. For the reasons discussed in its Earlier Comments, the Church Alliance again urges the Departments to extend the religious employer exemption to all employers that maintain or participate in "church plans", as defined in Code section 414(e). The Departments' continuing struggle with an employer-by-employer based approach highlights once again the utility of a plan-based approach. Among the reasons discussed were that focusing the exemption on benefit plans rather than employers avoids entanglement problems. Indeed, for nearly 40 years the Internal Revenue Service, the Department of Labor and courts have been making determinations as to whether plans were "church plans" within the meaning of Code section 414(e) without involving any prohibited entanglement in religious issues. In addition, the proposed plan-based exemption recognizes that in many churches the plan is not at an individual employer level but may be at a local, state, regional or even national level. Depending on a church's polity as determined by its theological beliefs, some religious employers are required to participate in a multiple employer church plan while others may elect to do so.

However, if the Departments are concerned that such an exemption would be too broad, the Departments could draft the exemption more narrowly so that if the church plan is established or maintained by a religious employer, and substantially all of the employers in the church plan are either religious employers or eligible organizations (or substantially all of the participants are employees of religious organizations or eligible employers), all employers in the church plan would be treated as religious

employers, exempt from the contraception coverage requirement. This approach would prevent the potential adverse consequence described in the Supplementary Information to the NPRM, which is the avoidance of the contraception coverage requirement by employers that are neither religious employers nor eligible organizations. At the same time, this approach would avoid the administrative challenges and possible governmental entanglement for the Departments or courts in determining whether religious organizations were religious enough to be categorized as religious employers or eligible organizations. In addition, this would allow one uniform set of benefits for plan participants and decrease the cost of plan administration for employees in church plans.

This approach would be narrower than an exemption based solely on Code section 414(e). It would result in some church plans being exempt (multiple employer church plans that only include employers that are closely tied to the church), while others, such as certain single employer church plans, not being exempt unless the individual employer satisfies the religious employer definition.

Applying the multiple employer church plan exemption in this manner would recognize the unique nature of multiple employer church plans, particularly the fact that such plans cover many houses of worship (often primarily covering clergy and employees at churches) but also cover some employers associated with the church that may not clearly be religious employers, but that clearly are eligible organizations.

III. ACCOMMODATION FOR "ELIGIBLE ORGANIZATIONS"

A. Definition of "Eligible Organization"

The NPRM requested comments on the proposed "accommodation" for "eligible organizations." Section 54.9815-2713A(a) of the Proposed Regulations defines an "eligible organization" as an organization that satisfies four requirements:

1. The organization opposes providing coverage for some or all of the required contraceptive services;
2. The organization is organized and operates as a nonprofit entity;
3. The organization holds itself out as being a religious organization; and
4. The organization self-certifies that it satisfies the requirements of paragraphs 1 through 3 and specifies the contraceptive services to which it objects.

The self-certification mechanism appears to operate so that an organization's determination that it is "religious" will not be challenged by regulators or others involved in the accommodation process. However, the Agencies noted that some commenters on the ANPRM urged the Departments to provide "enforcement mechanisms to monitor compliance with the criteria" for being an eligible organization.

If the Departments provide in final regulations that they will have oversight over accommodation eligibility, it will put them in the position of having to make determinations as to whether organizations are in fact "religious." Prior to the issuance of Revenue

Procedure 86-23 and the revision of the integrated auxiliary regulations in 1995, the Internal Revenue Service was required to determine if organizations were "exclusively religious." The presence of such a requirement in these regulations proved problematic and was litigated in *Lutheran Social Service of Minnesota v. United States*, 583 F. Supp. 1298 (D.Minn. 1984), *rev'd* 758 F.2d 1283 (8th Cir. 1985), and *Tennessee Baptist Children's Homes, Inc. v. United States*, 604 F. Supp. 210 (M.D. Tenn. 1984), *aff'd*, 790 F.2d 534 (6th Cir. 1986). If such an enforcement approach is adopted, the Departments will also have to determine what it means for an organization to hold itself out as being religious. The NPRM does not provide any insight as to what would be required to constitute the required holding out.

The NPRM also requires that an organization be organized and operated as a nonprofit entity in order for the accommodation to be available. The Supplementary Information to the NPRM states that " . . . an organization is not considered to be organized and operated as a nonprofit entity if its assets or income accrue to the benefit of private individuals or shareholders" – however, the NPRM does not tell us what standard should be used for making the "no private benefit" determination. The IRS has issued regulations and other guidance on the "no private inurement" requirement applicable to Code section 501(c)(3) organizations. The IRS and the courts have also developed a broader "no private benefit" rule, also applicable to such organizations. Are these the rules to be used to make the "no private benefit" determination for purposes of "eligible organization" status? And will even $1.00 of private

benefit cause the requirement not to be met? To the extent that the self-certification process is "self-policing," securing answers to these questions is perhaps not as urgent. However, if the Departments will be involved in oversight and enforcement of eligible organization status, the need for clear guidance on these questions becomes extremely important.

B. Application of the Accommodation

1. Insured Plans

In the case of an insured plan, the NPRM attempts to accommodate religious employers that object to providing contraception coverage by having the insurer providing group coverage assume the responsibility by providing individual insurance policies that provide contraception coverage to plan participants and beneficiaries without cost sharing. This proposed structure is thought to avoid conflicts for a religious employer because the employer would have "no role in contracting, arranging, paying or referring for this separate contraception coverage." 78 Fed. Reg. at 8463. However, for the reasons explained below, the NPRM fails to address the religious liberty concerns of religious organizations that object to providing contraception coverage on account of their religious beliefs. The NPRM still requires an objecting eligible organization to violate its religious beliefs by requiring it to play a substantial role in the provision of contraception coverage to its employees or pay a penalty.[13]

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[13] *See*, footnote 2, *supra*.

a. Eligible organizations will be paying for contraception coverage

Other commenters have noted that contraception coverage, like lunch, is not free. Since the eligible organizations (and plan participants in the case of contributory plans) are paying all the premiums, they must be paying for the contraception coverage. The Departments appear to be of the view that the group health insurers, not the eligible organizations or plan participants, will be providing the coverage, and that the insurers will do so because, when viewed together with the underlying group policy, the cost of contraception coverage will be less, or at least no more, than the cost of unplanned pregnancies. The Church Alliance remains skeptical about this assumption for the reasons set forth in its prior comments. However, even if true, religious organizations will still be paying for contraception coverage for the reasons set forth below.

First, the NPRM provides that the contraception coverage cannot be "reflected in the group health insurance premium." 78 Fed. Reg. at 8462. It follows therefore that the insurer will charge the eligible organization *more* for its group coverage because of the increased cost of unplanned pregnancies resulting from the omission of contraception coverage. Even if a group insurer could take the effect of individual contraception policies into account in setting the rates for an eligible organization's group policy,[14] the insurer will still charge more for

[14] We express no comment on whether under applicable state insurance laws the insurer can consider the individual policies

the eligible group coverage it will be required to issue because of the increased cost of administering the individual policies (e.g., state policy approvals, separate mailings, printing costs, increased cost of coordinating benefits, etc.).

Second, even if one ignores the additional administrative costs and assumes that the contraception coverage is cost neutral, the coverage is neutral only in the short run. Since the terms of group health insurance contracts rarely exceed more than 12 months in duration, the "cost" to one insurer for contraception coverage will often be recouped, if at all, in a subsequent plan year by a different insurer in the form of reduced unplanned pregnancies. Insurers cannot be certain that their policies will be renewed. Accordingly, in setting the premiums for any year, they will discount the future benefit of the upfront cost of provided contraception coverage.

b. Employees of eligible organizations will be receiving contraception coverage by virtue of their employment

Due to the absence of cost sharing, employees of eligible organizations will be receiving contraception coverage by virtue of their employment for less – nothing, in fact – than they would have paid for the coverage elsewhere. For plans that are covered by

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in setting the rates for the group policies. State insurance regulators are, of course, concerned about insurers setting rates too high. However, they are also concerned about insurers setting rates too low since it could affect their solvency.

ERISA, this will cause the contraception coverage to be part of the group plan because the contraception coverage will be part of an employee benefit program "established or maintained by an employer." 29 U.S.C. §1002(1).

In an analogous situation, employers have been held to have contributed to the cost of an employee-pay-all plan, thus bringing the plan under ERISA, if the plan participants could not have obtained the same coverage elsewhere for the same cost, perhaps because of a group discount. See, *House v. Am. United Life Ins. Co.*, 499 F.3d 443, 449 (5th Cir. 2007); *Tannebaum v. Unum Life Ins. Co.*, 2006 WL 26710405 (E.D. Pa.); *McCann v. Unum Provident*, Civ. Action No. 11–3241 (MCC) (D.N.J. 2013); *Healy v. Minnesota Life Ins. Co.*, 2012 WL 566759 (W.D. Mo.); *Moore v. Life Ins. Co. of North America*, 708 F. Supp. 2d 597 (N.D. W.V. 2010); *Chatterton v. Cuna Mut. Ins. Society*, 2007 WL 4207395 (S.D. W.V.); *Brown v. Paul Revere Life Ins. Co.*, 2002 WL 1019021 (E.D. Pa.) ("Where an employer provides the employee benefits they cannot receive as individuals, it has contributed to an ERISA plan."); and *Kuehl v. Provident Life & Accident Ins. Co.*, 2000 U.S. Dist. LEXIS 21625, *10 (E.D. Wis. Apr. 20, 2000) (contribution exists where 10% discount available only to employees in group plans). But see, *Schwartz v. Provident Life & Acc. Ins. Co.*, 280 F. Supp. 2d 937 (D. Ariz. 2003) (discount in and of itself not sufficient to establish an employer plan under ERISA).

Similarly, Code section 4980B and ERISA section 601 generally require most employers with 20 or more employees that have or contribute to plans to provide COBRA continuation coverage if they maintain a

group health plan. Treasury Regulation §54.4980B-2 provides that "a group health plan is maintained by an employer … even if the employer does not contribute to it if coverage under the plan would not be available at the same cost to an individual but for the individual's employment-related connection to the employer …."

c. Eligible organizations will be facilitating the providing of contraception coverage

The NPRM provides that the contraception coverage provided through individual contraception policies will not be "offered by or through a group health plan." 78 Fed. Reg. at 8462. Insurers will automatically provide contraception coverage for plan participants and beneficiaries. 78 Fed. Reg. at 8463 ("The issuer would automatically enroll plan participants and beneficiaries in a separate individual health insurance policy that covers recommended contraceptive services.") However, eligible organizations remain free to determine who is eligible to participate in their group health plans. Accordingly, by determining who will be eligible to participate in their group health plans, eligible organizations will be effectively determining who receives an individual policy providing contraception coverage. For plans covered by ERISA, serving as such a gatekeeper has been held sufficient employer involvement to indicate the presence of an "employee benefit plan established or maintained…by an employer" which is therefore covered by ERISA. See, *Glass v. United Omaha Life Ins. Co.*, 33 F.3d 1341 (11th Cir. 1994); *Brundage – Peterson v. Compare*

Health Services Ins. Corp., 877 F.2d 509, 510-11 (7th Cir. 1989); and *Rengifo v. Hartford Life and Accident Ins. Co.*, Case No. 8:09-CV-1725-T-17MAP (M.D. FL 2010).

d. The NPRM will limit eligible organizations' choice of group health insurers

The NPRM provides that an insurance company issuing a group policy to an employer will provide to plan participants "contraception coverage under individual policies, certificates, or contracts of insurance (hereinafter referred to as individual health insurance policies)." 78 Fed. Reg. at 8462. The NPRM apparently assumes that an insurer that has issued a group health policy to an eligible organization can legally issue such "individual health insurance policies" to any plan participant. In some cases, an insurer cannot.

The NPRM notes that the individual contraception policies issued in connection with *self-insured* plans will be subject to all applicable state laws, including state insurance filing and rate review requirements. 78 Fed. Reg. at 8465. As explained below, individual contraception policies issued in connection with insured plans will be treated as individual policies and therefore involve the laws not only of the state in which the group policy will be issued, but each state in which a plan participant resides.[15]

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[15] Certificates of insurance are generally treated as evidence of coverage under a group plan. They do not expand the coverage provided under the group policy.

Although insurance involves interstate commerce, as the result of the federal McCarran-Ferguson Act, the right to regulate insurance companies has generally been relegated to the states. State insurance regulators are charged with overseeing the regulation of the insurance industry to ensure that insurers remain solvent, and that the rules and requirements enacted by the state legislature are complied with. The laws vary from state to state, but states generally require insurers doing business in a state to be licensed in a state.

In the case of group insurance, the insurance company frequently need only be licensed in the state in which the policy is issued. For example, Alabama's unauthorized insurers law does not apply to "[t]ransactions in [Alabama] involving group…insurance…where the master policy or contract was lawfully issued and delivered in a state in which the insurer was authorized to transact business." Ins. Code § 27-11-2(4). Other states have similar provisions. Thus, an insurance company can often issue a group health policy to an employer headquartered in one state even though the policy may cover employees residing in other states so long as the insurer is licensed in the state in which the employer is headquartered. However, that changes when an insurance company issues individual policies. Each state will require a company issuing individual policies to its residents to be licensed in that state. Accordingly, an insurer issuing a group policy to an eligible organization may not be able to issue individual contraception policies to each plan participant unless it is licensed in all the states in which plan participants reside and complies with the

insurance laws of all those states. In addition to state filing and rate review requirements, those laws could include requirements regarding (i) provider access; (ii) utilization reviews, grievance reviews/internal appeals, and external reviews; (iii) prompt payment of claims; (iv) mandated benefits; (v) small group rating requirements; and (vi) handling of complaints. If an eligible organization is satisfied with its current insurer, it should not have to change insurers to an insurer that can issue individual contraception policies in each state in which a plan participant or beneficiary resides. The group health insurance market is already concentrated. Effectively limiting eligible organizations to large insurers that are licensed in all states, or at least in all the states in which plan participants reside, would severely limit eligible organizations' choice of insurers.

2. Uninsured Plans

a. Alternative approaches for providing participants and beneficiaries in self-insured group health plans contraception coverage

The Departments have not yet issued regulations on contraception coverage for self-insured group health plans. However, in the Supplementary Information to the NPRM, the Departments described three "alternative approaches for providing participants and beneficiaries in self-insured group health plans established or maintained by eligible organizations

with contraception coverage at no additional cost, while protecting the eligible organizations from having to contract, arrange, pay, or refer for such coverage."

In the subsections that follow, the Church Alliance will comment on each of the three described approaches, particularly as they would apply to multiple employer church plans.

Under all three approaches, the Departments state that "if there is a third party administrator for the self-insured group health plan of the eligible organization, the eligible organization would provide the third party administrator with a copy of its self-certification." In addition, if "the plan uses a separate third party administrator for certain coverage, such as prescription drug coverage, the eligible organization would also provide a copy of its self-certification to the separate third party administrator" if the separate coverage includes coverage of any contraceptive service listed in the self-certification.

However, it is unclear, in the multiple employer church plan context, which entity would be considered the third party administrator, especially since the proposed regulations contain no definition of that term. With multiple employer church plans, the "denominational plan board"[16] may perform

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[16] The term "denominational plan board" is intended to mean an organization that is described in Code section 414(e)(3)(A) as "an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a

many of the administrative functions that would be performed by an independent third party administrator in a single employer plan context, and is a "third party" in the sense that it is not the employer or participant. So, in such situations, is the denominational plan board the third party administrator? If the denominational plan board is the third party administrator, none of the approaches appear workable, because of the required involvement by the third party administrator, which is an exempt religious employer.

If there is a claims administrator that processes health benefits claims for a multiple employer church plan, is that claims administrator the third party administrator? Does the answer change if a denominational plan board that performs much of the health plan administration utilizes multiple claims administrators, for multiple categories of claims that include contraceptive services (e.g. by type of benefit or claim (e.g., pharmaceutical or medical) or geographic area, including city)? Can the answer change from year to year, depending on the level of administration by the denominational church plan board versus the claims administrator in the year in question?

With each of the three approaches, an adjustment would be made in the user fees that otherwise would be charged by an FFE to the issuer providing the

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church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches."

contraception coverage.[17] However, it is unclear how this would be administered if a church health plan uses multiple third party administrators, especially if they are affiliated with different issuers or none of them is affiliated with an issuer. It also is unclear how any of the approaches would work if the third party administrator is located in a state without an FFE, and any issuer affiliated with that third party administrator also is located in that state. Due to state licensing regulations, these affiliations may be extremely limited and, at the least, will require interstate coordination, which may not be allowable under state licensing requirements. In addition, if the denominational plan board is the third party administrator, it is unlikely to be affiliated with an issuer.

(i) First Approach

Under this approach, a "third party administrator receiving the copy of the self-certification would have an economic incentive to voluntarily arrange for the separate individual health insurance policies for contraception coverage", because it would be compensated with a reasonable fee for automatically arranging for the contraception coverage. Under this approach, the Supplementary Information to the NPRM describes the third party administrator's role in "automatically arranging for the contraception

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[17] Because the FFE user fee adjustments do not begin until 2014, after the end of the temporary enforcement safe harbor for some plans pursuant to guidance issued by the Departments on February 10, 2012, and reissued on August 15, 2012, referred to in 78 Fed. Reg. at 8558 n. 6. The safe harbor should be extended to cover this gap period.

coverage" as "acting, not as the third party administrator to the self-insured plan of the eligible organization, but rather in its independent capacity apart from its capacity as the agent of the plan."

It is difficult to envision how the third party administrator could provide this service "automatically" because of its relationship to the eligible organization and its employees, but be acting "in its independent capacity." In addition, how, exactly, could this "automatic" arrangement occur without some involvement on the part of the eligible organization? The eligible organization, first, would be required to provide the third party administrator with a copy of its self-certification. However, without any further involvement, how would the third party administrator have contact information and other necessary information to provide the contraception coverage? Even if the third party administrator had contact information for all employees covered by a multiple employer church plan, how will it distinguish between employees of eligible organizations and employees of exempt religious employers, without identification of those employees by either the eligible organizations or the denominational church plan board? The Supplementary Information to the NPRM requires that individual contraception policies be provided to both plan participants and *beneficiaries*. In multiple employer church plans, how will the third party administrator know which beneficiaries are connected to eligible organizations and which are connected to exempt religious employers, without involvement of the eligible organizations or denominational church plan board? How will the

beneficiaries' addresses and other contact information be obtained? Since this coverage is only for women with reproductive capacity, how will those women be identified, and beginning at what age will the daughters of an eligible organization's employees begin receiving offers of this free coverage? How will the daughters' ages be determined so the offers of such coverage may be made? How will newly eligible employees and beneficiaries be identified, without the involvement of the eligible organization or denominational church plan board? How will employees and beneficiaries who no longer are eligible for such coverage be identified, or will the issuer need to rely on those individuals to report that they no longer are eligible for this free coverage (because of change of employer, change in hours, change in relationship to employee, etc.)? If the issuer must rely on such self-reporting by the individuals, the individuals will have little incentive to report they no longer are eligible for free coverage.

The Supplementary Information to the NPRM states that issuers providing contraception coverage "would be responsible for providing the notice of availability of such coverage to participants and beneficiaries . . . in self-insured group health plans of eligible organizations", and that this notice would be provided directly to plan participants and beneficiaries by the issuer, generally annually. Again, for multiple employer church plans, it is difficult to imagine how these notices would be provided, without the involvement of the eligible organizations or denominational church plan board, due to practical issues like identifying who is entitled to such notices, and their addresses.

Then, what would prevent the third party administrator from aggressively marketing to those employees and beneficiaries not only contraception coverage, but other services and products, on which the administrator could profit, including other services and products that are objectionable to the eligible organization? When the employer or denominational plan board is involved in services provided, it can retain some oversight, but not when it has "no involvement."

Finally, contraceptive services are unlikely to fit neatly into discrete categories, unrelated to other health services that are covered by a self-insured plan. How will such payments be coordinated between the self-insured plan covering most health services and the third party administrator covering contraceptive services? How will employees and beneficiaries know which plan covers what? For multiple employer church plans with other similar types of coverage questions and coordination, the denominational church plan board resolves the issue.

(ii) Second Approach

Under this approach, coverage under the eligible organization's plan would comply with the requirement to provide contraception coverage *only* if the third party administrator automatically arranges for an issuer to assume sole responsibility for providing separate individual health insurance policies offering contraception coverage. The third party administrator would not be automatically providing products that are objectionable to the eligible organization (and church, in the case of a multiple employer church plan). However, the third

party administrator engaged by the eligible organization still would be arranging for such coverage. Ironically, if the third party administrator would fail to arrange for contraception coverage or the issuer would fail to provide such coverage, the eligible organization's plan coverage would fail to meet the requirements of section 2713 of the Public Health Service Act, which could subject the plan to severe penalties,[18] through inaction entirely outside the plan's control.

In addition, practical issues could arise with this approach, such as the necessity of individual participant and beneficiary information being provided to the issuer, privacy and security issues that could arise due to this second level of information transmission and questions about responsibility in the event of a breach involving this information. Also, with multiple employer church plans, participants employed by exempt religious employers and those employed by eligible organizations would need to be separated, with only information on the employees (and their beneficiaries) in the latter group being provided to the issuer. For a multiple employer church plan, difficulties are likely to be faced by a third party administrator being required to provide this on a nationwide basis, with separate issuers in different geographic locations, and no or possibly limited affiliation with any issuers. Many of the practical issues raised about the first approach also apply to this approach.

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[18] *See*, note 12, *supra*.

(iii) Third Approach

Under this approach, "the third party administrator, receiving the copy of the self-certification would be directly responsible for automatically arranging for contraception coverage for plan participants and beneficiaries." The "self-certification would have the effect of designating the third party administrator as the plan administrator under section 3(16) of ERISA solely for the purpose of fulfilling the requirement that the plan provide contraception coverage without cost sharing." This approach is likely to be objectionable to most third party administrators, because it places the legal responsibility for ensuring compliance with section 2713 of the Public Health Service Act solely on the third party administrator, which could have legal implications under ERISA's reporting, disclosure, claims processing and fiduciary provisions for both the third party administrator and the eligible organization.[19]

The Supplementary Information to the NPRM states that "there would be no obligation on a third party administrator to enter into or continue a third party administration contract with an eligible organization if the third party administrator were to object to having to carry out this responsibility." If this approach would be chosen by the Departments, eligible organizations may be faced suddenly with a lack of a third party administrator or suddenly increased fees charged by the third party administrator.

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[19] We assume that it was not the Departments' intent to subject to ERISA's requirements church plans that have not elected under Code section 410(d) to be covered by ERISA.

(iv) Problems with all three approaches

For any multiple employer church plan established or maintained by a religious employer, with only religious employers and eligible organizations as employers in the plan, all three of the approaches create a multitude of practical issues. Any of the approaches would force the denominational church plan board or the eligible organization to become involved in arranging for contraception coverage and would require continuous involvement in obtaining, sorting and transmitting information, and coordinating coverage. For these reasons and the reasons previously stated, the Church Alliance respectfully requests the exemption of all such multiple employer church plans from the contraception coverage requirement.

All these approaches create particular problems for church plans that are self-administered, and therefore have no third party administrator. The Departments noted in the Supplementary Information to the NPRM that "[n]o comments were submitted in response to the ANPRM on the extent to which there are plans without a third party administrator." 78 Fed. Reg. at 8464. The absence of comments does not mean there are no such plans, especially since there was no guidance issued defining what constitutes a third party administrator. The Church Alliance did comment that the third party administrator approach for self-insured plans would not accommodate the religious objections of self-insured church plans using an affiliated religious organization as an administrator. If a religious organization cannot provide contraception coverage without violating its religious

tenets and beliefs, neither can an affiliated religious organization.

Finally, perhaps the biggest question raised by the NPRM is whether insurance companies and third party administrators will in fact be willing to carry out the duties the Departments have assigned to them in the accommodation process, and in the manner contemplated by the NPRM. To date, there has been no indication that third party administrators will be willing to play such a role, nor has there be any firm indication that an insurance company or companies will be willing to provide a policy that only provides individual contraception coverage. Other commentators have pointed out that such a policy must be approved at the state level and would thus carry with it high administrative costs. It does not seem like an insurance company would be likely to approve a policy on which it will at best make only a small profit or, as some have suggested, lose money – and yet the entire structure of the NPRM seems to rest upon such an assumption – and on the assumption that third party administrators will also be willing to create an entirely new administration mechanism when they are not legally required to do so.

In addition to urging greater clarification of the three approaches for self-insured plans suggested in the NPRM, discussed above, the Church Alliance strongly suggests a plan-based approach to an exemption for self-insured plans of religious employers that are also self-administered, or are plans for which the third party administrator is itself a religious organization. Essentially, the only

workable solution for self-insured church plans of eligible organizations is a plan-based exemption.

C. Insured and Uninsured Plans Will be Forced to Facilitate Coverage for Abortions in Violation of Various Federal and State Laws

The NPRM continues the Departments' failure to recognize that for some religious organizations, having to provide coverage for contraceptives approved by the Food and Drug Administration, including so-called emergency contraceptives, such as ella (ulipristal acetate) and Plan B (levonorgestrel), requires the coverage of abortifacient drugs, thus violating: (i) the Weldon amendment; (ii) ACA; and (iii) various state insurance laws.

1. Weldon amendment

The Weldon amendment has been included in every federal appropriations law since 2004. Section 506 of the current Appropriations Act provides:

> (a) None of the funds appropriated in this [Consolidated Appropriations] Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion;
>
> (b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.

In addition, Section 507(d) of the Act provides:

> None of the funds made available in this Act may be made available to a Federal agency

> or program, or to a State or local government, 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.[20]

2. ACA Section 1303(b)(1)(A)

Section 1303(a)(1)(A) of ACA provides:

> Notwithstanding any other provision of this title … (i) nothing in this title … shall be construed to require a qualified health plan to provide coverage of [abortion services] as part of its essential health benefits for any plan year; and (ii) … the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion services] as part of such benefits for the plan year.

3. State insurance laws

NPRM's requirement for the issuance of individual insurance policies providing coverage for abortifacient drugs without cost sharing conflicts with the laws of several states that prohibit the issuance or delivery of individual policies providing coverage for elective abortions unless a separate premium is charged for such coverage. Kansas law, for example, provides:

> Any individual or group health insurance policy . . . delivered, issued for delivery,

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[20] Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1111.

> amended or renewed on or after July 1, 2011, shall exclude coverage for elective abortions, unless the procedure is necessary to preserve the life of the mother. Coverage for abortions may be obtained through an optional rider for which an additional premium is paid. The premium for the optional rider shall be calculated so that it fully covers the estimated cost of covering elective abortions per enrollee as determined on an average actuarial basis."[21]

These state laws are unaffected by the general preemption provision in the Public Health Service, 42 U.S.C. §300gg-23(a)(1). That section provides that the requirements of part A of title XXVII of that Act, which includes the preventive services requirement, are not to be:

> construed to supersede any provision of state law which establishes, implements, or

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[21] Kan. Stat. Ann. §40-2,190. *See also*, Ken. Rev. Stat. §304.5-160(1) ("No health insurance contracts, plans or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium."); *and* Mo. Ann. Code §376.805 ("No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium.") *and* R.I. Stat. §27-18-28 ("No health insurance contract, plan, or policy, delivered or issued for delivery in the state, shall provide coverage for induced abortions, except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy resulted from rape or incest, and except by an optional rider for which there must be paid an additional premium.").

> continues in effect any standard or requirement solely relating to health insurance issuers in connection with individual or group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement of [part A of title XXVII of the PHS Act].

However, these state insurance laws do not prevent the application of the mandate. Section 1303(c)(1) of ACA states that nothing in the Act preempts, or has any effect on, any State law regarding abortion coverage.

The Departments' are apparently of the view that emergency contraceptives are not abortifacients because the latest point at which they operate is to prevent implantation of a newly fertilized embryo in the uterus.[22] However, as the Departments know, some religions sincerely believe that life begins at conception. For organizations that are affiliated with these religions, emergency contraceptives that operate after fertilization are abortifacients.[23] The Departments should accommodate these beliefs. Just

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[22] *See*, *e.g.*, Kelly Wallace, Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771 (last visited Mar. 28, 2013).

[23] There is some evidence that some emergency contraceptives operate *after* implantation. If so, they would be abortifacients even under the Departments' view.

as the "power to tax involves the power to destroy,"[24] so too does the power to define. Allowing religious organizations to define for themselves which contraceptives are abortifacients would be consistent with ACA section 1303(a)(1)(A) of ACA, which provides that "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion services] as part of such benefits for the plan year."

Please contact the undersigned at 202-661-3882 if you have any questions or wish to discuss this matter further.

Sincerely,

Stephen H. Cooper
Government Affairs Counselor, K&L Gates
On Behalf of the Church Alliance

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[24] *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819) (J. Marshall).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-02611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants made clear in their motion that the regulations plaintiffs challenge do not require the third-party administrator (TPA) of a self-insured church plan, like the Christian Brothers Employee Benefit Trust ("Trust"), to make payments for contraceptive services for participants and beneficiaries in the plan. Plaintiffs nonetheless argue that their religious exercise is substantially burdened by the regulations. It is worth reflecting on this claim. The Little Sisters Plaintiffs (and any other eligible organization that participates in the Trust) need only self-certify that they are non-profit religious organizations with a religious objection to providing contraceptive coverage—a statement that they have repeatedly made in this litigation and elsewhere and that is entirely consistent with their religious beliefs—to be relieved of that requirement. Furthermore, neither the Christian Brothers Plaintiffs nor any other TPA of the Trust will be

required to provide contraceptive coverage to plan participants and beneficiaries. And yet, somehow, plaintiffs contend not only that they are injured by this regulatory scheme—which they are not—but also that it amounts to a *substantial* burden on their religious exercise. This claim is simply implausible.

Plaintiffs' opposition confirms that they are fighting an invisible dragon. Plaintiffs assert that signing the self-certification authorizes their TPA to make payments for contraceptive services for participants and beneficiaries of the Trust. But it does no such thing. Because the Trust is a self-insured church plan, neither Christian Brothers Services nor any other TPA of the Trust is required by the regulations to make payments for contraceptive services for plan participants and beneficiaries. Plaintiffs, moreover, may inform Christian Brothers Services and any other TPA of the Trust that it is not required by the regulations to make such payments—although, as a plaintiff in this case, Christian Brothers Services is no doubt already aware of that fact. Indeed, Christian Brothers Services has made clear that it will not provide such payments, which, as explained, the regulations do not require it to do. Furthermore, the self-certification form explicitly states that, "on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered." Ex. O, ECF No. 37-3. Plaintiffs therefore suffer no legally cognizable injury as a result of the challenged regulations and, in any event, state no valid legal claim. Accordingly, this case should be dismissed or summary judgment granted in favor of defendants.

REPLY CONCERNING UNDISPUTED FACTS

Pursuant to WJM Revised Practice Standards III.E.8.a, defendants reply to plaintiffs "Response to Defendants' Statement of Material Facts" as follows:

Plaintiffs assert, as a threshold matter, that defendants' motion to dismiss or, in the alternative, for summary judgment, should be converted entirely into a motion for summary judgment and then be deferred as premature. Opp'n at 38, ECF No. 42. But plaintiffs offer no compelling justification for their request. Defendants have moved to dismiss all of plaintiffs' claims for lack of jurisdiction and failure to state a claim upon which relief may be granted; defendants seek summary judgment only *in the alternative* and only "[t]o the extent the Court *must* consider the administrative record." Defs.' Mot. at 3, ECF No. 30 (emphasis added). Virtually all of defendants' arguments rely only on the pleadings, documents incorporated by reference into the complaint, and judicially noticeable matters—all of which the Court may consider in reviewing defendants' motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also, e.g., O'Brien v. U.S. Dep't of Health & Human Servs.*,

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., TRUETT-MCCONNELL COLLEGE, INC., GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION,,

Plaintiffs,

vs. Case No. CIV-13-1092-D

KATHLEEN SEBELIUS, SECRETARY OF U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS E. PEREZ, SECRETARY OF U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF

LABOR, JACOB J. LEW, SECRETARY OF THE TREASURY, SECRETARY OF THE TREASURY,

Defendants.

* * * * * * *

TRANSCRIPT OF PROCEEDINGS HAD ON DECEMBER 16, 2013 BEFORE THE HONORABLE TIMOTHY D. DEGIUSTI U.S. DISTRICT JUDGE, PRESIDING

* * *

APPEARANCES

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

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

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

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

* * *

[Page 92]

MR. BERWICK: That's correct, your Honor. Can I just say—

THE COURT: Well, aren't they—aren't the plaintiffs injured if any TPA decides to voluntarily comply even once?

MR. BERWICK: So if one of their—so the argument would be if one of their TPAs is voluntarily going to comply, that's an injury?

THE COURT: Yes.

MR. BERWICK: Well, so let me—I don't want to go back to standing if your Honor doesn't want to go there, but let me just say that I think that's a standing question—

THE COURT: Well, these are kind of—these are kind of interrelated.

MR. BERWICK: Well, they are, but in a way I think—I would argue, even if they have standing, they have to show more to show that they're substantial burdened. So let me address—

THE COURT: Well, hold on a second. If the equation is stated thusly, if you fill out this little piece of paper, nothing is going to happen, so this fear that you have—I think you described in your brief as—or in your reply brief—

MR. BERWICK: Uh-huh.

THE COURT:—as, you know, chasing the scarecrows or afraid of demons or something like that. What did you say?

MR. BERWICK: I think it was invisible dragons.

THE COURT: Invisible dragons. There you go. So this invisible dragon that they're scared of, there is nothing to it. But if providing that self-certification thereby empowers a TPA who chooses to voluntarily comply and provide these services and get reimbursed and make a profit, doesn't that equate to a substantial burden? Because the argument nothing happens, don't worry about it, it kind of goes away under those circumstances. Does it not?

MR. BERWICK: Well, so I think our standing argument—so I don't—I think that's a little bit a not correct characterization of our argument. Our argument is not nothing happens, at least for purposes of substantial burden.

For purposes of standing, our argument is it's entirely speculative that Highmark will provide this coverage. If it weren't speculative, if Highmark—and I would posit, as I said in the standing portion of the argument, that if you look at the declaration and the attachments to the declaration, it doesn't really say what plaintiffs claim it says. In other words, we don't know why—we don't know really to what extent Highmark is aware that they don't have to do it.

THE COURT: Yeah. But—

MR. BERWICK: And you don't know—

THE COURT:—but for purposes—excuse me.

MR. BERWICK: Sure.

THE COURT: For purposes of preliminary injunctive relief, the plaintiffs don't have to hang around until they're harmed. They don't have to say, you know, there's some level of theoretical speculation that a TPA out there might not

voluntarily comply and, therefore, we're just going to stick around and we're going to do the self-certification and we're just going to wait and see if somebody does. I mean, there is no requirement under the law. I mean, there has to be an imminent threat—

MR. BERWICK: Yes.

THE COURT:—of irreparable harm. It doesn't say—there is no requirement that they have to actually have been harmed.

MR. BERWICK: No. You're right. You're right. There is no requirement they actually have to have been harmed. But their harm has to be more than speculative.

THE COURT: Oh, I agree with you there.

MR. BERWICK: Just for standing purposes.

THE COURT: Yeah.

MR. BERWICK: So—

THE COURT: Well, for temporary injunction purposes, it has to be more than purely speculative.

MR. BERWICK: Yes. I agree with you. And I think our argument here, for standing purposes and for preliminary injunction purposes—let me separate them, because I think the arguments are a little different and I will explain why.

But for standing purposes, at least, we think what they have provided regarding Highmark is uncertain enough that it's still too speculative to satisfy the imminent injury requirement for purposes of standing.

THE COURT: Okay. Well, let's assume—

MR. BERWICK: And you disagree with that.

THE COURT: Let's assume that standing—

MR. BERWICK: Okay.

THE COURT:—is established.

MR. BERWICK: So for substantial burden purposes—so if—so, again, let's assume that Highmark says, yeah, we're going—we are going to do this and we are going to do it because—and, again, I don't understand this to be the case or I think it's totally unclear, but let's say they say we're going to do it because we want to take advantage of the benefits that—you know, the user fee reimbursement benefits that we would get. So there is a couple issues with that.

First of all, substantial burden—what plaintiffs' argument in that case would essentially be, that when we sign the self-certification, the consequences of signing that form is that a third party, our TPA, will do something that we don't want them to do. But this type of consequences-based objection does not—is not enough for substantial burden under RFRA.

THE COURT: Well, right now, as the situation exists, the plaintiffs know with a great degree of certainty, I would submit, that a TPA involved in their plan is not going to provide these services because they're contractually obligated to provide certain things and not others.

MR. BERWICK: Right.

THE COURT: So right now, under the status quo, they have that assurance. But if they self-certify, then are they not empowering a TPA—even if we accept the government's position that we don't have

the ability to enforce it, are they not empowering a TPA to provide these services and seek reimbursement?

MR. BERWICK: I think I take issue with the word "empowering." I will—I will concede that the TPA is eligible—once—if they receive the certification, they are eligible for reimbursement. They would not otherwise be eligible.

But that issue aside, the reimbursement issue aside, I don't think the self-certification really does anything beyond what would—the TPA would be allowed to do prior to these regulations. Because the government can't—so in the ordinary case where we are not talking about a self-insured church plan, once the employer signs a self-certification, the TPA is required to provide coverage.

By the way, we don't think even that is a substantial burden, and we've made that argument in quite a few cases around the country, because that is the case in—that is the situation in most of the cases the government has been arguing.

The—but in this case the—because the regulations do not require the TPA to provide a coverage, the relationship between the TPA and GuideStone is still governed by the contract between TPA and GuideStone.

So whether the TPA could voluntarily decide to provide contraceptive coverage to the employees of—members of the GuideStone plan, I think, is dependent on the contract between those entities and, thus, is no different than it was prior to the enactment of these regulations.

So, yes, the TPA, by virtue of receiving a self-certification, is now eligible to claim, essentially, a reimbursement for the cost, but that's sort of the only new piece here. As I explained before, that self-certification, for purposes of a self-insured ERISA plan, doesn't give the TPA any sort of new authority because the government, frankly, can't do that.

But, your Honor, let me say this. Even if it did, even if that—even if it did give the TPA new authority, even if it required the TPA to provide contraceptive coverage or, let's say, somehow gave them new authorization or new

* * *

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,

Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.

Defendants.

DECLARATION OF TIMOTHY E. HEAD

I, Timothy E. Head, do hereby state and declare as follows:

1. My name is Timothy E. Head. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true and correct and based on my personal knowledge or a review of the business records of GuideStone Financial Resources of the Southern Baptist Convention. If I were called upon to testify to these facts, I could and would competently do so.

2. I hold the position of Executive Officer – Denominational and Public Relations for GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). GuideStone serves the

retirement, health care and other benefit service needs of pastors, church staff members, missionaries, doctors, nurses, university professors and other workers of various Southern Baptist and evangelical Christian organizations.

3. I have served several Southern Baptist pastorates including as senior pastor of Cooper River Baptist Church in North Charleston, South Carolina, and Lighthouse Church in Mt. Pleasant, South Carolina. I earned a Bachelor of Arts in Political Science from Furman University, a Master's of Divinity from Southwestern Baptist Theological Seminary and a Doctor of Jurisprudence from the University of South Carolina School of Law. I served as a trustee of GuideStone prior to joining as an Executive Officer.

4. 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. In carrying out this mission, GuideStone has established a health benefits plan for and limited to current and former employees of organizations (and the employees' dependents) that are "controlled by or associated with" the Southern Baptist Convention (the "GuideStone Plan"). The GuideStone Plan is one of the largest "multiple employer" church health care plans in the country serving hundreds of employers (churches, denominational entities and other ministry organizations) and more than 78,000 participants (pastors, employees and their families).

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

6. 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.

7. 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.

8. 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 are generally referred to as "trustees."

9. The Guide Stone Plan is a "church plan" within the meaning of section 414(e) of the Code and is not subject to the Employee Retirement Income Security Act of 197 4 ("ERISA") because it has not made an election under section 410(d) of the Code.

10. The GuideStone Plan is a self-insured health plan. Therefore, the GuideStone Plan does not

contract with an insurance company to provide the health benefits provided by the GuideStone Plan. Connecticut General Life Insurance Company and Highmark Health Services 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. has entered into a similar agreement with respect to pharmaceutical benefits. The plan year for the GuideStone Plan currently begins on January 1st of each year.

11. 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."

12. 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.

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

14. 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. Additional 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"

15. 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."

16. 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).

17. 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*.

18. Consistent with the convictions of the Southern Baptist Convention, the GuideStone Plan does not pay or reimburse expenses associated with drugs or devices that are abortive in nature.

19. Requiring GuideStone to intentionally facilitate the provision of abortifacient drugs and related education and counseling, as would be required by the Final Mandate, impinges GuideStone's deeply held religious beliefs.

20. Obeying the Final Mandate's requirement to participate in the provision of abortion-inducing drugs will impinge its public witness to the respect for life and human dignity that GuideStone is committed to displaying, as stated in the Resolutions adopted by the Southern Baptist Convention in paragraph 25 and in the *Baptist Faith and Message 2000*.

21. GuideStone should not be required to compromise its commitment to its Christian witness by being seen as involved in the government's program. Doing so would not only impinge its sincerely held religious beliefs, but also would risk

leading others astray. Nor should GuideStone be required to compromise its sincerely held religious beliefs, because doing so would jeopardize the ministries of the class members whose operating revenue often includes substantial voluntary donations.

22. Because of the religious beliefs set forth above, being required to provide health benefits that will include access to and abortion-inducing drugs, devices and related counseling and education will infringe upon GuideStone's sincerely held religious beliefs.

23. Because of the religious beliefs set forth above, having the third party administrator(s) of the Guidestone Plan, with whom GuideStone has a contractual relationship, provide or arrange access by GuideStone Plan participants to abortion-inducing drugs, devices and related counseling and education will infringe upon GuideStone's sincerely held religious beliefs.

24. Because of the religious beliefs set forth above, being required to provide any information to facilitate the government-required certifications to a third party to require that third party to provide Plan participants or their employees with access to abortion-inducing drugs and devices will infringe upon GuideStone's sincerely held religious beliefs.

25. Because of the religious beliefs set forth above, GuideStone should not be forced to take any action that would assist the government in putting pressure on Plan participants to compromise their own religious beliefs in this regard. Requiring GuideStone to participate in the government's

placing pressure on Plan participants infringes GuideStone's religious beliefs.

26. Additionally, GuideStone is directed by its ministry assignment from the Southern Baptist Convention to "[a]ssist churches, denominational entities and other evangelical ministry organizations by making available ... health coverage."

27. GuideStone considers this assignment binding on how it carries out its religious ministry of providing health benefits to organizations controlled by or associated with the Southern Baptist Convention, that are consistent with their shared religious beliefs.

28. GuideStone understands the unique dynamics of organizations and institutions controlled by or associated with the Southern Baptist Convention, which are guided by and operated in accordance with Christian teachings about the sanctity of all human life. From my observation and constant interaction with GuideStone Plan employers, one of the many reasons employers choose to use the GuideStone Plan, which does not provide coverage for elective abortions or abortifacients, is because they share our religious beliefs and provide benefits accordingly.

29. It is my belief, based on the kinds of employers GuideStone allows to participate in the GuideStone Plan, that the proposed class members in this lawsuit—all of whom are controlled by or associated with the Southern Baptist Convention, and all of whom have chosen to provide health benefits through the Plan—likewise may not participate in the government's program without impinging their

religious beliefs. They are similarly committed to the religious teachings on abortion set forth above.

30. According to my review of the Complaint filed in this action, Plaintiffs Reaching Souls International, Inc. ("Reaching Souls"), and Truett-McConnell College, Inc. ("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 may 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 (as hereinafter defined); and (iii) are not "religious employers" within the meaning of the Final Mandate. The class members are all 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.

31. Based upon my understanding of the criteria under the Final Mandate as discussed in the Complaint in this action, GuideStone Plan employers currently include approximately 187 organizations, located in approximately 26 states, that are or could be reasonably construed to be "eligible organizations" under 45 C.F.R. § 147.13l(b)&(c) at 78 Fed. Reg. 39870, 39874. These organizations employ over 5,144 full-time employees. I estimate that 3,804 employees now work for employers in the GuideStone Plan that are large employers based upon GuideStone's records (i.e., that average 50 or more full time employees).

32. To a large extent, the class members are small non-profit organizations operating on limited budgets and devoted to religious ministries. I believe it would be impractical to have all of these class members joined in a single action in a distant locale taking away time and resources from their ministry, and having them incur the expense to do so; accordingly, we brought this action as a class action. Additionally, the proposed class includes unknown, future employers that join the GuideStone Plan at a later date or employers that currently qualify for the religious employer exemption as "integrated auxiliaries" of a church but later cease to be integrated auxiliaries. I believe that resolution of the claims of these class members in a single class action will provide substantial benefits to all parties.

33. The GuideStone Plan encompasses both exempt religious non-profit entities and non-exempt religious non-profit entities. The Complaint in this lawsuit has defined the class to only include the religious non-profit entities that could be construed as nonexempt "eligible organizations." These entities include organizations that might fall within the definition of "integrated auxiliaries" except for the fact that more than 50% of their funding comes from sources other than churches.

34. Under the Final Mandate, employers in the GuideStone Plan are faced with the impossible dilemma of (1) paying significant fines and providing their employees with health insurance that does not cover abortion-inducing drugs, devices and related counseling and education; or (2) eliminating their health insurance plans altogether and paying significant fines if they employ 50 or more employees.

35. Based on the penalties identified in the Complaint, if the GuideStone Plan continues to offer employee health insurance without the mandated items on January 1, 2014, each class member, regardless of its size, will be subject to a penalty beginning on January 1, 2014, of $100 per day "per affected individual." Thus, the non-exempt employers that have adopted the GuideStone Plan could incur penalties of approximately $514,400 per day – $187,756,000 per year – assuming 5,144 employees.

36. Additionally, it is my understanding, as alleged in the Complaint, that large employers (i.e., those with 50 or more employees) that cancel coverage altogether will be exposed to significant annual excise tax penalties of $2,000 per full-time employee starting on January 1, 2015. Consequently, if the non-exempt participants in the GuideStone Plan dropped their health coverage altogether, they would face annual penalties of more than $7,608,000 per year, based on estimates of 3,804 employers working with large employers (i.e., averaging 50 or more full time employees).

37. If the GuideStone Plan refuses to do anything that would facilitate coverage for contraceptives and related services, it would expose non-exempt "eligible organizations" that remain in the GuideStone Plan to financially ruinous penalties that could render them insolvent or foreclose their ability to provide health care coverage for their employees. Indeed, some class members will likely be forced to curtail or eliminate community and ministry programs.

38. If employer plan members discontinue participation in the GuideStone Plan and do not seek replacement coverage, GuideStone's ministry assignment from the Southern Baptist Convention to "[a]ssist churches, denominational entities and other evangelical ministry organizations by making available . . . health coverage" will be compromised.

39. Similarly, by discontinuing all coverage, these employers will be placed at a severe competitive disadvantage in their efforts to hire and retain employees, which will likely adversely impact their ministries. In my experience, a key factor to an employer's ability to retain existing employees and recruit new ones is the ability to offer and provide health benefits. Any uncertainty regarding these factors undermines the class members' ability to retain existing employees and recruit new ones.

40. If class members chose to compromise their beliefs by eliminating health care coverage for their employees altogether, they would likely need to increase employee compensation so that employees could purchase their own health insurance and pay the additional income taxes resulting from the increased compensation. Otherwise, they face the prospect of a loss of employees.

41. Other employers who, unlike those participating in the GuideStone Plan, do not object to the Final Mandate on religious grounds do not face this dilemma. The Final Mandate, therefore, is currently placing GuideStone Plan participants at a competitive disadvantage in their ability to recruit new and existing employees relative to employers

who do not have religious objections to the Final Mandate.

42. If non-exempt "eligible organizations" in the GuideStone Plan were forced to drop coverage to avoid the provision of objectionable coverage, it would also have a substantial adverse financial impact on the GuideStone Plan and its remaining participating employers because there would be fewer participating employers to share the fixed costs of administration.

43. Similarly, the financial impact on GuideStone is substantial. For "eligible organizations" over 50 employees, GuideStone estimates losses of $27 ,804,821 in medical plan contributions for "eligible organizations" that may be forced to drop coverage, and losses of an additional $11,283,504 in medical plan contributions for "eligible organizations" *under* 50 employees that may be forced to drop coverage.

44. The Government's "accommodation" does not address GuideStone's fundamental religious objection to improperly facilitating access to the objectionable products and services. This arrangement still requires GuideStone to facilitate the provision of products and services antithetical to its beliefs, since the GuideStone Plan participants would only receive free abortifacients and related counseling by virtue of their participation in the GuideStone Plan provided through their employer.

45. In my opinion, the class members would be required to actively facilitate and promote the distribution of these services in ways that are forbidden by our Southern Baptist beliefs. The Final Mandate forces Plaintiffs to contract for, facilitate, or provide abortifacients and related education and

counseling in violation of their religious beliefs, by taking the following actions, among others:

- Establish a new, direct contractual relationship with the GuideStone Plan's third-party administrators for the specific purpose of providing abortifacient drugs and devices to their employees. The GuideStone Plan employs third-party administrators, but currently there is no direct contractual relationship between GuideStone's third-party administrators and individual employers like Reaching Souls and Truett-McConnell.
- By delivering a self-certification, Plaintiffs take action for which the ultimate result is to provide access to abortifacient coverage that is made possible through participation in their health plan.
- By delivering a self-certification, Plaintiffs facilitate the coverage at issue and GuideStone is included in the Government's construct to provide that coverage in opposition to Southern Baptist convictions through third party administrators with whom it has existing contractual relationships.
- Plaintiffs would have to coordinate with the third party administrator when they add or remove employees and beneficiaries from their health plan and, as a result, the Final Mandate's scheme.
- Plaintiffs would also have to coordinate with third party administrators to provide notice to plan participants and beneficiaries of the

abortifacient 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 Plaintiffs self-funded plan. 78 Fed. Reg. at 39876. 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 26 C.F.R. § 54.9815-2715(b), 29 C.F.R. § 2590.715-2715(b) and 45 C.F.R. § 147.200(b); published 77 Fed. Reg. 8668, 8698-8705 (Feb. 14, 2012). 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).

- If Plaintiffs must leave the GuideStone Plan to avoid penalties because the GuideStone Plan does not provide the mandated coverage, Plaintiffs would be required to: (i) select another insurer or third party administrator, who under the terms of the Mandate must be willing to provide for or arrange abortifacient coverage; (ii) negotiate an administrative services agreement with the third party administrator; and (iii) communicate the plan changes to their employees.

- The third party administrator would also be required to provide the abortifacient benefits "in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 39876-77. Thus, any payment or coverage dispute would presumably be resolved under the terms of the Plaintiffs' plan documents, making them complicit. By delivering a self-certification to the third party administrator of a self-insured plan, the designation makes the third party administrator a plan administrator with fiduciary duties under a Plaintiffs plan and payments for contraceptive and abortifacient services would be payments made under the auspices of the health plan. Similarly, litigation claims relating to or arising from this coverage could theoretically implicate the class action Plaintiffs and GuideStone as parties-for coverage that the Plaintiffs oppose.

46. The only way to provide effective relief for GuideStone and class members is to enjoin enforcement of the Final Mandate with respect to all non-exempt "eligible organizations" in the GuideStone Plan; otherwise, they will be adversely affected by the application of the Final Mandate to these organizations and its penalty provisions.

47. In the past year, GuideStone has expended voluminous resources m studying, commenting on, and responding to every stage of the Final Mandate's administrative process. In addition, it has expended further resources in considering what must be done to comply with the Final Mandate.

48. GuideStone is now planning for the 2014 plan year. In addition to having the plan in place and funded by January 1, 2014, the Plaintiffs must coordinate regarding the structure and provision of coverage well in advance of January 1, 2014. This is a complex and time-consuming process and is presently underway as of the date of this declaration.

49. There is inadequate time to provide any changes in plan documentation to class members, including any Summary of Benefits and Coverage and notices of any material change in the Summary of Benefits and Coverage. A lapse in coverage will be disastrous for Plaintiffs' operations and for the employees and their families who depend on the GuideStone Plan for health care coverage.

50. I believe that the claims of the representatives Reaching Souls and Truett-McConnell are typical of the claims of the class in that all class members will be equally and similarly harmed by the Defendants' enforcement of the Affordable Care Act and Final Mandate given the shared and like-minded Christian religious beliefs regarding the sanctity of life and the obligation to speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. I believe that the factual bases of Defendants' actions are common to all class members in that the class members share in the same religious beliefs set forth above and, therefore, will suffer the same violation of rights by enforcement of the Final Mandate.

51. As the Complaint has defined the class, the class members are not eligible for the religious employer's exemption under the Final Mandate.

Thus, the Final Mandate forces all of the class members to choose between incurring severe financial hardship or violating their religious beliefs by taking steps to invoke the "accommodation." All of the class claims require a common finding by the Court as to whether the Final Mandate's accommodation and requirement that the class members facilitate access to abortifacient-related drugs and devices through their health plans violates their rights under the Religious Freedom Restoration Act and the First Amendment.

52. I believe that Reaching Souls and Truett-McConnell will fairly and adequately protect the interests of the Class. GuideStone, Reaching Souls, and Truett-McConnell have retained counsel with substantial experience in litigating class action cases and in litigating violations of religious and constitutional rights. GuideStone, Reaching Souls, Truett-McConnell, and their counsel are committed to prosecuting this action vigorously on behalf of the class members, and have the resources to do so. GuideStone is financially committed to assist Reaching Souls and Truett-McConnell in litigating this matter to conclusion on behalf of the class members. I do not believe that GuideStone, Reaching Souls, and Truett-McConnell have an interest adverse to those of the class members.

53. In this case, I believe that the prosecution of separate actions by individual class members creates a risk of inconsistent or varying adjudications with respect to Defendants, with respect to Defendants' enforcement of the Final Mandate, and with respect to individual members of the class. With an inconsistent application of the same federal

regulation, the courts may establish incompatible and controverting standards of conduct for Defendants. GuideStone would be subject to intense confusion of the applicability of the Final Mandate as to seemingly identical plan employers located in different forums. GuideStone would not know how to administer the health plan with certainty, and Defendants would not know how to enforce the Final Mandate with certainty.

54. I believe that all members of the class and GuideStone are entitled to an injunction prohibiting Defendants from enforcing the Final Mandate against them and from charging or assessing penalties against them for failure to offer or facilitate access to abortifacient contraceptives and related education and counseling. I believe that Plaintiffs and class members will suffer immediate injury if an injunction is not immediately issued, and any other remedies, such as monetary damages, are inadequate to prevent injury and fully compensate the class members and GuideStone from injury.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON OCTOBER 25, 2013

/s/ Timothy E. Head
Timothy E. Head

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,
Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.
Defendants.

DECLARATION OF JOSHUA WELLS

I, Joshua Wells, do hereby state and declare as follows:

1. My name is Joshua Wells. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true and correct and based on my personal knowledge or a review of the business records of Reaching Souls International, Inc. ("Reaching Souls"). If I were called upon to testify to these facts, I could and would competently do so.

2. I am the Director of Development & General Counsel of Reaching Souls. I received a B.A. in English from Oklahoma Baptist University. I also graduated in 2008 from the Oklahoma City University College of Law where I was the Executive

Editor of the Law Review and a Research Assistant for the University General Counsel, J. William Conger. I am an attorney and a current member of the Oklahoma Bar and the bar of this Court.

3. 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 approximately 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.

4. 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.

5. Reaching Souls' beliefs regarding the sanctity of life are consistent with and like-minded to The Southern Baptist Convention's position on the sanctity of life which provides that Southern Baptists should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.

6. As part of its religious belief that it must promote the spiritual and physical well-being of its employees, Reaching Souls provides its employees with comprehensive health benefits. Reaching Souls participates in the health benefits plan sponsored by GuideStone Financial Resources of the Southern Baptist Convention (the "GuideStone Plan") and has adopted the GuideStone Plan (as hereinafter defined) to provide health benefits for its employees in compliance with Reaching Souls' commitment to its employees' well-being and to the sanctity of human life. I am very familiar with the Reaching Souls health benefit plan through the GuideStone Plan, including enrollment. Consistent with the convictions of the Southern Baptist Convention, the GuideStone Plan does not pay or reimburse expenses associated with drugs or devices that are abortive in nature.

7. Because of the religious beliefs set forth above, being required to provide health benefits that will include access to and abortion-inducing drugs, devices and related counseling and education will

infringe upon Reaching Souls' sincerely held religious beliefs. Reaching Souls believes that it would impinge its religious beliefs if it were required to intentionally facilitate the provision of abortifacient drugs and related education and counseling, as would be required by the Final Mandate.

8. Because of the religious beliefs set forth above, being required to provide health benefits, by way of a third party administrator, that will include access to abortion-inducing drugs, devices and related counseling and education will infringe upon Reaching Souls' sincerely held religious beliefs.

9. Because of the religious beliefs set forth above, being required to provide any information to facilitate the government-required certifications to a third party to require that third party to provide employees with access to abortion-inducing drugs and devices will infringe upon Reaching Souls' sincerely held religious beliefs.

10. Reaching Souls should not be required to compromise its commitment to Christian witness by being seen to participate in the government's program. Doing so would not only impinge its sincerely held religious beliefs, but also would risk leading others astray.

11. One of the reasons that Reaching Souls chose to use the GuideStone Plan is because it shares our religious beliefs and does not provide access to abortion health benefits.

12. Reaching Souls and Truett-McConnell College, Inc. ("Truett- McConnell ") bring this action on behalf of themselves and all others similarly situated. Their attorneys defined the class as employers that:

(i) have adopted or in the future adopt the GuidcStone Plan to provide medical coverage for their "employees" or former employees and their dependants ("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. As like-minded organizations that hold to Southern Baptist convictions, it is my belief that the class members will be guided by and operated in accordance with Christian teachings about the sanctity of all human life.

13. Based on my understanding of the criteria under the Final Mandate as discussed in the Complaint in this action, if the GuideStone Plan continues to offer employee health insurance without the mandated items on January 1 2014, each class member, regardless-of.its size,-will be subject to a penalty beginning on January 1, 2014, of $100 per day "per affected individual." Reaching Souls currently has 10 full time employees covered under its health plan and would incur penalties of approximately $365,000 per year based on its current employee count, which would have a devastating and fatal impact on its operations. These penalties would limit Reaching Souls' ability to provide health care coverage for their employees or force it to curtail or eliminate community and ministry programs.

14. Nor can Reaching Souls avoid these fines by choosing not to provide health benefits at all. Culling off all benefits for our employees is repugnant. We

value and respect our employees and are dedicated to providing adequate health benefits. Cutting off all employee benefits would also have a severe negative impact on our employees and their families.

15. By discontinuing all coverage. Reaching Souls and class members would be placed at a severe competitive disadvantage in their efforts to hire and retain factor to an employer's ability to retain existing employees and recruit new ones is the ability to offer and provide health benefits. Benefits plans are an important reason that many employees make choices about which jobs to pursue, to keep, and to abandon. Any uncertainty regarding these factors undermines Reaching Souls and the class members' ability to retain existing employees and recruit new ones.

16. If Reaching Souls and class members chose to compromise their beliefs by eliminating their health care coverage for their employees altogether, they would likely need to increase employee compensation so that employees could purchase their own health insurance and pay the additional income taxes resulting from the increased compensation. Otherwise, we face the prospect of a loss of employees.

17. By forcing Reaching Souls and other non-exempt "eligible organizations" to make the difficult decision to stay in the GuideStone Plan and incur massive penalties or to leave the GuideStone Plan either to avoid the penalties or to avoid providing contraception coverage because of their religious belief, the Final Mandate substantially burdens Reaching Souls and the class members' religious

exercise and ministry of providing health insurance benefits to employees. The Final Mandate imposes enormous pressure on Reaching Souls to participate in activities prohibited by our sincerely held religious beliefs.

18. The Government's "accommodation" does not address Reaching Souls' and other class members' fundamental religious objection to improperly facilitate access to the objectionable products and services. This arrangement still requires us to facilitate the provision of products and services antithetical to our beliefs, since employees would employees, which would adversely impact their ministries. In my experience, a key receive free abortifacients and related counseling only by virtue of their participation in our health plan.

19. Reaching Souls believes that the religious beliefs set forth above do not allow Reaching Souls and the class members as a matter of faith to participate in the government's program to promote and facilitate access to the use of abortion-inducing drugs and devices; provide health benefits to our employees that will include access to abortion-inducing drugs and devices; designate any third party to provide our employees with access to abortion-inducing drugs and devices; and make the government-required certifications to a third party to require that third party to provide our employees with access to abortion-inducing drugs.

20. Reaching Souls and the class members would be required to actively facilitate and promote the distribution of these services in ways that are forbidden by our Southern Baptist convictions. The

Final Mandate forces us to contract for, facilitate, or pay for the provision of abortifacients and related education and counseling in violation of our religious beliefs, by having to take one or more the following actions, among others:

- By delivering a self-certification. Plaintiffs take action for which the ultimate result is to provide access to abortifacient coverage that is made possible through participation in their health plan.
- By delivering a self-certification, Plaintiffs facilitate the coverage at issue and Reaching Souls is included in the Government's scheme to provide the coverage in opposition to Southern Baptist convictions through third party administrators.
- Plaintiffs are required to be involved in the process by identifying its employees to the third party administrator for the purpose of enabling the Final Mandate's scheme. Plaintiffs would have to coordinate with the third party administrator when they add or remove employees and beneficiaries from their health plans and, as a result, the Final Mandate's scheme.
- Plaintiffs would also have to coordinate with third party administrators to provide notice to plan participants and beneficiaries of the abortifacient 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 Plaintiffs self-funded plan. 78 Fed. Reg. at

39876. 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* 26 C.F.R. § 54.9815-2715(b), 29 C.F.R. § 2590.715-2715(b) and 45 C.F.R. § 147.200(b); published 77 Fed. Reg. 8668, 8698-8705 (Feb. 14, 2012). 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).

- If Plaintiffs must leave the GuideStone Plan to avoid penalties because the GuideStone Plan does not provide the mandated coverage, Plaintiffs would be required to: (i) select another insurer or third party administrator willing to provide for or arrange abortifacient coverage; (ii) negotiate an administrative services agreement with the third party administrator; and (iii) communicate the plan changes to their employees.
- The third party administrator would also be required to provide the abortifacient benefits "in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 19876-77. Thus, any payment or coverage dispute would presumably be resolved under the terms of the Plaintiffs' plan documents, making them complicit. By delivering a self-certification to the third party administrator, the designation makes the third party administrator a plan

> administrator with fiduciary duties under a Plaintiff's plan and payments for contraceptive and abortifacient services would be payments made under the auspices of the health plan. Similarly, litigation claims relating to or arising from this coverage could theoretically implicate the class members and GuideStone as parties-for coverage that the Plaintiffs oppose!

21. The only way to provide effective relief for Reaching Souls and class members is to enjoin enforcement of the Final Mandate with respect to all class members in the GuideStone Plan; otherwise, they will be adversely affected by the application of the final Mandate to these organizations and its penalty provisions.

22. GuideStone is now planning for the 2014 plan year. Plaintiffs must coordinate regarding the structure and provision of coverage well in advance of January 1, 2014. A lapse in coverage will be disastrous for Reaching Souls' operations and for the employees and their families who depend on the GuideStone Plan for health care coverage.

23. I believe that the claims of Reaching Souls are typical of the claims of the class in that all class members will be equally and similarly harmed by the Defendants' enforcement of the Affordable Care Act and Final Mandate given the shared and likeminded Christian religious beliefs regarding the sanctity of life and the obligation to speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. I believe that the factual bases of Defendants' actions are common to

all class members in that the class members share in the same religious beliefs set forth above and, therefore, will suffer the same violation of rights by enforcement of the Final Mandate.

24. As the Complaint has defined the class, the class members are not eligible for the religious employer's exemption under the Final Mandate. Thus, the Final Mandate forces all of the class members to choose between incurring severe financial hardship or violating their religious beliefs by taking steps to invoke the "accommodation." All of the class claims require a common finding by the Court as to whether the Final Mandate's accommodation mid requirement that the class members provide abortifacient related health benefits in their health plans violates their rights under the Religious Freedom Restoration Act and the first Amendment.

25. I believe that Reaching Souls will fairly and adequately protect the interests of the Class. GuideStone, Reaching Souls, and Truett-McConnell have retained counsel with substantial experience in litigating class action cases and in litigating violations of religious and constitutional rights. GuideStone, Reaching Souls, Truett-McConnell, and their counsel are committed to prosecuting this action vigorously on behalf of the class members, and have the resources to do so. GuideStone is financially committed to assist Reaching Souls and Truett-McConnell in litigating this matter to conclusion on behalf of the class members. I do not believe that GuideStone, Reaching Souls, and Truett-McConnell have an interest adverse to those of the class members.

26. I believe that all members of the class and GuideStone are entitled to an injunction prohibiting Defendants from enforcing the Final Mandate against them and from charging or assessing penalties against them for failure to offer or facilitate access to abortifacient contraceptives and related education and counseling. I believe that the Reaching Souls and class members will suffer injury if an injunction is not issued because of the need to make a decision on our health plans before January I, 2014. Money damages awarded later would not be adequate to prevent injury and fully compensate us from injury because these decisions impact us now, will impact the benefits we can provide our employees now, and impact the services and ministry we can provide, now.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON 10/24/2013

/s/ Joshua Wells
JOSHUA WELLS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,

Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.

Defendants.

Declaration of David Armstrong

I, David Armstrong, do hereby state and declare as follows:

1. My name is David Armstrong. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true, correct, and based on my personal knowledge or a review of the business records of Truett-McConnell. If I were called upon to testify to these facts, I could and would competently do so.

2. I am the Vice President of Finance and Operations at Truett-McConnell College ("Truett-McConnell"). I received my undergraduate and master's degrees from Texas A & M. I also hold Master of Divinity and Master of Theology Degrees from Southeastern Baptist Theological Seminary. I

am currently a Doctor of Education Degree candidate from Southeastern Baptist Theological Seminary.

3. 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.

4. 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." 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).

5. Truett-McConnell has adopted the Southern Baptist Convention's Baptist Faith and Message 2000 as its own statement of faith and official doctrinal statement. Truett-McConnell 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). All of Truett-McConnell's faculty share its commitment to the sanctity of life from conception to natural death as outlined in the Baptist Faith and Message 2000. The Baptist Faith and Message 2000 is 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. Further, all Truett-McConnell Trustees must be active members of Southern Baptist churches that are in active participation with the Georgia Baptist Convention. 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.

6. 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.

7. Truett-McConnell participates in the health benefits plan sponsored by GuideStone Financial Resources of the Southern Baptist Convention (the "GuideStone Plan") and has adopted the GuideStone Plan to provide health benefits for its employees. Truett-McConnell has adopted the GuideStone Plan because it complies with Truett-McConnell 's religious commitment to its employees well-being and to the sanctity of human life.

8. Because of the religious beliefs set forth above, being required to provide health benefits that will include access to and abortion-inducing drugs, devices and related counseling and education will infringe upon Truett-McConnell's sincerely held religious beliefs. Truett-McConnell believes that it would impinge its religious beliefs if it were required to intentionally facilitate the provision of abortifacient drugs and related education and

counseling, as would be required by the Final Mandate.

9. Because of the religious beliefs set forth above, being required to provide health benefits, by way of a third party administrator, that will include access to abortion-inducing drugs, devices and related counseling and education will infringe upon Truett-McConnell 's sincerely held religious beliefs.

10. Because of the religious beliefs set forth above, being required to provide any information to facilitate the government-required certifications to a third party to require that third party to provide employees with access to abortion-inducing drugs and devices will infringe upon Truett-McConnell's sincerely held religious beliefs.

11. Truett-McConnell should not be required to compromise its commitment to Christian witness by being seen to participate in the government's program. Doing so would not only impinge its sincerely held religious beliefs, but also would risk leading others astray.

12. One of the reasons that Truett-McConnell chose to use the GuideStone Plan is because it shares our religious beliefs and does not provide access to abortion health benefits.

13. Truett-McConnell brings this action on behalf of itself and all others similarly situated. Their attorneys defined the class as 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. As like-minded Baptist organizations, it is my belief that the class members will be guided by and operated in accordance with Christian teachings about the sanctity of all human life.

14. Based on my understanding of the criteria under the Final Mandate as discussed in the Complaint in this action, if the GuideStone Plan continues to offer employee health insurance without the mandated items on January 1, 2014, each class member, regardless of its size, will be subject to a penalty beginning on January 1, 2014, of $100 per day "per affected individual." Truett-McConnell currently has 78 full time employees covered under its health plan and would incur penalties of approximately $2,810,500 per year based on its current employee count, which would have a devastating impact on its operations. These penalties would limit Truett-McConnell's ability to operate.

15. Additionally, Based on my understanding of the criteria under the Final Mandate as discussed in the Complaint, large employers (i.e., those with 50 or more employees) that cancel coverage altogether will be exposed to significant annual excise tax penalties of $2,000 per full-time employee. Truett-McConnell has approximately 78 full time employees and would incur penalties of approximately $156,000 per year.

16. Nor can Truett-McConnell avoid these fines by choosing not to provide health benefits at all. Cutting off all benefits for our employees is repugnant. We value and respect our employees and are dedicated to providing adequate health benefits. Cutting off all employee benefits would also have a severe negative impact on our employees and their families.

17. By discontinuing all coverage, Truett-McConnell and class members would be placed at a severe competitive disadvantage in their efforts to hire and retain employees, which would adversely impact their ministries. In my experience, a key factor to an employer's ability to retain existing employees and recruit new ones is the ability to offer and provide health benefits. Benefits plans are an important reason that many employees make choices about which jobs to pursue, to keep, and to abandon. Any uncertainty regarding these factors undermines Truett-McConnell and the class members' ability to retain existing employees and recruit new ones.

18. If Truett-McConnell and class members chose to compromise their beliefs by eliminating their health care coverage for their employees altogether, they would likely need to increase employee compensation so that employees could purchase their own health insurance and pay the additional income taxes resulting from the increased compensation. Otherwise, we face the prospect of a loss of employees.

19. By forcing Truett-McConnell and other non-exempt "eligible organizations" to make the difficult decision to stay in the GuideStone Plan and incur massive penalties or to leave the GuideStone Plan

either to avoid the penalties or to avoid providing contraception coverage because of their religious belief, the Final Mandate substantially burdens Truett-McConnell and the class members' religious exercise and ministry of providing health insurance benefits to employees. The Final Mandate imposes enormous pressure on Truett-McConnell to participate in activities prohibited by our sincerely held religious beliefs.

20. The Government's "accommodation" does not address Truett-McConnell's and other class members' fundamental religious objection to improperly facilitating access to the objectionable products and services. This arrangement still requires us to facilitate the provision of products and services antithetical to our beliefs, since employees would receive free abortifacients and related counseling only by virtue of their participation in our health plan.

21. Truett-McConnell believes that the religious beliefs set forth above do not allow Truett-McConnell and the class members as a matter of faith to participate in the government's program to promote and facilitate access to the use of abortion-inducing drugs and devices; provide health benefits to our employees that will include access to abortion-inducing drugs and devices; designate any third party to provide our employees with access to abortion-inducing drugs and devices; and make the government-required certifications to a third party to require that third party to provide our employees with access to abortion-inducing drugs.

22. Truett-McConnell and the class members would be required to actively facilitate and promote the distribution of these services in ways that are forbidden by our Southern Baptist beliefs. The Final Mandate forces us to contract for, facilitate, or provide abortifacients and related education and counseling in violation of our religious beliefs, by having to take one or more the following actions, among others:

- By establishing a new, direct contractual relationship with the GuideStone Plan's third-party administrators for the specific purpose of providing abortifacient drugs and devices to their employees. The GuideStone Plan employs third-party administrators, but currently there is no direct contractual relationship between GuideStone's third-party administrators and Truett-McConnell.
- By delivering a self-certification, Plaintiffs take action for which the ultimate result is to provide access to abortifacient coverage that is made possible through participation in their health plan.
- By delivering a self-certification, Plaintiffs facilitate the coverage at issue and Truett-McConnell is included in the Government's scheme to provide the coverage in opposition to Southern Baptist convictions through third party administrators.
- Plaintiffs are required to be involved in the process by identifying its employees to the third party administrator for the purpose of enabling the Final Mandate's scheme.

- Plaintiffs would have to coordinate with the third party administrator when they add or remove employees and beneficiaries from their health plans and, as a result, the Final Mandate's scheme. Plaintiffs would also have to coordinate with third party administrators to provide notice to plan participants and beneficiaries of the abortifacient 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 Plaintiffs self-funded plan. 78 Fed. Reg. at 39876. 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 26 C.F.R. § 54.9815-2715(b), 29 C.F.R. § 2590.715-2715(b) and 45 C.F.R. § 147.200(b); published 77 Fed. Reg. 8668, 8698-8705 (Feb. 14, 2012). 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).
- If Plaintiffs must leave the GuideStone Plan to avoid penalties because the GuideStone Plan does not provide the mandated coverage, Plaintiffs would be required to: (i) select another insurer or third party administrator who, under the terms of the Mandate, must be willing to provide for or arrange abortifacient coverage; (ii) negotiate an administrative

services agreement with the third party administrator; and (iii) communicate the plan changes to their employees.

- The third party administrator would also be required to provide the abortifacient benefits "in a manner consistent" with the provision of other covered services. 78 Fed. Reg. at 39876-77. Thus, any payment or coverage dispute would presumably be resolved under the terms of the Plaintiffs' plan documents, making them complicit. By delivering a self-certification to the third party administrator of a self-insured plan, the designation makes the third party administrator a plan administrator with fiduciary duties under a Plaintiffs plan and payments for contraceptive and abortifacient services would be payments made under the auspices of the health plan. Similarly, litigation claims relating to or arising from this coverage could theoretically implicate the class members and GuideStone as parties-for coverage that the Plaintiffs oppose!

23. The only way to provide effective relief for Truett-McConnell and class members is to enjoin enforcement of the Final Mandate with respect to all class members in the GuideStone Plan; otherwise, they will be adversely affected by the application of the Final Mandate to these organizations and its penalty provisions.

24. GuideStone is now planning for the 2014 plan year. Plaintiffs must coordinate regarding the structure and provision of coverage well in advance of January 1, 2014. A lapse in coverage will be disastrous for Truett-McConnell' operations and for

the employees and their families who depend on the GuideStone Plan for health care coverage.

25. I believe that the claims of Truett-McConnell are typical of the claims of the class in that all class members will be equally and similarly harmed by the Defendants' enforcement of the Affordable Care Act and Final Mandate given the shared and like-minded religious beliefs regarding the sanctity of life and the obligation to speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. I believe that the factual bases of Defendants' actions are common to all class members in that the class members share in the same religious beliefs set forth above and, therefore, will suffer the same violation of rights by enforcement of the Final Mandate.

26. As the Complaint has defined the class, the class members are not eligible for the religious employer's exemption under the Final Mandate. Thus, the Final Mandate forces all of the class members to choose between incurring severe financial hardship or violating their religious beliefs by taking steps to invoke the "accommodation." All of the class members require a finding by the Court as to whether the Final Mandate's accommodation and requirement that the class members facilitate access to abortifacient-related drugs and devices through their health plans violates their rights under the Religious Freedom Restoration Act and the First Amendment.

27. I believe that Truett-McConnell will fairly and adequately protect the interests of the Class. GuideStone, Reaching Souls, and Truett-McConnell

have retained counsel with substantial experience in litigating class action cases and in litigating violations of religious and constitutional rights. GuideStone, Reaching Souls, Truett-McConnell, and their counsel are committed to prosecuting this action vigorously on behalf of the class members, and have the resources to do so. GuideStone is financially committed to assist Reaching Souls and Truett-McConnell in litigating this matter to conclusion on behalf of the class members. I do not believe that GuideStone, Reaching Souls, and Truett-McConnell have an interest adverse to those of the class members.

28. I believe that all members of the class and GuideStone are entitled to an injunction prohibiting Defendants from enforcing the Final Mandate against them and from charging or assessing penalties against them for failure to offer or facilitate access to abortifacient contraceptives and related education and counseling. I believe that Truett-McConnell and class members will suffer injury if an injunction is not issued because of the need to make a decision on our health plans before January 1, 2014. Money damages awarded later would not be adequate to prevent injury and fully compensate us from injury because these decisions impact us now, will impact the benefits we can provide our employees now, and impact the services and ministry we can provide, now.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON October 25, 2013

/s/ David Armstrong
David Armstrong

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,

Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.

Defendants.

Declaration of Joseph Ormont

I, Joseph Ormont, do hereby state and declare as follows:

1. My name is Joseph Ormont. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true and correct and based on my personal knowledge or a review of the business records of GuideStone Financial Resources of the Southern Baptist Convention. If I were called upon to testify to these facts, I could and would competently do so.

2. I hold the position of Manager of Product and Vendor Service Management at GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone").

3. My job responsibilities include negotiating and communicating with GuideStone's Third Party Administrators ("TPA As") concerning the administration of the GuideStone Plan as well as the proposed "accommodation" imposed under the Final Mandate. Highmark Inc. ("Highmark") is a TPA for the GuideStone Plan.

4. Highmark outlined to me its intended procedure as a TPA to the GuideStone Plan in the event that it receives a self-certification from a GuideStone employer. Highmark indicated that, in the absence of an indemnification from GuideStone (to the extent legally permissible and enforceable), it will comply with the Final Mandate and provide contraceptive coverage for employees and beneficiaries of any GuideStone Plan "eligible organization" from which it receives a self-certification form. Highmark has chosen to take this action despite being made aware of the Defendants' new position in this litigation regarding the lack of enforceability of the Final Mandate against TPAs of self-funded non-ERISA church plans like Highmark. Attached as Exhibit A is a true and correct copy of an email I received from a Highmark representative and the attachment thereto setting forth Highmark's procedures.

5. The proposed handling of abortifacient coverage by Highmark is a matter of immediate and urgent concern for GuideStone and Plaintiffs. The mailing of notice of abortifacient coverage to female participants, including females as young as 10 years of age, along with the provision of that coverage is extremely disconcerting. Furthermore, the provision of indemnification and unlimited exposure and cost

associated with this coverage is an unacceptable and inappropriate burden to GuideStone and Plaintiffs for exercising their religious beliefs. Accordingly, GuideStone and Plaintiffs continue to need a judicial declaration and injunction from the Court finding that these regulations do not apply to them, their TPAs and eligible employers.

6. Exhibit A is part of GuideStone's business records. These business records are kept by GuideStone in the regular course of business. These business records were made as a regular practice and in the regular course of business at GuideStone. These business records were made at or near the time of the acts, events, conditions, opinions, and diagnoses appearing in them and made by-or from information transmitted by someone with knowledge of the facts. These business records were kept in the regular course of regularly conducted business activity at and of GuideStone. The records are the original or exact duplicates of the original received and maintained by GuideStone. I am a custodian of records of these GuideStone records attached to this declaration.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT DALLAS, TEXAS, ON NOVEMBER 25, 2013

/s/ Joseph Ormont
Joseph Ormont

Exhibit 1-A

From: Christopher J <Christopher.Little @highmark.com>

Sent: Wednesday, November 20, 2013 8:35 AM

To: Joe Ormont

Cc: Cipresse, Jarrod M

Subject: Updated Process

Attachments: AccommodationSelfCertification Form.pdf;

GuideStoneEmp_Contraceptives_ process.docx

Hi Joe-

Per our conversation yesterday, attached is the updated process guide. More specifically, we have adjusted step 2 to be a bit more streamlined.

Let us know if you have any questions.

Thanks!
Christopher Little, CEBS
Executive Client Manager
National Accounts
412-544-2581

412-544-2223 (fax)
christopher.little@highmark.com

Exhibit A

GuideStone: Accommodation Process for Religious Employers

Pre Highmark step: In early December 2013, GuideStone will send out communication to all of their employers regarding the contraceptive mandate. Included in this letter, information will be provided notifying employers that it is solely their responsibility and obligation as an employer to determine whether they are religiously exempt from the mandate, or, if they meet the eligibility provisions to claim an accommodation. Employers that claim accommodation will need to self-certify directly with Highmark via step 1 below. The email address and telephone number within step 1 can be included in GuideStone's communication to their employers.

1) GuideStone covered employers/clients wishing to self-certify for the accommodation will do so via email to NationalCBA@highmark.com and can contact Jarrod Cipresse, Client Service Manager, directly at 412.544.0990 with any questions. If an employer fails to notify Highmark via email, the employer will assume to be Religiously Exempt as directed by Guidestone.

2) The employer will submit a completed Self Certification form that will contain the following information:

- Organization Name
- Organization Contact Information
- Employer Address
- Employer Payroll Location (if one does not exist today a new payroll location will need to be

established. The current process to establish payroll locations will be followed.)

3) Highmark will confirm the following information outlined above is in place for employers that have responded and elected to accommodate for contraceptives.

4) Once Highmark has all necessary information we will identify the female population ages 10-49 within the respective payroll location. These members will be moved into the unique medical contraceptive only line of business which will be activated upon notice from the member.

5) Highmark will mail letters to all applicable female members advising they should call the dedicated customer service unit at 1.866.472.0924 to request the contraceptive accommodation coverage.

6) Once contraceptive accommodation coverage has been requested, Highmark will activate the unique medical-contraceptive line of business, generating ID cards and insert for each eligible contract member. The new ID card will have a specialized Highmark customer service telephone number, 1.888.745.3214 specific to this contraceptive line of business.

7) Ongoing, nightly feeds will take place to determine if any changes in eligibility have taken place on the medical plan:

- Identify any new female members who were activated on the medical plan who will need sent the contraceptive welcome letter.
- Monitor the active members within the accommodating groups to account for any female members that become eligible (age 10), or become ineligible (age 49), and add or remove

them from the contraceptive line of business as appropriate.

- Identify any female members which have left the medical plan and will also need removed from the contraceptive line of business.

8) As Guidestone adds religious employers in the future, the above steps will need to be followed.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,

Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.

Defendants.

Supplemental Declaration of Timothy E. Head

I, Timothy E. Head, do hereby state and declare as follows:

1. My name is Timothy E. Head. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true and correct and based on my personal knowledge or a review of the business records of GuideStone Financial Resources of the Southern Baptist Convention. If I were called upon to testify to these facts, I could and would competently do so.

2. I hold the position of Executive Officer - Denominational and Public Relations for GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone").

3. This supplemental declaration is in furtherance of my earlier declaration offered in support of the Plaintiffs' Motion for Preliminary Injunction and also in response to Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment and Memorandum in Support.

4. I understand that, after the Plaintiffs filed their Complaint and Motion for Preliminary Injunction in this action, the government has conceded that it lacks the authority "at this time" to force third party administrators ("TPAs") of a self-insured church health plan like the GuideStone Plan to make separate payments for contraceptive services under the Affordable Care Act's final rules and regulations (the "Mandate"). However, my understanding is that the government will still require member employers of the GuideStone Plan that are not exempt from the Mandate to execute and submit to the GuideStone Plan and/or its TPAs a prescribed self-certification form, pursuant to the "accommodation" created by the Final Rules.

5. The government's prescribed self-certification form is available at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf. I have reviewed the self-certification form. The government's new position does not change the religious objection to complying with the "accommodation" created under the Mandate for GuideStone and employer members of the GuideStone Plan.

6. On the back of the self-certification form, the government states that our employers or their plan "must provide a copy of this certification to ... a third

party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement."

7. Also, on the back of the form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that ... [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." By the express term of the form, the self-certification becomes an "instrument" under the GuideStone Plan for the purpose of facilitating the provision of abortifacient drugs and devices through the GuideStone Plan. It is also my understanding that these referenced regulations require that the third party administrator shall provide or arrange payments for the complained of abortifacients. 8. GuideStone's religious beliefs prohibit us from taking the following action on or after December 31, 2013: authorizing anyone to arrange for or make payments for abortifacients; taking action that triggers the provision of abortifacients; or taking action that is the but-for cause of the provision of abortifacients. It makes no difference whether those payments will take place now or next year. Under Southern Baptist religious principles, GuideStone objects to and cannot do the following:

- allow its plan, plan information, and contractual relationships with third-party administrators to be used as the vehicle for delivering abortifacients to the employees and

beneficiaries of GuideStone member employers, now or in the future;

- deliver the self-certification form to another organization that could then rely on it as an authorization to deliver these abortifacients to the employees and beneficiaries of GuideStone member employers, now or in the future;
- agree to refrain from speaking to other organizations and instructing or asking them not to deliver abortifacients to the employees and beneficiaries of GuideStone member employers;
- assist in the creation of a relationship (between plan beneficiaries and any third-party administrator), the sole purpose of which would be to provide abortifacients;
- participate in a scheme, the sole purpose of which is to provide abortifacients to the employees and beneficiaries of GuideStone member employers. GuideStone believes that it would be immoral and sinful to intentionally facilitate the provision of abortifacients and related education and counseling, as it would be required to do by the Mandate.

9. Yet, from my review of the pleadings in this case, the government still requires GuideStone to do these things. Specifically, the government still wants the GuideStone Plan member employers who are "eligible organizations" to comply with its "accommodation" by filling out the self-certification form and delivering it to GuideStone or one of GuideStone's TPAs. If they do not, they will be charged substantial penalties. If they do, then the

GuideStone Plan will effectively be forced into the position of facilitating the provision of abortion-causing drugs and devices to the eligible organizations' employees, as described in paragraph below. The use of the GuideStone Plan to facilitate the "accommodation" impinges upon GuideStone's religious beliefs and substantially burdens its religious exercise.

10. Despite the government's new position, it is my understanding that regulations promulgated under the Affordable Care Act (the "Act") continue to require third party administrators to provide contraceptive coverage, providing that "if a third party administrator receives a copy of the [self] certification . . . the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(b)(2); 26 C.F.R. § 54.9815-2713A(b)(2). It is also my understanding that the preamble to these regulations explains, "[a] third party administrator that receives a copy of the self-certification . . . must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39,879, 39,880 (July 2, 2013). It is my understanding that there is no exception for church-plan TPAs in the regulations, and the regulations on their face appear to apply to all TPAs. Furthermore, the government has stated that it intends to enforce these regulations in the future, saying that it "continue[s] to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans."

11. Indeed, at least one of the GuideStone Plan's TPAs has told Guide Stone that, despite the position taken by the government that it cannot force the TPA A to comply, it will nonetheless provide abortifacient coverage under the Mandate for employees of any eligible organization for which it receives a self-certification form. Accordingly, GuideStone and Plaintiffs continue to need a judicial declaration and injunction from the Court finding that these regulations do not apply to them, their TPAs and eligible employers.

12. GuideStone considers it a violation of its sincerely held religious beliefs to act as a liaison between Guide Stone Plan employers and Guide Stone's TPAs under the Mandate to arrange for and facilitate the provision of abortifacients. Nevertheless, GuideStone's TPAs are requesting GuideStone's assistance in determining which participating employers in the GuideStone Plan are "eligible organizations" and therefore must comply with the accommodation's self-certification requirements. The TPAs are requesting that GuideStone identify eligible organizations for purpose of self-certification identification and in furtherance of the Mandate's abortifacient scheme. These requests have been made due to the requirement to implement the Mandate by January 1, 2014. However, GuideStone objects to being forced to facilitate and assist with the government's scheme against its religious beliefs. For this additional reason, GuideStone continues to need a judicial declaration and injunction from the Court finding that these regulations to not apply to the GuideStone Plan employers or Plaintiffs.

13. GuideStone is also concerned about the possibility that, by being forced into this untenable position, its conduct may lead others to do evil, or to think that GuideStone condones evil. Obeying the Final Mandate's requirement to participate in the provision of abortion-inducing drugs and IUDs impinges GuideStone's public witness to the respect for life and human dignity that GuideStone is committed to displaying, as stated in the Resolutions adopted by the Southern Baptist Convention in the Baptist Faith and Message 2000. GuideStone should not be required to compromise its commitment to its Christian witness by being seen as involved in the government's program. Doing so not only impinges its sincerely held religious beliefs, but also risks leading others astray.

14. Additionally, GuideStone is directed by its ministry assignment from the Southern Baptist Convention to "[a]ssist churches, denominational entities and other evangelical ministry organizations by making available ... health coverage." Even with the government's new position, "eligible organizations" participating in the GuideStone Plan are faced with an impossible dilemma. If they refuse to fill out the self-certification because of their religious objection, they face significant penalties. If they eliminate health coverage for their employees altogether to ensure that they are not required to participate in the government's scheme, they will be denied the opportunity to follow their religious beliefs concerning the health and welfare of their employees and also face significant penalties beginning in 2015 if they have more than 49 employees. By forcing non-exempt eligible organizations to make the difficult

decision to leave the GuideStone Plan to avoid the penalties or to avoid participating in the government's scheme because of their religious belief, the Mandate substantially burdens GuideStone's religious exercise and ministry of providing health coverage to like-minded organizations that have adopted the GuideStone Plan. The Mandate also requires GuideStone to choose between serving non-exempt ministry organizations and violating its beliefs regarding the sanctity of life. Declining to serve these likeminded organizations would not only prevent GuideStone from carrying out its religious mission, it would also have a substantial adverse financial impact on the GuideStone Plan and its remaining exempt employers because there would be fewer participating employers to share the fixed costs of administration. Thus, GuideStone continues to need a judicial declaration and injunction in this matter.

15. The only way to provide effective relief for GuideStone and class members is to enjoin enforcement of the Final Mandate with respect to all non-exempt "eligible organizations" in the GuideStone Plan; otherwise, they will be adversely affected by the application of the Final Mandate to these organizations and its penalty provisions.

16. GuideStone is a member of the Church Alliance. 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. On April 8, 2013, the Church Alliance 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. A true and correct copy of the Church Alliance's comment letter submitted to the government is attached hereto and is also available at http://church-alliance.org/initiatives/comment-letters (last visited Nov. 22, 2013).

PURSUANT TO 28 U.S.C. § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED IN DALLAS, TEXAS, ON NOVEMBER 26, 2013

/s/Timothy E. Head

Timothy E. Head

CHURCH ALLIANCE ACTING ON BEHALF OF CHURCH BENEFITS PROGRAMS

April 8, 2013

BY ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW.
Washington, DC 20201

Re: Notice of Proposed Rulemaking Regarding Preventive Services
CMS-9968-P
RIN 0938-AR42

Dear Sir or Madam:

The Church Alliance submits this comment in response to the notice of proposed rulemaking regarding preventive services ("NPRM") issued 'jointly by the Internal Revenue Service, the Department of Labor and the Department of Health and Human Services (HHS) (together, the "Departments") and published at 78 Fed. Reg. 8456 (Feb. 6, 2013). The Church Alliance commented twice previously on the topic of preventive services ("Earlier Comments"), first on the then interim final rules published at 76 Fed. Reg. 46621 (Aug. 3, 2011) ("2011 Interim Final Rules"), and then on the

advance notice of proposed rulemaking published at 77 Fed. Reg. 16501 (Mar. 21, 2012) ("ANPRM").[1]

Executive Summary

The Church Alliance appreciates the Departments' responsiveness and attentiveness to the Church Alliance's Earlier Comments in the NPRM to attempt to accommodate the religious beliefs of religious organizations. However, for the reasons explained below, the expanded definition of "religious employer" continues to exclude bona fide religious organizations, and the proposed accommodation for "eligible organizations" is unworkable, particularly for self-insured church plans. For these reasons the Church Alliance reiterates its suggestion in its Earlier Comments that the Departments abandon the employer-by-employer approach and adopt instead a broader plan-based exemption.

I. BACKGROUND ON THE CHURCH ALLIANCE

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. The Church Alliance members, listed on the left of this letterhead, provide medical coverage to approximately one million participants (clergy and lay workers) serving over 155,000 churches, synagogues and affiliated

[1] Copies of these Earlier Comments are available at http://churchalliance.org/initiatives/comment-letters (last visited April 3, 2013).

organizations. These .medical programs are defined as "church plans" under section 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 414(e) of the Internal Revenue Code (the "Code").

All of the members of the Church Alliance share the common view that a church or an employer associated with a church should not have to face the choice of violating its religious tenets and beliefs or violating the law in order to maintain a health care plan for its workers.[2] This is true even though most of the health care plans associated with the members of the Church Alliance do not impose any specific restrictions on contraception coverage. A few programs, reflecting the religious beliefs of the churches with which they are associated, exclude coverage for all contraceptives. Other programs whose associated churches do not object to contraception but hold fundamental convictions against abortion, exclude coverage for contraceptives that are or could be abortifacients, such as the so-called "morning-after pills" or "emergency contraceptives."

II. EXEMPTION IN THE FINAL REGULATIONS FOR "RELIGIOUS EMPLOYERS"

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[2] If a religious employer, large or small, sponsors a medical plan for its employees, but the plan does not provide required contraception coverage, Code section 49800 will impose an excise tax equal to $100/day for each covered individual denied such coverage. If a religious employer with an average of 50 or more full-time employees discontinues its plan to avoid violating its religious tenets and beliefs, it will be subject to a penalty under Code Section 4980H of $3 ,000/year for each full-time employee.

A. Exemption

In the NPRM, HHS proposed the addition of a new 45 C.F.R. §147.13l(a), defining the term "religious employers", which will read as follows:

> § 147.131 Exemption and accommodations in connection with coverage of preventive health services.
>
> (a) Religious employers. In issuing guidelines under§ 147.130(a)(l)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended.

B. Improved, But Further Improvement Necessary

The Church Alliance is grateful that the Departments considered and responded to comments received in response to the ANPRM, and that the criteria for the religious employer exemption have been amended by the Departments "to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the

inculcation of religious values or because the employer serves or hires people of different religious faiths."[3]

The elimination of the first three prongs of the definition for "religious employer" contained in the 2011 Interim Final Rules is a significant improvement. However, the exemption for "religious employers" continues to exclude bona fide religious organizations because it continues to reference statutory exemptions set out in Code sections 6033(a)(3)(A)(i) and (iii) that were crafted for another purpose - specifically, to exempt churches, their integrated auxiliaries, conventions or associations of churches and the exclusively religious activities of a religious order from the annual Form 990 filing requirement under Code section 6033.

As other commenters have noted, the Form 990 filing requirement - the requirement from which Code sections 6033(a)(3)(A)(i) and (iii) carve out exemptions - serves a two-fold purpose: it provides the IRS with information necessary to administer the tax laws, and it makes tax-exempt organizations financially accountable to the IRS and the general public. The initial purpose of this filing requirement, in 1943, was to monitor organizations that were using an unrelated business income "loophole", to determine whether and how they should be taxed.[4]

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[3] 78 Fed. Reg. at 8459.

[4] Gaffney, *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an "Integrated Auxiliary of a Church"*, 25 VAL. U. L. REV. 203, 211 (1991), *available at* http://scholar.valpo.edu/vulr/vol25/iss2/3/ (last visited Mar. 29, 2013).

The exemptions from filing the annual Form 990 reflect congressional sensitivity to the church-state entanglement issues inherent in mandating financial reporting and accountability for churches and religious organizations.

The Form 990 filing exemptions, however, are unduly narrow when applied to exempt religious employers from the contraception coverage requirement. More importantly, they have no relevance whatsoever to church benefit plans (to which the contraception coverage requirement otherwise would apply), having been devised, as noted above, to serve an entirely different purpose.

The church-related organizations exempted by Code section 6033(a)(3)(A)(i) are described as "integrated auxiliaries." Since the Form 990 discloses an organization's income, it was logical to utilize a Form 990 filing exemption for integrated auxiliaries that is focused on the sources of the organizations' financial support.[5] However, basing an exemption from the contraception coverage requirement on the level of an employer's financial support from the church or convention or association of churches with which it is affiliated ignores the historic boundaries of churches and church conventions and effectively divides them into two categories of employers—those who are entitled to the exemption and those who are only entitled to the accommodation. This would be true despite the fact that they all share the same religious faith and beliefs with regard to the provision of contraception coverage. There does not seem to be a rational basis for such a distinction.

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[5] TD 8640, 1996-1 C.B. 289.

As noted by the United States Conference of Catholic Bishops, the proposed test for deciding whether an organization is a "religious employer" bears no rational relationship to any legitimate governmental interest that the mandate or the exemption purports to advance.[6] The Form 990 filing exemptions, which have no relevance whatsoever to church welfare or benefit plans, were never intended to protect against a government requirement that may violate religious tenets and beliefs entitled to First Amendment protection. Additionally, the proposed exemption would run afoul of the Establishment Clause of the First Amendment because it would discriminate between various denominations depending on sources of financial support, which may depend on the denomination's polity (governance structure) or church members' affluence.[7]

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[6] *See*, comment by United States Conference of Catholic Bishops dated March 20, 2013, *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf (last visited Apr. 2, 2013).

[7] *See*, *Lutheran Social Service of Minnesota v. United States*, 758 F.2d 1283, 288 n.5 (8th Cir. 1985) ("We necessarily construe the word 'church' in section 6033 to include both organizational forms of churches with respect to "churches and their integrated auxiliaries." Any other construction of the phrase—i.e., if "church" were construed as meaning only hierarchical churches such as the Catholic Church—would result in an unconstitutional construction of the statute because favorable tax treatment would be accorded to hierarchical churches while being denied to congregational churches, in violation of the first amendment.").

We urge instead a plan-based exemption for all employers participating in "church plans" as defined in ERISA section 3(33) and Code section 414(e). As noted in our Earlier Comments, exemptions based on "church plan" status have been in place for years under a variety of federal laws, including ERISA, the Code and federal securities laws. Thus, a plan-based exemption would be much less likely to be challenged on the basis of constitutionality.

A plan-based exemption would simplify the administration of large denominational benefit plans. Some of these plans have hundreds, some even thousands, of small religious employers. The plans are typically administered by a benefits board that strives to make the communications to employers and covered participants uniform across the country. The plans often provide the same information about the benefits and procedures of the plan to all participants regardless of the type of participating employer for which they work. A plan-based exemption, discussed above, would allow these practices to continue in an efficient manner.

In the absence of a plan-based exemption, a few unintended consequences could result. First, the expenses that the benefit board would have to undertake to make the determination of which participating employers are eligible organizations, and the expenses of complying with the accommodation would be borne in part by each participating exempt religious employer. This would happen because the funds in multiple employer church plans are typically commingled among all participating employers in the plan. This unintentionally subjects some exempt religious

employers to the expenses, though small, of complying with the accommodation for eligible organizations.

Second, the administrative burden of an employer-by-employer determination may also drive multiple employer church plans away from eligible organizations. Some benefit boards may be so concerned about contraception coverage that they may terminate the coverage of participating eligible organizations in favor of having a plan that only covers exempt religious employers. This may leave participating eligible organizations, and their employees, worse off. Alternatively, the benefit board maintaining a multiple employer plan, out of concern for the participating exempt religious organizations, may pass the cost of complying with the accommodation for eligible organizations on to those eligible organizations. This may cause friction between participating employers (exempt religious employers versus eligible organizations) or may cause participating eligible organizations, perhaps long participating in the multiple employer church plan, to depart the plan due to the higher cost, or may cause them to be more attracted to coverage through outside commercial insurance providers.

C. Continued Omission of Bona Fide Religious Organizations

The exclusion in Code section 6033(a)(3)(A)(i) has been defined in regulations as covering "a church, an interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church (as defined in

paragraph (h) of this section)."[8] Other church-related organizations also are excluded from the Form 990 filing requirement, but may not be included within either section 6033(a)(3)(A)(i) or (iii). These organizations include:

- an educational organization (below college level) that is described in Code section I 70(b)(1)(A)(i), that has a program of a general academic nature, and that is affiliated with a church or operated by a religious order,
- a mission society sponsored by or affiliated with one or more churches or church denominations, more than one-half of the activities of which society are conducted in or directed at persons in foreign countries,
- an organization described in Code section 6033(a)(3)(C), which is a religious organization described in Code section 50 I (c)(3), other than a private foundation, the gross receipts of which in each taxable year are normally not more than $5,000,
- an organization described in Code section 501(c)(3), with gross receipts that are normally not more than $5,000 annually, and that is operated, supervised or controlled by or in connection with a religious organization described in section 6033(a)(3)(C)(i), and
- an organization exempt from filing Form 990 under the authority of Revenue Procedure 96-10, 1996-1 C.B. 577, which includes organizations operated, supervised or controlled

[8] Treas. Reg. § 1.6033-2(g)(I)(i).

> by one or more churches, integrated auxiliaries or conventions or associations of churches and that are engaged exclusively in financing, funding the activities of, or managing the funds of such organizations, or that maintain retirement insurance programs primarily for such organizations and their employees; and organizations engaged in financing, funding or managing assets used exclusively for religious activities that are operated, supervised or controlled by one or more religious orders.[9]

These additional exemptions were created because of First Amendment concerns about subjecting religious organizations to financial oversight by the IRS. To the extent the religious employer exemption to the contraception coverage mandate continues to be based on the Form 990 filing exemptions, these same First Amendment concerns also justify the extension of the religious employer exemption to the above categories of religious organizations.

D. Additional Clarity Needed

Integrated auxiliaries are exempted from the Form 990 requirement under Code section 6033(a)(3)(A)(i). However, the term "integrated auxiliary" is unclear and has been subject to much controversy over its history, including litigation.[10] While the current

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[9] Many organizations within the categories listed above (as outside section 6033(a)(3)(A)(i) or (iii)) also may qualify as integrated auxiliaries, and the inclusion of a religious organization in any of these categories is not intended to imply that the organization is not an integrated auxiliary.

[10] *See*, footnote 4, *supra*.

regulatory definition of the term "integrated auxiliary" is more objective and less controversial than the prior definition used for that term, the "internal support" test within that definition remains hazy. That definition states that an organization is internally supported, unless it both:

- offers admissions, goods, services or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and
- normally receives more than fifty percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities and activities that are not unrelated trades or businesses.

The internal support test must be met for an organization to be considered an "integrated auxiliary." However, application of this test to some church-related organizations is unclear.

For some organizations, it is unclear whether their activities constitute an offer of sale and whether the receipts are from sales, such as when donations are requested in return for goods. At other times, it is unclear if items (especially in the case of intangible items) being "offered" are admissions, goods, services or facilities. And what is the "general public"? If the "offer" is being made to a very large church group that is open to the general public, is that an offer to the "general public"? Yet another question is whether contributions are received from a "public solicitation,"

when an appeal is made to the membership of a large church.

These questions on the definition of "integrated auxiliary" have existed for a number of years. However, in the near future, in addition to risking penalties for failure to file a Form 990 if the IRS deems an organization's interpretation of this term to be incorrect, the organization possibly may be subject to severe penalties for its "incorrect" interpretation, especially for those with self-insured plans, for which the requirements are still unclear.[11] So, for example, if the administrator of a large denominational benefit plan has determined that all employers participating in the plan are exempt religious employers, either as churches or integrated auxiliaries, and the IRS decides some of the employers are not exempt, severe penalties ($100 per day per participant) could be imposed for a plan's failure to meet the group health plan requirements imposed by section 2713 of the Public Health Service Act.[12] This seems especially severe when the test for exemption from the requirement is unrelated to the underlying requirement.

E. Comments Sought: Proposed Additional Exemption

In the Supplementary Information to the NPRM, the Departments proposed making the

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[11] *See*, footnote 2, *supra*.

[12] U.S. Congressional Research Service, Enforcement of the Preventive Health Care Services Requirements of the Patient Protection and Affordable Care Act (RILL 7-5700; February 24, 2012), by Jennifer Staman and John Shimabukuro.

accommodation or the religious employer exemption available on an employer-by-employer basis and sought comments on this approach, including comments on alternative approaches. For the reasons discussed in its Earlier Comments, the Church Alliance again urges the Departments to extend the religious employer exemption to all employers that maintain or participate in "church plans", as defined in Code section 414(e). The Departments' continuing struggle with an employer-by-employer based approach highlights once again the utility of a plan-based approach. Among the reasons discussed were that focusing the exemption on benefit plans rather than employers avoids entanglement problems. Indeed, for nearly 40 years the Internal Revenue Service, the Department of Labor and courts have been making determinations as to whether plans were "church plans" within the meaning of Code section 414(e) without involving any prohibited entanglement in religious issues. In addition, the proposed plan-based exemption recognizes that in many churches the plan is not at an individual employer level but may be at a local, state, regional or even national level. Depending on a church's polity as determined by its theological beliefs, some religious employers are required to participate in a multiple employer church plan while others may elect to do so.

However, if the Departments are concerned that such an exemption would be too broad, the Departments could draft the exemption more narrowly so that if the church plan is established or maintained by a religious employer, and substantially all of the employers in the church plan

are either religious employers or eligible organizations (or substantially all of the participants are employees of religious organizations or eligible employers), all employers in the church plan would be treated as religious employers, exempt from the contraception coverage requirement. This approach would prevent the potential adverse consequence described in the Supplementary Information to the NPRM, which is the avoidance of the contraception coverage requirement by employers that are neither religious employers nor eligible organizations. At the same time, this approach would avoid the administrative challenges and possible governmental entanglement for the Departments or courts in determining whether religious organizations were religious enough to be categorized as religious employers or eligible organizations. In addition, this would allow one uniform set of benefits for plan participants and decrease the cost of plan administration for employees in church plans.

This approach would be narrower than an exemption based solely on Code section 414(e). It would result in some church plans being exempt (multiple employer church plans that only include employers that are closely tied to the church), while others, such as certain single employer church plans, not being exempt unless the individual employer satisfies the religious employer definition.

Applying the multiple employer church plan exemption in this manner would recognize the unique nature of multiple employer church plans, particularly the fact that such plans cover many houses of worship (often primarily covering clergy and employees at churches) but also cover some

employers associated with the church that may not clearly be religious employers, but that clearly are eligible organizations.

III. ACCOMMODATION FOR "ELIGIBLE ORGANIZATIONS"

A. Definition of "Eligible Organization"

The NPRM requested comments on the proposed "accommodation" for "eligible organizations." Section 54.9815-2713A(a) of the Proposed Regulations defines an "eligible organization" as an organization that satisfies four requirements:

1. The organization opposes providing coverage for some or all of the required contraceptive services;
2. The organization is organized and operates as a nonprofit entity;
3. The organization holds itself out as being a religious organization; and
4. The organization self-certifies that it satisfies the requirements of paragraphs through 3 and specifies the contraceptive services to which it objects.

The self-certification mechanism appears to operate so that an organization's determination that it is "religious" will not be challenged by regulators or others involved in the accommodation process. However, the Agencies noted that some commenters on the ANPRM urged the Departments to provide "enforcement mechanisms to monitor compliance with the criteria" for being an eligible organization.

If the Departments provide in final regulations that they will have oversight over accommodation eligibility, it will put them in the position of having to make determinations as to whether organizations are in fact "religious." Prior to the issuance of Revenue Procedure 86-23 and the revision of the integrated auxiliary regulations in 1995, the Internal Revenue Service was required to determine if organizations were "exclusively religious." The presence of such a requirement in these regulations proved problematic and was litigated in *Lutheran Social Service of Minnesota v. United States*, 583 F. Supp. 1298 (D. Minn. 1984), *rev'd* 758 F.2d 1283 (8th Cir. 1985), and *Tennessee Baptist Children's Homes, Inc. v. United States*, 604 F. Supp. 210 (M.D. Tenn. 1984), aff'd, 790 F.2d 534 (6th Cir. 1986). If such an enforcement approach is adopted, the Departments will also have to determine what it means for an organization to hold itself out as being religious.

The NPRM does not provide any insight as to what would be required to constitute the required holding out. The NPRM also requires that an organization be organized and operated as a nonprofit entity in order for the accommodation to be available. The Supplementary Information to the NPRM states that " ... an organization is not considered to be organized and operated as a nonprofit entity if its assets or income accrue to the benefit of private individuals or shareholders" - however, the NPRM does not tell us what standard should be used for making the "no private benefit" determination. The IRS has issued regulations and other guidance on the "no private inurement" requirement applicable to Code section 50l(c)(3) organizations. The IRS and the courts have

also developed a broader "no private benefit" rule, also applicable to such organizations. Are these the rules to be used to make the "no private benefit" determination for purposes of "eligible organization" status? And will even $1.00 of private benefit cause the requirement not to be met? To the extent that the self-certification process is "self-policing," securing answers to these questions is perhaps not as urgent. However, if the Departments will be involved in oversight and enforcement of eligible organization status, the need for clear guidance on these questions becomes extremely important.

B. Application of the Accommodation

1. Insured Plans

In the case of an insured plan, the NPRM attempts to accommodate religious employers that object to providing contraception coverage by having the insurer providing group coverage assume the responsibility by providing individual insurance policies that provide contraception coverage to plan participants and beneficiaries without cost sharing. This proposed structure is thought to avoid conflicts for a religious employer because the employer would have "no role in contracting, arranging, paying or referring for this separate contraception coverage." 78 Fed. Reg. at 8463. However, for the reasons explained below, the NPRM fails to address the religious liberty concerns of religious organizations that object to providing contraception coverage on account of their religious beliefs. The NPRM still requires an objecting eligible organization to violate its religious beliefs by requiring it to play a

substantial role in the provision of contraception coverage to its employees or pay a penalty.[13]

a. Eligible organizations will be paying for contraception coverage

Other commenters have noted that contraception coverage, like lunch, is not free. Since the eligible organizations (and plan participants in the case of contributory plans) are paying all the premiums, they must be paying for the contraception coverage. The Departments appear to be of the view that the group health insurers, not the eligible organizations or plan participants, will be providing the coverage, and that the insurers will do so because, when viewed together with the underlying group policy, the cost of contraception coverage will be less, or at least no more, than the cost of unplanned pregnancies. The Church Alliance remains skeptical about this assumption for the reasons set forth in its prior comments. However, even if true, religious organizations will still be paying for contraception coverage for the reasons set forth below.

First, the NPRM provides that the contraception coverage cannot be "reflected in the group health insurance premium." 78 Fed. Reg. at 8462. It follows therefore that the insurer will charge the eligible organization more for its group coverage because of the increased cost of unplanned pregnancies resulting from the omission of contraception coverage. Even if a group insurer could take the effect of individual contraception policies into account in setting the rates for an eligible organization's

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[13] *See*, footnote 2, *supra*.

group policy,[14] the insurer will still charge more for the eligible group coverage it will be required to issue because of the increased cost of administering the individual policies (e.g., state policy approvals, separate mailings, printing costs, increased cost of coordinating benefits, etc.).

Second, even if one ignores the additional administrative costs and assumes that the contraception coverage is cost neutral, the coverage is neutral only in the short run. Since the terms of group health insurance contracts rarely exceed more than 12 months in duration, the "cost" to one insurer for contraception coverage will often be recouped, if at all, in a subsequent plan year by a different insurer in the form of reduced unplanned pregnancies. Insurers cannot be certain that their policies will be renewed. Accordingly, in setting the premiums for any year, they will discount the future benefit of the upfront cost of provided contraception coverage.

b. Employees of eligible organizations will be receiving contraception coverage by virtue of their employment

Due to the absence of cost sharing, employees of eligible organizations will be receiving contraception coverage by virtue of their employment for less - nothing, in fact - than they would have paid for the

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[14] We express no comment on whether under applicable state insurance laws the insurer can consider the individual policies in setting the rates for the group policies. State insurance regulators are, of course, concerned about insurers setting rates too high. However, they are also concerned about insurers setting rates too low since it could affect their solvency.

coverage elsewhere. For plans that are covered by ERISA, this will cause the contraception coverage to be part of the group plan because the contraception coverage will be part of an employee benefit program "established or maintained by an employer." 29 U.S.C. § 1002(1).

In an analogous situation, employers have been held to have contributed to the cost of an employee-pay-all plan, thus bringing the plan under ERISA, if the plan participants could not have obtained the same coverage elsewhere for the same cost, perhaps because of a group discount. See, *House v. Am. United Life Ins. Co.*, 499 F.3d 443, 449 (5th Cir. 2007); *Tannebaum v. Unum Life Ins. Co.*, 2006 WL 26710405 (E.D. Pa.); *McCann v. Unum Provident*, Civ. Action No. 11-3241 (MCC) (D.N.J. 2013); *Healy v. Minnesota Life Ins. Co.*, 2012 WL 566759 (W.D. Mo.); *Moore v. Life Ins. Co. of North America*, 708 F. Supp. 2d 597 (N.D. W.V. 2010); *Chatterton v. Cuna Mut. Ins. Society*, 2007 WL 4207395 (S.D. W.V.); *Brown v. Paul Revere Life Ins. Co.*, 2002 WL 1019021 (E.D. Pa.) ("Where an employer provides the employee benefits they cannot receive as individuals, it has contributed to an ERISA plan."); and *Kuehl v. Provident Life & Accident Ins. Co.*, 2000 U.S. Dist. LEXIS 21625, *10 (E.D. Wis. Apr. 20, 2000) (contribution exists where l 0% discount available only to employees in group plans). But see, *Schwartz v. Provident Life & Acc. Ins. Co.*, 280 F. Supp. 2d 937 (D. Ariz. 2003) (discount in and of itself not sufficient to establish an employer plan under ERISA).

Similarly, Code section 4980B and ERISA section 601 generally require most employers with 20 or more employees that have or contribute to plans to

provide COBRA continuation coverage if they maintain a group health plan. Treasury Regulation §54.4980B-2 provides that "a group health plan is maintained by an employer ... even if the employer does not contribute to it if coverage under the plan would not be available at the same cost to an individual but for the individual's employment-related connection to the employer ...."

c. Eligible organizations will be facilitating the providing of contraception coverage

The NPRM provides that the contraception coverage provided through individual contraception policies will not be "offered by or through a group health plan." 78 Fed. Reg. at 8462. Insurers will automatically provide contraception coverage for plan participants and beneficiaries. 78 Fed. Reg. at 8463 ("The issuer would automatically enroll plan participants and beneficiaries in a separate individual health insurance policy that covers recommended contraceptive services.") However, eligible organizations remain free to determine who is eligible to participate in their group health plans. Accordingly, by determining who will be eligible to participate in their group health plans, eligible organizations will be effectively determining who receives an individual policy providing contraception coverage. For plans covered by ERISA, serving as such a gatekeeper has been held sufficient employer involvement to indicate the presence of an "employee benefit plan established or maintained ... by an employer" which is therefore covered by ERIS A. See, *Glass v. United Omaha Life Ins. Co.*, 33 F.3d 1341 (11th Cir. 1994); *Brundage - Peterson v. Compare*

Health Services Ins. Corp., 877 F.2d 509, 510-11 (7th Cir. 1989); and *Rengifo v. Hartford Life and Accident Ins. Co*., Case No. 8:09-CV-l 725-T-17MAP (M.D. FL 2010).

d. The NPRM will limit eligible organizations' choice of group health insurers

The NPRM provides that an insurance company issuing a group policy to an employer will provide to plan participants "contraception coverage under individual policies, certificates, or contracts of insurance (hereinafter referred to as individual health insurance policies)." 78 Fed. Reg. at 8462.

The NPRM apparently assumes that an insurer that has issued a group health policy to an eligible organization can legally issue such "individual health insurance policies" to any plan participant. In some cases, an insurer cannot. The NPRM notes that the individual contraception policies issued in connection with self-insured plans will be subject to all applicable state laws, including state insurance filing and rate review requirements. 78 Fed. Reg. at 8465. As explained below, individual contraception policies issued in connection with insured plans will be treated as individual policies and therefore involve the laws not only of the state in which the group policy will be issued, but each state in which a plan participant resides.[15]

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[15] Certificates of insurance are generally treated as evidence of coverage under a group plan. They do not expand the coverage provided under the group policy.

Although insurance involves interstate commerce, as the result of the federal McCarran-Ferguson Act, the right to regulate insurance companies has generally been relegated to the states. State insurance regulators are charged with overseeing the regulation of the insurance industry to ensure that insurers remain solvent, and that the rules and requirements enacted by the state legislature are complied with. The laws vary from state to state, but states generally require insurers doing business in a state to be licensed in a state. In the case of group insurance, the insurance company frequently need only be licensed in the state in which the policy is issued. For example, Alabama's unauthorized insurers law does not apply to "[t]ransactions in [Alabama] involving group ... insurance ... where the master policy or contract was lawfully issued and delivered in a state in which the insurer was authorized to transact business." Ins. Code § 27-11-2(4). Other states have similar provisions. Thus, an insurance company can often issue a group health policy to an employer headquartered in one state even though the policy may cover employees residing in other states so long as the insurer is licensed in the state in which the employer is headquartered. However, that changes when an insurance company issues individual policies. Each state will require a company issuing individual policies to its residents to be licensed in that state. Accordingly, an insurer issuing a group policy to an eligible organization may not be able to issue individual contraception policies to each plan participant unless it is licensed in all the states in which plan participants reside and complies with the insurance laws of all those states. In

addition to state filing and rate review requirements, those laws could include requirements regarding (i) provider access; (ii) utilization reviews, grievance reviews/internal appeals, and external reviews; (iii) prompt payment of claims; (iv) mandated benefits; (v) small group rating requirements; and (vi) handling of complaints. If an eligible organization is satisfied with its current insurer, it should not have to change insurers to an insurer that can issue individual contraception policies in each state in which a plan participant or beneficiary resides. The group health insurance market is already concentrated. Effectively limiting eligible organizations to large insurers that are licensed in all states, or at least in all the states in which plan participants reside, would severely limit eligible organizations' choice of insurers.

2. Uninsured Plans

a. Alternative approaches for providing participants and beneficiaries in self-insured group health plans contraception coverage

The Departments have not yet issued regulations on contraception coverage for self-insured group health plans. However, in the Supplementary Information to the NPRM, the Departments described three "alternative approaches for providing participants and beneficiaries in self-insured group health plans established or maintained by eligible organizations with contraception coverage at no additional cost, while protecting the eligible organizations from having to contract, arrange, pay, or refer for such coverage."

In the subsections that follow, the Church Alliance will comment on each of the three described approaches, particularly as they would apply to multiple employer church plans.

Under all three approaches, the Departments state that "if there is a third party administrator for the self-insured group health plan of the eligible organization, the eligible organization would provide the third party administrator with a copy of its self-certification." In addition, if "the plan uses a separate third party administrator for certain coverage, such as prescription drug coverage, the eligible organization would also provide a copy of its self-certification to the separate third party administrator" if the separate coverage includes coverage of any contraceptive service listed in the self-certification.

However, it is unclear, in the multiple employer church plan context, which entity would be considered the third party administrator, especially since the proposed regulations contain no definition of that term. With multiple employer church plans, the "denominational plan board"[16] may perform many of the administrative functions that would be performed by an independent third party

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[16] The term "denominational plan board" is intended to mean an organization that is described in Code section 414(e)(3)(A) as "an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches."

administrator in a single employer plan context, and is a "third party" in the sense that it is not the employer or participant. So, in such situations, is the denominational plan board the third party administrator? If the denominational plan board is the third party administrator, none of the approaches appear workable, because of the required involvement by the third party administrator, which is an exempt religious employer.

If there is a claims administrator that processes health benefits claims for a multiple employer church plan, is that claims administrator the third party administrator? Does the answer change if a denominational plan board that performs much of the health plan administration utilizes multiple claims administrators, for multiple categories of claims that include contraceptive services (e.g. by type of benefit or claim (e.g., pharmaceutical or medical) or geographic area, including city)? Can the answer change from year to year, depending on the level of administration by the denominational church plan board versus the claims administrator in the year in question?

With each of the three approaches, an adjustment would be made in the user fees that otherwise would be charged by an FFE to the issuer providing the contraception coverage.[17] However, it is unclear how

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[17] Because the FFE user fee adjustments do not begin until 2014, after the end of the temporary enforcement safe harbor for some plans pursuant to guidance issued by the Departments on February 10, 2012, and reissued on August 15, 2012, referred to in 78 Fed. Reg. at 8558 n.6. The safe harbor should be extended to cover this gap period.

this would be administered if a church health plan uses multiple third party administrators, especially if they are affiliated with different issuers or none of them is affiliated with an issuer. It also is unclear how any of the approaches would work if the third party administrator is located in a state without an FFE, and any issuer affiliated with that third party administrator also is located in that state. Due to state licensing regulations, these affiliations may be extremely limited and, at the least, will require interstate coordination, which may not be allowable under state licensing requirements. In addition, if the denominational plan board is the third party administrator, it is unlikely to be affiliated with an issuer.

(i) First Approach

Under this approach, a "third party administrator receiving the copy of the self-certification would have an economic incentive to voluntarily arrange for the separate individual health insurance policies for contraception coverage", because it would be compensated with a reasonable fee for automatically arranging for the contraception coverage. Under this approach, the Supplementary Information to the NPRM describes the third party administrator's role in "automatically arranging for the contraception coverage" as "acting, not as the third party administrator to the self-insured plan of the eligible organization, but rather in its independent capacity apart from its capacity as the agent of the plan."

It is difficult to envision how the third party administrator could provide this service "automatically" because of its relationship to the

eligible organization and its employees, but be acting "in its independent capacity." In addition, how, exactly, could this "automatic" arrangement occur without some involvement on the part of the eligible organization? The eligible organization, first, would be required to provide the third party administrator with a copy of its self-certification. However, without any further involvement, how would the third party administrator have contact information and other necessary information to provide the contraception coverage? Even if the third party administrator had contact information for all employees covered by a multiple employer church plan, how will it distinguish between employees of eligible organizations and employees of exempt religious employers, without identification of those employees by either the eligible organizations or the denominational church plan board? The Supplementary Information to the NPRM requires that individual contraception policies be provided to both plan participants and beneficiaries. In multiple employer church plans, how will the third party administrator know which beneficiaries are connected to eligible organizations and which are connected to exempt religious employers, without involvement of the eligible organizations or denominational church plan board? How will the beneficiaries' addresses and other contact information be obtained? Since this coverage is only for women with reproductive capacity, how will those women be identified, and beginning at what age will the daughters of an eligible organization's employees begin receiving offers of this free coverage? How will the daughters' ages be determined so the offers of

such coverage may be made? How will newly eligible employees and beneficiaries be identified, without the involvement of the eligible organization or denominational church plan board? How will employees and beneficiaries who no longer are eligible for such coverage be identified, or will the issuer need to rely on those individuals to report that they no longer are eligible for this free coverage (because of change of employer, change in hours, change in relationship to employee, etc.)? If the issuer must rely on such self-reporting by the individuals, the individuals will have little incentive to report they no longer are eligible for free coverage.

The Supplementary Information to the NPRM states that issuers providing contraception coverage "would be responsible for providing the notice of availability of such coverage to participants and beneficiaries ... in self-insured group health plans of eligible organizations", and that this notice would be provided directly to plan participants and beneficiaries by the issuer, generally annually. Again, for multiple employer church plans, it is difficult to imagine how these notices would be provided, without the involvement of the eligible organizations or denominational church plan board, due to practical issues like identifying who is entitled to such notices, and their addresses.

Then, what would prevent the third party administrator from aggressively marketing to those employees and beneficiaries not only contraception coverage, but other services and products, on which the administrator could profit, including other services and products that are objectionable to the eligible organization? When the employer or

denominational plan board is involved in services provided, it can retain some oversight, but not when it has "no involvement."

Finally, contraceptive services are unlikely to fit neatly into discrete categories, unrelated to other health services that are covered by a self-insured plan. How will such payments be coordinated between the self-insured plan covering most health services and the third party administrator covering contraceptive services? How will employees and beneficiaries know which plan covers what? For multiple employer church plans with other similar types of coverage questions and coordination, the denominational church plan board resolves the issue.

(ii) Second Approach

Under this approach, coverage under the eligible organization's plan would comply with the requirement to provide contraception coverage only if the third party administrator automatically arranges for an issuer to assume sole responsibility for providing separate individual health insurance policies offering contraception coverage. The third party administrator would not be automatically providing products that are objectionable to the eligible organization (and church, in the case of a multiple employer church plan). However, the third party administrator engaged by the eligible organization still would be arranging for such coverage. Ironically, if the third party administrator would fail to arrange for contraception coverage or the issuer would fail to provide such coverage, the eligible organization's plan coverage would fail to meet the requirements of section 2713 of the Public

Health Service Act, which could subject the plan to severe penalties,[18] through inaction entirely outside the plan's control.

In addition, practical issues could arise with this approach, such as the necessity of individual participant and beneficiary information being provided to the issuer, privacy and security issues that could arise due to this second level of information transmission and questions about responsibility in the event of a breach involving this information. Also, with multiple employer church plans, participants employed by exempt religious employers and those employed by eligible organizations would need to be separated, with only information on the employees (and their beneficiaries) in the latter group being provided to the issuer. For a multiple employer church plan, difficulties are likely to be faced by a third party administrator being required to provide this on a nationwide basis, with separate issuers in different geographic locations, and no or possibly limited affiliation with any issuers. Many of the practical issues raised about the first approach also apply to this approach.

(iii) Third Approach

Under this approach, "the third party administrator, receiving the copy of the self-certification would be directly responsible for automatically arranging for contraception coverage for plan participants and beneficiaries." The "self-certification would have the effect of designating the

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[18] *See*, note 12, *supra*.

third party administrator as the plan administrator under section 3(16) of ERISA solely for the purpose of fulfilling the requirement that the plan provide contraception coverage without cost sharing." This approach is likely to be objectionable to most third party administrators, because it places the legal responsibility for ensuring compliance with section 2713 of the Public Health Service Act solely on the third party administrator, which could have legal implications under ERISA's reporting, disclosure, claims processing and fiduciary provisions for both the third party administrator and the eligible organization.[19]

The Supplementary Information to the NPRM states that "there would be no obligation on a third party administrator to enter into or continue a third party administration contract with an eligible organization if the third party administrator were to object to having to carry out this responsibility." If this approach would be chosen by the Departments, eligible organizations may be faced suddenly with a lack of a third party administrator or suddenly increased fees charged by the third party administrator.

(iv) Problems with all three approaches

For any multiple employer church plan established or maintained by a religious employer, with only religious employers and eligible organizations as

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[19] We assume that it was not the Departments' intent to subject to ERISA's requirements church plans that have not elected under Code section 410(d) to be covered by ERISA.

employers in the plan, all three of the approaches create a multitude of practical issues. Any of the approaches would force the denominational church plan board or the eligible organization to become involved in arranging for contraception coverage and would require continuous involvement in obtaining, sorting and transmitting information, and coordinating coverage. For these reasons and the reasons previously stated, the Church Alliance respectfully requests the exemption of all such multiple employer church plans from the contraception coverage requirement.

All these approaches create particular problems for church plans that are self-administered, and therefore have no third party administrator. The Departments noted in the Supplementary Information to the NPRM that "[n]o comments were submitted in response to the ANPRM on the extent to which there are plans without a third party administrator." 78 Fed. Reg. at 8464. The absence of comments does not mean there are no such plans, especially since there was no guidance issued defining what constitutes a third party administrator. The Church Alliance did comment that the third party administrator approach for self-insured plans would not accommodate the religious objections of self-insured church plans using an affiliated religious organization as an administrator. If a religious organization cannot provide contraception coverage without violating its religious tenets and beliefs, neither can an affiliated religious organization.

Finally, perhaps the biggest question raised by the NPRM is whether insurance companies and third

party administrators will in fact be willing to carry out the duties the Departments have assigned to them in the accommodation process, and in the manner contemplated by the NPRM. To date, there has been no indication that third party administrators will be willing to play such a role, nor has there be any firm indication that an insurance company or companies will be willing to provide a policy that only provides individual contraception coverage. Other commentators have pointed out that such a policy must be approved at the state level and would thus carry with it high administrative costs. It does not seem like an insurance company would be likely to approve a policy on which it will at best make only a small profit or, as some have suggested, lose money - and yet the entire structure of the NPRM seems to rest upon such an assumption - and on the assumption that third party administrators will also be willing to create an entirely new administration mechanism when they are not legally required to do so.

In addition to urging greater clarification of the three approaches for self-insured plans suggested in the NPRM, discussed above, the Church Alliance strongly suggests a plan-based approach to an exemption for self-insured plans of religious employers that are also self-administered, or are plans for which the third party administrator is itself a religious organization. Essentially, the only workable solution for self-insured church plans of eligible organizations is a plan-based exemption.

C. Insured and Uninsured Plans Will be Forced to Facilitate Coverage for Abortions

in Violation of Various Federal and State Laws

The NPRM continues the Departments' failure to recognize that for some religious organizations, having to provide coverage for contraceptives approved by the Food and Drug Administration, including so-called emergency contraceptives, such as ella (ulipristal acetate) and Plan B (levonorgestrel), requires the coverage of abortifacient drugs, thus violating: (i) the Weldon amendment; (ii) ACA; and (iii) various state insurance laws.

1. Weldon amendment

The Weldon amendment has been included in every federal appropriations law since 2004. Section 506 of the current Appropriations Act provides:

> (a) None of the funds appropriated in this [Consolidated Appropriations] Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion;
>
> (b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.

In addition, Section 507(d) of the Act provides:

> None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, 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.[20]

2. ACA Section 1303(b)(l)(A)

Section 1303(a)(l)(A) of ACA provides:

> Notwithstanding any other provision of this title ... (i) nothing in this title ... shall be construed to require a qualified health plan to provide coverage of [abortion services] as part of its essential health benefits for any plan year; and (ii) ... the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion services] as part of such benefits for the plan year.

3. State insurance laws

NPRM's requirement for the issuance of individual insurance policies providing coverage for abortifacient drugs without cost sharing conflicts with the laws of several states that prohibit the issuance or delivery of individual policies providing coverage for elective abortions unless a separate premium is charged for such coverage. Kansas law, for example, provides:

> Any individual or group health insurance policy ... delivered, issued for delivery, amended or renewed on or after July 1, 2011, shall exclude coverage for elective abortions, unless the procedure is necessary to preserve the life of the mother. Coverage for abortions may be obtained

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[20] Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 1111.

> through an optional rider for which an additional premium is paid. The premium for the optional rider shall be calculated so that it fully covers the estimated cost of covering elective abortions per enrollee as determined on an average actuarial basis."[21]

These state laws are unaffected by the general preemption provision in the Public Health Service, 42 U.S.C. §300gg-23(a)(l). That section provides that the requirements of part A of title XXVII of that Act, which includes the preventive services requirement, are not to be:

> construed to supersede any provision of state law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with individual or group health insurance coverage except to the extent that such standard or requirement prevents the

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[21] Kan. Stat. Ann. §40-2, 190. *See also*, Ken. Rev. Stat. §304.5-160(1) ("No health insurance contracts, plans or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium."); and Mo. Ann. Code §376.805 ("No health insurance contracts, plans, or policies delivered or issued for delivery in the state shall provide coverage for elective abortions except by an optional rider for which there must be paid an additional premium.") and R.I. Stat. §27-18-28 ("No health insurance contract, plan, or policy, delivered or issued for delivery in the state, shall provide coverage for induced abortions, except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy resulted from rape or incest, and except by an optional rider for which there must be paid an additional premium.").

> application of a requirement of [part A of title XXVII of the PHS Act].

However, these state insurance laws do not prevent the application of the mandate. Section 1303(c)(l) of ACA states that nothing in the Act preempts, or has any effect on, any State law regarding abortion coverage.

The Departments are apparently of the view that emergency contraceptives are not abortifacients because the latest point at which they operate is to prevent implantation of a newly fertilized embryo in the uterus.[22] However, as the Departments know, some religions sincerely believe that life begins at conception. For organizations that are affiliated with these religions, emergency contraceptives that operate after fertilization are abortifacients.[23] The Departments should accommodate these beliefs. Just as the "power to tax involves the power to destroy,"[24] so too does the power to define. Allowing religious organizations to define for themselves which contraceptives are abortifacients would be consistent with ACA section J 303(a)(l)(A) of ACA, which

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[22] *See, e.g.,* Kelly Wallace, Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebeliusguidelines- cover-contraception-not-abortion/4-a-369771 (last visited Mar. 28, 2013).

[23] There is some evidence that some emergency contraceptives operate after implantation. If so, they would be abortifacients even under the Departments' view.

[24] *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819) (J. Marshall).

provides that "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion services] as part of such benefits for the plan year."

Please contact the undersigned at 202-661-3882 if you have any questions or wish to discuss this matter further.

Sincerely,

Stephen H. Cooper
Government Affairs Counselor, K&L Gates
On Behalf of the Church Alliance

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,
Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.
Defendants.

DECLARATION OF JOSHUA WELLS

I, Joshua Wells, do hereby state and declare as follows:

1. My name is Joshua Wells. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true and correct and based on my personal knowledge or a review of the business records of Reaching Souls International, Inc. ("Reaching Souls"). If I were called upon to testify to these facts, I could and would competently do so.

2. I am the Director of Development & General Counsel of Reaching Souls. I received a B.A. in English from Oklahoma Baptist University. I also

graduated in 2008 from the Oklahoma City University College of Law where I was the Executive Editor of the Law Review and a Research Assistant for the University General Counsel, J. William Conger. I am an attorney and a current member of the Oklahoma Bar and the bar of this Court.

3. This supplemental declaration is in furtherance of my earlier declaration offered in support of the Plaintiffs' Motion for Preliminary Injunction and also in response to Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment and Memorandum in Support.

4. I understand that, after the Plaintiffs filed their Complaint and Motion for Preliminary Injunction in this action, the government has argued that the government lacks the authority "at this time" to force the third party administrator ("TPA") of a self-insured church health plan like the GuideStone Plan to make separate payments for contraceptive services for participants and beneficiaries under the Mandate's accommodation. However, my understanding is that the government will still require Reaching Souls to execute and submit to the GuideStone Plan's TPAs a prescribed self-certification form.

5. I have reviewed the government's prescribed self-certification form at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf. The government's new position does not change Reaching Souls' religious objection to complying with the "accommodation" created under the final rules for GuideStone and employer members of the GuideStone Plan.

6. On the back of the self-certification form, the government states that Reaching Souls "must provide a copy of this certification to . . . a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement."

7. Also, on the back of the form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that ... [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." It is my understanding that it is these referenced regulations that require that the TPA shall provide or arrange payments for the complained of abortifacients.

8. The self-certification form does not notify the third party administrators of self-insured church health plans of the government's opinion expressed in this litigation that they cannot currently be forced by the government to comply with the federal regulations cited on the form. The self-certification form does not notify the third party administrators of self-insured church health plans that the certification is not a valid "instrument under which the plan is operated." Moreover, it is my understanding that the Mandate prevent employers from telling any third party administrator to disregard the instructions on the form. Specifically, it is my understanding that the Mandate states that the employers "must not, directly or indirectly, seek to influence the third party administrator's decision" to "provide or arrange

separate payments for contraceptive services for participants or beneficiaries." 26 C.F.R. § 54.9815-2713A(b)(3) (emphasis added).

9. And despite the government's new position, it is my understanding that the Affordable Care Act (the "Act") provisions continue to require third party administrators to provide contraceptive coverage, providing that "if a third party administrator receives a copy of the [self] certification ... the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(b)(2) (emphasis added); 26 C.F.R. § 54.9815-2713A(b)(2). It is also my understanding that the preamble to these regulations explains, "[a] third party administrator that receives a copy of the self-certification . . . must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39,879, 39,880 (July 2, 2013) (emphasis added). It is my understanding that there is no exception for church-plan TPAs in the regulations, and the regulations on their face appear to apply to all TPAs. Furthermore, the government has stated an intent to enforce these regulations in the future by their statement that they "continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans." This is a serious and immediate concern to Reaching Souls that impacts Reaching Souls.

10. Reaching Souls' religious beliefs prohibit us from signing and submitting the self-certification form that on its face authorizes and mandates another organization to deliver abortifacients to employees and other beneficiaries now and in the

future. If Reaching Souls does not sign and submit this self-certification, however, it is Reaching Souls' understanding that it will be charged substantial penalties. These requirements impinge upon Reaching Souls' religious beliefs and substantially burden their religious exercise.

11. Reaching Souls' religious beliefs regarding the sanctity of life are consistent with and like-minded to The Southern Baptist Convention's position on the sanctity of life which provides that Southern Baptists should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death. Being required to intentionally facilitate the provision of abortifacient drugs and related education and counseling, as would be required by the Final Mandate, will infringe upon Reaching Souls' sincerely held religious beliefs. Indeed, being required to provide any information to facilitate the government-required certifications to a third party to require that third party to provide employees with access to abortion-inducing drugs and devices will infringe upon Reaching Souls' sincerely held religious beliefs.

12. Reaching Souls should not be required to compromise its commitment to Christian witness by being seen to participate in the government's program. Doing so would not only impinge its sincerely held religious beliefs, but also would risk leading others astray.

13. Alternatively, if it is forced to discontinue all coverage to avoid the Mandate, Reaching Souls would be forced to take action repugnant to it and would violate Reaching Souls religious beliefs and

obligations concerning providing health benefits consistent with our religious beliefs for our employees. Reaching Souls and class members would be placed at a severe competitive disadvantage in their efforts to hire and retain employees, which would adversely impact their ministries, or require them to increase employee compensation so that employees could purchase their own health insurance and pay the additional income taxes resulting from the increased compensation.

14. Reaching Souls' religious beliefs prohibit us from: authorizing anyone to arrange for or make payments for abortifacients; taking action that triggers the provision of abortifacients; or take action that is the but-for cause of the provision of abortifacients. Plaintiffs cannot do the following and object to: Signing the self-certification form that on its face authorizes and mandates another organization to deliver abortifacients to employees and other beneficiaries now; Delivering the self-certification form to another organization that could then rely on it as an authorization to deliver these abortifacients to employees and beneficiaries, now or in the future; Agreeing to refrain from speaking to other organizations and instructing or asking them not to deliver abortifacients to employees; Creating a provider-insured relationship (between plan beneficiaries and any third-party administrator), the sole purpose of which would be to provide abortifacients; Participating in a scheme, the sole purpose of which is to provide abortifacients to employees or other beneficiaries. Plaintiffs believe that it would be immoral and sinful for them to intentionally facilitate the provision of abortifacients

and related education and counseling, as would be required by the Mandate.

15. The only way to provide effective relief for Reaching Souls and class members is to enjoin enforcement of the Final Mandate with respect to all non-exempt "eligible organizations" in the GuideStone Plan; otherwise, they will be adversely affected by the application of the Final Mandate to these organizations and its penalty provisions.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON NOVEMBER 22, 2013

/s/ Joshua Wells
JOSHUA WELLS

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF OKLAHOMA

TRUETT-MCCONNELL INTERNATIONAL, INC., et al.,
Plaintiffs,

v. Civil Action No. 5:13-CV-01092-D

KATHLEEN SEBELIUS, et al.
Defendants.

DECLARATION OF DAVID ARMSTRONG

I, David Armstrong, do hereby state and declare as follows:

1. My name is David Armstrong. I am of sound mind and competent to make this declaration and swear to the matters herein. I am over the age of 21 years and have never been convicted of a felony or crime of moral turpitude. The statements herein are true, correct, and based on my personal knowledge or a review of the business records of Truett-McConnell. If I were called upon to testify to these facts, I could and would competently do so.

2. I am the Vice President of Finance and Operations at Truett-McConnell College ("Truett-McConnell"). I received my undergraduate and master's degrees from Texas A & M. I also hold

Master of Divinity and Master of Theology Degrees from Southeastern Baptist Theological Seminary. I am currently a Doctor of Education Degree candidate from Southeastern Baptist Theological Seminary.

3. This supplemental declaration is in furtherance of my earlier declaration offered in support of the Plaintiffs' Motion for Preliminary Injunction and also in response to Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment and Memorandum in Support.

4. I understand that, after the Plaintiffs filed their Complaint and Motion for Preliminary Injunction in this action, the government has argued that the government lacks the authority "at this time" to force third party administrators ("TPAs") of a self-insured church health plan like the GuideStone Plan to make separate payments for contraceptive services for participants and beneficiaries under the Mandate's accommodation. However, my understanding is that the government will still require Truett-McConnell to execute and submit to the GuideStone Plan's TPAs a prescribed self-certification form.

5. I have reviewed the government's prescribed self-certification form at http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf. The government's new position does not change Truett-McConnell's religious objection to complying with the "accommodation" created under the final rules for GuideStone and employer members of the GuideStone Plan.

6. On the back of the self-certification form, the government states that Truett-McConnell "must provide a copy of this certification to . . . a third party

administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement."

7. Also, on the back of the form, there is a "Notice to Third Party Administrators of Self-Insured Health Plans," which states that the form "constitutes notice to the third party administrator that ... [t]he obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A," and that "[t]his certification is an instrument under which the plan is operated." It is also my understanding that these referenced regulations require that the TPA shall provide or arrange payments for the complained of abortifacients.

8. It is my understanding that the Mandate prevents employers from telling any third party administrator to disregard the instructions on the form. Specifically, it is my understanding that the Mandate states that the employers "must not, directly or indirectly, seek to influence the third party administrator's decision" to "provide or arrange separate payments for contraceptive services for participants or beneficiaries." 26 C.F.R. § 54.9815-2713A(b)(3).

9. And despite the government's new position, it is my understanding that the Affordable Care Act (the "Act") provisions continue to require third party administrators to provide contraceptive coverage, providing that "if a third party administrator receives a copy of the [self] certification ... the third party administrator shall provide or arrange payments for contraceptive services." 29 C.F.R. § 2590.715-

2713A(b)(2); 26 C.F.R. § 54.9815-2713A(b)(2). It is also my understanding that the preamble to these regulations explains, "[a] third party administrator that receives a copy of the self-certification ... must provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. 39,879, 39,880 (July 2, 2013). It is my understanding that there is no exception for church-plan TPAs in the regulations, and the regulations on their face appear to apply to all TPAs. Furthermore, the government has stated an intent to enforce these regulations in the future by their statement that they "continue to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans." This is a serious and immediate concern to Truett-McConnell. Truett-McConnell is confronted with having to take action under the Mandate within the next 35 days that violates its religious beliefs and requires court consideration.

10. Truett-McConnell's religious beliefs prohibit us from signing and submitting the self-certification form that on its face authorizes and mandates another organization to deliver abortifacients to employees and other beneficiaries now and in the future. If Truett-McConnell does not sign and submit this self-certification, however, it is Truett-McConnell's understanding that it will be charged substantial penalties. These requirements impinge upon Truett-McConnell's religious beliefs and substantially burden their religious exercise.

11. Truett-McConnell has adopted the Southern Baptist Convention's Baptist Faith and Message

2000 as its own statement of faith and official doctrinal statement. Article 15 of the *Baptist Faith and Message 2000*, provides "[w]e should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." The Mandate's requirement that Truett-McConnell intentionally facilitate the provision of abortifacient drugs and related education and counseling by signing and submitting the self-certification and being involved in this process infringes Truett-McConnell's sincerely held religious beliefs.

12. Additionally, Truett-McConnell should not be required to compromise its commitment to Christian witness by being seen to participate in the government's program. Doing so would not only impinge its sincerely held religious beliefs, but also would risk leading others astray.

13. 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. However, if it is forced to discontinue all coverage to avoid the Mandate, Truett-McConnell would be forced to take action repugnant to it and would violate Truett-McConnell religious beliefs and obligations concerning providing health benefits consistent with our religious beliefs for our employees. Truett-McConnell and class members would also be placed at a severe competitive disadvantage in their efforts to hire and retain employees, which would adversely impact their ministries, or require them to increase employee compensation so that employees could purchase their own health insurance and pay the

additional income taxes resulting from the increased compensation.

14. Moreover, based on my understanding of the criteria under the Final Mandate, because Truett-McConnell has approximately 78 full time employees, it would be exposed to significant annual excise tax penalties of $2,000 per full-time employee if it cancels its health plan.

15. Truett-McConnell's religious beliefs prohibit us from: authorizing anyone to arrange for or make payments for abortifacients; taking action that triggers the provision of abortifacients; or take action that is the but-for cause of the provision of abortifacients. Truett-McConnell cannot do the following and object to: signing the self-certification form that on its face authorizes and mandates another organization to deliver abortifacients to employees and other beneficiaries now; delivering the self-certification form to another organization that could then rely on it as an authorization to deliver these abortifacients to employees and beneficiaries, now or in the future; agreeing to refrain from speaking to other organizations and instructing or asking them not to deliver abortifacients to employees; creating a provider-insured relationship (between plan beneficiaries and any third-party administrator), the sole purpose of which would be to provide abortifacients; participating in a scheme, the sole purpose of which is to provide abortifacients to employees or other beneficiaries. Plaintiffs believe that it would be immoral and sinful for them to intentionally facilitate the provision of abortifacients and related education and counseling, as would be required by the Mandate.

16. The only way to provide effective relief for Truett-McConnell and class members is to enjoin enforcement of the Final Mandate with respect to all non-exempt "eligible organizations,, in the GuideStone Plan; otherwise, they will be adversely affected by the application of the Final Mandate to these organizations and its penalty provisions.

PURSUANT TO 28 U.S.C § 1746, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON October 25, 2013

/s/ David Armstrong
David Armstrong

No. 15-119

U.S. District Court

Western District of Oklahoma [LIVE] (Oklahoma City)

CIVIL DOCKET FOR CASE #: 5:13-cv-01015-F

Southern Nazarene University et al v. Sebelius et al	Date Filed: 09/20/2013
Assigned to: Honorable Stephen P. Friot	Jury Demand: None
Case in other court: Tenth Circuit Court of Appeals, 14-06026	Nature of Suit: 440 Civil Rights: Other
Cause: 42:1981 Civil Rights	Jurisdiction: U.S. Government Defendant

* * *

11/27/2013	19	MOTION for Preliminary Injunction by All Plaintiffs. (Baylor, Gregory) (Entered: 11/27/2013)
11/27/2013	20	MEMORANDUM in Support re 19 MOTION for Preliminary Injunction filed by All Plaintiffs. (Baylor, Gregory) (Entered: 11/27/2013)

* * *

12/17/2013	25	RESPONSE in Opposition re 19 MOTION for Preliminary Injunction filed by All Defendants. (Pollack, Michael) (Entered: 12/17/2013)
12/17/2013	26	MOTION to Dismiss for Lack of Jurisdiction *or, in the Alternative*, MOTION for Summary

		Judgment, *and Memorandum in Support* by All Defendants. (Pollack, Michael) Modified on 8/15/2014 (llg). (Entered: 12/17/2013)
		* * *
12/19/2013	32	MOTION to File Amicus Brief by American Civil Liberties Union. (Henderson, Brady) (Entered: 12/19/2013)
12/19/2013	33	BRIEF IN SUPPORT *of Defendants' Motion to Dismiss, or in the alternative, for summary judgment, and in opposition to Plaintiff's Motion for Preliminary Injunction, submitted pending leave to enter as Amicus Curiae*, by American Civil Liberties Union. (Henderson, Brady) (Entered: 12/19/2013)
		* * *
12/20/2013	38	REPLY to Response to Motion re 19 MOTION for Preliminary Injunction filed by All Plaintiffs. (Baylor, Gregory) (Entered: 12/20/2013)
		* * *
12/21/2013	43	STIPULATION re 19 MOTION for Preliminary Injunction *Joint Stipulation of Facts* by All Plaintiffs. (Baylor, Gregory) (Entered: 12/21/2013)

* * *

12/23/2013	45	ORDER granting 19 Motion for Preliminary Injunction; denying 26 Motion to Dismiss to the extent that it seeks dismissal under Rule 12(b)(6). The defendants, their agents, officers, and employees, and all others in active concert or participation with them, Rule 65, Fed.R.Civ.P., are ENJOINED and RESTRAINED from any effort to apply or enforce, as to plaintiffs, the substantive requirements imposed by 42 U.S.C. § 300gg-13(a)(4) and at issue in this case, or the self-certification regulations related thereto, or any penalties, fines or assessments related thereto, until the further order of the court. Signed by Honorable Stephen P. Friot on 12/23/13. (kw,) Modified on 12/23/2013 to correct docket text (kw,). (Entered: 12/23/2013)
12/26/2013	46	ENTER ORDER granting 32 Motion of the American Civil Liberties Union and the American Civil Liberties Union of Oklahoma for Leave to File Amicus Curiae Brief. Entered at the direction of Honorable Stephen P. Friot on 12/26/13. (llg)

(Entered: 12/26/2013)

* * *

1/16/2014	53	UNOPPOSED MOTION to Stay Case by All Defendants. (Attachments: # 1 Attachment Proposed Order)(Pollack, Michael) (Entered: 01/16/2014)
1/17/2014	54	ORDER granting 53 Defendants' Unopposed Motion for Stay of Proceedings. All proceedings in this case are stayed until 3/1/14. Signed by Honorable Stephen P. Friot on 1/17/14. (llg) (Entered: 01/17/2014)
2/11/2014	55	NOTICE OF APPEAL by All Defendants. (Pollack, Michael) (Entered: 02/11/2014)

* * *

2/13/2014	58	MOTION to Stay Case *Pending Appeal* by All Defendants. (Attachments: # 1 Exhibit Ozinga v. HHS, # 2 Exhibit Domino's Farms Corp. v. Sebelius)(Pollack, Michael) (Entered: 02/13/2014)

* * *

03/06/2014	70	RESPONSE in Opposition re 58 MOTION to Stay Case *Pending Appeal* filed by All Plaintiffs. (Baylor, Gregory) (Entered: 03/06/2014)
03/06/2014	71	REPLY to Response to Motion re 58 MOTION to Stay Case

		Pending Appeal filed by All Defendants. (Pollack, Michael) (Entered: 03/06/2014)
03/06/2014	72	MEMORANDUM in Opposition re 26 MOTION to Dismiss MOTION to Dismiss for Lack of Jurisdiction *or, in the Alternative* MOTION for Summary Judgment, *and Memorandum in Support* filed by All Plaintiffs. (Baylor, Gregory) (Entered: 03/06/2014)
03/06/2014	73	ORDER granting 58 Defendants' Motion for Stay of Proceedings. Proceedings in this case are stayed pndg resolution of dfts' appeal of this court's order granting plfs' mtn for preliminary injunction. Signed by Honorable Stephen P. Friot on 3/6/14. (llg) (Entered: 03/06/2014)
03/31/2014	74	ORDER of USCA as to 55 Notice of Appeal filed by United States Department of the Treasury, Kathleen Sebelius, United States Department of Health and Human Services, Thomas E Perez, United States Department of Labor, Jacob J Lew (kr) (Entered: 04/08/2014)

* * *

07/14/2015	79	USCA OPINION as to 55 Notice of Appeal filed by United States

		Department of the Treasury, Kathleen Sebelius, United States Department of Health and Human Services, Thomas E Perez, United States Department of Labor, Jacob J Lew (kr) (Entered: 07/16/2015)
07/14/2015	80	USCA JUDGMENT as to 55 Notice of Appeal filed by United States Department of the Treasury, Kathleen Sebelius, United States Department of Health and Human Services, Thomas E Perez, United States Department of Labor, Jacob J Lew. These cases originated in the District of Colorado and the Western District of Oklahoma and were argued by counsel. The District Courts denial of a preliminary injunction in Little Sisters, 6 F. Supp. 3d 1225, is affirmed, and the District Courts grant of a preliminary injunction in Southern Nazarene, 2013 WL 6804265, and Reaching Souls, 2013 WL 6804259, is reversed. The cases are remanded to the United States District Courts for the District of Colorado and the Western District of Oklahoma for further proceedings in accordance with the opinion of this court. (kr) (Entered: 07/16/2015)

07/28/2015	81	PETITION FOR WRIT OF CERTIORARI re Supreme Court Number: 15-119 (kr) (Entered: 07/28/2015)
11/10/2015	82	PETITION FOR WRIT OF CERTIORARI Granted (kw) (Entered: 11/12/2015)

U.S. Court of Appeals for the Tenth Circuit

Court of Appeals Docket #: 14-6026

SOUTHERN NAZARENE UNIVERSITY, et al v. BURWELL, et al	Docketed: 02/11/2014 Terminated: 07/14/2015 Nature of Suit: 2440 Other Civil Rights
Trial Judge: Stephen P. Friot Case: 5:13-CV-01015-F	Case Type Information: 1) civil 2) USA as party

02/11/2014	[10148784] Civil case docketed. Preliminary record filed. DATE RECEIVED: 02/11/2015 Docketing statement due 02/25/2014 for Jacob J. Lew, Thomas E. Perez, Kathleen Sebelius, United States Department of Health & Human Services, United States Department of Labor and United States Department of the Treasury. Transcript order form due 02/25/2014 for Michael C. Pollack. Notice of appearance due on 02/25/2014 for Jacob J. Lew, Mid-America Christian University, Oklahoma Baptist Univeristy, Oklahoma Wesleyan University, Thomas E. Perez, Kathleen Sebelius, Southern Nazarene University, United States Department of Health & Human Services, United States Department of Labor and United States Department of the Treasury [14-6026]

* * *

03/06/2014	[10155404] Motion filed by Appellees Jacob J. Lew, Mr. Thomas E. Perez, Kathleen Sebelius, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, Appellants Jacob J. Lew, Mr. Thomas E. Perez, Kathleen Sebelius, HHS, United States Department of Labor and United States Department of the Treasury in 14-6026, Appellants HHS, LABR, Department of the Treasury, Jacob J. Lew, Mr. Thomas E. Perez and Kathleen Sebelius in 14-6028 to consolidate appeals, to consolidate briefs. Served on: 03/06/2014. Manner of service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6028, 14-6026] ACJ

* * *

03/18/2014	[10158498] Response filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University to Appellants' Motion to Consolidate Appeals. Served on 03/18/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026] GB
03/21/2014	[10159555] Reply filed by Jacob J. Lew, Mr. Thomas E. Perez, Kathleen

	Sebelius, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, 14-6026, HHS, LABR, Department of the Treasury, Jacob J. Lew, Mr. Thomas E. Perez and Kathleen Sebelius in 14-6028 to Reply in Support of Government's Motion to Consolidate in Part. Served on 03/21/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6028, 14-6026] ACJ
03/31/2014	[10161813] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Holmes, Matheson, Bacharach, Phillips and McHugh denying the government's motion to consolidate appeals. Appeal numbers 14-6026 and 14-6028 will brief separately and will have separate appendices. The separate briefing will apply to the opening briefs, the response brief, and the optional reply brief. Likewise, the appeals will not be joined for a single oral argument hearing. The court will decide at a later date whether the same panel of judges will hear the matters, and will also determine how and when oral argument will proceed. Those issues remain for consideration. The opening brief and appendix for 14-

6026 reamins due 4/7/2014; the opening brief and appendix for 14-6028 remains due 4/14/2014; and the appellees' brief in 13-1540 remains due the date of this order. Please see order for additional important information. Served on 03/31/2014. [13-1540, 14-6028, 14-6026]

* * *

04/07/2014 [10164268] Appellant/Petitioner's brief filed by Jacob J. Lew, Mr. Thomas E. Perez, Kathleen Sebelius, HHS, United States Department of Labor and United States Department of the Treasury. 7 paper copies to be provided to the court. Served on 04/07/2014 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026] PN

04/09/2014 [10165301] Appendix filed by Appellants Jacob J. Lew, Mr. Thomas E. Perez, Kathleen Sebelius, HHS, United States Department of Labor and United States Department of the Treasury. Original and 1 copy. Appendix pages: 290. Number of volumes: 1. Hardcopy only. Served on 04/07/2014. Manner of Service: US mail. [14-6026]

* * *

04/14/2014 [10166649] Amicus Curiae brief filed by Feminist Majority Foundation, Ibis

Reproductive Health, Legal Momentum, MergerWatch, NARAL Pro-Choice America, NARAL Pro-Choice Colorado, NARAL Pro-Choice Wyoming, National Organization for Women (NOW) Foundation, National Partnership for Women and Families, National Women's Health Network, National Women's Law Center, Planned Parenthood Association of Utah, Planned Parenthood of Kansas and Mid-Missouri, Planned Parenthood of the Heartland, Planned Parenthood of the Rocky Mountains, Inc., Population Connection, Raising Women's Voices for the Health Care We Need, Service Employees International Union and The Black Women's Health Imperative. Original and 7 copies.. Served on 04/15/2014. Manner of Service: email. [14-6026]

04/14/2014 [10166671] Amicus Curiae brief filed by American Civil Liberties Union, American Civil Liberties Union of Oklahoma and Americans United for Separation of Church and State. Original and 7 copies. Served on 04/14/2014. Manner of Service: email. [14-6026]

* * *

05/12/2014 [10175264] Appellee/Respondent's brief filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan

University and Southern Nazarene University. 7 paper copies to be provided to the court. Served on: 05/12/2014. Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes.--[Edited 05/13/2014 by BV to attach errata sheet] [14-6026] GB

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05/16/2014 [10177472] Amicus Curiae brief filed by Liberty, Life and Law Foundation. Original and 7 copies. Served on 05/16/2014. Manner of Service: email. [14-6026]

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05/19/2014 [10177919] Amicus Curiae brief filed by American Bible Society, Association of Christian Schools International, Association of Gospel Rescue Missions, Christian Legal Society, Ethics & Religious Liberty Commission of the Southern Baptist Convention, Institutional Religious Freedom Alliance, Lutheran Church - Missouri Synod, National Association of Evangelicals and Prison Fellowship Ministries. 7 copies. Served on 05/19/2014. Manner of Service: email. [14-6026]

06/13/2014 [10183748] Appellant/Petitioner's reply brief filed by Jacob J. Lew, Mr. Thomas E. Perez, Kathleen Sebelius,

HHS, United States Department of Labor and United States Department of the Treasury. 7 paper copies to be provided to the court. Served on 06/13/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026] ACJ

07/01/2014 [10187793] Order filed by Clerk of the Court (EAS) directing supplemental briefing. The plaintiffs separately, as well as the Secretary, shall file simultaneous supplemental briefs as set forth in the attached order on or before 07/22/2014. The briefs shall be no longer than 15 pages in 13 or 14 point font. 7 hard copies must be received by the clerk within 2 business days. Served on 07/01/2014. [13-1540, 14-6028, 14-6026]

* * *

07/22/2014 [10193027] Appellee/Respondent's supplemental brief filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury. 7 paper copies to be provided to the court. Served on 07/22/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ

07/22/2014 [10193104] Appellee/Respondent's supplemental brief filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University. 7 paper copies to be provided to the court. Served on 07/22/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026] GB

* * *

08/01/2014 [10195667] Order filed by Clerk of the Court (EAS) The government is ordered to file a written status report on or before Tuesday August 12, 2014, addressing the anticipated timetable for promulgation of the "interim final rules," whether these cases should continue to be scheduled for oral argument, and any further information that may be relevant to assist the court. The plaintiffs may file separate responses to the status report no later than Tuesday, August 19, 2014. Served on 08/01/2014. [13-1540, 14-6026, 14-6028]

08/08/2014 [10197252] Status report filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, 14-6026, Ms.

Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 08/08/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ

* * *

08/19/2014 [10199781] Response filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University to Appellants' Status Report. Served on 08/19/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026, 14-6028] GB

08/22/2014 [10200873] Status report filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury in 14-6026, 13-1540, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 08/22/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026, 14-6028, 13-1540] PN

08/27/2014	[10201699] Order filed by Clerk of the Court (EAS) upon consideration of the status reports and responses, the filing of simultaneous supplemental briefs are due on 09/08/2014 as set forth in the attached order. Each brief shall be no longer than 15 pages, double spaced, and in 13 point font. The parties need not submit hard copies. Served on 08/27/2014. [13-1540, 14-6026, 14-6028]

* * *

09/08/2014	[10204556] Appellee/Respondent's supplemental brief filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury. 7 paper copies to be provided to the court. Served on 09/08/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] MB
09/08/2014	[10204592] Appellee/Respondent's supplemental brief filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University. Served on 09/08/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-

6026]—[Edited docket text re: number of copies 09/08/2014 by SLS.] GB

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09/17/2014 [10207226] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 09/17/2014. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ

* * *

11/18/2014 [10225361] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 11/18/2014. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ

12/05/2014 [10229885] Response filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University to Appellants' Nov. 14, 2014 Rule 28(j)

	Supplemental Authority regarding Priests for Life v. U.S. Dept. of Health and Human Services. Served on 12/05/2014. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-6026] GB
12/08/2014	[10230454] Case argued by Adam Jed for the Appellant and by Gregory Baylor for the Appellee; Submitted to Judges Matheson, McKay and Baldock. [14-6026]
12/08/2014	[10230642] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Mr. Thomas E. Perez, HHS, United States Department of Labor and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 12/08/2014. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ
	* * *
12/23/2014	[10235401] Response filed by Mid-America Christian University, Oklahoma Baptist University, Oklahoma Wesleyan University and Southern Nazarene University in 14-6026 to Response to Appellants Dec. 8, 2014 FRAP 28(j) letter. Served on 12/23/2014. Manner of Service: email. This pleading complies with all

	required (privacy, paper copy and virus) certifications: Yes.--[Edited 12/23/2014 by BV to remove from appeal No. 14-1492] [14-6026] GB
01/30/2015	[10244434] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028 to 28(j) letter.. Served on 01/30/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ
02/11/2015	[10247577] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 02/11/2015. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ
02/19/2015	[10249294] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States

	Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028 to Feb. 10 Notice of Supplemental Authority. Served on 02/19/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ
03/11/2015	[10254104] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028 to 28(j) about GVR. Served on 03/11/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ
04/29/2015	[10267930] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr.

Thomas E. Perez in 14-6028 to 28(j) Letter. Served on 04/29/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ACJ

05/21/2015 [10273760] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 05/21/2015. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ

06/24/2015 [10281616] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 06/24/2015. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ

07/09/2015 [10285379] Supplemental authority filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United

States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028. Served on 07/09/2015. Manner of Service: email. [13-1540, 14-6026, 14-6028] ACJ

07/14/2015 [10286343] Affirmed and Reversed; Terminated on the merits after oral hearing; Written, signed, published. Judges Matheson (authoring), McKay and Baldock (dissenting in part). Mandate to issue. [13-1540, 14-6026, 14-6028]

07/14/2015 [10286354] Judgment for opinion filed. [13-1540, 14-6026, 14-6028]

07/28/2015 [10290163] Petition for a writ of certiorari filed by Southern Nazarene University, et al., on 07/24/2015. Supreme Court Number 15-119. [14-6026, 14-6028]

08/06/2015 [10292806] Motion filed by Appellants Christian Brothers Employee Benefit Trust, Christian Brothers Services, Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore, Inc. in 13-1540, Appellees Guidestone Financial Resources of the Southern Baptist Convention, Reaching Souls International, Inc. and Truett-McConnell College, Inc. in 14-6028, SOUTHERN NAZARENE

UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY, INC.; OKLAHOMA BAPTIST UNIVERSITY, INC.; MID-AMERICA CHRISTIAN UNIVERSITY, INC. to stay execution of the mandate until 12/31/2015. Served on: 08/06/2015. Manner of service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] CCS

* * *

08/12/2015 [10294167] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028 to Plaintiffs' Motion for Stay of Mandate. Served on 08/12/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ABK

08/12/2015 [10294233] Response filed by Ms. Sylvia Mathews Burwell, Jacob J. Lew, Thomas Perez, Mr. Thomas E. Perez, HHS and United States Department of the Treasury in 13-1540, 14-6026, Ms. Sylvia Mathews

Burwell, HHS, LABR, Department of the Treasury, Jacob J. Lew and Mr. Thomas E. Perez in 14-6028 to Plaintiffs' Motion for Stay of Mandate. Served on 08/12/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [13-1540, 14-6026, 14-6028] ABK

08/19/2015 [10295864] "Reply in Support of Their Motion for Stay of Mandate Pending Petitions for Writ of Certiorari" filed by Appellants Christian Brothers Employee Benefit Trust, Christian Brothers Services, Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore, Inc. in 13-1540, Appellees Guidestone Financial Resources of the Southern Baptist Convention, Reaching Souls International, Inc. and Truett-McConnell College, Inc. in 14-6028, and SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY, INC.; OKLAHOMA BAPTIST UNIVERSITY, INC.; MID-AMERICA CHRISTIAN UNIVERSITY, INC. in 14-6026. Served on: 08/19/2015. Manner of service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes—[Edited 08/19/2015

	by KF to correct the event code and modify the text.] [13-1540, 14-6026, 14-6028] CCS
08/21/2015	[10296442] Order filed by Judges Matheson, McKay and Baldock. The motion to stay the mandate is granted. Issuance of the mandate is stayed in these appeals pending the Supreme Court's consideration of the certiorari petitions. If the petitions are granted, the stay of the mandate shall continue until the Supreme Court's final disposition. Served on 08/21/2015. [13-1540, 14-6026, 14-6028]
09/03/2015	[10299849] Published order filed by Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Holmes, Matheson, Bacharach, Phillips, McHugh and Moritz. A poll was called, sua sponte, to consider en banc rehearing. Upon consideration, a majority of the active judges voted to deny. Judges Kelly, Hartz, Tymkovich, Gorsuch, and Holmes voted to grant en banc rehearing. Judge Hartz has written separately in dissent. Judges Kelly, Tymkovich, Gorsuch and Holmes join in that dissent. [13-1540, 14-6026, 14-6028]
11/10/2015	[10318052] Supreme court order dated 11/06/2015 granting certiorari filed. [14-6026, 14-6028]

Excerpts from Complaint in *Southern Nazarene University v. Sebelius*, No. 5:13-cv-01015 (W.D. Okla.)

* * *

30. SNU's current enrollment is approximately 2,100.

* * *

53. OKWU's current enrollment is approximately 1,220.

* * *

71. OBU's current enrollment is approximately 1,900.

* * *

90. Approximately 1,447 students are currently enrolled at MACU.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) SOUTHERN NAZARENE UNIVERSITY; (2) OKLAHOMA WESLEYAN UNIVERSITY; (3) OKLAHOMA BAPTIST UNIVERSITY; and (4) MID-AMERICA CHRISTIAN UNIVERSITY, *Plaintiffs*, v. (1) KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; (2) THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; (3) JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; (4) UNITED STATES DEPARTMENT	Case No. 5:13-cv-01015-F

OF HEALTH AND HUMAN SERVICES; (5) UNITED STATES DEPARTMENT OF LABOR; and (6) UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

JOINT STIPULATION OF FACTS— PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The parties stipulate to the following facts for the limited purpose of this Court's adjudication of Plaintiffs' motion for preliminary injunction:

1. Plaintiffs Southern Nazarene University (SNU), Oklahoma Wesleyan University (OKWU), Oklahoma Baptist University (OBU), and Mid-America Christian University (MACU) (collectively, "the Universities") are Christ-centered institutions of higher learning.

2. The Universities hold, as a matter of sincere religious conviction, that it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to Plan B, ella, and IUDs, and related counseling.

3. The Universities believe that Plan B, ella, and IUDs can and sometimes do act abortifaciently by preventing implantation after fertilization.

4. They hold that one of the prohibitions of the Ten Commandments ("thou shalt not murder") precludes them from facilitating, assisting in, or

enabling the use of drugs or devices that they believe destroy very young human beings in the womb.

5. The Universities believe that their religious duties include promoting the physical well-being and health of their employees by providing them health insurance coverage.

6. OBU and SNU believe that their religious duties include promoting the physical well-being and health of their employees by offering them health insurance coverage.

7. SNU has approximately 505 employees, of which approximately 315 are full-time.

8. Approximately 253 SNU employees are enrolled in health insurance plans sponsored by the University. Approximately 249 dependents of employees are covered. The plans thus cover approximately 502 individuals.

9. SNU offers coverage through BlueCross BlueShield of Oklahoma. SNU offers beneficiaries two choices: "Blue Choice PPO – SNU Choice" and "Blue Choice PPO – SNU Premier."

10. SNU's health plan is partially self-insured. The university has contracted with an outside insurance company to pay all claims over $100,000.

11. The plan year for SNU's employee health insurance coverage begins on July 1 of each year.

12. SNU's employee health plans cover a variety of contraceptive methods. However, consistent with its religious commitments, SNU's contract for employee health coverage states that all drugs and devices that act after fertilization has occurred are excluded.

13. All SNU students enrolled in nine hours or more of classroom instruction are required to have health insurance.

14. SNU offers a health plan to those students who do not have health insurance coverage of their own.

15. The student plan excludes ella, Plan B, and IUDs.

16. The next student plan year begins on August 21, 2014.

17. Oklahoma Wesleyan University has approximately 557 employees, and about 112 of them are full-time.

18. OKWU provides two plans insured by Community Care of Oklahoma. One is an HMO benefit plan and the other is a PPO benefit plan.

19. Ninety-three employees are enrolled in the group health plans sponsored by OKWU. An additional 128 of these employees' dependents are covered, meaning that 221 individuals are covered by OKWU's group health plans.

20. Consistent with its religious commitments, the University's current contracts for employee health coverage exclude IUDs and emergency contraception.

21. The OKWU employee health plans do cover a variety of contraceptive methods.

22. The plan year for Oklahoma Wesleyan University's employee health insurance coverage begins on July 1 of each year.

23. OBU has approximately 328 employees, of whom about 269 are full time.

24. OBU provides eligible employees a PPO health plan with the choice of two networks provided by Blue Cross Blue Shield of Oklahoma.

25. Approximately 279 employees are covered by the plans. Approximately 696 dependents of employees are covered by the plans, bringing total coverage to 975 individuals.

26. Plan years for OBU's employee health plans begin on January 1 of each year.

27. The current OBU employee health plan excludes coverage of Plan B, ella, and IUDs.

28. All undergraduate and graduate students taking nine or more credit hours' worth of classes are eligible to enroll in a health plan facilitated by OBU.

29. The current OBU student health plan does not cover Plan B, ella, or IUDs.

30. A new OBU student plan is scheduled to go into effect on January 1, 2014.

31. MACU has approximately 298 employees, of whom about 139 are full time.

32. MACU's employee health plans cover approximately 100 employees.

33. The plan covers approximately 116 dependents of these employees.

34. MACU offers two traditional PPO plans: Health Choice 1000 and Health Choice 2000, both provided by GuideStone.

35. The plan year for MACU's employee health plan begins on January 1.

36. MACU's employee health plan does not cover Plan B, ella, or IUDs.

37. Prior to the promulgation of the challenged regulations, the Universities contracted with their health insurance issuers and third party administrators not to provide or pay for the coverage to which the Universities object.

38. In March 2010, Congress passed, and President Obama signed, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 11-152 (March 30, 2010), together known as the "Affordable Care Act" (ACA).

39. One ACA provision requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" provide coverage for certain preventive care services, including "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a).

40. These services must be covered without "any cost sharing." 42 U.S.C. § 300gg-13(a).

41. Because there were no such existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women.

42. After conducting a review, IOM recommended that women's preventive services include, among

other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."

43. On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day.

44. Plan B, ella, and IUDs fall within the category of "FDA-approved contraceptive methods."

45. Defendants exempted certain religious employers from the regulations.

46. The Universities are not eligible for this exemption.

47. Defendants created a "Temporary Enforcement Safe Harbor" for religious organizations ineligible for the religious exemption.

48. The Universities were eligible for, and took advantage of, the Temporary Enforcement Safe Harbor.

49. The Temporary Enforcement Safe Harbor expires beginning January 1, 2014. More specifically, the Safe Harbor is no longer available at the beginning of the first plan year on or after January 1, 2014.

50. The Safe Harbor is thus not available to OBU and MACU with respect to the employee and student plan years than begin on January 1, 2014.

51. The Safe Harbor will no longer be available to SNU and OKWU with respect to its employee and student plan years that begin on July 1, 2014.

52. Defendants promulgated regulations that provide for accommodations for certain organizations not eligible for the exemption that have a religious objection to including some or all "FDA-approved contraceptive methods" and related counseling in their employee and/or student health insurance plans.

53. A non-exempt religious organization is eligible for an accommodation if it satisfies the following requirements: (a) it opposes providing coverage of some or all of any contraceptive services required to be covered under the applicable regulations on account of religious objections; (b) it is organized and operates as a nonprofit entity; (c) it holds itself out as a religious organization; and (d) it self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the three preceding criteria and makes such self-certification available for examination upon request.

54. Under the regulations, a group health plan established or maintained by an organization eligible for an accommodation ("eligible organization") that provides benefits on a self-insured basis complies with the requirement to provide contraceptive coverage if (a) the organization or its plan contracts with one or more third party administrators; and (b) the organization provides each third party administrator that will process claims for any contraceptive services that must be covered with a copy of a "self- certification."

55. Under the regulations, a group health plan established or maintained by an eligible organization

that provides benefits on a self-insured basis must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for some or all contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make such arrangements.

56. Under the regulations, if a third party administrator receives a copy of the self-certification, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services.

57. Under the regulations, a group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies with the requirement to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification to each issuer that would otherwise provide such coverage in connection with the group health plan.

58. A group health insurance issuer that receives a copy of the self-certification must (a) expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; (b) provide separate payments for any required contraceptive services for plan participants and beneficiaries for so long as they remain enrolled in the plan.

59. For each plan year with respect to which the accommodation is in effect, a third party administrator or issuer required to provide or arrange payments for contraceptive services must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year.

60. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

61. The regulations prohibit an issuer or third party administrator from passing the costs of the separate payments for contraceptive services on to the eligible organization, its group health plan, or plan participants or beneficiaries.

62. The Universities must choose among four options: (a) provide the coverage to which they object; (b) violate the regulations and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers.

63. If the Universities discontinue health plan coverage for employees, they would be subject to an annual penalty of $2,000 per full-time employee, after the first 30 employees.

64. The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs.

65. The Universities believe that providing employee or student health insurance that includes coverage for Plan B, ella, and/or IUDs would violate the Universities' sincere religious beliefs.

66. The Universities' missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life.

67. The Universities believe that sinful behavior adversely affects their relationships with God.

68. Christian conviction, including respect for and dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities.

Respectfully submitted this 21st day of December, 2013,

/s/ Gregory S. Baylor
Gregory S. Baylor (Texas Bar No. 01941500)
ALLIANCE DEFENDING FREEDOM
801 G Street, NW, Suite 509
Washington, DC 20001
(202) 393-8690
(202) 347-3622 (facsimile)
gbaylor@alliancedefendingfreedom.org
mbowman@alliancedefendingfreedom.org

David A. Cortman* (Georgia Bar No. 188810)
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road, NE, Ste. D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)
dcortman@alliancedefendingfreedom.org

Kevin H. Theriot (Kansas Bar No. 21565)
ALLIANCE DEFENDING

STUART F. DELERY
Assistant Attorney General

SANFORD C. COATS
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Benjamin L. Berwick
Benjamin L. Berwick (MA Bar No. 679207)
Michael c. Pollack (NY Bar)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW, Rm 7306
Washington, DC 20530
Tel: (202) 305-8573
Fax: (202) 616-8470
Email: Benjamin.L.Berwick@usdoj.gov

FREEDOM
15192 Rosewood
Leawood, KS 66224
(913) 685-8000
(913) 685-8001 (facsimile)
ktheriot@alliancedefendingfreedom.org

John Paul Jordan (Oklahoma Bar No. 22613)
THE JORDAN LAW FIRM
1703 Professional Circle, Suite 501-A
Yukon, OK 73099
(405) 222-8721
(877) 335-5521 (facsimile)
jp@jpjordanlaw.com

Attorneys for Plaintiffs

*Motions for pro hac vice admission to be filed.

Attorneys for Defendants

No. 15-191

U.S. District Court
Western District of Pennsylvania (Pittsburgh)
CIVIL DOCKET FOR CASE #: 2:12-cv-00207-JFC

GENEVA COLLEGE v. SEBELIUS et al	Date Filed: 02/21/2012
Assigned to: Chief Judge Joy Flowers Conti	Jury Demand: None
Case in other court: 3rd Circuit, 13-02814 3rd Circuit, 13-03536 3rd Circuit, 14-01374	Nature of Suit: 440 Civil Rights: Other
Cause: 42:2000 Civil Rights: Other	Jurisdiction: U.S. Government Defendant

* * *

05/31/2012	32	First AMENDED COMPLAINT against All Defendants, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Baylor, Gregory) Modified on 6/1/2012 to edit docket text. (ksa2) (Entered: 05/31/2012)

* * *

08/02/2012	39	MOTION to Dismiss for Lack of Jurisdiction *or, in the alternative, to dismiss claims seven through twelve for failure*

		to state a claim by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Proposed Order) (Humphreys, Bradley) (Entered: 08/02/2012)
08/02/2012	40	BRIEF in Support re 39 Motion to Dismiss/Lack of Jurisdiction, *or, in the alternative, to dismiss claims seven through twelve for failure to state a claim* filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) (Entered: 08/02/2012)

* * *

09/13/2012	51	RESPONSE IN OPPOSITION to 39 Motion to Dismiss/Lack of Jurisdiction, filed by GENEVA

		COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Attachments: # 1 Affidavit of Wayne L. Hepler) (Baylor, Gregory) (Entered: 09/13/2012)
		* * *
10/04/2012	54	REPLY in Support re 39 Motion to Dismiss/Lack of Jurisdiction, filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) Modified on 10/5/2012 to edit docket text. (ksa2) (Entered: 10/04/2012)
11/14/2012	55	SUPPLEMENTAL BRIEF in Support re 39 Motion to Dismiss/Lack of Jurisdiction, *pursuant to the Court's October 31, 2012* Order filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED

		STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) Modified on 11/15/2012 to add additional docket text. (ksa2) (Entered: 11/14/2012)

* * *

12/03/2012	57	BRIEF in Opposition re 39 Motion to Dismiss/Lack of Jurisdiction, *pursuant to the Court's October 31, 2012 Order*, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Bowman, Matt) Modified on 12/4/2012 ERROR: Wrong event selected. Document removed from public view and redocketed. (ksa) (Entered: 12/03/2012)
12/03/2012	58	RESPONSE to 55 Brief in Support of Motion, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER

		COMPANY, INC., WLH ENTERPRISES. "Document previously filed electronically" (ksa) (Entered: 12/04/2012)

* * *

12/10/2012	59	NOTICE *of Supplemental Authority* by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES (Baylor, Gregory) (Entered: 12/10/2012)
12/18/2012	60	RESPONSE to 59 Notice, filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) (Entered: 12/18/2012)
12/18/2012	61	NOTICE *of Supplemental Authority* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES

		DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 39 Motion to Dismiss/Lack of Jurisdiction, (Attachments: # 1 Exhibit Korte v. Sebelius, # 2 Exhibit Hobby Lobby Stores, Inc. v. Sebelius) (Humphreys, Bradley) (Entered: 12/18/2012)
12/19/2012	62	RESPONSE *and Notice of New Supplemental Authority* to 61 Notice, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Attachments: # 1 Exhibit 1 (Wheaton/BAC Order)) (Bowman, Matt) (Entered: 12/19/2012)
12/19/2012		NOTICE of Additional Supplemental Authority by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Filed with document 62) (ksa2) (Entered: 12/20/2012)

* * *

12/31/2012	63	NOTICE *of Supplemental Authority, 7th Circuit Korte Opinion*, by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES (Attachments: # 1 Exhibit 7th Cir Opinion Korte) (Bowman, Matthew) (Entered: 12/31/2012)

* * *

01/12/2013	65	NOTICE *of Supplemental Authority* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 39 Motion to Dismiss/Lack of Jurisdiction, (Attachments: # 1 Exhibit University of Notre Dame v. Sebelius, # 2 Exhibit Diocese of Peoria v. Sebelius, # 3 Colorado Christian University v. Sebelius) (Humphreys, Bradley) (Entered: 01/12/2013)

01/12/2013	66	RESPONSE to Plaintiffs' Notice of Supplemental Authority to 63 Notice,, filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Exhibit Autocam Corporation v. Sebelius, # 2 Exhibit Annex Medical, Inc. v. Sebelius) (Humphreys, Bradley) (Entered: 01/12/2013)
01/15/2013	67	NOTICE *of Supplemental Authority* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 39 Motion to Dismiss/Lack of Jurisdiction. (Attachments: # 1 Exhibit Conestoga Wood Specialties Corp. v. Sebelius) (Humphreys,

		Bradley) (Entered: 01/15/2013)
01/16/2013	68	RESPONSE to 67 Notice, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Bowman, Matthew) (Entered: 01/16/2013)
01/25/2013	69	NOTICE *of Supplemental Authority* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 39 Motion to Dismiss/Lack of Jurisdiction, (Attachments: # 1 Exhibit Persico v. Sebelius) (Humphreys, Bradley) (Entered: 01/25/2013)
01/31/2013	70	NOTICE *of Supplemental Authority* by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC.,

		WLH ENTERPRISES (Attachments: # 1 Exhibit 7th Circuit Decision) (Bowman, Matthew) (Entered: 01/31/2013)
02/12/2013	71	NOTICE *of Supplemental Authority* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 39 Motion to Dismiss/Lack of Jurisdiction, (Attachments: # 1 Exhibit Conestoga Specialties Corporation v. Sebelius) (Humphreys, Bradley) (Entered: 02/12/2013)
02/18/2013	72	RESPONSE to 71 Notice, filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES. (Bowman, Matthew) (Entered: 02/18/2013)
02/18/2013	73	NOTICE *of Supplemental*

		Authority by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC., WLH ENTERPRISES (Attachments: # 1 Exhibit 1 Eighth Circuit Annex Medical, # 2 Exhibit 2 ND Tex Fort Worth) (Bowman, Matthew) (Entered: 02/18/2013)
03/06/2013	74	MEMORANDUM OPINION and ORDER granting in part and denying in part 39 Motion to Dismiss for Lack of Jurisdiction, as set forth in the accompanying memorandum opinion and order. Signed by Judge Joy Flowers Conti on 3/6/2013. (dmm) Modified on 3/7/2013 to add additional docket text. (ksa2) (Entered: 03/06/2013)
03/11/2013	75	MOTION for Preliminary Injunction by WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC. (Attachments: # 1 Proposed Order) (Bowman, Matthew) (Entered: 03/11/2013)
03/11/2013	76	BRIEF in Support re 75 Motion

		for Preliminary Injunction filed by WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC. (Attachments: # 1 Exhibit 1 Affidavit of Wayne L. Hepler, # 2 Exhibit 2 Affidavit of Carrie E. Kolesar) (Bowman, Matthew) (Entered: 03/11/2013)

* * *

03/22/2013	78	BRIEF in Opposition re 75 Motion for Preliminary Injunction filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Exhibit Gilardi v. Sebelius (D.C. Cir.)) (Humphreys, Bradley) (Entered: 03/22/2013)
03/22/2013	79	NOTICE *of Supplemental Authorities* by WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER

		COMPANY, INC. re 75 Motion for Preliminary Injunction (Attachments: # 1 Exhibit 1 Lindsay Consent PI, # 2 Exhibit 2 Sharpe Consent to PI) (Bowman, Matthew) (Entered: 03/22/2013)
		* * *
04/03/2013	80	NOTICE *of Supplemental Authorities* by WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC. re 75 Motion for Preliminary Injunction (Attachments: # 1 Exhibit 1 Gilardi Injunction (D.C. Cir.), # 2 Exhibit 2 Hall Consent Injunction, # 3 Exhibit 3 Bick Consent Injunction) (Bowman, Matthew) (Entered: 04/03/2013)
04/05/2013	81	MOTION for Reconsideration re 74 Order on Motion to Dismiss/Lack of Jurisdiction, by GENEVA COLLEGE. (Attachments: # 1 Exhibit 1 Declaration of Kenneth A. Smith) (Baylor, Gregory) Modified on 4/8/2013. (jsp) (Entered: 04/05/2013)
		* * *
04/19/2013	83	FINDINGS OF FACT AND

		CONCLUSIONS OF LAW with respect to plaintiffs' motion for preliminary injunction (ECF No. 75). An appropriate order will follow. Signed by Judge Joy Flowers Conti on 4/19/2013. (dmm) (Entered: 04/19/2013)
04/19/2013	84	ORDER granting 75 Motion for Preliminary Injunction, as set forth in the accompanying order. Signed by Judge Joy Flowers Conti on 4/19/2013. (dmm) (Entered: 04/19/2013)
04/19/2013	85	BRIEF IN OPPOSITION to 81 Motion for Reconsideration, filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) Modified on 4/22/2013 to edit docket text. (ksa2) (Entered: 04/19/2013)
05/08/2013	86	MEMORANDUM OPINION and ORDER granting 81 Motion for Reconsideration, as set forth in the accompanying

		memorandum opinion and order. It is FURTHER ORDERED that defendants' motion to dismiss ECF No. 39 is Granted in Part, as follows: The claims set forth in count III and count IV are dismissed without prejudice; The arbitrary and capricious and contrary to law claims set forth in count VI are dismissed without prejudice; and the claim set forth in count V is dismissed with prejudice. It is FURTHER ORDERED that in all other respects defendants' motion to dismiss counts I, II, and VI is DENIED. Signed by Judge Joy Flowers Conti on 5/8/2013. (dmm) Modified on 5/9/2013 to add additional docket text. (ksa2) (Entered: 05/08/2013)
05/22/2013	87	MOTION for Preliminary Injunction by GENEVA COLLEGE. (Attachments: # 1 Proposed Order) (Baylor, Gregory) (Entered: 05/22/2013)
05/22/2013	88	BRIEF in Support re 87 Motion for Preliminary Injunction filed by GENEVA COLLEGE. (Attachments: # 1 Affidavit of Timothy R. Baird) (Baylor,

		Gregory) (Entered: 05/22/2013)
		* * *
06/05/2013	89	Memorandum in Opposition to Motion re 87 MOTION for Preliminary Injunction *by Geneva College* filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) Modified on 6/6/2013 to correctly title document. (ksa) (Entered: 06/05/2013)
06/17/2013	90	NOTICE OF APPEAL as to 84 Order on Motion for Preliminary Injunction by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. Motion for IFP N/A. Certificate of

		Appealability N/A. Court Reporters: Karen Earley and Juliann Kienzle. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will NOT be mailed to the parties. The form is available on the Court's internet site. (Humphreys, Bradley) Modified on 6/18/2013 to add name of additional court reporter. (ksa) (Entered: 06/17/2013)
06/18/2013	91	FINDINGS OF FACT AND CONCLUSIONS OF LAW with respect to plaintiff Geneva College's motion for preliminary injunction (ECF No. 87). An appropriate order will follow. Signed by Judge Joy Flowers Conti on 6/18/2013. (dmm) (Entered: 06/18/2013)
06/18/2013	92	ORDER granting 87 Motion for Preliminary Injunction, as set forth in the accompanying order. Signed by Judge Joy Flowers Conti on 6/18/2013. (dmm) (Entered: 06/18/2013)
08/17/2013	94	NOTICE OF APPEAL as to 92

		Order on Motion for Preliminary Injunction by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. Motion for IFP N/A. Certificate of Appealability N/A. Court Reporters: Karen Earley and Juliann Kienzle. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will NOT be mailed to the parties. The form is available on the Court's internet site. (Humphreys, Bradley) Modified on 8/19/2013 to edit court reporters. (ksa) (Entered: 08/17/2013)
09/12/2013	96	MOTION for an Indicative Ruling Under Federal Rule of Civil Procedure 62.1 re 84 Order on Motion for

		Preliminary Injunction, 92 Order on Motion for Preliminary Injunction *if Remanded by the United States Court of Appeals for the Third Circuit* by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Proposed Order) (Humphreys, Bradley) Modified on 10/4/2013 to correctly title motion. (ksa) (Entered: 09/12/2013)
09/12/2013	97	BRIEF in Support re 96 Motion to Vacate, filed by TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) (Entered: 09/12/2013)

* * *

10/03/2013	103	BRIEF in Opposition re 96 Motion to Vacate, *if remanded –– i.e. motion for indicative order* filed by GENEVA COLLEGE, WAYNE HEPLER, CARRIE E. KOLESAR, THE SENECA HARDWOOD LUMBER COMPANY, INC.. (Attachments: # 1 Affidavit Exh 1 WLH Affidavit) (Bowman, Matthew) (Entered: 10/03/2013)
10/18/2013	98	Second AMENDED COMPLAINT against All Defendants, filed by CARRIE E. KOLESAR, WAYNE HEPLER, GENEVA COLLEGE, THE SENECA HARDWOOD LUMBER COMPANY, INC. (Baylor, Gregory) Modified on 10/2/2013 to edit docket text. (ksa) (Entered: 10/01/2013) 10/18/2013)

* * *

10/18/2013	104	ORDER denying 96 Motion for an Indicative Ruling pursuant to Federal Rule of Civil Procedure 62.1. Signed by Chief Judge Joy Flowers Conti on 10/18/2013. (ten) (Entered: 10/18/2013)

* * *

11/12/2013	105	Second MOTION for Preliminary Injunction by GENEVA COLLEGE. (Attachments: # 1 Proposed Order) (Baylor, Gregory) (Entered: 11/12/2013)
11/12/2013	106	BRIEF in Support re 105 Motion for Preliminary Injunction filed by GENEVA COLLEGE. (Baylor, Gregory) (Entered: 11/12/2013)

* * *

12/03/2013	107	BRIEF in Opposition re 105 Motion for Preliminary Injunction filed by TIMOTHY GEITHNER, JACOB J. LEW, THOMAS E. PEREZ, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) (Entered: 12/03/2013)
12/03/2013	108	MOTION to Dismiss *or, in the Alternative, for Summary Judgment* by TIMOTHY GEITHNER, JACOB J. LEW, THOMAS E. PEREZ,

		KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Exhibit Defendants' Statement of Material Facts, # 2 Proposed Order) (Humphreys, Bradley) Modified on 12/4/2013 ERROR: MULTIPLE RELIEF DOCUMENT FILED AS ONE RELIEF; RE−FILED BY COURT. (ksa) (Entered: 12/03/2013)
12/03/2013	109	BRIEF in Support re 108 Motion to Dismiss, *or, in the Alternative, for Summary Judgment* filed by TIMOTHY GEITHNER, JACOB J. LEW, THOMAS E. PEREZ, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Humphreys, Bradley) (Entered: 12/03/2013)

* * *

12/03/2013	110	CONCISE STATEMENT OF MATERIAL FACTS re Motion for Summary Judgment, by TIMOTHY GEITHNER, JACOB J. LEW, THOMAS E. PEREZ, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (ksa) (Entered: 12/04/2013)

* * *

12/06/2013	111	REPLY Brief in support of 105 Motion for Preliminary Injunction, 107 Brief in Opposition to Motion, filed by GENEVA COLLEGE. (Baylor, Gregory) Modified on 12/9/2013 to edit docket text. (ksa) (Entered: 12/06/2013)

* * *

12/20/2013	113	NOTICE *of Supplemental Authority* by GENEVA COLLEGE (Attachments: # 1 Roman Catholic Archdiocese of NY v. Sebelius Opinion) (Baylor, Gregory) (Entered:

		12/20/2013)
12/23/2013	114	FINDINGS OF FACT AND CONCLUSIONS OF LAW re: 105 Second MOTION for Preliminary Injunction filed by GENEVA COLLEGE. Signed by Chief Judge Joy Flowers Conti on 12/23/2013. (ten) Modified on 12/26/2013 to correctly title document. (ksa) (Entered: 12/23/2013)
12/23/2013	115	ORDER granting 105 Motion for Preliminary Injunction. Signed by Chief Judge Joy Flowers Conti on 12/23/2013. (ten) (Entered: 12/23/2013)
01/03/2014	116	RESPONSE IN OPPOSITION to 108 Motion to Dismiss and Motion for Summary Judgment filed by GENEVA COLLEGE. (Baylor, Gregory) Modified on 1/6/2014 document linkage corrected. Document also linked to Motion for Summary Judgment filed with document 108. (ksa) (Entered: 01/03/2014)
01/03/2014	117	RESPONSE IN OPPOSITION to 110 Concise Statement of Material Facts, filed by GENEVA COLLEGE. (Baylor, Gregory) (Entered: 01/03/2014)

* * *

02/11/2014	118	NOTICE OF APPEAL as to 115 Order on Motion for Preliminary Injunction by TIMOTHY GEITHNER, JACOB J. LEW, THOMAS E. PEREZ, KATHLEEN SEBELIUS, HILDA SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. Motion for IFP N/A. Certificate of Appealability N/A. Court Reporters: Karen Earley, Juliann Kienzle and Virginia Pease. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will NOT be mailed to the parties. The form is available on the Court's internet site. (Humphreys, Bradley) Modified on 2/12/2014 to add names of court reporters. (ksa) (Entered: 02/11/2014)
04/02/2014	120	ORDER of USCA as to 118

		Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, JACOB J. LEW, TIMOTHY GEITHNER, 94 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER granting Motion by appellants to consolidate for the purposes of filing a single opening brief and a single reply brief. (ksa) Modified docket text on 9/9/2014. (tt) (Entered: 04/02/2014)
		* * *
08/28/2014	123	ORDER of USCA as to 118 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE

		TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, JACOB J. LEW, TIMOTHY GEITHNER that the foregoing motion to lift the stay is Denied at this time. The government shall advise the Court of its position not later than 9/5/2014. (ksa) (Entered: 09/16/2014)
09/04/2014	121	ORDER of USCA as to 90 Notice of Appeal, filed by UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, dismissing case pursuant to Fed. R. App. P. 42(b). Modified docket text on 9/9/2014. (tt) (Entered: 09/04/2014)

* * *

10/10/2014	125	PERMANENT INJUNCTION. Signed by Chief Judge Joy Flowers Conti on 10/10/2014. (ten) (Entered: 10/10/2014)

10/10/2014	126	JUDGMENT in favor of Wayne L. Hepler, individually, and in his capacity as sole proprietor of WLH Enterprises, Carrie E. Kolesar, and The Seneca Hardwood Lumber Company, Inc. and against Sylvia Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services, Thomas Perez, in his official capacity as Secretary of the United States Department of Labor, Jacob Lew, in his official capacity as Secretary of the United States Department of the Treasury, the United States Department of Health and Human Services, the United States Department of Labor, and the United States Department of the Treasury. Signed by Chief Judge Joy Flowers Conti on 10/10/2014. (ten) (Entered: 10/10/2014)

* * *

02/11/2015	130	JUDGMENT OF USCA as to 118 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

		UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, JACOB J. LEW, TIMOTHY GEITHNER, 94 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER Reversing judgments/orders of the district court. Mandate will follow. (pdb3,) (Entered: 02/11/2015)
		* * *
04/15/2015	133	MANDATE of USCA issued as to 118 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, THOMAS E. PEREZ, JACOB J. LEW, TIMOTHY GEITHNER, 94 Notice of Appeal, filed by HILDA SOLIS, KATHLEEN SEBELIUS, UNITED STATES

		DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER. IT IS HEREBY ORDERED and ADJUDGED that the judgments of the District Court entered 6/18/2013, 12/20/2013 and 12/23/2013 be and the same are hereby reversed. (Attachments: # 1 mandate letter, # 2 opinion) (tmm3,) Modified on 4/16/2015 to add additional docket text. (ksa) (Entered: 04/15/2015)
05/06/2015	134	USCA ORDER Motion by Appellee Geneva College to Recall and Stay Mandate is temporarily granted pending action by the Supreme Court in Zubik v. Burwell, No. 14A1065 (S. Ct.). (Entered: 05/06/2015)

U.S. Court of Appeals for the Third Circuit

Court of Appeals Docket #: 14-6026

GENEVA COLLEGE, et al v. SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al	Docketed: 08/22/2013 Terminated: 02/11/2015 Nature of Suit: 2440 Other Civil Rights Case Type Information: 1) civil 2) USA as party 3) civil rights
Trial Judge: Joy Flowers Conti Case: 2-12-cv-00207F	

08/22/2013	CIVIL CASE DOCKETED. Notice filed by Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Department of the Treasury in District Court No. 2-12-cv-00207. (TMM)
	* * *
09/04/2013	ECF FILER: Concise Summary of the Case filed by Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, received. (ABK)
	* * *
01/02/2014	ORDER (SMITH and HARDIMAN, Circuit Judges) granting Motion to hold appeal at 13-2814 in abeyance pending the Supreme Court's decision

	in Conestoga Wood Specialties Authoring Judge. [13-2814, 13-3536]—[Edited 01/03/2014 by LML] (SLC)
	* * *
02/20/2014	CLERK ORDER The actions at Nos. 13-2814, 13-3536, and 14-1374 are hereby consolidated for all purposes. The parties are advised that all motions and briefs must be electronically filed in all cases on the Court's electronic case filing (ECF) system. The parties are further advised that case opening forms for later filed appeals must be filed in the new appeals and not re-filed in earlier appeals in which the forms were previously filed, filed. [13-2814, 13-3536, 14-1374] (TMM)
	* * *
03/24/2014	ECF FILER: Reply by Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in Support of Motion to Consolidate Appeals, filed. Certificate of Service dated 03/24/2014. [13-3536, 13-2814, 14-1374, 14-1376, 14-1377]--[Edited 03/24/2014 by TMM] (ACJ)
04/02/2014	ORDER (VANASKIE, Circuit Judge) Motion by appellants to consolidate for

	the purposes of filing a single opening brief and a single reply brief is granted, filed. Panel No.: BCO-060. Vanaskie, Authoring Judge. [13-3536, 14-1374, 14-1376, 14-1377] (TMM)
05/01/2014	ORDER (Clerk) On April 2, 2014, the Court granted Appellants' motion to consolidate Appeal Nos. 13-3536, 14-1374, 14-1376, and 14-1377 for purposes of filing of a single opening brief and a single reply brief, which essentially consolidated the 4 cases for all purposes. Appellees are encouraged to consult with one another regarding the contents of their briefs as the Court disfavors repetitive briefs. Appellees may file a consolidated brief or join in or adopt portions by reference. It is noted that a 5th appeal, No. 13-2814, has been stayed pending the Supreme Court's disposition of a petition for writ of certiorari in Conestoga Wood Specialties Corporation v. Sebelius, Supreme Court Case No. 13-356. Given this, Appeal No. 13-2814 will no longer be consolidated with Nos. 13-3536 and 14-1374, but rather a decision in the District Court on a motion for preliminary injunction. As the District Court has ruled on that motion and the order is on appeal in No. 14-1374, the stay on No. 13-3536 is hereby lifted. The briefing and

scheduling order entered in Nos. 13-2814 and 13-3536 on October 28, 2013 is hereby vacated. A separate briefing and scheduling order will be issued in No. 13-2814 once the stay in that case has been lifted. The following briefing schedule shall now apply to Appeal Nos. 13-3536, 14-1374, 14-1376, and 14-1377: Step 1: Opening brief and the joint appendix by Appellants, to be filed and served within 40 days of the date of this order; Step 2: Responsive briefs by Appellees, to be filed and served within 30 days of the date of service of Appellants' brief; and Step 3: Reply brief, if any, by Appellants, to be filed and served within 14 days of the date of service of the last Appellees' brief filed. [13-2814, 13-3536, 14-1374, 14-1376, 14-1377] (TMM)

06/10/2014 ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377, filed. Certificate of Service dated 06/10/2014 by ECF. [Entry has been spread to case no. 14-1377] [13-3536,

14-1374, 14-1376, 14-1377]—[Edited 06/10/2014 by EMA] (ABK)

06/10/2014 ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377, filed. Certificate of service dated 06/10/2014 by ECF. [13-3536, 14-1374, 14-1376, 14-1377] (ABK)

* * *

06/10/2014 ECF FILER: ELECTRONIC ADDENDUM to JOINT APPENDIX entitled "Joint Appendix" on behalf of Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377 containing the District Court Docket, filed. Certificate of service dated 06/10/2014 by ECF. [Entry edited by Clerk's Office to reflect the correct event and contents] [13-3536, 14-1374,

14-1376, 14-1377]—[Edited 06/12/2014 by EMA] (ABK)

* * *

06/17/2014 ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Amici Julian Bond, American Civil Liberties Union, and American Civil Liberties Union of Pennsylvania in support of Appellant/Petitioner, filed. Certificate of Service dated 06/17/2014 by ECF. [13-3536, 14-1374, 13-1376 & 13-1377] (SJR)

* * *

06/17/2014 ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Americans United for Separation of Church and State in support of Appellant/Petitioner, filed. Certificate of Service dated 06/17/2014 by ECF. [13-3536, 14-1374, 14-1376, 14-1377] (ANK)

* * *

06/17/2014 ECF FILER: Motion filed by National Women's Law Center; American Association of University Women (AAUW); American Federation of State, County and Municipal Employees (AFSCME); Ibis Reproductive Health; Feminist Majority Foundation; Legal Momentum; Merger Watch; NARAL Pro Choice America; National Organization for Women (NOW) Foundation; National Partnership for

	Women and Families; Planned Parenthood Association of the Mercer Area; Planned Parenthood of Central and Greater Northern New Jersey, Inc.; Planned Parenthood of Delaware; Planned Parenthood Keystone; Planned Parenthood of Metropolitan New Jersey; Planned Parenthood of Southeastern Pennsylvania; Planned Parenthood of Southern New Jersey; Planned Parenthood of Western Pennsylvania; Population Connection; Raising Women's Voices for the Health Care We Need; Service Employees International Union (SEIU) . to proceed as Amicus Curiae in support of Appellant/Petitioner. Certificate of Service dated 06/17/2014. [13-3536, 14-1374, 14-1376. 14-1377] (CED)
06/17/2014	ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Amici National Women's Law Center; American Association of University Women (AAUW); American Federation of State, County and Municipal Employees (AFSCME); Ibis Reproductive Health; Feminist Majority Foundation; Legal Momentum, Merger Watch;NARAL Pro Choice America; National Organization for Women (NOW) Foundation; National Partnership for Women and Families; Planed

	Parenthood Association of the Mercer Area; Planned Parenthood of Central and Greater Northern New Jersey, Inc.; Planned Parenthood of Delaware; Planned Parenthood Keystone; Planned Parenthood of Metropolitan New Jersey; Planned Parenthood of Southeastern Pennsylvania; Planned Parenthood of Southern New Jersey; Planned Parenthood of Western Pennsylvania; Population Connection; Raising Women's Voices for the Health Care We Need; Service Employees International Union (SEIU) . to proceed as Amicus Curiae in support of Appellant/Petitioner. Certificate of Service dated 06/17/2014. [13-3563, 14-1374, 14-1376, 14-1377] (CED)
	* * *
07/08/2014	ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Proposed Amici-Appellants American Public Health Association, Asian & Pacific Islander American Health Forum, Asian Americans Advancing Justice, Asian Americans Advancing Justice Los Angeles, California Womens Law Center, Forward Together, HIV Law Project, Ipas, National Asian Pacific American Women Forum, National Family Planning & Reproductive Health Association, National Health Law

	Program, National Hispanic Medical Association, National Latina Institute for Reproductive Health, National Womens Health Network and Sexuality Information & Education Council of the United States in 13-3536, 14-1374, 14-1376, Proposed Amici-Appellants American Public Health Association, Asian & Pacific Islander American Health Forum, Asian Americans Advancing Justice, Asian Americans Advancing Justice Los Angeles, California Womens Law Center, Forward Together, HIV Law Project, Ipas, National Asian Pacific American Women Forum, National Family Planning & Reproductive Health Association, National Health Law Program, National Hispanic Medical Association, National Womens Health Network, Sexuality Information & Education Council of the United States and Proposed Intervenor-Appellant National Latina Institute for Reproductive Health in 14-1377 Amicus National Health Law Program, et al. in support of Appellant/Petitioner, filed. Certificate of Service dated 06/17/2014 by ECF. [13-3536, 14-1374, 14-1376, 14-1377] (SS)
07/14/2014	ORDER (SHWARTZ, Circuit Judge) The foregoing Motion by Americans United for Separation of Church and

State to proceed as Amicus Curiae in support of Appellant is granted, filed. Panel No.: CCO-102. Judge: SHWARTZ, Authoring. Appearance Form on or before 07/21/2014. Disclosure Statement on or before 07/21/2014. [13-3536, 14-1374, 14-1376, 14-1377] (EMA)

* * *

07/24/2014 ORDER (GREENAWAY JR., Circuit Judge) granting Motion Julian Bond, American Civil Liberties and American Civil Liberties Union of Pennsylvania for leave to proceed as Amicus Curiae in Support of Appellants, filed. Panel No.: ACO-099. Greenaway, Jr., Authoring Judge. [13-3536, 14-1374, 14-1376, 14-1377] (MCW)

* * *

07/24/2014 ORDER (GREENAWAY JR., Circuit Judge) granting Motion by National Women's Law Center, et al for leave to proceed as amicus curiae in support of Appellants, filed. Panel No.: ACO-100. Greeneaway, Jr., Authoring Judge. [13-3536, 14-1374, 14-1376, 14-1377] (MCW)

* * *

07/24/2014 ORDER (GREENAWAY JR., Circuit Judge) granting Motion by National Health Law Program, et al for leave to proceed as amicus curiae in support of Appellants, filed. Panel No.: ACO-101.

Greenaway, Jr., Authoring Judge. [13-3536, 14-1374, 14-1376, 14-1377] (MCW)

* * *

07/28/2014 ECF FILER: ELECTRONIC BRIEF on behalf of Appellees Geneva College, Seneca Hardwood Lumber Company Inc, Carry E. Kolesar and in Wayne Helper in13-3536 & 14-1374, filed. Certificate of Service dated 07/28/2014 by ECF. [13-3536, 14-1374] [Entry edited by the Clerk's Office to reflect all filers]--[Edited 07/29/2014 by MS] (GSB)

* * *

07/30/2014 ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Amicus Curiae Liberty Life and Law Foundation in support of Appellee/Respondent, filed. Certificate of Service dated 07/30/2014 by ECF. F.R.A.P. 29(a) Permission: YES. [13-3536, 14-1374] (DJD)

* * *

08/01/2014 ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of Amicus Appellees Association of Gospel Rescue Missions, et al. in support of Appellee/Respondent, filed. Certificate of Service dated 08/01/2014 by ECF. F.R.A.P. 29(a) Permission: YES. [13-3536, 14-1374] (KWC)

* * *

08/04/2014 ECF FILER: Request by Appellee Geneva College in 13-3536, 14-1374 for Oral Argument. [SEND TO MERITS] [13-3536, 14-1374] (GSB)

* * *

08/11/2014 ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377, filed. Certificate of Service dated 08/11/2014 by ECF. [13-3536, 14-1374, 14-1376, 14-1377] (PN)

* * *

09/23/2014 ECF FILER: Letter dated 09/23/2014 , filed pursuant to Rule 28(j) from counsel for Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377. This document will be SENT TO THE MERITS PANEL, if/when applicable. [13-3536, 14-1374, 14-1376, 14-1377] (PN)

09/24/2014 ECF FILER: Response filed by Appellees Erie Catholic Preparatory School, Lawrence T. Persico, Prince of Peace Center Inc., Roman Catholic Diocese of Erie and St Martin Center Inc in 14-1376, Appellees Catholic Charities Diocese of Pittsburgh Inc, Roman Catholic Diocese of Pittsburgh and David A. Zubik in 14-1377 to Rule 28(j) letter. Certificate of Service dated 09/24/2014. This document will be SENT TO THE MERITS PANEL, if/when applicable. [14-1376, 13-3536, 14-1374, 14-1377] (PMP)

* * *

10/07/2014 CLERK'S LETTER to counsel written at the direction of the Court. At the direction of the Court, pursuant to counsel's 28j letter dated September 23, 2014, Counsel are to file Supplemental briefing limited to 8 pages. Briefs are due within 14 days by Tuesday, October 21, 2014. [13-3536, 14-1374, 14-1376, 14-1377] (TLG)

10/21/2014 ECF FILER: ELECTRONIC SUPPLEMENTAL BRIEF on behalf of Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United

States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377, filed in accordance to the Court's letter of 10/07/2014. Certificate of Service dated 10/21/2014 by ECF. [13-3536, 14-1374, 14-1376, 14-1377]—[Edited 10/21/2014 by TLG] (PN)

10/21/2014 ECF FILER: ELECTRONIC SUPPLEMENTAL BRIEF on behalf of Appellee Geneva College in 13-3536, filed. Certificate of Service dated 10/21/2014 by ECF. [13-3536, 14-1374] (GSB)

* * *

11/14/2014 ECF FILER: Letter dated 11/14/2014 , filed pursuant to Rule 28(j) from counsel for Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377. This document will be SENT TO THE MERITS PANEL, if/when applicable. [13-3536, 14-1374, 14-1376, 14-1377] (ACJ)

11/17/2014 ECF FILER: Response filed by Appellees Erie Catholic Preparatory School, Lawrence T. Persico, Prince of Peace Center Inc., Roman Catholic Diocese of Erie and St Martin Center

	Inc in 14-1376, Appellees Catholic Charities Diocese of Pittsburgh Inc, Roman Catholic Diocese of Pittsburgh and David A. Zubik in 14-1377 to Rule 28(j) letter. Certificate of Service dated 11/17/2014. This document will be SENT TO THE MERITS PANEL, if/when applicable. [14-1376, 14-1377, 14-1374, 13-3536]—[Edited 11/17/2014 by TMM] (PMP)
11/18/2014	ECF FILER: Response filed by Appellee Geneva College to Rule 28(j) letter. Certificate of Service dated 11/18/2014. This document will be SENT TO THE MERITS PANEL, if/when applicable. [13-3536, 14-1374, 14-1376, 13-1377]—[Edited 11/18/2014 by TMM] (GSB)
11/19/2014	COURT MINUTES OF ARGUED/SUBMITTED CASES. [13-3536, 14-1374, 14-1376, 14-1377, 14-1328, 14-1406, 12-4574] (TLG)
11/19/2014	ARGUED on Wednesday, November 19, 2014. Panel: McKEE, Chief Judge, RENDELL and SLOVITER, Circuit Judges. Gregory S. Baylor arguing for Appellees Geneva College, Wayne Hepler and Carrie E. Kolesar; Paul M. Pohl arguing for Appellees Lawrence T. Persico, Prince of Peace Center Inc., Roman Catholic Diocese of Erie and Roman Catholic Diocese of Pittsburgh; Mark B. Stern arguing for Appellants Secretary United States Department

	of the Treasury, United States Department of Health and Human Services and United States Department of Labor. [13-3536, 14-1374, 14-1376, 14-1377] (TLG)
02/03/2015	ECF FILER: Letter dated 02/03/2015 , filed pursuant to Rule 28(j) from counsel for Appellees Erie Catholic Preparatory School, Lawrence T. Persico, Prince of Peace Center Inc., Roman Catholic Diocese of Erie and St Martin Center Inc in 14-1376, Appellees Catholic Charities Diocese of Pittsburgh Inc, Roman Catholic Diocese of Pittsburgh and David A. Zubik in 14-1377. This document will be SENT TO THE MERITS PANEL, if/when applicable. [14-1376, 13-3536, 14-1374, 14-1377] (PMP)
02/09/2015	ECF FILER: Response filed by Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377 to Rule 28(j) letter. Certificate of Service dated 02/09/2015. This document will be SENT TO THE MERITS PANEL, if/when applicable. [13-3536, 14-1374, 14-1376, 14-1377] (PN)

02/11/2015	PRECEDENTIAL OPINION Coram: MCKEE, Chief Judge, RENDELL and SLOVITER, Circuit Judges. Total Pages: 49. Judge: RENDELL Authoring. [13-3536, 14-1374, 14-1376, 14-1377] (PDB)
02/11/2015	JUDGMENT, Reversed. Costs taxed against Appellees. All of the above in accordance with the Opinion of this Court. [13-3536, 14-1374, 14-1376, 14-1377] (PDB)
03/30/2015	ECF FILER: Petition filed by Appellee Geneva College in 13-3536, 14-1374 for Rehearing before original panel and the court en banc. Certificate of Service dated 03/30/2015. [13-3536, 14-1374] (GSB)
04/13/2015	ORDER (MCKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, SHWARTZ, KRAUSE and SLOVITER*, Circuit Judges) denying Petition for Panel Rehearing and En Banc Rehearing filed by Appellee Geneva College, filed. Rendell, Authoring Judge. [13-3536, 14-1374] *Honorable Dolores K. Sloviter's vote is limited to panel rehearing only. (TMM)
04/15/2015	MANDATE ISSUED, filed. [14-1376, 13-3536, 14-1374, 14-1377] (TMM)
04/21/2015	ECF FILER: Motion filed by Appellee

	Geneva College to recall and stay mandate. Certificate of Service dated 04/21/2015. [13-3536, 14-1374]—[Edited 04/21/2015 by TMM] (GSB)
	* * *
05/01/2015	ECF FILER: Response filed by Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374 to court order , Motion Mandate (recall, stay or issue), Motion to stay mandate. Certificate of Service dated 05/01/2015. [13-3536, 14-1374] (ABK)
05/06/2015	ORDER (MCKEE, Chief Judge, RENDELL and SLOVITER, Circuit Judges) Motion by Appellee Geneva College to Recall and Stay Mandate is temporarily granted pending action by the Supreme Court in Zubik v. Burwell, No. 14A1065 (S. Ct.), filed. Authoring Judge Rendell. [13-3536, 14-1374] (Corrected Order attached and NDA Resent)—[Edited 05/06/2015 by TMM] (TMM)
07/10/2015	U.S. Supreme Court Letter dated 06/30/2015 granting Appellee Geneva College in 13-3536, 14-1374 an extension of time to and including

	08/11/2015 to file petition for writ of certiorari. Supreme Court Application No. 15A1. [13-3536, 14-1374] (CRG)
07/22/2015	ECF FILER: STATUS REPORT received from Appellants Secretary United States Department of Health and Human Services, Secretary United States Department of Labor, Secretary United States Department of the Treasury, HHS, United States Department of Labor and United States Department of the Treasury in 13-3536, 14-1374, 14-1376, 14-1377.. Certificate of Service dated 07/22/2015. [13-3536, 14-1374, 14-1376, 14-1377] (ABK)
07/23/2015	ECF FILER: Response filed by Appellees Erie Catholic Preparatory School, Lawrence T. Persico, Prince of Peace Center Inc., Roman Catholic Diocese of Erie and St Martin Center Inc in 14-1376, Appellees Catholic Charities Diocese of Pittsburgh Inc, Roman Catholic Diocese of Pittsburgh and David A. Zubik in 14-1377 to status report. Certificate of Service dated 07/23/2015. [14-1376, 13-3536, 14-1374, 14-1377] (PMP)
08/13/2015	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Geneva College on 08/11/2015 and placed on the docket 08/12/2015 as Supreme Court Case No. 15-191. [13-3536, 14-1374] (CND)

11/06/2015	NOTICE of U.S. Supreme Court disposition at No. 15-191. Petition for Writ of Ceriorari filed by Geneva College granted on 11/06/2015. [13-3536, 14-1374] (LML)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; and CARRIE E. KOLESAR Plaintiffs, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT	Case No.: 2:12-cv-00207-JFC

OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,	)
Defendants.	)

SECOND AMENDED COMPLAINT

Plaintiffs, by their attorneys, state as follows:

NATURE OF THE ACTION

1. This lawsuit challenges regulations issued by Defendants under the 2010 Patient Protection and Affordable Care Act that compel employee and student health insurance plans to provide free coverage of contraceptive services, including so-called "emergency contraceptives" that cause early abortions.

2. Plaintiff Geneva College is a Christ-centered institution of higher learning. It believes that God has condemned the intentional destruction of innocent human life. The College holds, as a matter of religious conviction, that it would be sinful and immoral for Geneva intentionally to participate in, pay for, facilitate, enable, or otherwise support access to abortion, which destroys human life. It holds that one of the prohibitions of the Ten Commandments ("thou shalt not murder") precludes it from facilitating, assisting in, or enabling the use of drugs that can and do destroy very young human beings in the womb.

3. Plaintiffs Wayne L. Hepler and Carrie E. Kolesar are a father and daughter who, with several of Mr. Hepler's other children, own The Seneca Hardwood Lumber Company, Inc. Located in Cranberry, Pennsylvania, Seneca Hardwood is a lumber business that Mr. Hepler runs in conjunction with a sawmill that he operates as WLH Enterprises, his sole proprietorship. The Hepler family owners and operators of these businesses are practicing Catholic Christians who in their personal lives and their operation of Seneca and WLH adhere to Catholic Church teachings on sexuality and the sanctity of innocent human life. Following these beliefs, the Hepler family has for multiple years omitted abortifacients, contraception, sterilization, and related education and counseling from their health insurance plan covering themselves and their employees and family members. (Seneca Hardwood Lumber Company and the Heplers, including Wayne Hepler's activities in WLH Enterprises, collectively are referred to in this Second Amended Complaint as "the Hepler Plaintiffs.")

4. The regulations impact the Hepler Plaintiffs not only as employers, but as employees. It robs the individual Hepler family members of morally acceptable health insurance, instead potentially forcing them and their daughters to receive coverage for "free" contraception and sterilization from the health insurance plan they will be forced to co-purchase.

5. Neither the College nor the Hepler Plaintiffs qualify for the extraordinarily narrow religious exemption from the regulations. That exemption protects only "churches, their integrated auxiliaries,

and conventions or associations or churches" and "the exclusively religious activities of any religious order."

6. For purely secular reasons, the government has elected not to impose the challenged regulations upon thousands of other organizations. Employers with "grandfathered" plans and favored others are exempt from these rules.

7. Defendants have offered entities like the College—but not ones like the Hepler Plaintiffs—a so-called "accommodation" of their religious beliefs and practices. However, the alleged accommodation fails. It still conscripts Geneva into the government's scheme, forces the College to obtain an insurer and to submit a form that specifically causes that insurer to pay for the objectionable drugs, so that such coverage will accrue to the College's own employees, due to the fact that those employees have insurance as an employee benefit from the College and from that insurer.

8. Under the supposed accommodation, Defendants continue to treat entities like the College as second-class religious organizations, not entitled to the same religious freedom rights as substantially similar entities that qualify for the exemption. Defendants' rationale for entirely exempting churches and integrated auxiliaries from the regulations – their employees are likely to share their religious convictions – applies equally to the College. Yet, Defendants refuse to exempt the College, offering only an flimsy, superficial, and utterly semantic "accommodation" that falls woefully short of addressing the substance of its concerns. And the

Hepler Plaintiffs do not receive even that much consideration from Defendants.

9. If Plaintiffs follow their religious convictions and decline to participate in the government's scheme, they will face, among other injuries, enormous fines that will cripple their respective operations and/or the loss of morally acceptable health insurance.

10. By unconscionably placing Plaintiffs in this untenable position, Defendants have violated the Religious Freedom Restoration Act; the Free Exercise, Establishment and Free Speech Clauses of the First Amendment to the United States Constitution; the Due Process Clause of the Fifth Amendment; and the Administrative Procedure Act.

11. Plaintiffs therefore respectfully request that this Court vindicate their rights through declaratory and permanent injunction relief, among other remedies.

IDENTIFICATION OF PARTIES AND JURISDICTION

12. Plaintiff Geneva College is a Christ-centered institution of higher learning located in Beaver Falls, Pennsylvania. It is a Pennsylvania not-for-profit corporation.

13. Plaintiff Wayne L. Hepler lives in Cranberry, Pennsylvania. He is 58% owner, President, and Secretary of The Seneca Hardwood Lumber Company, Inc. He is also the sole owner of WLH Enterprises. WLH Enterprises is a sawmill and sole proprietorship owned by Wayne L. Hepler. It is located at 5939 Route 38, Emlenton, Pennsylvania.

WLH Enterprises employees participate in the health insurance plan of Seneca Hardwood. As an employee, Mr. Hepler is a participant in the health insurance plan of Seneca Hardwood, and beneficiaries of his plan include his wife, their two high-school aged daughters, another daughter under age 26, two sons in college, and one son under age 26.

14. Plaintiff The Seneca Hardwood Lumber Company, Inc., is a Pennsylvania Corporation located at 212 Seneca Hardwood Road, Cranberry, Pennsylvania. The Seneca Hardwood Lumber Company, Inc., is designated as an S-corporation.

23. This action arises under the Constitution and laws of the United States. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361, jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 2000bb-1, 5 U.S.C. § 702, and Fed. R. Civ. P. 65, and to award reasonable attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, and 42 U.S.C. § 1988.

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

FACTUAL ALLEGATIONS

I. Geneva College's Religious Beliefs and Provision of Educational Services in General

25. Geneva College was established in 1848 by the Reformed Presbyterian Church of North America (RPCNA). The College's mission is to glorify God by educating and ministering to a diverse community of

students in order to develop servant-leaders who will transform society for the kingdom of Christ.

26. The College pursues this mission through biblically-based programs and services anchored in the historic, evangelical, and Reformed Christian faith. The vocationally-focused curriculum is rooted in the liberal arts and sciences and is delivered through traditional and specialized programs.

27. Central to the mission of Geneva College is its desire to glorify God. The College believes that the Bible teaches that the lives of all people (especially followers of Jesus Christ) should glorify God. The College embraces the oft-quoted statement of the Westminster Shorter Catechism: "Man's chief end is to glorify God and enjoy Him forever."

28. Geneva College believes that one of its central purposes is "to see the glory of God in all the aspects of His Word and world. This is furthered by having students, faculty and, ultimately, the whole of academe see the glory that is God's in His creation, deeds, disciples and, above all, in His Son, the Lord of Glory."

29. Geneva College follows the creedal commitment in the application to many of its policies and practices that flow from the Reformed Presbyterian Church of North America. That commitment is derived from the Holy Bible and is articulated in the Westminster Confession of Faith, the Westminster Larger and Shorter Catechisms, and the Testimony of the RPCNA.

30. Members of Geneva's Board of Corporators, which governs the College, must be members in good standing of the Reformed Presbyterian Church of

North America. The Synod of the RPCNA elects all members of the Board of Corporators. The Board of Corporators exercises control for the RPCNA over the purpose, policies, and property of the College.

31. The RPCNA is a church and/or convention or association of churches and thus need not file an informational return with the Internal Revenue Service under 26 U.S.C. § 6033(a)(3)(A)(i).

32. If the College were an "integrated auxiliary" of the RPCNA, it would fall within the scope of the narrow religious exemption to the HHS Mandate. Because the College and the RPCNA chose not to structure their relationship this way, the College falls outside the scope of the exemption and is thus subject to the Mandate.

33. A Board of Trustees operates Geneva College under authority delegated by the Board of Corporators. Trustees must be members of either the RPCNA or other Reformed and Evangelical Christian congregations.

34. Geneva College draws its faculty, staff, and administration from among those who profess faith in Christ and otherwise agree with the College's Christian convictions, including its convictions about the sanctity and dignity of human life.

35. Although the College does not require a profession of faith as a prerequisite for student admission, it does give priority in its recruitment to the evangelical Christian community and seeks to create a Christian peer influence among students. All students are expected to live by the standards of historic Christian morality, including those expressed in the Ten Commandments.

36. Geneva College has a long history of providing education to individuals from segments of society that have been disenfranchised. In the years following the Emancipation Proclamation of 1863, a significant percentage of its students were freed black slaves. Geneva was among the earliest schools to matriculate women to a full degree program. The College is building on that history through special efforts to recruit and retain African-American, Latino, other minority, and international students, believing that its student body should reflect the diversity of our world.

37. At certain points in its history, Geneva has found it necessary to engage in civil disobedience of unjust laws. In the 1860s, Geneva College was a station on the Underground Railroad, which sought, against the law of the land, to hide and transport escaped slaves. The College believed that the institution of slavery was inimical to biblical faith.

38. The College's current total enrollment (including traditional undergraduate, adult undergraduate, and graduate students) is approximately 1,850.

39. The College has approximately 350 employees, and about 280 of them are full-time. There are approximately 95 full-time faculty members.

II. The Religious Beliefs of Geneva College and of the Reformed Presbyterian Church of North America Regarding Abortion

40. The RPCNA Testimony, one articulation of the Church's religious beliefs, declares as follows: "Unborn children are living creatures in the image of God. From the moment of conception to birth they

are objects of God's providence as they are being prepared by Him for the responsibilities and privileges of postnatal life. Unborn children are to be treated as human persons in all decisions and actions involving them. Deliberately induced abortion, except possibly to save the mother's life, is murder."

41. In support of this declaration, the Testimony cites Exodus 20:13 ("thou shalt not murder"), Exodus 21:22-23, and Psalm 139:13-16, all of which the College believes are part of the inerrant and infallible Word of God.

42. The Westminster Larger Catechism, another articulation of the Church's beliefs, sets forth the duties required by the Commandment against murder (which the Catechism numbers as the Sixth Commandment). These include "all careful studies, and lawful endeavors, to preserve the life of ourselves and others by resisting all thoughts and purposes, subduing all passions, and avoiding all occasions, temptations, and practices, which tend to the unjust taking away the life of any . . . and protecting and defending the innocent." In support of this statement, the Larger Catechism cites the following Scripture verses: Eph. 5:28-29; 1 Kings 18:4; Jer. 26:15-16; Acts 23:12, 16-17, 21, 27; Eph. 4:26-27; 2 Sam. 2:22; Deut. 22:8; Matt. 4:6-7; Prov. 1:10-11, 15-16; 1 Sam. 24:12; 1 Sam. 26:9-11; Gen. 37:21-22; Ps. 82:4; Prov. 24:11-12; 1 Sam. 14:45; Jas. 5:7-11; Heb. 12:9; 1 Thess. 4:11; 1 Pet. 3:3-4; Ps. 37:8-11; Prov. 17:22; Prov. 25:16, 27; 1 Tim. 5:23; Isa. 38:21; Ps. 127:2; Eccl. 5:12; 2 Thess. 3:10, 12; Prov. 16:26; Eccl. 3:4, 11; 1 Sam. 19:4-5; 1 Sam. 22:13-14; Rom. 13:10; Luke 10:33-34; Col. 3:12-13; Jas. 3:17; 1 Pet. 3:8-11; Prov. 15:1; Judg. 8:1-3; Matt. 5:24; Eph. 4:2,

32; Rom. 12:17, 20-21; 1 Thess. 5:14; Job 31:19-20; Matt. 25:35-36; and Prov. 31:8-9.

43. The Westminster Larger Catechism also identifies "the sins forbidden in the sixth commandment." Among these are "all taking away the life of ourselves, or of others, except in case of public justice, lawful war, or necessary defence; the neglecting or withdrawing the lawful and necessary means of preservation of life; . . . and whatsoever else tends to the destruction of the life of any." In support of this statement, the Larger Catechism cites the following Scripture verses: Acts 16:28; Gen. 9:6; Num. 35:31, 33; Jer. 48:10; Deut. 20:1-20; Ex. 22:2-3; Matt. 25:42-43; Jas. 2:15-16; Eccl. 6:1-2; Matt. 5:22; 1 John 3:15; Lev. 19:17; Prov. 14:30; Rom. 12:19; Eph. 4:31; Matt. 6:31, 34; Luke 21:34; Rom. 13:13; Eccl. 12:12; Eccl. 2:22-23; Isa. 5:12; Prov. 15:1; Prov. 12:18; Ezek. 18:18; Ex. 1:14; Gal. 5:15; Prov. 23:29; Num. 35:16-18, 21; and Ex. 21:18-36.

44. The Foreword to a recent re-issue of the 1888 *History of the Reformed Presbyterian Church in America* observes that the Testimony "has been updated to keep pace." As an example, the Foreword states that "[t]he Church of 1888 did not make reference to willful abortion, as that was not an issue. Today, however, abortion is one of the most dynamic social controversies, and we should praise God that he has enabled this church to maintain a testimony against such murder."

45. Geneva College unreservedly shares the RPCNA's religious views regarding abortion, believing that the procurement, participation in, facilitation of, or payment for abortion (including

abortion-causing drugs like Plan B and ella) violates the Commandment against murder (and the interpretation of that Commandment in the Westminster Standards) and is inconsistent with the dignity conferred by God on creatures made in His image.

46. By "conception," "pregnancy," "abortion" and related concepts referenced herein regarding the sanctity of innocent human life and prohibitions on its destruction, Geneva College understands such concepts to recognize and protect the lives of human beings from the moment of fertilization.

47. The College has participated in Life Ring, a community-wide pro-life awareness campaign that encourages churches with bell towers to ring their bells in mourning on the anniversary of the U.S. Supreme Court's 1973 decision in *Roe v. Wade*.

48. Geneva has sponsored public events in which it has explored the religious dimensions of the abortion issue. These include an October 18, 2011, panel discussion entitled, "Abortion: Is it an Issue of Justice for the Mother or Unborn Child?"

49. Geneva's publications frequently highlight the pro-life activities of students, alumni, and staff. For example, the March 2005 issue of a College newsletter reported on a letter sent by the College's student-led pro-life group to President George W. Bush, supporting the "culture of life" discussed in the President's 2005 state of the union address. The February/March 2009 issue of the newsletter reported on the volunteer work of three Geneva staff members at a local pro-life pregnancy resource center. On January 21, 2009, Brenda Schaeffer

delivered a message at the College chapel service regarding the value of human life and the heartache she experienced after having an abortion.

50. In January 2012, a group of Geneva College students and a staff member went to Washington, DC, to participate in the annual March for Life, at which they expressed their support for the sanctity of human life and their opposition to the Supreme Court's decision in *Roe v. Wade*.

51. Geneva College does not permit members of its community to participate in abortion. The Student Handbook states that "[m]orally unacceptable practices according to Biblical teaching are not acceptable for members of the Geneva College community. Specific acts such as . . . sexual sins (i.e. premarital sex, cohabitation with a member of the opposite sex, rape, adultery, homosexual behavior, abortion, etc.) . . . will not be tolerated."

III. Geneva College's Group Health Insurance Plans

52. To fulfill its religious commitments and duties in the Christ-centered educational context, Geneva College promotes the spiritual and physical well-being and health of its employees and students. This includes the provision of generous health insurance to employees and their dependants and the facilitation of a student health plan.

53. The plan year for the current employee health plan began on January 1, 2013. The next plan year is scheduled to begin on January 1, 2014.

54. Consistent with its religious beliefs about the sanctity of life, Geneva College's contract for

employee health coverage states that it excludes "[a]ny drugs used to abort a pregnancy."

55. The College requires that all full-time undergraduate students carry health insurance. If a student does not provide the College information about his or her health insurance coverage, the student will be enrolled in the College's UnitedHealthcare Plan. Full-time graduate students may enroll in the College's UnitedHealthcare Plan on a voluntary basis.

56. The College's religious convictions prevent it from facilitating student health insurance coverage that enables or facilitates access to ella, Plan B, or IUDs. The student health plan for the 2013-14 academic year does not include coverage of these items.

57. The student plan does not possess grandfathered status.

58. The plan year for the student plan began on August 1, 2013. It is scheduled to begin on August 1, 2014 for the 2014-15 academic year.

IV. The Heplers and Their Religious Beliefs in Business Practice

59. Wayne L. Hepler, his wife, and their adult children and families including Carrie E. Kolesar (collectively, "the Heplers") are practicing and believing Catholic Christians.

60. They strive to follow Catholic ethical beliefs and religious and moral teachings in all areas of their lives, including in the operation of their businesses.

61. The Heplers' sincerely-held religious convictions do not allow them to violate Catholic

religious and moral teachings in their decisions about the operation of their businesses. They believe that according to the Catholic faith their operation of their businesses must be guided by ethical social principles and Catholic religious and moral teachings, that the adherence of their business practice according to such Catholic ethics and religious and moral teachings is a genuine calling from God, that their Catholic faith prohibits them to sever their religious beliefs from their daily business practice, and that their Catholic faith requires them to integrate the gifts of the spiritual life, the virtues, morals, and ethical social principles of Catholic teaching, into their life and work.

62. The Catholic Church teaches that abortifacient drugs, contraception and sterilization are intrinsic evils.

* * *

[Page 33]

181. Despite the accommodation's convoluted machinations, a religious organization's decision to offer health insurance and its self-certification continue to serve as the sole triggers for creating access to free contraceptive and abortifacient services to its employees and plan beneficiaries from the same insurer they are paying for their insurance plan.

182. The College cannot participate in or facilitate the government's scheme without violating its religious convictions.

The Final Mandate and Plaintiffs' Health Insurance Plans

183. The plan year for the College's next employee health plan begins on January 1, 2014. As a result, the College now faces a choice. It can transgress its religious commitments by including abortifacients in the plan or by directing its insurance issuer to provide the exact same services. Or it can transgress its religious duty to provide for the well-being of its employees and their families by dropping its employee health insurance plan altogether in order to avoid being complicit in the provision of abortifacients, thereby incurring annual fines of at least $500,000.

184. Although the government has recently announced that it will postpone implementing the annual fine of $2000 per employee for organizations that drop their insurance altogether, the postponement is only for one year, until 2015. This postponement does not delay the crippling daily fines under 26 U.S.C. § 4980D or lawsuits under 29 U.S.C. § 1132.

185. The plan year for the College's next student plan begins on August 1, 2014. As a result, the College will face a choice in the period leading up to that date. It can transgress its religious commitments by including abortifacients in the plan or by triggering its insurance issuer to provide the exact same services by providing the self-certification. Or it can transgress its religious duty to provide for the well-being of its students by dropping its student health insurance plan altogether in order to avoid being complicit in the provision of abortifacients.

186. The College's religious convictions forbid it from participating in any way in the government's scheme to provide free access to abortifacient services through the College's health care plans.

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

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

189. The Final Mandate forces the College to facilitate government-dictated education and counseling concerning abortion that directly conflicts with its religious beliefs and teachings.

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

191. Small employers such as the Hepler Plaintiffs suffer substantial burdens under the Mandate if they are forced to choose between providing health insurance consistent with their religious beliefs or providing no health insurance at all.

192. The "option" of the Hepler Plaintiffs to drop their employee health insurance would take health insurance away from their needy employees in violation of the Heplers' religious beliefs.

193. The "option" of the Hepler Plaintiffs to drop their employee health insurance would take health insurance away from themselves, their sibling co-owners and their families as employees and beneficiaries of the same plans, harming their families' well-being.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVA COLLEGE; WAYNE L. HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; and CARRIE E. KOLESAR;	)	
Plaintiffs,	)	
v.	)	Case No. 2:12-cv-00207-JFC
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN	)	

SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

DECLARATION OF TIMOTHY R. BAIRD IN SUPPORT OF GENEVA COLLEGE'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury the following:

l. I am Associate Vice President of Operations and Human Resources at Geneva College.

2. The allegations pertaining to Geneva College in the First Amended Complaint filed in this Court on May 31, 2012 (ECF No. 32 are true and correct.

3. The College will send out invoices to students and their families for the fall 2013 semester on or about June 30, 2013.

4. No later than June 20, 2013 (and preferably by June 15, 2013), the College will need to know whether to bill students for student health insurance for the fall 2013 semester.

5. No later than June 20, 2013 (and preferably by June 15, 2013), the College must inform its insurance broker (First Risk Advisors) and student plan insurer (United HealthCare) whether it will enter into an agreement regarding a student health plan for the 2013-2014 school year.

6. If the Court grants Geneva's Motion for Preliminary Injunction by June 20, 2013, the College will enter into an agreement with the broker and insurer for a student health plan for the 2013-2104 school year.

7. If the Court denies Geneva's Motion for Preliminary Injunction or does not rule by June 20, 2013, the College will not enter into an agreement with the broker and insurer for a student health plan for the 2013-2014 school year.

8. The College deems it sinful and immoral to facilitate a student plan that includes coverage for abortifacients. The College deems it sinful and immoral to facilitate a student plan, participation in which entitles a student to access insurance coverage of abortifacients. The College believes that the facilitation of such a plan would undermine its efforts to inculcate its students with Christian ethical principles, including compliance with the Sixth Commandment ("Thou shalt not murder").

9. If the Court grants the College's Motion for Preliminary Injunction, the insurer and broker will provide Geneva a student plan that excludes the abortifacients to which the College objects.

10. Many Geneva students rely upon the College to make a comparatively affordable group health plan available to them. Many Geneva students, especially returning students, reasonably expect that the College will once again make health insurance available to them for the 2013-14 school year.

11. Effective January 1, 2014, the Affordable Care Act will require Geneva students to possess health insurance coverage. If the College is unable, for

reasons of conscience, to facilitate a student plan for the 2013-14 school year, Geneva students who would otherwise have participated in the College's student plan will be forced to obtain insurance elsewhere.

Executed on this 20th day of May, 2013.

/s/ Timothy R. Baird
TIMOTHY R. BAIRD
Associate Vice President of
Operations and Human Resources