IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA, an association of churches and schools, THE MOST REVEREND WILTON D. GREGORY, and his successors, Archbishop of THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA; CHRIST THE KING CATHOLIC SCHOOL; CATHOLIC CHARITIES OF THE ARCHDIOCESE OF ATLANTA, INC., a Georgia non-profit corporation; THE ROMAN CATHOLIC DIOCESE OF SAVANNAH, an ecclesiastical territory, and THE MOST REVEREND JOHN HARTMAYER, and his successors, Bishop of THE ROMAN CATHOLIC DIOCESE OF SAVANNAH,

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO.: 03489-WSD

FIRST AMENDED AND RECAST COMPLAINT

Pursuant to Fed. R. Civ. P. Rule 15(a)(1)(B), Plaintiffs hereby submit their First Amended and Recast Complaint, which shall substitute for and supersede Plaintiffs' original Complaint in this action (Doc 1), and state as follows:

1. This lawsuit is brought to vindicate one of America's most fundamental freedoms: the freedom to practice one's religion without governmental interference. The United States Government (the "Government") is attempting to force Plaintiffs—all Catholic entities—to provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization, and contraception in violation of their sincerely held religious beliefs. Plaintiffs acknowledge that individuals in this country have a legal right to these medical services; they are, and will continue to be, freely available in the United States, and nothing prevents the Government itself from making them more widely available. But the right to such services does not authorize the Government to co-opt religious entities like Plaintiffs into providing or facilitating access to them. Indeed, American history and tradition, embodied in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb *et seq.* ("RFRA"), prohibit just this sort of overbearing and oppressive governmental

action. Plaintiffs therefore seek relief in this Court to protect this most cherished of American rights.

2. Plaintiffs are Catholic religious entities that provide a wide range of spiritual, educational, social and medical services to residents, both Catholic and non-Catholic alike, throughout the State of Georgia.

3. The Roman Catholic Archdiocese of Atlanta (the "Atlanta Archdiocese") is an association of those Roman Catholic parishes and organizations located in the 69 counties in northern Georgia under the pastoral care of the Most Reverend Wilton D. Gregory ("Archbishop Gregory"), and his successors in office. The Atlanta Archdiocese carries out its mission directly, through the work of affiliated Catholic entities and associations, and through the education of students in 18 Catholic schools operated by and within the Atlanta Archdiocese, including Plaintiff Christ the King Catholic School ("Christ the King School").

4. Plaintiff Catholic Charities of the Archdiocese of Atlanta, Inc. ("Catholic Charities"), a nonprofit Georgia corporation headquartered in Atlanta, Georgia, with five regional offices located throughout northern Georgia, is a charitable organization committed to providing "an advocate and friend for individuals and families facing adversity." Catholic Charities provides "a holistic

combination of accredited social services—life skills education, counseling, family stabilization, and immigration legal services—that remove barriers to self-sufficiency and wholeness." Catholic Charities serves its neighbors in multiple languages, and regardless of background.

5. Plaintiff the Catholic Diocese of Savannah (the "Diocese of Savannah") is a religious association of parishes and schools inclusive of those Roman Catholic parishes and organizations located in 90 counties in south Georgia under the pastoral care of the Most Reverend John Hartmayer ("Bishop Hartmayer"), Bishop of the Roman Catholic Diocese of Savannah and his successors in office. The Diocese of Savannah carries out its mission directly, through the work of affiliated Catholic entities and associations, and through the education of students in its Catholic schools.

6. Plaintiffs' work is in every respect guided by and consistent with Roman Catholic beliefs. Among those beliefs is the requirement to serve those in need, regardless of their religion. This is perhaps best captured by words attributed to St. Francis of Assisi: "Preach the Gospel at all times. Use words if necessary." As Pope Benedict stated: "love for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to [the Catholic Church] as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the

service of charity any more than she can neglect the Sacraments and the Word." Pope Benedict XVI, *Deus Caritas Est* ¶ 22 (2006).

7. Plaintiffs address the needs of Georgia residents in numerous different ways. The Atlanta Archdiocese and the Diocese of Savannah serve families through the education of the students attending their Catholic school systems, which are devoted to teaching a religiously and ethnically diverse student body. Both provide charitable service statewide through dozens of programs undertaken by their respective parishes.

8. Catholic belief includes the firm conviction that sexual union should be reserved to married couples who are so committed to each other that they are open to the creation of life. Thus, artificial interference with the creation of life, including through abortion, sterilization, or contraception, is contrary to core Catholic doctrine.

9. Defendants have promulgated various rules (collectively, "the U.S. Government Mandate"), as part of the 2010 Patient Protection and Affordable Care Act (the "Affordable Care Act" or the "Act"), that would require many Catholic and other religious organizations to provide health plans to their employees that include and/or facilitate coverage for abortion-inducing drugs, sterilization,

contraception, and related counseling services, in violation of their sincerely held religious beliefs.

10. The U.S. Government Mandate is subject to a narrow exemption (the "Exemption") for certain "religious employers" who can convince the Government that they satisfy four criteria:

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

Unlike broader religious exemptions available under other federal laws, the Exemption forces religious employers to seek a determination from a government bureaucrat that they are sufficiently "religious" before they can exercise their religious freedoms.

11. Because of the narrow and vague terms of the Exemption, as well as the arbitrary and discretionary nature of the determination it calls for, the Atlanta Archdiocese and the Diocese of Savannah do not know whether they qualify for the Exemption or whether the Government will conclude that they do. Before they

can find out, they must submit to an intrusive and arbitrary governmental investigation into whether, in the discretionary view of the Government, their "purpose" is the "inculcation of religious values"; whether they "primarily" employ "persons who share [their] religious tenets" (even though they do not consider religious affiliation in hiring for most positions); and whether they "primarily" serve such people (even though their schools and programs are open to those of all faiths). Regardless of outcome, Plaintiffs strongly object to such an intrusive, arbitrary and misguided governmental investigation into their religious missions.

12. The Exemption's narrow definition of "religious employer" likely excludes Catholic Charities and Christ the King School, even though they are "religious" organizations under any reasonable definition, because they do not "primarily employ" or "primarily serve" only Catholics. Consequently, to attempt to qualify as a "religious employer," these Plaintiffs may be required to stop providing educational opportunities to non-Catholics throughout Georgia, stop serving non-Catholics in the State, and fire all non-Catholic employees—actions that would run counter to their Catholic faith and commitment to serve all in need without regard to religion.

13. Because Plaintiffs provide their services to persons in need without regard to religious affiliation, and do not consider religious affiliation in hiring for most positions, each of the Plaintiffs is unclear as to whether it qualifies as a "religious employer" under the Exemption.

14. The U.S. Government Mandate and its purported Exemption are irreconcilable with the First Amendment, RFRA, and other laws. The Government has not shown any compelling interest in forcing Plaintiffs to provide, pay for, and/or facilitate access to abortion-inducing drugs, sterilization, and contraception, or for requiring Plaintiffs to submit to an intrusive and discretionary governmental examination of their religious missions. Nor has the Government shown that the U.S. Government Mandate is narrowly tailored to advance the Government's interest in ensuring access to these services, given that such services are already widely available and nothing prevents the Government from providing or paying for them directly through a duly enacted law. The Government, therefore, cannot justify its decision to force Plaintiffs to provide, pay for, and/or facilitate access to these services in violation of Plaintiffs' sincerely held religious beliefs.

15. Accordingly, Plaintiffs respectfully request that the Court enter an order declaring that the U.S. Government Mandate is contrary to the First Amendment, RFRA, and the Administrative Procedure Act ("APA"), and therefore

invalid. Plaintiffs further request that this Court enjoin Defendants from enforcing the U.S. Government Mandate against Plaintiffs.

THE PARTIES

ARCHBISHOP GREGORY AND THE ATLANTA ARCHDIOCESE

16. The Atlanta Archdiocese is an unincorporated association of 99 parishes and 18 Catholic schools, with its principal place of business in Smyrna, Georgia. It is organized exclusively for charitable, religious, and educational purposes under Section 501(c)(3) of the Internal Revenue Code ("IRC").

17. Archbishop Gregory, in his capacity as Archbishop of the Atlanta Archdiocese, is responsible for serving more than 900,000 Catholics residing throughout 69 counties in northern Georgia. Originally established in 1956 by a division of the Diocese of Savannah, the Atlanta Archdiocese was elevated to the rank of archdiocese on February 10, 1962.

18. Archbishop Gregory is assisted in his ministry by a staff of clergy, religious brothers and sisters, and lay people. Except where religion is a bona fide requirement for fulfilling a job requirement, the Atlanta Archdiocese imposes no religious litmus test on its employees and employs Catholics and non-Catholics alike.

19. The Atlanta Archdiocese carries out a tripartite spiritual, educational, and social service mission, largely through its 99 parishes. Through the ministry of its priests, the Atlanta Archdiocese ensures the regular availability of the Sacraments to all Catholics living in or visiting the northern part of Georgia.

THE ATLANTA CATHOLIC SCHOOLS

20. The Catholic Church's teaching ministry within the Atlanta Archdiocese is conducted largely through 18 Catholic schools, including Plaintiff Christ the King School. Collectively, they serve more than 9,800 students and employ more than 1,500 full-time and 2,700 part-time teachers and administrators.

21. The Catholic schools within the Atlanta Archdiocese, including Christ the King School, welcome students of any or no faith. To serve as many children as possible, the Atlanta Archdiocese expends significant funds in tuition assistance programs. A substantial number of the students and faculty are not Catholic.

22. The Catholic schools within the Atlanta Archdiocese have established certain priorities that distinguish them from public educational institutions. They provide an education based on Christ's teaching and Catholic values, and focus on the formation of strong moral character, the furtherance of academic excellence, the inspiration to serve others and the motivation to achieve the students' potential in the local and the world communities. High academic standards help each

student reach his or her potential. Nationally, 99.4% of students in Catholic high schools graduate.

CATHOLIC CHARITIES

23. Catholic Charities is a nonprofit Georgia corporation that is part of the Catholic ministry of the Atlanta Archdiocese. It is organized exclusively for charitable, religious, and educational purposes under IRC § 501(c)(3).

24. The mission of Catholic Charities is to be a faith-based advocate and friend for individuals and families facing adversity by providing multiple accredited social services that remove barriers to self-sufficiency and wholeness. Last year, Catholic Charities directly served more than 21,000 people, without regard to religious affiliation.

25. Catholic Charities serves the needy, underserved, and underprivileged in countless ways, including immigration legal services, refugee resettlement services, outpatient mental health counseling, foreclosure intervention and prevention, disaster preparedness and response education, financial literacy education, English language instruction, and marriage counseling. More than 75 professionals at Catholic Charities provide services to those in need in over 16 languages.

26. Serving the needs of women and children is a priority of Catholic Charities. It operates numerous programs for new and prospective mothers, including in-home parenting education, pregnancy support services, post-adoption services, and play therapy for children. The pregnancy support counselors at Catholic Charities focus on the prospective mother's emotional needs during pregnancy, and help mothers to make positive, long-term plans for the child. Last year, 46 women were counseled through the pregnancy support program, and 86% of the mothers who received counseling prior to the birth of their child actively prepared for the child by making a parenting, kinship, or adoption plan.

27. Catholic Charities provides millions of dollars in services annually (excluding administrative and fund-raising costs) for the communities it serves.

28. Catholic Charities believes "we serve God by serving our neighbor. Though 'Catholic' is in our name, we serve people of every faith." It does not ask whether the people it serves are Catholic.

29. Catholic Charities maintains offices in Atlanta, Chamblee, Lilburn and Athens, Georgia. It also provides counseling services at parishes throughout northern Georgia, including parishes in Alpharetta, Conyers, Cumming, Douglasville, Lawrenceville, Marietta, Norcross, Duluth, Flowery Branch, Hapeville, Johns Creek, Peachtree City, Roswell, Sandy Springs, and Woodstock.

The people who work at Catholic Charities are employed by the Atlanta Archdiocese, which, by agreement, shares them with Catholic Charities. Catholic Charities does not inquire about the religious commitments of its applicants for employment and does not know how many of its employees are Catholic.

BISHOP HARTMAYER AND THE DIOCESE OF SAVANNAH

30. The Diocese of Savannah is a religious association of parishes and schools, with its principal place of business located in Savannah, Georgia. It is organized exclusively for charitable, religious, and educational purposes under IRC § 501(c)(3).

31. Bishop Hartmayer, in his capacity as Bishop of the Diocese of Savannah, is responsible for 55 parishes and 24 missions in 90 counties located throughout the southern part of Georgia. The Diocese of Savannah has been serving these communities since it was established by Pope Pius IX in 1850. It currently serves a Catholic population of more than 77,000 people.

32. Since 2011, Bishop Hartmayer has overseen the multifaceted mission of delivering spiritual, educational, and social services to residents, both Catholic and non-Catholic alike, of the region. The parishes maintain their own charitable efforts and serve an indeterminate number of persons of all faiths who are homeless, hungry, elderly, or otherwise in need of material assistance. Because it

serves people regardless of their faith, the Diocese of Savannah does not know how many of those that it serves are Catholic.

33. The Diocese of Savannah employs hundreds of people, the majority of whom are full-time employees. While most of these employees likely identify themselves as Catholic, except where religion is a bona fide requirement for the job, the Diocese does not inquire into faith for employment positions. Consequently, the Diocese does not know whether a majority of its employees share its religious tenets.

34. The Diocese of Savannah also serves the community through its Catholic schools. The Office of Catholic Schools is vested with responsibility for all of the Catholic schools within the Diocese, which include 16 elementary schools, five high schools, and various preschool programs. Collectively, these schools educate approximately 5,000 students.

35. The mission of the Diocese of Savannah Catholic Schools is to "encourage[ ] and support[ ]" students to reach the fullness of their potential spiritually, intellectually, aesthetically, emotionally, socially, and physically." These Catholic schools offer an educational experience unlike any other in the area. As Cardinal Donald Wuerl said about Catholic education: "We educate

people not just for exams, but for life eternal. We educate the whole person: mind, body, and spirit."

36. Like the Catholic schools of the Atlanta Archdiocese, the Catholic schools of the Diocese of Savannah maintain high standards for academic excellence.

37. The Diocese of Savannah schools are open to and serve all children, without regard to the students' religion, race or financial condition. To make a Catholic education available to as many children as possible, the Diocese of Savannah expends substantial funds in tuition assistance programs. Approximately one-third of the students who attend the Catholic schools of the Diocese of Savannah are not Catholic, and approximately one-quarter of them are minorities.

38. The Diocese of Savannah schools do not consider religious affiliation in hiring for most positions. While the Diocese does not know exactly how many teachers in its schools are Catholic, it is likely that a substantial percentage of the Diocese's teachers do not share its religious tenets.

THE IMPACTED HEALTH PLANS

39. The Atlanta Archdiocese operates the Roman Catholic Archdiocese of Atlanta Group Health Care Plan (the "Atlanta Plan"), which provides coverage to the employees of the Atlanta Archdiocese, Christ the King School and Catholic

Charities (collectively, the "Atlanta Plaintiffs"). It does not contract with a separate insurance company to provide health care coverage to its employees. Instead, the Archdiocese itself functions as the insurance company, underwriting its employees' medical costs. The Archdiocese contracts with Meritain Health to provide certain claims and other related administration services. The Atlanta Plan does not cover abortion-inducing drugs or sterilization. Contraceptives are not covered by the plan unless they are necessary for medically diagnosed conditions unrelated to contraception.

40. The Atlanta Plan year begins on January 1.

41. The Diocese of Savannah operates two self-insured health plans (collectively, the "Savannah Plan") that provide coverage to the employees of the Diocese, the parishes, and the schools within the Diocese. Third-party administrator Meritain Health manages benefit applications, claims processing, and payment of claims for the Savannah Plan on behalf of the Diocese of Savannah. The Savannah Plan does not cover abortion-inducing drugs or sterilization. Contraceptives are not covered by the plan unless they are necessary for medically diagnosed conditions unrelated to contraception.

42. The Savannah Plan year begins on July 1.

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

44. Because of financial pressures caused by increasing healthcare costs, the Diocese of Savannah was forced to modify significantly its existing Plan on July 1, 2011. Among other changes, the Diocese of Savannah increased employee deductibles and out-of-pocket maximums by approximately 33% above those amounts associated with the Savannah Plan as of March 23, 2010. Further, the Diocese of Savannah introduced an additional "Value Plan" for its employees on July 1, 2012. Plaintiffs believe that because of these changes and others the

Savannah Plan does not meet the Affordable Care Act's definition of a "grandfathered plan."

45. Plaintiffs believe that the Atlanta Plan currently meets the Affordable Care Act's definition of a "grandfathered plan." As a result of this, the Atlanta Archdiocese has included a statement describing its grandfathered status in its Plan materials, as required by 26 C.F.R. § 54.9815-1251T(a)(2)(ii).

46. To maintain their putative grandfathered status, however, the Atlanta Plaintiffs are locked into their current health plan, unable to adjust it in response to the ever-changing health care marketplace. Thus, to avoid compromising their core religious beliefs, the Atlanta Plaintiffs are stuck in perpetuity with providing their current Plan, and forgoing necessary modifications that would benefit their plan participants and the organizations as a whole.

47. In any event, the Atlanta Plaintiffs will lose their grandfathered status in the near future for reasons that cannot be avoided. For example, the employer contribution to the premium cannot decrease by more than 5% of the cost of coverage compared to the employer contribution on March 23, 2010. 26 C.F.R. §54.9815-1251T(g)(1)(v). The Atlanta Plan's costs, however, have increased by 14% a year since March 23, 2010. The Atlanta Plaintiffs have had to absorb the bulk of these millions of dollars in increased healthcare premiums since March 23,

2010, and may be unable to continue to do so without threatening the overall solvency of the Atlanta Plaintiffs. Given the well-established, long term trajectory of health care costs, the Atlanta Plaintiffs anticipate that, as employers, they will be unable to continue to pay within 5 percentage points of what they had paid in 2010 by January 1, 2014. Even the Government acknowledges that, as health costs escalate, the number of grandfathered health plans will decrease substantially in the near future. *See* 75 Fed. Reg. 41,726, 41,731 (July 19, 2010).

THE GOVERNMENT DEFENDANTS

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

STATUTORY BACKGROUND

THE AFFORDABLE CARE ACT

57. On March 23, 2010, Congress enacted the Affordable Care Act. *See* Pub. L. No. 111-148, 124 Stat. 119. The Act significantly amended the Public Health Service Act by establishing many new requirements for "group health plans," broadly defined as "employee welfare benefit plans" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1), that "provide[] medical care . . . to employees or their dependents." 42 U.S.C. § 300gg-91(a)(1). The Act, for example, prohibits an employer's group health plan from excluding employees based on preexisting medical conditions, *see* Pub. L. No. 111-148 § 1201, 124 Stat. 154 (codified, as amended, at 42 U.S.C. §

300gg-3(a)), and requires the plan to provide dependent coverage to employees' children until they turn 26 years old, *see* Pub. L. No. 111-148 § 1001(5), 124 Stat. 132 (codified at 42 U.S.C. § 300gg-14(a)).

58. The Act requires an employer's group health plan to cover women's "preventive care," stating that: "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum[,] provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." Pub. L. No. 111-148 § 1001(5), 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13(a)(4)). The prohibition on "cost sharing requirements" means that a qualified health plan must pay for the full cost of "preventive care" services, without any deductible or co-payment.

59. Several of the Act's provisions, along with other federal statutes, reflect a clear congressional intent that the executive agency charged with identifying the "preventive care" required by § 300gg-13(a)(4) should exclude all abortion-related services. The Act itself states that "nothing in this title (or any amendment made by this title) shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits

for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i). And the Act left to "the issuer of a qualified health plan," not the Government, the ability "[to] determine whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii). Likewise, the so-called Weldon Amendment, which has been included in every HHS and Department of Labor appropriations bill since 2004, states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat 786, 1111 (2011).

60. The legislative history of the Act also demonstrates a clear congressional intent to prohibit the executive branch from requiring group health plans to provide abortion-related services. The House of Representatives originally passed a bill that included an amendment by Congressman Bart Stupak expressly prohibiting the use of federal funds for abortion services. *See* H.R. 3962, 111th Cong. § 265 (Nov. 7, 2009). The Senate version, however, lacked that restriction. S. Amend. No. 2786 to H.R. 3590, 111th Cong. (Dec. 23, 2009). The

two respective bills contained many different provisions, and so they needed to be reconciled into a final bill passed by both houses. After the passage of the Senate version, however, Senator Scott Brown won a special election in Massachusetts. Any reconciled bill, therefore, was likely to face a filibuster in the Senate. To avoid defeat, congressional proponents of the Act engaged in a procedure known as "budget reconciliation," which required the House to adopt the Senate version of the bill largely in its entirety. Congressman Stupak and other pro-life House members, however, indicated that they would refuse to vote for the Senate version because it failed adequately to prohibit federal funding of abortion. To appease these Representatives, President Obama issued an executive order providing that no executive agency would authorize the federal funding of abortion services. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). The Act was, therefore, passed on the central premise that all federal agencies would uphold and follow "longstanding Federal laws to protect conscience" and to prohibit federal funding of abortion services. *Id.* That executive order was consistent with a 2009 speech that President Obama gave at the University of Notre Dame, in which he promised that his Administration would honor the consciences of those who disagree with abortion, and draft sensible conscience clauses.

THE U.S. GOVERNMENT MANDATE

61. Less than two years later, however, Defendants promulgated the U.S. Government Mandate, subverting the Act's clear purpose to protect the rights of conscience. The U.S. Government Mandate, moreover, was implemented contrary to the normal procedural rules required for the promulgation and implementation of rules of this magnitude.

62. In particular, on July 19, 2010, Defendants issued initial interim final rules (the "Interim Rules") concerning § 300gg-13(a)(4)'s requirement that group health plans provide coverage for women's "preventive care." Interim Final Rules, 75 Fed. Reg. 41,726. Defendants arbitrarily dispensed with notice-and-comment rulemaking for the Interim Rules, even though federal law had never previously required coverage of abortion-inducing drugs, sterilization procedures or contraceptives. Defendants offered as an excuse that the APA did not apply to the relevant provisions of the Affordable Care Act and that "it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed." *Id.* at 41,730.

63. The Interim Rules tracked the Affordable Care Act's statutory language by requiring that "a group health plan . . . must provide coverage for all

of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or deductible) with respect to those items or services: . . . (iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan guidelines supported by the Health Resources and Services Administration." Interim Final Rules, 75 Fed. Reg. at 41,728 (codified at 45 C.F.R. § 147.130(a)(iv)).

64. The Interim Rules, however, failed to identify the specific women's "preventive care" services that Defendants planned to require employer group health plans to cover. 42 U.S.C. § 300gg-13(a)(4). Instead, Defendants noted that "[t]he Department of HHS [was] developing these guidelines and expects to issue them no later than August 1, 2011." Interim Final Rules, 75 Fed. Reg. at 41,731.

65. Defendants permitted concerned entities to provide written comments about the Interim Rules. *See id.* at 41,726. But, as Defendants have conceded, they chose not to comply with the notice-and-comment requirements of the APA. *Id.* at 41,730.

66. In response, several groups lobbied to persuade Defendants to include various abortion-inducing drugs and contraceptives in the "preventive care" requirements for group health plans. *See, e.g.*,

http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-supports-initial-white-house-regulations-preventive-care-highlights-need-new-33140.htm. Other commenters noted that "preventive care" could not reasonably be interpreted to include such practices. These groups pointed out that pregnancy was not a disease that needed to be "prevented" and that a contrary view would intrude on the sincerely-held beliefs of many religiously affiliated organizations. *See, e.g.*, Comments of United States Conference of Catholic Bishops, at 1-2 (Sept. 17, 2010), *available at* http://old.usccb.org/ogc/preventive.pdf.

67. On August 1, 2011, HHS announced the "preventive care" services that group health plans would be required to cover under the U.S. Government Mandate. *See* HHS, *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, available at http://www.hhs.gov/news/press/2011pres/08/20110801b.html. Again acting without notice-and-comment rulemaking, HHS announced these guidelines through a press release rather than enactments in the Code of Federal Regulations or statements in the Federal Register. The press release made clear that the guidelines were developed by a non-governmental "independent" organization, the Institute of Medicine ("IOM"). *See id.* The IOM's own report, in turn, included a

dissent that suggested that the IOM's recommendations were made on an unduly short time frame dictated by political considerations and without the appropriate transparency for all concerned persons.

68. HHS's guidelines required insurers and group health plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* http://www.hrsa.gov/womensguidelines/. FDA-approved contraceptives include drugs that induce abortions. For example, the FDA has approved "emergency contraceptives," such as the morning-after pill (otherwise known as Plan B), which can prevent an embryo from implanting in the womb, and Ulipristal (otherwise known as HRP 2000 or ella), which can also induce abortions. These guidelines are in stark contrast with the central compromise necessary for passing the Affordable Care Act and President Obama's promise to protect religious liberty.

FINES AND PENALTIES

69. Violations of the Affordable Care Act subject an employer and an insurer to substantial fines.

70. Under the Internal Revenue Code, certain employers who fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan" will be exposed to significant annual fines of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1).

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

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

73. ERISA may provide for additional fines. Moreover, ERISA plan participants may bring civil actions against insurers for unpaid benefits. 29 U.S.C. § 1132(a)(1)(B); *see also* Cong. Research Serv., RL 7-5700. Similarly, the

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

THE EXEMPTION

74. Two days after HHS announced the guidelines, on August 3, 2011, Defendants issued amendments to the July 2010 Interim Rules (the "Amended Rule"). *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011). Again, Defendants issued the Amended Rule without notice-and-comment rulemaking on the same claimed basis they had provided for bypassing the APA with the July 2010 Interim Rules. *See id.* at 46,624.

75. When announcing the Amended Rule, Defendants ignored the view that "preventive care" should exclude abortion-inducing drugs, sterilization procedures and contraceptives that do not prevent disease. Instead, they noted only that "commenters [had] asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems

contrary to its religious tenets would impinge upon their religious freedom." *Id.* at 46,623. They then sought "to provide for a religious accommodation that respect[ed]" only "the unique relationship between a house of worship and its employees in ministerial positions." *Id.*

76. Specifically, the regulatory Exemption ignored the broader definitions of religious employers already existing in federal law. Instead, the Exemption covered only those employers whose purpose is to inculcate religious values, and who employ and serve primarily individuals of the same religion. Taken on its face, at least some of the Plaintiffs appear not to fit within these criteria. The Exemption provides in full:

> (A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.
>
> (B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:
>
> (1) The inculcation of religious values is the purpose of the organization.

> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Id. at 46,626 (codified at 45 C.F.R. § 147.130(a)(iv)(A)-(B)).

77. The Exemption effectively excludes the health plans of religiously affiliated employers that do not discriminate in providing charitable, educational, and employment opportunities, and who provide such opportunities to all persons, regardless of religious faith.

78. It is unclear whether, if an entity qualifies as a "religious employer" for purposes of the Exemption, any affiliated entity or association (such as Plaintiffs Catholic Charities and Christ the King School) that provides coverage to its employees through the exempt entity's group health plan would also receive the benefit of the Exemption. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,502 (Mar. 21, 2012).

79. Moreover, the Government assumes exclusive and discretionary authority to determine whether and when an organization is sufficiently "religious" so as to qualify for the Exemption -- an unconstitutionally invasive inquiry into an

organization's religious beliefs and practices. For example, the Government must determine the "religious tenets" of an organization and the individuals it employs and serves; whether the organization "primarily" employs and "primarily" serves individuals who "share" the organization's "religious tenets"; and whether "the purpose" of the organization is the "inculcation of religious values."

80. When issuing the Amended Rule, Defendants did not explain why they created such a narrow religious Exemption, nor did Defendants address why they refused to incorporate the other "longstanding Federal laws to protect conscience," which President Obama promised to respect. *See* Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). ERISA, for example, has long excluded "church plans" from its requirements. *See* 29 U.S.C. §§ 1002(33)(C)(iv), 1003. Likewise, the Affordable Care Act itself excludes from its requirement that all individuals maintain minimum essential coverage those individuals with religious objections to receiving benefits from public or private insurance. 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2).

81. Moreover, Defendants did not address whether they have a compelling interest in forcing religiously-affiliated employers to include services in their health plans that are contrary to their religious beliefs. And they failed to

consider whether they could achieve their views of sound policy in a more religiously accommodating manner.

82. Subsequently, the Defendants permitted parties to provide comments to the Amended Rule, which gave the appearance that Defendants were open to good-faith discussion. Numerous organizations expressed the same concerns that they had before, noting that the mandated services should not be viewed as "preventive care." They also explained that the Exemption was "narrower than any conscience clause ever enacted in federal law and narrower than the vast majority of religious exemptions from state contraceptive mandates." Comments of United States Conference of Catholic Bishops, at 1-2 (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf.

THE TEMPORARY ENFORCEMENT SAFE HARBOR AND ANPRM

83. Three months later, allegedly "[a]fter evaluating [the new] comments" to the Amended Rule, Defendants gave their response. Defendant Sebelius issued a short, Friday-afternoon press release, announcing with neither analysis nor reasoning that HHS had decided to keep the Exemption unchanged, but had also created a temporary enforcement safe harbor whereby "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in

their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law." *See* HHS, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html. As noted by Cardinal Timothy Dolan, the release effectively gave objecting religious institutions "a year to figure out how to violate [their] consciences."

84. The temporary enforcement safe harbor ("Safe Harbor") did not delay the Mandate from going into effect on August 1, 2012 -- it only purported to delay the Government's enforcement of the Mandate as against certain individuals and entities, provided those individuals and entities "certify that they qualify for the delayed implementation." *Id.*; *see also* HHS, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (describing procedure for certification under the Safe Harbor). The Safe Harbor does not and cannot restrain private parties from bringing their own lawsuits to enforce the Mandate against Plaintiffs for damages under applicable laws. Nor does the Safe Harbor eliminate or postpone the Government-imposed requirement that the Atlanta Plaintiffs continuously maintain the grandfathered status of their plan to avoid enforcement of the Mandate once the Safe Harbor expires.

85. On February 10, 2012, the White House held a press conference and issued another press release about the U.S. Government Mandate. The White House announced that it had come up with a "solution" by which the insurance companies of religious organizations that object to providing abortion-inducing drugs, sterilization, or contraception services "will be required to directly offer . . . contraceptive care [to plan participants] free of charge." White House, *Fact Sheet: Women's Preventive Services and Religious Institutions* (Feb. 10, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

86. Defendants later explained in the Federal Register that they "plan[ned] to initiate a rulemaking to require issuers to offer insurance without contraception coverage to [an objecting religious] employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer's plan participants (and their beneficiaries) who desire it, with no cost-sharing." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). Defendants further asserted that the rulemaking would "achieve the same goals for self-insured group health plans." *Id.*

87. Defendants then "finalize[d], without change," the Amended Rule containing the religious employer Exemption, 77 Fed. Reg. at 8725, and issued

guidelines regarding the previously announced "temporary enforcement safe harbor" for "non-exempted, non-profit religious organizations with religious objections to [contraceptive] coverage." *Id.* at 8728; Ctr. for Consumer Info. & Ins. Oversight, Guidance on the Temporary Enforcement Safe Harbor (Feb. 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf.

88. On March 16, 2012, Defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM") seeking comment on various ways to structure the proposed accommodation. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). The proposed scenarios require an "independent entity" to provide coverage for the objectionable services at no cost to the participants. But private entities do not provide insurance coverage "for free," and, in any event, the Atlanta Plan and Savannah Plan are self-insured. Moreover, even if these proposals were ever finalized and adopted, they would still require religious organizations to pay for and/or facilitate access to the objectionable services. It is also unclear whether the Government has statutory authority to implement each of the possibilities referenced in the ANPRM.

89. The ANPRM itself does not alter the existing U.S. Government Mandate. Rather, it expresses a vague and non-binding intention to do so at some undefined time in the future. Even a promise to modify the law, whether issued by the White House or in the form of an ANPRM, does not, in fact, alter the law. The U.S. Government Mandate is and remains the current, operative law. Therefore, the Diocese of Savannah has until the start of its next plan year following August 1, 2013, to come into compliance with the U.S. Government Mandate. For their part, the Atlanta Plaintiffs are faced with the untenable choice of remaining grandfathered at prohibitive cost, or complying with the U.S. Government Mandate beginning with the first plan year following August 1, 2013.

THE U.S. GOVERNMENT MANDATE SUBSTANTIALLY BURDENS PLAINTIFFS' RELIGIOUS BELIEFS

90. Freedom of conscience and religious practice drove the founding of our nation. As noted by Thomas Jefferson, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."

91. The U.S. Government Mandate seeks to require Plaintiffs to pay for, provide, and/or facilitate access to services that are contrary to their core religious convictions. The U.S. Government Mandate thus substantially burdens Plaintiffs' firmly held religious beliefs and practices.

92. The U.S. Government Mandate also seeks to compel Plaintiffs to fund related "patient education and counseling for all women with reproductive capacity." It therefore compels Plaintiffs to pay for, provide, and/or facilitate speech that is contrary to their firmly held religious beliefs.

93. On January 27, 2012, Archbishop Gregory drafted a letter to the parishioners of the Atlanta Archdiocese objecting to the U.S. Government Mandate. The letter is available at http://www.archatl.com/archbishops/gregory/writings/2012/letter_archbishop_01272012.pdf. In his letter, Archbishop Gregory stated: "[T]he Administration has cast aside the First Amendment to the Constitution of the United States, denying to Catholics our Nation's first and most fundamental freedom, that of religious liberty. And as a result, unless the rule is overturned, we Catholics will be compelled either to violate our consciences, or to drop health coverage for our employees (and suffer the penalties for doing so)."

94. Bishop Hartmayer wrote a similar letter to the parishioners of the Diocese of Savannah to be read at all masses on the weekend of January 28-29, 2012. The letter is available at http://www.diosav.org/news-HHS-2012?page=1. In the letter, Bishop Hartmayer stated: "Along with my brother bishops and other

religious leaders, I insist that this is a direct attack on our religious freedom and our First Amendment rights."

95. Avoiding the U.S. Government Mandate by leaving the health care market is not a viable option for Plaintiffs. Eliminating their employee group health plans might expose Plaintiffs to substantial fines or penalties of $2,000 per full-time employee per year. If the Atlanta Plaintiffs cease offering health plans to their over 1,500 full-time employees, they may face over $3,000,000 in fines during 2014. Likewise, if the Diocese of Savannah ceases offering its health plans to its approximately 750 full-time employees, it may face approximately $1,500,000 in fines annually. Meanwhile, Plaintiffs' employees would be left scrambling for health insurance.

96. Nor would the ANPRM—even if it were law, which it is not—relieve Plaintiffs from the untenable and unconscionable position in which the U.S. Government Mandate currently puts them.

97. First, the promised "accommodation" would not alter the fact that Plaintiffs would be required to facilitate practices that run directly contrary to their religious beliefs. Catholic teaching does not simply require Catholic institutions to avoid ***directly paying*** for practices they believe are intrinsically immoral. It also requires them to avoid actions that ***facilitate*** those practices.

98. Second, the "accommodation" does not affect the excessively narrow Exemption applicable to "religious employers." Before they may even qualify for the Exemption, religious organizations must submit to an invasive governmental inquiry conducted by the Government, under the direction of Secretary Sebelius, regarding their purpose and religious beliefs. Requiring Plaintiffs to submit to this government-conducted test to determine if they are sufficiently religious is inappropriate and substantially burdens their firmly held religious beliefs. That unconstitutional burden on Plaintiff's First Amendment rights, and the excessive entanglement between the Government and religion that goes with it, will occur no matter what "accommodation" the Government might adopt.

99. It is unclear how the Government defines or will interpret "purpose."

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

101. It is unclear how the Government will ascertain the "religious tenets" of an organization, those it employs, and those it serves.

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

103. To force Plaintiffs to seek to qualify for the Exemption by restricting their charitable and educational mission to Catholics is unconscionable and would have devastating effects on the communities Plaintiffs serve.

104. Finally, as explained below, the U.S. Government Mandate burdens Plaintiffs' religious beliefs right now.

105. In short, while the President claimed to have "f[ou]nd a solution that works for everyone" and that ensures that "[r]eligious liberty will be protected," his proposed accommodation does neither.

THE U.S. GOVERNMENT MANDATE IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY

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

107. The Government has also crafted the Exemption to favor certain religions over others. It applies only to plans sponsored by those religious

organizations that have as their "purpose" the "inculcation of religious values"; that "primarily" serve only individuals that share their "religious tenets"; and that "primarily" employ such individuals. 45 C.F.R. § 147.130(a)(iv)(B).

108. While the Exemption may protect some of the Defendants' favored religious organizations, it does not appear to protect the many Catholic and other religious organizations that educate students, provide vital services to the needy, and employ individuals of all faiths. Yet, because these organizations do not consider religious affiliation in hiring for most positions, or consider the religious affiliation of those they serve, they appear to be denied the Exemption. The U.S. Government Mandate thus discriminates against religious organizations like Plaintiffs because of their religious commitment to educate, serve, and employ people of all, or no, faiths.

THE U. S. GOVERNMENT MANDATE IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST

109. The U.S. Government Mandate is not narrowly tailored to promote a compelling governmental interest.

110. The Government has no compelling interest in forcing Plaintiffs to violate their firmly held religious beliefs by requiring them to provide, pay for, or facilitate access to abortion-inducing drugs, sterilizations, and contraceptives. The Government itself has relieved other employers from this requirement by

exempting plans of employers it deems to be sufficiently religious. These services are already widely available in the United States, and the U.S. Supreme Court has held that individuals have a constitutional right to purchase or otherwise obtain them.

111. Even assuming that the interest is compelling—which it is not—the Government has numerous alternatives to furthering that interest other than forcing Plaintiffs to violate their religious beliefs. For example, the Government could provide or pay for the objectionable services through expansion of its existing network of family planning clinics funded by HHS or though other programs established by a duly enacted law. Or, at a minimum, it could create a broader exemption for religious employers, such as those found in numerous federal and state statutes. The Government cannot demonstrate that requiring Plaintiffs to violate their religious beliefs is the least restrictive means of furthering its claimed interest.

112. The U.S. Government Mandate, moreover, burdens religious freedom while simultaneously undermining the very interests it ostensibly tries to promote by interfering with entities (like Plaintiffs) that serve our society's neediest individuals.

THE U.S. GOVERNMENT MANDATE AND EXEMPTION PRODUCE AN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

113. The U.S. Government Mandate's religious employer Exemption further excessively entangles the Government in defining the purpose and religious tenets of each organization and its employees and beneficiaries.

114. To determine whether a religious organization qualifies for the Exemption, the Government will first have to identify the organization's "religious tenets" and determine whether "the purpose" of the organization is to "inculcate" those tenets. It will then have to conduct an inquiry into the practices and beliefs of the individuals that the organization ultimately employs and educates. The Government will then have to compare and contrast those religious practices and beliefs to determine whether and how many of them are "share[d]."

115. Regardless of outcome, this inquiry is unconstitutional, and Plaintiffs strongly object to such an intrusive governmental investigation into an organization's religious mission.

116. The Exemption is based on an improper Government determination that "inculcation" is a religious employer's only legitimate purpose. The Government should not base exemption on an assessment of the "purity" or legitimacy of an institution's religious purpose. By limiting that legitimate purpose to "inculcation," at the expense of other sincerely held religious purposes,

the U.S. Government Mandate and Exemption interfere with religious autonomy. Religious institutions have the right to determine their own religious purpose, including religious purposes broader than "inculcation," without Government interference and without losing their religious liberties.

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

THE U.S. GOVERNMENT MANDATE IS CAUSING PRESENT HARDSHIP

118. The U.S. Government Mandate is causing serious, ongoing hardship to Plaintiffs now, regardless of any delayed enforcement.

119. Health plans cannot and do not arise overnight. A number of analyses, negotiations and decisions must occur each year before Plaintiffs can develop, procure and offer to their employees a health benefits package. Plaintiffs, while self-insured employers, must consult and negotiate with their third-party administrators to determine the cost of the products and services they want to offer to their employees and the employees of affiliated entities.

120. The process of determining the health care package for a plan year requires a substantial amount of time before the plan year actually begins. The

benefits departments for Plaintiffs must begin budgeting and planning for their insurance Plans from 14 to 16 months ahead of the start of a plan year in order to analyze vet, and implement changes to their plans. Because both the Atlanta Plan and the Savannah Plan are self-insured, the benefits departments for Plaintiffs must analyze historical data, evaluate potential changes, work with consultants to model and analyze potential changes, and compare potential change options. The benefits departments must then develop options to be presented to committees that are responsible for benefits issues. The potential changes are discussed and debated with the committees during a three to four month period, and a proposal must be finalized at least five months in advance of the start of the next plan year.

121. Further, the Government-imposed dilemma that the Atlanta Plaintiffs face between continuously maintaining the grandfathered status of their group health plan—which severely limits the changes the Atlanta Plaintiffs can make to the Atlanta Plan in response to increasing healthcare costs—and becoming subject to the U.S. Government Mandate is causing injury now. The Atlanta Plaintiffs have considered making certain beneficial changes to the Atlanta Plan since March 23, 2010, and would have made those changes if not for the need to maintain grandfathered status. Specifically, after March 23, 2010, the Atlanta Plaintiffs would have introduced some combination of increased employee premium

contributions, deductibles, and/or co-pays, to preserve the financial stability of both the Atlanta Plan and the Atlanta Plaintiffs, but they cannot do so for fear of losing grandfathered status.

122. In addition, the multiple levels of uncertainty swirling around the U.S. Government Mandate and the ANPRM make the already lengthy process of preparing a compliant health benefits package even more complex.

123. For example, if Plaintiffs were to decide that the only plausible option is to attempt to qualify as a "religious employer" under the Exemption, they would need to undertake a major overhaul of their corporate structures, hiring practices, and the scope of their programming. Such a process could take years to plan and implement. And, if they are forced to employ only Catholics so as to come within the confines of the Exemption, their hiring options would be greatly diminished.

124. In addition, if Plaintiffs choose not to comply with the U.S. Government Mandate, they may be subject to annual government fines and penalties, and claims for damages by private parties. Plaintiffs require lead time to budget for any such additional expenses in a particular fiscal year. Specifically, Plaintiffs must begin budgeting for such major general expenses approximately 18 months before a plan year will begin.

125. Moreover, a significant portion of the budget and planning sessions for the Atlanta Plaintiffs each year necessarily entails analyzing the grandfathered status. In fact, since March 2010, the Atlanta Plaintiffs and their insurance brokers have spent well over 150 hours analyzing the Plan's grandfathered status. The time the Atlanta Plaintiffs have had to spend on these issues could have been spent addressing other significant budgetary and operational issues facing the Atlanta Plaintiffs.

126. The Atlanta Plaintiffs have already been injured because they have expended significant resources to ensure that the 2011, 2012, and 2013 health plans comply with the grandfather status and the U.S. Government Mandate, as well as evaluating how they are impacting and will continue to impact the Atlanta Plaintiffs. For example, since March 2010, the Atlanta Plaintiffs have incurred professional fees of more than $10,000 just to determine how to maintain the Atlanta Plan's grandfathered status.

127. The uncertainty regarding when and how the U.S. Government Mandate will affect Plaintiffs also limits Plaintiffs' ability to fund other projects, including community service and public health projects. The prospect of significant fines forces Plaintiffs to consider setting aside significant sums of money that otherwise could be directed toward their missions. The money

Plaintiffs need to set aside for those costs directly limits their ability right now to use or set aside funds for other projects, including public service projects, for the 2013 and 2014 budgets. For example, the money and time spent by the Atlanta Plaintiffs in the past on community programs and charity care have exceeded $6 million dollars annually. The money and time spent by the Diocese of Savannah in the past on community programs and charity care have exceeded $1 million dollars annually. The fines and other costs associated with the U.S. Government Mandate jeopardize all services provided by Plaintiffs — especially community and charitable funding.

128. Moreover, given the lack of proper notice-and-comment rulemaking regarding the guidelines for "preventive care" services, and the Amended Rule and Exemption, Plaintiffs have no available administrative remedy. And, in any event, further administrative efforts to obtain relief would be futile since, among other reasons, the relevant agencies and officers lack the authority to resolve the statutory and constitutional claims at issue here.

129. Thus, an actual, justiciable controversy currently exists between Plaintiffs and Defendants. Absent a declaration resolving this controversy and the validity and applicability of the U.S. Government Mandate, Plaintiffs are uncertain as to their rights and duties in planning, negotiating, and/or implementing their

group health insurance plans, their hiring and retention programs, and their social, educational, and charitable programs and ministries, as described herein. Plaintiffs have an actual, well-founded fear that the Mandate will be enforced against them.

130. Plaintiffs have standing to invoke the power of this Court to redress the injuries they are presently suffering and, in addition, other imminent injuries that they are likely to suffer in the near future.

131. Accordingly, Plaintiffs seek an order vacating the U.S. Government Mandate and declaring that it violates the First Amendment, RFRA, and the APA. Plaintiffs further request that the Court enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against them. Absent such a declaration of rights and award of injunctive relief by this Court, Plaintiffs have no adequate remedy at law.

CAUSES OF ACTION

COUNT I

SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE IN VIOLATION OF RFRA

132. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 through 131 hereinabove.

133. RFRA prohibits the Government from substantially burdening an entity's exercise of religion, even if the burden results from a rule of general

applicability, unless the Government demonstrates that the burden (i) furthers a compelling governmental interest, and (ii) is the least restrictive means of furthering that interest.

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

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

136. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to Plaintiffs' core religious beliefs.

137. In order to qualify for the Exemption to the U.S. Government Mandate, Plaintiffs must submit themselves to an intrusive governmental inquiry into their religious beliefs.

138. The U.S. Government Mandate thereby substantially burdens Plaintiffs' exercise of religion.

139. Defendants have no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

140. Requiring Plaintiffs to comply with the U.S. Government Mandate is not the least restrictive means of furthering any compelling governmental interest.

141. By enacting and threatening to enforce the U.S. Government Mandate against Plaintiffs, Defendants have violated RFRA.

142. Plaintiffs have no adequate remedy at law.

143. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT II

SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE IN VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

144. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraph 1 through 131 hereinabove.

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

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

147. The U.S. Government Mandate requires Plaintiffs to provide, pay for, and/or facilitate practices and speech that are contrary to their religious beliefs.

148. In order to qualify for the Exemption to the U.S. Government Mandate, Plaintiffs must submit to an intrusive governmental inquiry into their religious beliefs.

149. The U.S. Government Mandate (including the Exemption) substantially burdens Plaintiffs' exercise of religion.

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

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

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

153. Defendants have no compelling governmental interest to require Plaintiffs to comply with the U.S. Government Mandate.

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

155. By enacting and threatening to enforce the U.S. Government Mandate, Defendants have burdened Plaintiffs' religious exercise in violation of the Free Exercise Clause of the First Amendment.

156. Plaintiffs have no adequate remedy at law.

157. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT III

EXCESSIVE ENTANGLEMENT IN VIOLATION OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

158. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 through 131 hereinabove.

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

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

161. The Exemption applies only after the Government conducts an invasive investigation into an organization's religious beliefs, including whether the organization's "purpose" is the "inculcation of religious values" and whether the organization "primarily employs" and "primarily serves" individuals who share the organization's religious tenets.

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

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

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

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

166. Plaintiffs have no adequate remedy at law.

167. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT IV

RELIGIOUS DISCRIMINATION IN VIOLATION OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

168. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 through 131 hereinabove.

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

170. This requirement of equal treatment protects organizations as well as individuals.

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

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

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

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

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

176. Plaintiffs have no adequate remedy at law.

177. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT V

INTERFERENCE IN MATTERS OF INTERNAL CHURCH GOVERNANCE IN VIOLATION OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT AND RFRA

178. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 through 131 hereinabove.

179. The Free Exercise and Establishment Clauses protect the freedom of religious organizations to decide for themselves, free from governmental interference, matters of church governance as well as those of faith and doctrine.

180. The Government may not interfere with a religious organization's internal decisions concerning the organization's religious structure, ministers, or doctrine.

181. Moreover, the Government may not interfere with a religious organization's internal decision if that interference would affect the underlying faith and mission of the organization itself.

182. Plaintiffs are religious organizations affiliated with the Roman Catholic Church.

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

184. Plaintiffs have abided and must continue to abide by the decision of the Catholic Church on these issues.

185. The Government may not interfere with, or otherwise question, the final decision of the Catholic Church that its religious organizations must abide by these core beliefs and teachings.

186. Plaintiffs have therefore made the internal decision that the health plans they offer to their employees may not cover, subsidize, or facilitate abortion-inducing drugs, sterilization, or contraception.

187. The U.S. Government Mandate interferes with Plaintiffs' internal decisions concerning their structure and mission by requiring them to facilitate practices that directly conflict with Catholic teachings and beliefs.

188. The U.S. Government Mandate's interference with Plaintiffs' internal decisions affects their faith and mission by requiring them to facilitate practices that directly conflict with their religious beliefs.

189. Because the U.S. Government Mandate interferes with the internal decision-making of Plaintiffs in a manner that affects their faith and mission, it violates the Establishment and Free Exercise Clauses of the First Amendment.

190. Plaintiffs have no adequate remedy at law.

191. The U.S. Government Mandate and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VI

COMPELLED SPEECH IN VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

192. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 though 131 hereinabove.

193. The First Amendment prohibits the Government from compelling affirmation of any religious or ideological proposition that the speaker finds unacceptable.

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

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

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

197. The U.S. Government Mandate compels Plaintiffs to provide health care plans to its employees that include or facilitate coverage of practices that violate their religious beliefs.

198. The U.S. Government Mandate compels Plaintiffs to subsidize, promote, and facilitate education and counseling services regarding these practices.

199. By imposing the U.S. Government Mandate, Defendants are compelling Plaintiffs publicly to subsidize or facilitate activity and speech that are contrary to their religious beliefs.

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

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

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

203. Plaintiffs have no adequate remedy at law.

204. The U.S. Government Mandate imposes an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VII

FAILURE TO CONDUCT NOTICE-AND-COMMENT RULEMAKING AND IMPROPER DELEGATION IN VIOLATION OF THE APA

205. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 though 131 hereinabove.

206. The Affordable Care Act expressly delegates to an administrative agency within HHS discretionary responsibility for establishing guidelines concerning the "preventive care" that group health plans and health insurance issuers must provide.

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

208. Defendants promulgated the "preventive care" guidelines without first engaging in formal notice-and-comment rulemaking in a manner prescribed by law.

209. Defendants, instead, improperly delegated their discretionary governmental responsibilities for issuing preventive care guidelines to a non-governmental entity, the IOM, which is not accountable to the public.

210. The IOM did not permit or provide for the broad public comment otherwise required under the APA. Indeed, the dissent to the IOM report noted both that the IOM conducted its review in an unacceptably short time frame, and that the review process lacked transparency.

211. Within two weeks of the IOM issuing its guidelines, HHS issued a press release announcing that the IOM's guidelines were required under the Affordable Care Act.

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

213. Defendants also failed to engage in notice-and-comment rulemaking when issuing the Interim and Amended Rules incorporating the guidelines.

214. Defendants' stated reasons for promulgating these rules without engaging in formal notice-and-comment rulemaking do not constitute "good cause." Providing proper public notice and an opportunity for comment was not

impracticable, unnecessary, or contrary to the public interest for the reasons claimed by Defendants.

215. Defendants failed to observe a procedure required by law and violated 5 U.S.C. § 706(2)(D) by enacting the "preventive care" guidelines and the Interim and Amended Rules through improper delegation to a non-governmental entity and without engaging in notice-and-comment rulemaking.

216. Plaintiffs have no available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

217. Plaintiffs have no adequate remedy at law.

218. The enactment of the U.S. Government Mandate without following the procedures required by law and its impending enforcement impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT VIII

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

219. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 though 131 hereinabove.

220. The United States Constitution vests all legislative power in the United States Congress. Congress may not delegate its policymaking authority to

an executive agency in the absence of an intelligible principle that limits and guides the agency's exercise of that authority.

221. The Affordable Care Act expressly delegates unchecked authority to Defendant HHS to establish "comprehensive guidelines" for the services that group health plans and health insurance issuers must provide as "preventive care" under the Act.

222. The Act does not contain an intelligible principle or any other identifiable standard to which HHS is directed to conform in deciding which services do and do not qualify as "preventive care."

223. For example, and as illustrated by the U.S. Government Mandate and Exemption, the Act purports to bestow unfettered discretion on HHS to mandate coverage for whatever medical services and procedures it deems to qualify as "preventive care" without any basis for concluding that the those services and procedures actually "prevent" a disease or adverse medical condition. Also, HHS has used its unbounded discretion under the Act to claim for itself the authority to decide which entities will (and will not) be subject to the U.S. Government Mandate and which will (and will not) qualify for the Exemption.

224. The Act's delegation of legislative authority violates the separation of powers principles of the United States Constitution.

225. Plaintiffs have no adequate remedy at law.

226. The enactment and impending enforcement of the U.S. Government Mandate pursuant to this unconstitutional delegation of authority impose an immediate and ongoing harm on Plaintiffs that warrants relief.

COUNT IX

ARBITRARY AND CAPRICIOUS ACTION IN VIOLATION OF THE APA

227. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 though 131 hereinabove.

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

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

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

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

232. Defendants failed to consider the suggestion of many commenters that abortion, contraceptive, and sterilization services could not be viewed as "preventive care."

233. Defendants failed adequately to take into account voluminous comments suggesting that the scope of the Exemption should be broadened.

234. Defendants did not articulate a reasoned basis for their arbitrary actions by drawing a connection between facts found and the policy decisions it made.

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

236. Defendants' promulgation of the U.S. Government Mandate violated the APA.

237. Because Defendants promulgated the U.S. Government Mandate in violation of the APA, Plaintiffs have no available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

238. Plaintiffs have no adequate remedy at law.

239. The U.S. Government Mandate imposes an immediate and ongoing harm on the Plaintiffs that warrants immediate relief.

COUNT X

ACTING ILLEGALLY IN VIOLATION OF THE APA

240. Plaintiffs hereby repeat and re-allege the allegations set out in Paragraphs 1 though 131 hereinabove.

241. The APA requires that all Government agency action, findings, and conclusions be made "in accordance with law."

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

243. The Weldon Amendment states that "[n]one of the funds made available in this Act [to the Department of Labor and the Department of Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011).

244. The Affordable Care Act states that "nothing in this title (or any amendment by this title) shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits

for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i). It adds that "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion.]" *Id.* § 18023(b)(1)(A)(ii).

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

246. The U.S. Government Mandate nevertheless requires employer-based health plans to provide coverage for abortion-inducing drugs, contraception, sterilization, and related education. By issuing the U.S. Government Mandate, Defendants have exceeded their authority and ignored the direction of Congress.

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

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

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

250. Plaintiffs have no available administrative remedy, or, in the alternative, any effort to obtain an administrative remedy would be futile.

251. Plaintiffs have no adequate remedy at law.

252. The enactment of the U.S. Government Mandate is not in accordance with law and its impending enforcement imposes an immediate and ongoing harm on Plaintiffs that warrants relief.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Plaintiffs' rights under the First Amendment;
3. Enter a declaratory judgment that the U.S. Government Mandate was promulgated in violation of the APA;
4. Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate against Plaintiffs;
5. Enter an order vacating the U.S. Government Mandate as to Plaintiffs;
6. Award Plaintiffs their attorneys' and expert fees and costs under 42 U.S.C. § 1988; and
7. Award all other relief as the Court may deem just and proper.

Respectfully submitted, this the 31st day of December, 2012.

By:

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2012, I have caused a copy of this First Amended and Recast Complaint to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record for Defendants.

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