IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY and HOUSTON BAPTIST UNIVERSITY	§	
Plaintiffs	§	CIVIL NO. 4:12-cv-03009
v.	§	Jury Demanded
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY	§	
Defendants	§	

WESTMINSTER THEOLOGICAL SEMINARY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff-in-Intervention Westminster Theological Seminary ("Westminster") moves for partial summary judgment. There is no genuine dispute as to any fact material to Westminster's claims as set out in its First Amended Complaint in Intervention and referenced and elaborated in the accompanying memorandum of law, and Westminster is entitled to summary judgment as a matter of law. It specifically moves the Court to grant summary judgment in its favor on counts I, II, III, IV, V, VII, VIII and IX of its First Amended Complaint in Intervention. See Fed. R. Civ. P. 56(a).

Further, Pursuant to Federal Rule of Civil Procedure 65, Westminster hereby moves the Court to enter a preliminary injunction to the ends and for the reasons set forth in the accompanying Memorandum of Law.

Pursuant to local rule 7.1D, Westminster's counsel has conferred with counsel for Defendants concerning this motion and Defendants do not consent to either aspect of the motion.

Pursuant to local rule 7.5 A, and pursuant to this Court's order, Dkt. 60, Westminster also requests oral argument on this motion on October 25, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel listed below either electronically pursuant to the District Court's ECF noticing system or via direct e-mail on this the 9th day of September, 2013.

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Defendants	§	

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INTRODUCTION AND SUMMARY OF ARGUMENT

Westminster is a Christian theological seminary. Its reason for being is to prepare ministers of God's word. As its key founder said, it endeavors to teach its students to become specialists in the Bible.

The seminal events recounted in the Bible, and the foundational events for all Westminster stands for, are that in the beginning God made the heavens and the earth and made man in His own image. The entire remainder of the Bible stands and builds on those events. The thrust then is that God is creator and man is creature. Man is not God, but man, every man (and every woman and child) is made by God and images God. Man, therefore, is beholden to God and is to represent him as His image.

Man defiled his imagery of God in the Garden of Eden and thereby separated himself and his progeny from God. That rebellion corrupted man's imagery of God, but did not destroy it. God was so resolved to preserve man's status in relationship to Himself, that God Himself became incarnate in the man, Jesus, to restore God's children of faith into relationship with Himself. Jesus died that God's children of faith, the faith exhibited by Abraham, would not.

Therefore, central to all Westminster is, and all Westminster teaches, is that every human life is sacred because it is created by God in His own image. Man, as creature, does not have the prerogative to destroy what is sacred. Only God has that right. Natural man, however, continues to rebel against God. Natural man insists on being his own God, in satan's words in the garden, to be “like God”, not in the sense of mirroring His character, but in purporting to assume His sovereign power and prerogatives. That rebellion by man, in the words of Jeremiah, was to "have

forsaken me, the fountain of living waters, and [to have] hewed out cisterns for themselves, broken cisterns that can hold no water."[1]

That is precisely what Westminster believes is happening when man and his inventions, in this instance the Defendants, enable and encourage abortions. Westminster believes abortions are the overarching scourge of evil in this Country in this day. That belief is grounded in the biblical faith convictions that are core to Westminster's existence and the reason for its being. Westminster has intervened in this case because the Defendants are not only, in Secretary of HHS Sebelius' words, warring against Westminster and what it stands for, but are deploying as a weapon in that war a requirement that Westminster be traitor to its faith convictions and become party to the Defendants' abortionist assault against God. It is not overstatement to say the Defendants' effort is one to force Westminster to forsake the fountain of living waters for a cistern that holds no water. That effort forces Westminster either to become traitor to God, or, by dent of the imposition of crushing fines if it stands true to its convictions, to become obliterated and lose its mission.

Westminster believes and asserts that the requirement of the Mandate described in its First Amended Complaint in Intervention, which is the device by which Defendants mean to traitorize or destroy Westminster, is unconstitutional, violates numerous of Westminster's statutory protections and should not be enforced against it. The only means for Westminster to enjoy its protections under the Constitution and applicable statutes will be if it is judicially protected from the Mandate's reach. Hence, Westminster's First Amended Complaint in Intervention and its motions for partial summary judgment and preliminary injunction.

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[1] Jer. 2:13

From a secular legal standpoint, the central question raised in Westminster's motions is whether in light of its constitutional and statutory protections Westminster can be forced either to pay insurance premiums or to take affirmative action that will cause its employees to receive health insurance coverage for abortifacient drugs.

It is indisputable and undisputed that Westminster sincerely believes in the foregoing principles. It is also indisputable and undisputed that the Mandate forces Westminster to act against its will and contrary to its religious faith convictions by facilitating the federal government's scheme to provide insurance coverage to its employees that includes what Westminster believes are abortifacient drugs.

The Defendants contend that what the Mandate forces Westminster to do has now been sufficiently jerry-rigged by the so-called "accommodation" as to avoid any violation of its faith convictions. Westminster has endeavored to explain in its First Amended Complaint in Intervention why the purported "accommodation" accomplishes no such thing, and those reasons are brought forward and amplified here.

First, the government cannot alter what Westminster believes, including that it cannot simply proclaim and conclude that what the Mandate requires Westminster to do does not violate its religious beliefs. Second, the Mandate clearly places Westminster and action required of it, albeit alternative action, at the center of providing its employees coverage for abortifacient drugs. That is, the Mandate requires Westminster either (a) to pay for that coverage or (b) to take affirmative action, specifically through "self-certification," that will cause Westminster's insurer to provide that coverage. The reality is that the Mandate, however jerry-rigged, forces Westminster to violate its faith convictions by compelling it, through one or the other of those actions, to be instrumental in promoting abortions. For this Court, or any court, to find that reality

acceptable, would be, as the Supreme Court stated just last Term, to allow the government to force Westminster to express its beliefs, and inculcate its beliefs in its students, "only at the price of evident hypocrisy." See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013).

Or, as the 10th Circuit Court has recently explained, the requirement the Mandate imposes on Westminster is akin to soliciting a person to commit a crime, or to inviting a person to join a conspiracy or a fraud. That person must then decide whether to join the conspiracy or fraud and become criminal or to abstain. The law makes individuals culpable for their decisions to participate in conspiracies and frauds. Similarly, the Mandate not only invites, but, by force of punitive taxes if it declines, requires Westminster to participate in what it views as a scheme to violate the law of God. The government should not be able so to coerce Westminster into action that defies what it perceives is God's standard of culpability, especially when federal standards of culpability in the realm of conspiracies and frauds are so similar.[2]

Westminster's faith-based conscientious objection to participating in what the Mandate requires of it is protected under the Religious Freedom Restoration Act (RFRA), the Free Exercise Clause, the Establishment Clause, the Free Speech Clause and the Due Process Clause. The Mandate creates a substantial burden on Westminster's religious exercise of refusing to assist in providing abortions, triggering strict scrutiny under RFRA. The Mandate is neither neutral nor generally applicable, triggering strict scrutiny under the Free Exercise Clause. The Mandate

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[2] Judge Gorsuch explained the problem well in *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d. ---, No. 12-6294, 2013 WL 3216103 (June 27, 2013) (en banc): "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The [plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case." *Id.* at *31 (Gorsuch, J., concurring).

discriminates among religions to Westminster's detriment, triggering strict scrutiny under the Establishment Clause. The Mandate compels Westminster to speak when its convictions require silence and to be silent when its convictions require expression, triggering strict scrutiny under the Free Speech Clause. And by imposing irrational distinctions between churches and other religious organizations for purposes of providing exemptions from its force, the Mandate discriminates against Westminster in violation of its right to Due Process.

As several Courts of Appeals have already held, the Mandate cannot be justified under strict scrutiny. The government invokes no compelling interest to justify it, the Mandate does not actually further the interests the government has identified, and it is not the least restrictive means of inhibiting Westminster's otherwise constitutional and RFRA rights.

There is no genuine dispute of material fact regarding the foregoing claims, and summary judgment should be entered for Westminster on those claims. Moreover, absent entry of a preliminary injunction protecting Westminster from the force of the Mandate during the pendency of this litigation and ensuing appeals, Westminster will also soon be subjected to the Mandate's coercive effects.

STATEMENT OF FACTS SUPPORTING SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

I. The HHS Mandate

A. Promulgation of the Mandate and the "Religious Employer" Exemption

Signed into law by President Obama in March of 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010) (collectively, "ACA") instituted a number of significant changes to our nation's health care and health insurance systems. Among other things, the ACA mandates that any "group health plan" or "health insurance issuer offering group

or individual health insurance coverage" must provide coverage for certain, what are euphemistically called "preventive care and screening" services without "any cost sharing." 42 U.S.C. § 300gg-13(a). The ACA does not specify what "preventive care and screenings" include, but rather leaves that task to the Health Resources and Services Administration (HRSA), a division of Defendant Department of Health and Human Services (HHS).[3] 42 U.S.C. § 300gg-13(a)(4); 75 Fed. Reg. 41726, 41728 (July 19, 2010).

On July 19, 2010, HHS published an interim final rule under the Affordable Care Act, (First Interim Final Rule). 75 Fed. Reg. 41726 (2010). The First Interim Final Rule, enacted without prior notice of rulemaking or public comment, provided that at a later date HRSA would publish guidelines specifying what would constitute "preventive care." 75 Fed. Reg. at 41759. The First Interim Final Rule explained that "cost sharing" refers to "out-of-pocket" expenses for plan participants and beneficiaries, 75 Fed. Reg. 41730, and acknowledged that those expenses would be "covered by group health plans and issuers" which would, in turn, result in "higher average premiums for all enrollees[,]" id., and "an increase in premiums," id. at 41737. In other words, the prohibition on cost sharing was a way "to distribute the cost of preventive services more equitably across the broad insured population." Id.

On August 1, 2011, HRSA issued guidelines stating that "preventive services" would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines (Aug. 1, 2011), Ex. B (C-1). FDA-approved contraceptive methods

[3] Unless context indicates otherwise, all references to "HHS" or "Defendants" also include Defendants Department of Labor and Department of Treasury.

include "emergency contraception" such as Plan B (commonly known as the "morning-after pill") and ulipristal (also known as "Ella" or the "week-after pill"). FDA Birth Control Guide (August 2012), Ex. B (C-2) at 9. The FDA birth control guide specifically notes that Plan B and Ella (and certain intrauterine devices ("IUD"s)) may work by preventing "attachment (implantation)" of a fertilized egg in a woman's uterus. Id.

On the same day HRSA issued these guidelines, HHS promulgated an amended interim final rule (Second Interim Final Rule) which reiterated the mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. The Second Interim Final Rule granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46623 (emphasis added). A "religious employer" was restrictively defined as one that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "primarily serves persons who share its religious tenets"; and (4) "is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. at 46626. The fourth of these requirements refers to "churches, their integrated auxiliaries, and conventions or associations of churches" and the "exclusively religious activities of any religious order." 26 U.S.C. § 6033. Like the First Interim Final Rule, the Second Interim Final Rule went into effect immediately, without prior notice or comment. 76 Fed. Reg. 46621.

B. The Safe Harbor

Controversy ensued over the mandate and the religious employer exemption, and hundreds of thousands of public comments were filed in response to the mandate and the religious

employer exemption. See 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).[4] In response, Secretary Sebelius announced in January 2012 that certain non-exempt religious objectors would be granted an "additional year" before the mandate was enforced against them, in order to "allow these organizations more time and flexibility to adapt to this new rule." January 20, 2012 Statement of HHS Secretary Kathleen Sebelius, Ex. B (C-3). Accordingly, on February 10, 2012, HHS issued a bulletin describing a "Temporary Enforcement Safe Harbor" from the mandate. Department of Health and Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers (updated June 28, 2013), Ex. B (C-4). The bulletin advised that Defendants would not enforce the mandate for one additional year against certain non-profit organizations who have religious objections to covering the mandated services but who did not qualify for the religious employer exemption. Ex. B (C-4) at 3. Under the safe harbor, the mandate would not apply until an organization's first insurance plan year that began after August 1, 2013 (as opposed to August 2012 under the Second Interim Final Rule). Ex. B (C-4) at 3. The safe harbor is available to non-profit organizations that self-certify that they had not offered the offending coverage "from February 10, 2012 onward" and that provide notice to plan participants. Ex. B (C-4) at 4. The safe harbor did not alter the religious employer exemption, however. On that same afternoon Defendants issued regulations adopting that exemption "as a final rule without change." 77 Fed. Reg. 8725, 8729 (published Feb. 15, 2012).

[4] Additionally, in 2011, religious organizations that did not qualify for the exemption began filing lawsuits challenging the interim final rules. See, e.g., *Belmont Abbey College v. Sebelius*, No. 11-1989 (D.D.C. Nov. 10, 2011), dismissed as moot, Dkt. 41 (Aug. 19, 2013) (first lawsuit filed). To date, 30 lawsuits have been filed by nonprofit religious organizations and 37 lawsuits have been filed by business owners. Their status is kept reasonably updated at HHS Mandate Information Central, www.becketfund.org/hhsinformationcentral.

C. The Advance Notice of Proposed Rulemaking

On March 16, 2012, Defendants Announced an "Advance Notice of Proposed Rulemaking" (ANPRM). 77 Fed. Reg. 16501, 16503 (published March 21, 2012). The ANPRM announced the Defendants' intention to finalize an accommodation by the end of the safe harbor period. 77 Fed. Reg. at 16503. The ANPRM did not announce any intention to alter the mandate. Id. In vague terms, the ANPRM proposed that "health insurance issuers" for objecting religious employers could be required to "assume the responsibility for the provision of contraceptive coverage without cost sharing." Id. For self-insured plans, the ANPRM suggested that third party plan administrators "assume this responsibility." Id. For the first time, the ANPRM suggested that the cost for the separate contraceptive coverage could not result in increased premiums for conscientious objectors. Id. at 16503 ("the Departments would require that, in this circumstance, there be no premium charge for the separate contraceptive coverage"). Defendants recognized "approximately 200,000 comments" submitted in response to the ANPRM, which for the most part objected to the scheme. 78 Fed. Reg. 8456, 8459 (published Feb. 6, 2013).

D. The Notice of Proposed Rulemaking

On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (NPRM). 78 Fed. Reg. 8456. The NPRM proposed two major changes to the then-existing regulations. 78 Fed. Reg. at 8458-59. First, it proposed revising the religious employer exemption by eliminating the requirements that religious employers have the purpose of inculcating religious values and primarily employ and serve persons of their own faith. Id. It did not, however, "expand the universe of employer plans that would qualify for the exemption." Id. Second, it proposed to "accommodate" non-exempt religious organizations such as Westminster by requiring them to force their insurers and third party administrators to provide "separate . . . coverage" for the free

contraceptive and abortifacient drugs and services. 78 Fed. Reg. 8463. "[O]ver 400,000 comments" were submitted in response to the NPRM. 78 Fed. Reg. 39870, 39871 (published July 2, 2013). On April 8, 2013, the same day the notice-and-comment period ended, Defendant Secretary Sebelius answered questions about the contraceptive and abortifacient services requirement in a presentation at Harvard University.[5] In response to a question, she explained that "religious entities will be providing coverage to their employees starting August 1st." Id. at 51:30-52:00. That statement clearly recognized that based on the action required by them under the "accommodations," such religious employers were themselves, effectively providing the required coverage.

E. The Final Form of the Mandate

On June 28, 2013, Defendants issued a final rule which constitutes the Mandate. Under the Mandate, the "religious employer" exemption remains limited to entitles in its"organized and operate[d]" as nonprofit entities "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code," i.e., churches in the traditional, current forms. 78 Fed. Reg. at 39874(a). The Mandate creates a separate "accommodation" for certain religious organizations that are not exempt. 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). An organization is eligible for the accommodation if it (1) "opposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). The final rule extends the current safe harbor through the end of 2013.

[5] The Forum, A Conversation with Kathleen Sebelius, U.S. Secretary of Health & Human Services (April 8, 2013) available at http://theforum.sph.harvard.edu/sites/default/files/downloads/audio/20130408_Sebelius_PODCAST.mp3 (last visited August 30, 2013).

78 Fed. Reg. at 39889. An eligible organization would need to execute its self-certification "prior to the beginning of the first plan year" which begins on or after January 1, 2014, and deliver it to the organization's insurer, or, if the organization has a self-insured plan, to the plan's third party administrator. Id. at 39875. The delivery of the self-certification would trigger the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." Id. at 39875-76; see 45 C.F.R. § 147.131(c). This obligation would continue only "for so long as the participant or beneficiary remains enrolled in the plan." 78 Fed. Reg. 39876; see 45 C.F.R. § 147.131(c)(2)(i)(B). Insurers and third party administrators would be required to notify plan participants and beneficiaries of the contraceptive payment benefit "contemporaneous with (to the extent possible) but separate from any application materials distributed in connection with enrollment" in a group health plan. Id. at 39876; 45 C.F.R. § 147.131(d). The insurers and third party administrators are expected to provide the emergency contraceptives "in a manner consistent" with the provision of other covered services, 78 Fed. Reg. at 39876-77, and "may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or Defendants state in the final rule that they "have evidence to support" that providing payments for contraceptive and abortifacient services will be "cost neutral for issuers." Id. at 39877. Nevertheless, even if the payments were, over time, to become cost neutral, it is undisputed that there will be up-front costs for making the payments. Id. at 39877-78 (addressing ways insurers can cover up-front costs). The final rule suggests that issuers may ignore this fact and "set the premium for an eligible organization's large group policy as if no payments for contraceptive services had been provided to plan participants." Id. at 39877. Another suggestion Defendants have provided is to "treat the cost of payments for contraceptive

services . . . as an administrative cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." Id. at 39878.

The Mandate requires that, even if the third party administrator consents, the religious organization—via its self-certification—must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." Id. at 39879. The self-certification must specifically notify the third party administrator of its "obligations set forth in the[ ] final regulations, and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." Id. at 39879.

Employers with fewer than fifty employees are exempt from the Mandate. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). Nearly 34 million individuals are employed by firms with fewer than fifty employees. http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Aug. 30, 2013), Ex. B (C-5) at 3. Also exempt from the Mandate are employers who provide "grandfathered" health care plans. 42 U.S.C. § 18011. In 2010, the government predicted that 87 million people would remain on grandfathered plans in 2013. Ex. B (C-6) at 4.

II. Westminster Theological Seminary

Plaintiff-in-Intervention, Westminster, is a graduate level Christian seminary located in Glenside, Pennsylvania. Ex. A ¶3. Westminster was established in 1929 and is committed to offering a complete seminary education that develops students spiritually, intellectually, and professionally. Id. Faith in Jesus Christ, in His Person, His work and His Word, is central to the educational mission of Westminster. Id. ¶ 4. Westminster's mission, drawn from Habakkuk 2:14,

is, "Westminster Theological Seminary (PA) exists to serve Christ and his kingdom by extending the knowledge of the glory of God in Christ until that knowledge covers the earth as the waters cover the sea." Ex. A-1 (Westminster's Statement of Distinctives). Consistent with its mission, Westminster works to manifest its Christian faith in all aspects of its administration. Ex A ¶ ¶ 3-12. All Westminster employees profess faith in Jesus Christ, which establishes the essential framework within which members of Westminster both unite in shared beliefs and explore differences. Id ¶¶ 10-11. Westminster holds religious beliefs that include traditional Christian teachings on the sanctity of life. Id. ¶¶13-16. Westminster believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Ibid. Westminster therefore believes and teaches that abortion ends a human life and, with rare exceptions, is a sin. Ibid. Westminster has 620 students. Westminster has approximately 60 full-time and 65 part-time employees. Id. ¶ 24.

As part of its commitment to Christian education, Westminster also promotes the spiritual and physical well-being and health of its students and employees. Id. ¶23. This includes provision of generous health services and health insurance for its employees. Ibid. It is a violation of Westminster's religious beliefs to deliberately provide, or cause to be provided, insurance coverage for drugs, devices, services, or procedures inconsistent with its faith, in particular abortion-inducing drugs, abortion procedures, and related services. Id. ¶¶ 17-21. It is similarly a violation of Westminster's religious beliefs to deliberately provide health insurance, or cause it to be provided,that would facilitate access to abortion-inducing drugs, abortion procedures, and related services. Ibid. Westminster has no conscientious objection to providing coverage for non-abortion-inducing contraceptive drugs and devices. The plan year for Westminster's employee insurance plans begins on November 1 of each year. Id. ¶ 45.

Westminster holds and follows traditional Christian beliefs about the sanctity of life. Ex. A ¶¶ 13-16. Westminster believes that Scripture calls Christians to uphold the God-given worth of human beings, as the unique image-bearers of God, from conception to death. Ibid. Westminster affirms that "the duties required of the sixth amendment are . . . to preserve the life of ourselves and others" and understands that extends to unborn children as well. Ex. A ¶¶ 14-15. Westminster believes and teaches that abortion ends a human life and is a sin. Ex. A ¶ 16.

Consequently, it is a violation of Westminster's teachings and religious beliefs to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services. Ex. A ¶¶ 17-21. Specifically, Westminster has a sincere religious objection to covering the emergency contraceptive drugs popularly known as Plan B, Ella, and certain abortifacient IUDs. Ibid. Westminster believes that those drugs could prevent a human embryo—which it understands to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo. Ex. A ¶ 18. It is similarly a violation of Westminster's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third-party administrator and not by Westminster. Ibid.

It is also part of Westminster's religious convictions to provide for the well-being and care of the employees who further its mission and make up an integral part of its community. Id. at ¶ 23. It is important to Westminster that its insurance plan be consistent with its religious beliefs. Ex. A ¶¶ 20-21. Westminster cannot, in good conscience, participate in the Mandate. Id at ¶ 30.

The Mandate purportedly will take effect against Westminster on November 1, 2014, but in practical effect, it forces action on Westminster by November 1, 2013. Ex. A ¶ 66. If

Westminster violates the law by ceasing to offer employee health insurance, it will face the prospect of fines of $2000 per employee per year, or roughly $454,000 per year, every year. Ex. A ¶ 46; 26 U.S.C. § 4980H. 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. Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, Continuing to Implement the ACA in a Careful, Thoughtful Manner (July 2, 2013), Ex. B (C-7). Furthermore, if Westminster violates the law by offering insurance that fails to comply with the Mandate, it could also incur penalties of $100 per day "for each individual to whom such failure relates," or over $2 million per year for its 60 full-time employees. Ex. A ¶ 48; 26 U.S.C. § 4980D; 29 U.S.C. § 1132. Terminating its health plan would result in serious competitive disadvantages for Westminster in recruiting and retaining faculty and staff. Ex. A ¶ 52. Westminster could also face regulatory action and lawsuits under ERISA. Ex. A ¶ 50.

Westminster's health benefits plan (plan) is provided through Independent Blue Cross of Philadelphia ("IBX"). Ex. A ¶ 25. IBX is an entirely secular insurance company and, as such, is unconcerned about Westminster's religious scruples. It will insist upon seeing federal court injunctive relief that explicitly protects it, as well as Westminster, in the terms it includes in, or agrees to exclude from, Westminster's health insurance plan. Id at ¶¶ 22, 45. Westminster's plan is not grandfathered. Ex. A ¶ 27.

III. The Mandate's Impact on Westminster

Although Westminster has no objection to including free coverage for non-abortifacient contraceptive drugs and services, its religious convictions forbid it from including free coverage for abortifacient drugs and services in its employee healthcare plans. Ex. A ¶ 21. Westminster

does not appear to qualify for the religious employer exemption. Ex. A ¶ 31. In order to comply with the Mandate under the "accommodation," Westminster would need to execute its self-certification prior to November, 2014. Ex. A ¶ 35. Westminster's beliefs preclude it from soliciting, contracting with, or designating a third party to provide these drugs and services. Ex. A ¶ 4.

Expressly designating a third party administrator as "an ERISA section 3(16) plan administrator" and notifying the third party administrator of its "obligations set forth in the[] final regulations" would thrust Westminster into immoral complicity in providing the drugs and services. Ex. A ¶ 41; 78 Fed. Reg. 39879.

The Mandate burdens Westminster's employee recruitment and retention efforts by creating uncertainty as to whether they will be able to offer health benefits beyond 2013. Ex. A ¶ 45. The Mandate forces Westminster to choose between, on the one hand, violating its religious beliefs, and, on the other hand, incurring substantial fines and terminating its benefits. Ex. A ¶¶ 45-49.

Westminster is already experiencing recalcitrance from IBX in providing coverage that excludes the abortifacient drugs and must begin planning soon for its insurance plan year beginning in on November 1, 2013. Ex. A ¶¶ 22, 45. Westminster needs immediate relief from the Mandate in order to arrange for and continue providing employee health insurance. Ex. A ¶¶ 56-59.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

The original Plaintiffs filed an original complaint in this matter on October 9, 2012. Dkt. 1. On December 20, 2012, this Court held a status conference and stayed the case pending the promulgation of new regulations. Dkt. 25. Defendants issued the new regulations on June 28,

2013, 78 Fed. Reg. 39870-01 (published July 2, 2013), and this Court lifted the stay on August 1, 2013. Dkt. 57. Following a status conference on August 2, 2013, this Court ordered inter alia that Plaintiffs file their motion for partial summary judgment and preliminary injunction on August 30, 2013. Dkt. 60. On August 6, 2013, Plaintiffs filed their first amended complaint addressing the new regulations. Dkt. 61. On August 30, 2013, the Court granted permissive intervention to Westminster. Dkt. 68. Westminster promptly filed its First Amended Complaint in Intervention, Dkt. 71, and now, as soon as possible following its intervention, files its motion for partial summary judgment and for preliminary injunctive relief.

STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS OF REVIEW

I. Preliminary Injunction

Westminster requests a preliminary injunction barring enforcement of the Mandate against it and against its insurer regarding coverage for Westminster's employees during the pendency of proceedings in this Court and any subsequent appeal.

To obtain a preliminary injunction, a plaintiff must establish: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). See also *Blanco v. Select Specialty Hosp. Houston, L.P.*, Civ. A. H-13-1591, 2013 WL 2408189 (S.D. Tex. May 31, 2013).

II. Summary Judgment

Westminster also requests that summary judgment be entered in its favor on some of its claims brought under RFRA, the Free Exercise Clause, the Establishment Clause, the Free Speech Clause and the Due Process Clause.

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to a material fact exists when, after considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, a court determines that the evidence is such that a reasonable jury could return a verdict for the party opposing the motion. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007) (citations omitted). A court considering a motion for summary judgment must consider all facts and evidence in the light most favorable to the nonmoving party. Id. (citing *United Fire & Cas. Co. v. Hixson Bros., Inc.*, 453 F.3d 283, 285 (5th Cir.2006)).

ARGUMENT

I. Westminster is entitled to summary judgment on its RFRA, Free Exercise, Establishment Clause, Free Speech and Due Process claims.

The Mandate violates federal constitutional and statutory law in five independent ways.[6] Most obviously, it is a flagrant violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et. seq.. It also violates the Free Exercise, Establishment, Free Speech and Due Process Clauses of the First and Fifth Amendments to the U.S. Constitution. Each violation subjects the Mandate to strict scrutiny, a test it cannot possibly survive. Any one violation is sufficient to invalidate the Mandate and entitle Westminster to summary judgment.

[6] Westminster has raised other claims in addition to these five, but does not currently seek a preliminary injunction or summary judgment on the basis of those other claims.

A. The Mandate violates the Religious Freedom Restoration Act.

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (b).

RFRA thus restored strict scrutiny to religious exercise claims. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006); see also 42 U.S.C. § 2000bb (b)(1) (RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972))."[7] A plaintiff makes a prima facie case under RFRA by showing the government substantially burdens its sincere religious exercise. *O Centro*, 546 U.S. at 428. The burden then shifts to the government to show that "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." Id. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).[8]

1. Westminster's resistance to facilitating access to abortion-causing drugs and devices is sincere religious exercise.

RFRA broadly defines "religious exercise" to "include[ ] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), as

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[7] Although RFRA has been found unconstitutional as applied to States, it continues to apply "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). Some states have enacted their own individual RFRAs. The Fifth Circuit has previously applied Texas' RFRA. The analysis for that statute is the same as the federal RFRA. See, e.g., *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009).

[8] These burdens are the same at the preliminary injunction stage as at trial. *O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

amended by 42 U.S.C. § 2000cc-5(7)(A); see also *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

Westminster has demonstrated its sincere commitment to the Christian faith, and specifically to Christian teachings on the sanctity of life. Ex. A ¶¶ 4-5, 10-20. Westminster cannot, in good conscience, support activities or products it believes, based on God's biblical revelation, to be immoral. Ex. A ¶¶ 16-22. The Mandate requires Westminster to participate in a scheme to provide its employees with drugs and devices that destroy what Westminster believes to be human life. Its religious beliefs forbid it from participating in that scheme. The Mandate requires Westminster to provide and pay premiums for health insurance coverage for its employees that include abortifacients or, per the "accommodation," to avoid paying premiums for the offensive coverage, to self-certify and notify its insurer that it has done so and thereby set in motion a chain of requirements under the Mandate that results in its employees' receiving free abortifacients. 78 Fed. Reg. at 39875-77. It violates Westminster's Christian faith to do either of the only two things the Mandate requires it to do: (a) pay for insurance coverage for the offensive drugs or (b) act as a conduit for insurance for these drugs and devices to be provided to its employees. Ex. A ¶¶ 20-22, 34-40. Westminster has always sought to avoid knowingly facilitating access to abortifacients through its insurance plans, and the Mandate forces them to abandon this practice. Ex. A ¶¶ 22, 34-40. Abstaining for religious reasons from facilitating evil easily qualifies as "religious exercise," just as much as refusing to manufacture items that will later be used for the destruction of human life in a war, see *Thomas v. Review Bd.*, 450 U.S. 707 (1981), abstaining from work on certain days, see *Sherbert*, 374 U.S. 398, or providing alternative education for children, see *Yoder*, 406 U.S. 205. See also 42 U.S.C. § 2000bb (b)(1) (incorporating *Sherbert* and *Yoder* in the RFRA).

2. The Mandate imposes a substantial burden of enormous fines on Westminster's religious exercise of resistance.

Once the sincerity of the specific religious exercise at issue is determined, the Court must answer the question of whether the burden is substantial. This is an objective test. It does not matter what the belief is that is being violated, what matters is the objectively-measured burden imposed by the government upon the plaintiff.[9] In *Hobby Lobby v. Sebelius*, the en banc Tenth Circuit confirmed that the existence of a substantial burden does not turn on whether the government coercion "somehow depends on the independent actions of third parties." *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d ---, No. 12-6294, 2013 WL 3216103, at *17 (10th Cir. June 27, 2013) (en banc). In that case, the government argued that the burden on Hobby Lobby to comply with the same Mandate at issue here was too attenuated because it was the employees, not Hobby Lobby itself, who would have access to the problematic drugs and devices. The Tenth Circuit explained that the government's argument mistakenly transformed the objective substantial burden test into a subjective test. The government would have wrongly required a subjective review of the Hobby Lobby plaintiffs' belief that delved into "the theological merit of the belief in question." Id. Instead, the Tenth Circuit squarely held that the controlling consideration was the intensity of the coercion applied by the government to act contrary to those beliefs. Id.; see also *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) ("The focus of the inquiry is on the degree to which a person's religious conduct

[9] One way to think about the burden analysis is whether the burden would be considered "substantial" when imposed on any activity, religious or not. For example, if the government imposed the burdens here—massive fines—on for-profit corporations engaged in political speech, those burdens would easily be considered "substantial." Cf. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 336-37 (2010) (describing unconstitutional restrictions on speech such as "imposing a burden by impounding proceeds on receipts or royalties").

is curtailed and the resulting impact on his religious expression, as measured . . . from the person's perspective, not from the government's.") (quotations omitted).

To explain the burden the Mandate imposes on Westminster another way, if the accommodation were in furtherance of a crime rather than access to abortifacients, Westminster would be subject to liability for conspiracy and accomplice liability under, for example, 18 U.S.C. § 371 (conspirator liable for "any act to effect the object of the conspiracy") or 21 U.S.C. § 846 (liability for "[a]ny person who attempts or conspires to commit any offense"). Westminster's understanding of moral culpability, grounded in the law it recognizes as established by the sovereign God of the universe, should be given at least as much deference as that of culpability in federal criminal law. Of course the Court need not agree with Westminster that abortion constitutes taking innocent human life, or even to honor that such law emanates from the ultimate source of law, itself, in order to defer to its understanding of moral culpability and the unimpeachable source for it. But Defendants cannot—without hypocrisy—claim that Westminster's understanding of its own moral complicity is wrong when they frequently use a similar standard in conspiracy and accomplice liability prosecutions.

In the Fifth Circuit, a government action substantially burdens a religious belief "when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 793 (5th Cir. 2013). The Mandate easily qualifies as a substantial burden under both prongs of that test. As to the first prong, the Mandate compels Westminster to participate in a scheme that it believes is immoral. Ex. A ¶¶ 13-22, 34-40. By paying for the insurance or by communicating with an outside party through the self-certification

accommodation process, Westminster is required to facilitate the use of emergency contraceptives. See Ex. A ¶¶ 20-21, 30-33, 35-36, 42-43. This conundrum violates its sincere religious belief. Since Westminster can continue to exercise its faith only by dropping its insurance and facing enormous penalties, 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1132(a), the Mandate most certainly "influences" it "to act in a way that violates [its] religious beliefs." See *Moussazadeh*, 703 F.3d at 793; see also Ex. A ¶¶ 45-53 (discussing the impact of penalties and potential loss of health benefits). As for the second prong, the Mandate forces Westminster to forgo the "non-trivial benefit," *Moussazadeh*, 703 F.3d at 793, of providing insurance to its employees that does not violate its conscience. Ex. A ¶¶ 13-21, 30-33, 35-36, 45-53 (discussing the impact that the threat of losing health benefits has on Westminster's ability to hire and retain faculty). The imposition of fines for non-compliant insurance leaves Westminster with a "Hobson's choice" between obeying its own conscience in light of the precepts of the God it worships and serves on the one hand and providing health insurance to its employees on the other. *Hobby Lobby*, 2013 WL 3216103, at *21.

3. The Mandate cannot satisfy strict scrutiny.

The Mandate cannot survive strict scrutiny for three separate reasons: (1) the government has neither identified an "interest of the highest order" nor acted as if its interests are compelling; (2) the Mandate will not further the government's purported interests; and (3) Defendants have multiple alternative means of pursuing their ends that are less restrictive of Westminster's constitutional and civil rights than the Mandate. Any one of these reasons suffices to defeat the Mandate under strict scrutiny.[10]

[10] *Lukumi*, 113 S. Ct. at 2233 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the

a. The government has identified no compelling interest.

Strict scrutiny requires "'the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Merced*, 577 F.3d at 592 (quoting *O Centro*, 546 U.S. at 430-31).

i. Providing Westminster's employees access to the objectionable drugs and devices is not an "interest of the highest order."

In other lawsuits, the government has identified its compelling interests in imposing the Mandate as "public health" and "gender equality." *Hobby Lobby*, 2013 WL 3216103 at *23. Although its assertion that these are the interests it is seeking to further through the Mandate is dubious,[11] and even though some would argue the professed objectives are important in the abstract, they do not meet the *O Centro* test because they are only "'broadly formulated interests justifying the general applicability of government mandates.'" Id. (quoting *O Centro*, 546 U.S. at 431). Cf. *Betenbaugh*, 611 F.3d at 268 ("invocation of general interests, standing alone, is not enough"). The government has thus far in the litigation failed to bring forward any explanation at all, much less a logical or convincing one, as to why it has a compelling interest in specifically requiring insurance coverage for the mandated abortion-causing drugs and devices—Plan B, Ella, and certain IUDs—to Westminster's and like institutions' employees, but that is what it must do

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highest order' and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.' A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.") (citations omitted).

[11] Anyone who witnessed the Democratic National Convention in 2012 can attest that the reason primarily advocated there was for women's autonomy to choose whether or not to bear a baby, even after impregnation, not some generic interest in public health, and, in any event, it defies physiological realities to invoke gender equality when it comes to bearing a baby and giving birth.

to meet the "to the person" standard articulated in *O Centro*. Since it is the government's burden to do so, the Mandate fails to survive strict scrutiny as a threshold matter.

ii. Defendants' purported interest is not compelling because the government has issued numerous exemptions and because the objectionable drugs and devices are already widely available.

A purported government interest also will not qualify as compelling unless the government has consistently pursued furtherance of that interest. "'Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.'" *Merced*, 577 U.S. at 594 (quoting *Lukumi*, 508 U.S. at 546-47).

Here, the government's professed interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 2013 WL 3216103 at *23. "[T]his exempted population includes those working for private employers with grandfathered plans, [and] for employers with fewer than fifty employees." Id. In addition, some religious organizations are exempt from the Mandate altogether. See 45 C.F.R. § 147.131 (religious exemptions); 26 U.S.C. § 5000A (d)(2)(A) & (B) (exempting "health care sharing ministr[ies]"). These massive exemptions cover upwards of 120 million people.[12] That means that the Mandate fails to survive strict scrutiny, because "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Hobby Lobby*, 2013 WL 3216103 at *23 (citations omitted).

[12] And the government expects 87 million people to be on grandfathered plans. See Ex. B (C-7) at 4. And "small employers," employing nearly 34 million people, need not offer health insurance at all and can therefore avoid the Mandate. Ex. B (C-5) at 2.

b. The Mandate will not further the government's purported interests.

The Mandate also does not further Defendants' purported interests, because expanding the availability of contraceptives (including abortifacients) to citizens does not support either public health or gender equality. For the Mandate to survive strict scrutiny, there must be a causal link between the end in view and the means applied "to the person." *O Centro*, 546 U.S. at 430. In *O Centro*, for example, the Court recognized that in applying strict scrutiny courts "must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing [the claimed exemption]." Id. at 431 (quoting *Yoder*, 406 U.S. at 221). Moreover, the government had "to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish." *O Centro*, 546 U.S. at 431 (quoting *Yoder*, 406 U.S. at 236). Indeed, the government "cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests.'" *Betenbaugh*, 611 F.3d at 268 (quoting *Merced*, 577 F.3d at 592). See also *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (applying intermediate scrutiny, courts must not conflate "two distinct concepts . . . whether there is a substantial government interest and whether the regulation furthers that interest").

Forcing Westminster to terminate its employee health insurance coverage—or face the threat of having to cease its operations altogether because it cannot sustain the crippling fines imposed—will not advance the government's claimed purposes of promoting public health and gender equality. Indeed, by forcing Westminster to drop coverage for its employees, fewer people will have insurance coverage for their health needs, not more.

And it is no answer for the government to speculate that employees might obtain insurance on the exchanges it has yet to set up. There is little reason to think that every person covered

under Westminster's plan would seek coverage on the exchange rather than paying the relatively small penalty under the individual mandate. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595-96 (2012) ("for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more" so "[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance"). Thus, the means (the Mandate) chosen by the government to advance its purported ends (promoting public health and gender equality) does not just fail to advance that goal, but actually tends to defeat it.

c. Defendants have numerous alternative less restrictive means of furthering their purported interest.

Even if one were to assume that Defendants had identified a compelling interest and that the Mandate advanced that interest, the Mandate still fails strict scrutiny because there are other readily-available means of expanding contraception coverage that are far less restrictive of Westminster's constitutional and RFRA rights. See, e.g., *Merced*, 577 F.3d at 595 ("'If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'") (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Moreover, the government must put forward "specific evidence" explaining why there is no less restrictive means of applying it "to the person"—that is, specifically to Westminster. *Betenbaugh*, 611 F.3d at 268; *O Centro*, 546 U.S. at 430.

In nationwide litigation over the Mandate, the government has failed to "advance[ ] an argument that the contraception mandate is the least restrictive means of furthering" its general interest in ensuring contraceptive access. *Korte v. Sebelius*, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2012); accord *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (government "has not demonstrated that requiring religious objectors to provide cost-free contraception coverage is the least restrictive means of increasing access to contraception").

Indeed, Defendants have a host of readily available alternatives for expanding contraceptive access that would avoid any need to conscript religious objectors. Defendants could:

- Provide a tax credit to employees who purchase emergency contraceptives with their own funds.
- Directly provide the drugs at issue, or directly provide insurance coverage for them through the state and federal health exchanges.
- Empower willing actors—for instance, physicians, pharmaceutical companies, or various interest groups—to deliver the drugs and sponsor education about them.
- Use their own resources to inform the public that these drugs are available in a wide array of publicly-funded venues.

This array of alternatives is real. Plan B is available over the counter to anyone, from a leading online pharmacy for $50, and even in many college vending machines.[13] Ella can be purchased online for $40, with no need for a physician's visit.[14] Moreover, HHS planned to spend over $300

[13] Teva Women's Health, Find Plan B One-Step in the Aisle and Pick It Up Yourself, http://planbonestep.com/pharmacylocator.aspx (last visited Aug. 30, 2013) ("just take it off the shelf, and pay for it at the cashier"); Drugstore.com, Plan B One Step Emergency Contraceptive, http://www.drugstore.com/plan-b-one-step-emergency-contraceptive/qxp387630?catid=183040 (last visited Aug. 30, 2013) (advertising Plan B for $49.99 with free shipping); James Eng, FDA OK with college's Plan B contraceptive vending machine, MSN News, Jan. 29, 2013, available at http://news.msn.com/us/fda-ok-with-colleges-plan-b-contraceptive-vending-machine?stay=1 (last visited Aug. 29, 2013) (reporting that "Plan B is available widely in colleges and universities throughout . . . the nation," and that a Pennsylvania college that dispenses Plan B from a vending machine for $25 is "far from the first to do this").

[14] KwikMed, ella Prescribed Online Legally, http://ella-kwikmed.com/ (last visited Aug. 29, 2013) (physicians licensed to prescribe online offering free medical consultation and free next day shipping for Ella); Watson Pharmacy, Understanding How Your Patients Can Get ella, http://www.ella-rx.com/wheredoigetella.asp (last visited Aug. 29, 2013) (noting "ella is also available at Planned Parenthood clinics").

million in 2012 to provide 35 contraceptives directly through Title X funding.[15] And the federal government, in partnership with state governments, has constructed an extensive funding network designed to increase contraceptive access, education, and use, including:

- $2.37 billion for family planning in FY 2010.[16]
- $228 million in FY 2010 for Title X program.
- $294 million in state spending for family planning in FY 2010.

The government can employ such pre-existing sources to increase contraceptive access. See *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting existence of "analogous programs" and concluding that government has "failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women").

B. The Mandate violates the Free Exercise Clause.

Laws which are not neutral or generally applicable face strict scrutiny under the Free Exercise Clause. *Lukumi*, 508 U.S. at 520. The Mandate is neither generally applicable nor neutral and cannot satisfy strict scrutiny.

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[15] See HHS Grant Announcement, 2012 Family Planning Services FOA, available at https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id =12978 (click on Grant Announcement – View PDF Version) (last visited Aug. 29, 2013) (announcing that "[t]he President's Budget for . . . (FY) 2012 requests approximately $327 million for the Title X Family Planning Program").

[16] Guttmacher Inst., Facts on Publicly Funded Contraceptive Services in the United States (May 2012), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Aug. 29, 2013) (citations omitted).

1. The Mandate is not generally applicable.

A regulation fails general applicability when it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3rd Cir. 1999) (Alito, J.) ("FOP"). The animal slaughter ordinances in *Lukumi*, for example, ostensibly protected public health and prevented animal cruelty, but "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests." 508 U.S. at 543. Because the ordinances exempted many types of animal killing—such as hunting, fishing, pest eradication, and euthanasia—the ordinances were not generally applicable. Id. at 543-44.

To be sure, not every exemption dooms a regulation. The problem arises when government allows secular exemptions that undermine a regulation's purported interests but disallows religious exemptions, thus making a "value judgment in favor of secular motivations, but not religious motivations." *FOP*, 170 F.3d at 366. In *FOP*, a regulation prohibiting police officers from growing beards allowed one exemption for undercover officers and another for medical reasons. Id. Two Muslim officers sued because the regulation forbade beards for religious reasons. The Third Circuit found that, whereas the undercover-officer exemption "d[id] not undermine the Department's interest in uniformity [of appearance]," the medical exemption did. Id. The court therefore found the policy failed general applicability.

Here, the Mandate goes far beyond the exemption scheme in *FOP*. The Mandate allows massive categorical exemptions for secular conduct that undermine the Mandate's purposes. Most notably, over 87 million Americans are covered under "grandfathered" plans that are indefinitely excused, not only from complying with the Mandate, but from covering any of the

mandated preventive services. Additionally, 34 million more Americans are employed by small businesses which may avoid the Mandate. Ex. B (C-5) at 2; see 26 U.S.C. § 4980H(c)(2). While these

secular exemptions severely undermine the Mandate's interest in increasing insurance coverage for the whole range of women's "preventive services," Westminster gets no exemption even from the narrow slice of the Mandate to which it objects for religious reasons. This is exactly the kind of "value judgment in favor of secular motivations, but not religious motivations" that fails general applicability and triggers strict scrutiny. *FOP*, 170 F.3d at 366.

2. The Mandate is not neutral.

In addition to failing the requirement of general applicability, the Mandate also fails the requirement of neutrality for three reasons: (1) it produces differential treatment among religions; (2) it accomplishes a "religious gerrymander"; and (3) it favors secular over religious values.

a. The Mandate produces differential treatment among religions.

One way to prove that a law is not neutral is to show that it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. In *Lukumi*, for example, the Court said that prohibiting killing animals for one religious purpose (sacrifice) while exempting other religious killings (kosher slaughter) created "differential treatment of two religions," which could constitute "an independent constitutional violation." Id. Similarly, in *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982), the Court struck down registration and reporting requirements that created different treatments between "well-established churches" and "churches which are new and lacking in a constituency."[17] More specifically, the statute in question in *Larson* distinguished

[17] Although *Larson* was decided under the Establishment Clause, 456 U.S. at 230, it is significant for interpreting the neutrality requirement of both Religion Clauses. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) ("[W]hile the Establishment Clause

between religious organizations based on the extent to which their revenues were supplied from outside their membership. In other words, although the Court discerned that the statute operated to exempt one religious denomination and not another, the distinction explicitly drawn by the statute there under review was more subtle. The statute distinguished, on its face, between types of religious institutions based on whether they raised funds primarily from within their membership or not. That brings the *Larson* analysis even closer to home here, because the difference in exempt status under the Mandate is between religious organizations by type: between churches in the traditional sense on the one hand and religious educational entities such as Westminster on the other.

Here, the Mandate establishes three tiers of religious objectors: favored "religious employers" (who are exempt), less-favored "religious organizations" (who are forced to facilitate access to abortion-causing drugs), and disfavored for-profit entities (who are forced to facilitate and pay for access). See 78 Fed. Reg. at 39874-75; *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face."). Cf. *O Centro*, 546 U.S. at 432-37 (requiring exemption under RFRA for one religion where exemption was granted for another).

The government cannot rank in different tiers the rights of people with identical religious objections. See *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) ("[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.") (quotations omitted); see also *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral

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frames much of our [religious discrimination] inquiry, the requirements of the Free Exercise Clause . . . proceed along similar lines."). For further discussion of *Larson* under the Establishment Clause, see infra Argument I.C.

where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).

This requirements of neutrality between categories of religious organizations is all the more important when the status of the one discriminated against is a teacher – or in this case a religious teaching institution.[18] The Mandate denies Westminster the benefit of an exemption and subjects it to harsh, even devastating, consequences because it is a teaching institution rather than one that gathers congregants together for worship as a central function.

b. The Mandate accomplishes a religious gerrymander.

Another way to prove that a law is not neutral is to show that "the effect of [the] law" is to accomplish a "religious gerrymander." *Lukumi*, 508 U.S. at 535. In *Lukumi*, the Court found that a "pattern of exemptions," Id. at 537, was impermissibly used to narrow the law's prohibitions specifically "to target petitioners and their religious practices." Id. at 535. A similar pattern is manifest here.

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[18] *McDaniel v. Paty*, 435 U.S. 618, 641, 98 S. Ct. 1322, 1336 (1978) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."): *Wieman v. Updegraff*, 73 S. Ct. 215, 221 (1952) ("To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.").

Defendants have repeatedly recognized the sincerity of religious organizations' objections to facilitating access to abortion-causing drugs and devices. See, e.g., January 20, 2012 Statement of Defendant Secretary Sebelius, Ex. B (C-3) (recognizing the "important concerns some have raised about religious liberty" and the need to "respect[ ] religious freedom"); see also *Hobby Lobby*, 2013 WL 3216103, at *20 (noting the government did not dispute the religious sincerity of objections). Nevertheless, the "religious employers" exemption appears to protect only institutional churches, their "integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." See 78 Fed. Reg. at 39871. Yet other religious organizations—such as Westminster—are excluded from the exemption, even though they share the same religious objections. On its face, the exemption is thus narrowed to specifically target all religious organizations except institutional churches.

This facial evidence of targeting is bolstered in that the government's proffered justification for discriminating lacks legitimacy. Defendants claim that objecting "[h]ouses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. But the same can be said for Westminster. It limits employment to persons who "profess a commitment to "to biblical orthodoxy (belief) and orthopraxy (practice)" and limits its board members and faculty to those who "subscribe *ex animo* to the Westminster Standards, which includes the Westminster Confession of Faith, the Larger and Shorter Catechisms, and the Directory of Public Worship, the quintessential expression of the Reformed understanding of faith and [the faculty] pledge, 'not to inculcate, teach or insinuate anything which shall appear to me to contradict or contravene, either directly or impliedly, any element in that system of doctrine

…." Ex. A ¶ 10. Westminster believes those pledges include "that Scripture condemns the taking of innocent human life (Exodus 20:13 (NIV)) and commands Christians to protect the weak and vulnerable. As the Scriptures say, we are to '[d]efend the weak and the fatherless,' "[r]escue the weak and the needy,' and 'speak up for those who cannot speak for themselves.'" Psalm 82:3-4b (NIV); Proverbs 31:8a (NIV) and "that abortion ends a human life and is a sin." Ex. A ¶¶14-16.

The inconsistency in Defendants' justifications underscores the Mandate's targeting effect. See *Mayfield v. Texas Dep't of Criminal Justice*, 529 F.3d 599, 609 (5th Cir. 2008) (neutrality requires that government policy be "actually based on the justifications it purports, and not something more nefarious").

c. The Mandate favors secular reasons for noncompliance over religious reasons.

Finally, the Mandate also fails neutrality by honoring certain secular reasons for failure to comply, while rejecting Westminster's religious reasons. See *supra* Argument I.B.1 (cataloguing secular reasons for many employers to avoid the Mandate). The net effect is that policies covering tens of millions of Americans are exempt for secular reasons, while Westminster must drop its insurance and pay fines for its religious inability to comply with the Mandate. See *Lukumi*, 508 U.S. at 535 (noting "the effect of a law in its real operation is strong evidence of its object"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("[T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality between religion and non-religion.").

Because the Mandate cannot qualify as a neutral or generally applicable law, Defendants must satisfy strict scrutiny. They cannot do so. See *supra* Argument I.A.3.

C. The Mandate violates the Establishment Clause

The Mandate's "explicit and deliberate distinctions between different religious organizations" also violate the Establishment Clause. See *Larson*, 456 U.S. at 247 n.23; see *Croft v. Perry*, 624 F.3d 157, 165-66 (5th Cir. 2010) (quoting *Larson*) (a denominational preference would contravene the clearest command of the Establishment Clause"). The government exempts favored religious organizations under the Mandate only if they are an institutional church or have structural, doctrinal, and financial affiliation—as defined by the government—with an institutional church. By structuring the exemption in this way, the Mandate engages in "discrimination . . . expressly based on the degree of [or, as applies here, the content of the] religiosity of the institution and the extent to which [or, as applies here, the way in which] that religiosity affects its operations[.]" *Weaver*, 534 F.3d at 1257 (McConnell, J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). This is forbidden by the Establishment Clause.

Larson invalidated a Minnesota law that imposed anti-fraud disclosure requirements on religious organizations that did not "receive[ ] more than half of their total contributions from members or affiliated organizations." 456 U.S. at 231-32. The law thus exempted established, self-supported churches, while targeting churches that relied on outside donations. Id. at 247 n.23; see also *Weaver*, 534 F.3d at 1259 (explaining that the law in *Larson* "discriminated against religions . . . that depend heavily on soliciting donations from the general public"). This was an "explicit and deliberate distinction[] between different religious organizations," one that failed strict scrutiny and violated the Establishment Clause. Id. at 247 n.23.

Like the exemption struck down in *Larson*, the Mandate's "religious employer" exemption impermissibly distinguishes religious organizations based on internal religious

characteristics and different modes of actuating their religious convictions. An organization is exempt if it qualifies as an "integrated auxiliary" of a church—meaning that it has a particular church "affiliation" and is "internally supported."[19] As detailed in Treasury Regulations, these requirements measure the quality of an organization's ties to a church as well as its funding sources. See 26 C.F.R. § 1.6033-2(h)(2) and (3) ("affiliation"); id. § 1.6033-2(h)(4) ("internal support"). So, an organization is exempt depending on, for instance:

(1) whether it is "operated, supervised, or controlled by or in connection with . . . a church," id. § 1.6033-2(h)(2)(iii);

(2) whether its "enabling instrument . . . affirm[s] that [it] shares common religious doctrines, principles, disciplines, or practices with a church," id. § 1.6033-2(h)(3)(i);

(3) whether "[a] church . . . has the authority to appoint or remove . . . [its] officers or directors," id. § 1.6033-2(h)(3)(ii);

(4) whether, "[i]n the event of dissolution, [its] assets are required to be distributed to a church," id. § 1.6033-2(h)(3)(vi); and,

(5) whether it "[n]ormally receives more than 50 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 in activities that are not unrelated trades or businesses," id. § 1.6033-2(4)(ii).

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[19] 15 See 45 C.F.R. § 147.131(a) (exempting as "religious employers" churches, their "integrated auxiliaries," and religious orders) (referring to 26 U.S.C. §§ 6033(a)(3)(A)(i) & (iii)); 26 C.F.R. § 1.6003-2(h)(1) (defining a non-profit organization as an exempt "integrated auxiliary" if "[a]ffiliated" with a church and "[i]nternally supported")). The Mandate co-opts tax code criteria that relieve certain tax exempt entities from filing an "annual information return," or "Form 990." See 26 C.F.R. § 1.6033-2(a)(1).

If it fails to meet these requirements, a religious organization cannot qualify for an exemption and must therefore participate in the government's scheme to facilitate employee access to free contraception, sterilization, and abortion-causing drugs and devices.

As previously noted, the government has candidly explained the assumptions that led it to structure the Mandate exemption this way:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). In other words, whether or not a religious organization is exempt turns on the government's estimate, based entirely on type of structure, of whether its faith does, or does not, line up with the faith of its employees. This distinction is at least as suspect as the one invalidated in *Larson*. There, the Minnesota law's premise was that, if a church is not predominantly self-supporting, it poses a fraud risk and needs regulation. 456 U.S. at 249-51. Here, the Mandate's premise is that, if a religious organization is not closely affiliated with (and officially and financially tied to) a church, its employees are "more likely" to disagree with it about the morality of contraception, and its insurance should therefore be made to facilitate access to the mandated contraceptive services. Cf. 78 Fed. Reg. at 39874 (estimating that the employees of "[h]ouses of worship and their integrated auxiliaries" are "less likely than other people to use contraceptive services even if such services were covered").

As explained by Judge McConnell in *Weaver*, the leading circuit case applying *Larson*, distinguishing religious organizations based on internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*." 534 F.3d at 1259. *Weaver* invalidated a Colorado state scholarship program's exclusion of "pervasively sectarian" schools, but not mere

"sectarian" schools, as "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" Id. Judge McConnell's description of the program's constitutional infirmity applies equally well to the Mandate, which separates exempt from non-exempt organizations based on their "degree of religiosity" (i.e., their doctrinal, structural, and financial connection to an institutional church) and "the extent to which that religiosity affects [their] operations" (i.e., whether employees are more or less likely to share an organization's beliefs about contraception). Id.[20]

The Mandate's impermissible distinction among religious organizations triggers strict scrutiny regardless of whether it "substantially burdens" Westminster's religious exercise under the Free Exercise Clause or RFRA.[21] See *Larson*, 456 U.S. at 253-54 (explaining that the Establishment Clause is offended by "the selective legislative imposition of burdens and advantages upon particular denominations," whether or not those "burdens . . . would be intrinsically impermissible if they were imposed evenhandedly") (emphasis in original); *Weaver*, 534 F.3d at 1257 (observing that "neutral treatment of religions [is] '[t]he clearest command of

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[20] The Mandate also violates the Establishment Clause for the reasons set forth supra in Arguments I.B.2(b) and (c)—it creates a religious gerrymander that targets the sincere religious beliefs of organizations that are not institutional churches and favors secular reasons for non-compliance over religious reasons. In both instances, the government is establishing a preference for institutional churches that meet an IRS definition as such over organizations that endeavor to serve the same purposes in a different, but supportive, way.

[21] Most Establishment Clause violations are not subject to an affirmative defense of strict scrutiny, but *Larson* type claims are. See *Weaver*, 534 F.3d at 1266. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."); see also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citing *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The Mandate violates the First Amendment in both respects.

the Establishment Clause'") (quoting *Larson*). And, for the reasons already discussed, the Mandate cannot be justified under strict scrutiny. See *supra* Argument I.A.3.

The distinction between Westminster and the institutional church is all the more illogical, because Westminster's mission is to equip leadership for the church. It is dedicated to equipping its students to lead in the institutional church. Ex. A ¶¶ 3-5, 9-10, 12. Therefore, according to the government's apparent view, the object of Westminster's whole enterprise warrants exemption, but Westminster, itself, which operates as a source of leadership for the institutional church, does not. It is an arbitrary distinction, not one that correlates in any intelligible way with what the government asserts are the interests it means to support.

D. The Mandate violates the Free Speech Clause.

For similar reasons, the Mandate violates Westminster's free speech rights under the First Amendment. The First Amendment protects Westminster's rights to be free both from government efforts to compel its speech and government efforts to compel its silence. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781 (1988).

First, the Mandate's proposed accommodation purports to require Westminster to make statements that will trigger payments for the use of abortion-inducing drugs and devices. Ex. A ¶¶ 33-43. In particular, Westminster would have to make certifications about its religious objections to its insurers and/or third party administrators "in a form and manner specified by the Secretary." 29 C.F.R. § 2590.715-2713A (a)(4), (b)(1)(ii), (c). Making those statements will trigger payments for the use of abortion-inducing drugs and devices. 29 C.F.R. § 2590.715-2713A (b)(2), (c)(2). As set forth above, Westminster cannot engage in the speech required by the Mandate because to do so would contravene its obligation to obey the God it serves. Ex. A ¶¶ 18-21.

Second, the Mandate expressly prohibits Westminster from engaging in speech with a particular content and viewpoint: it is barred by federal law from talking to its third party administrators and encouraging them not to provide abortion-inducing drugs. 29 C.F.R. § 2590.715-2713A ("must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements"). Ex. A ¶¶ 18-21.

None of this is remotely permissible under the First Amendment. The government cannot force Westminster to make statements about its religious beliefs to third parties. Nor can it forbid Westminster from trying to convince others to exercise their own lawful right to choose not to pay for abortion-inducing drugs. Where, as here, the government has compelled speech, dictated its content, and forbade speakers from conveying particular messages, strict scrutiny applies. See, e.g., *Turner Broad. Sys. Inc. v. FCC* ("Turner I"), 512 U.S. 624, 642 (1994) (stating that "laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content").

The mechanism of the so-called "accommodation" also triggers strict scrutiny because "[l]aws singling out a small number of speakers for onerous treatment are inherently suspect." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012). The number of speakers here—"eligible [religious] organizations"—is quite small, especially when taken in the context of the sheer number of organizations subject to the Mandate. Thus this targeted speech regulation triggers strict scrutiny.

The Mandate fails strict scrutiny for all the reasons set forth in Section I.A.

Nor can the government justify controlling Westminster's speech as the price of obtaining the alleged benefit of the accommodation—even where the government is paying speakers, it

cannot force them speak the government's preferred message. See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy").

Westminster is not even able to avoid these coercive requirements about what it must say and what they must not say by foregoing the so-called "accommodation." That course of action would leave it subject to the original Mandate, meaning it would be forced to pay directly for abortion-inducing drugs and devices, and for "patient education and counseling for all women with reproductive capacity" about these drugs and devices.[22] For the reasons set forth above, such a course would violate Westminster's religious liberty. And forcing it to pay for speech counseling and educating people about how to use abortion-inducing drugs would separately violate its speech rights. See, e.g., *Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 234-35 (1977) (finding that forced contributions for union political speech violate the First Amendment "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *United States v. United Foods Inc.*, 533 U.S. 405, 411 (2001) (finding that forced contributions for advertising related to unbranded mushrooms violates First Amendment).

For these reasons, the Mandate and proposed accommodation violate the Free Speech Clause of the First Amendment.

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[22] Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines (Aug. 1, 2011), Ex. B (C-1).

E. The Mandate violates the Due Process Clause.

The Due Process Clause of the Fifth Amendment, which incorporates the protections of the Equal Protection Clause of the Fourteenth Amendment,[23] demands that any legislative classifications, such as the Mandate here classifies what entities are exempt from the Mandate and what entities are not exempt, must be "rationally based and free from invidious discrimination." *Dandridge v. Williams*, 90 S. Ct. 1153, 1162 (1970). See also "*Richardson v. Belcher*, 92 S. Ct. 254, 257 (1971).

The Mandate classifies churches in the traditional sense as qualifying for exemption from its force, but appears to disqualify Westminster and like religious educational institutions from the exemption. By exempting churches in the traditional sense and refusing to exempt the likes of Westminster, a theological seminary that is devoted to developing leadership for the traditional church, the Defendants have violated the rational basis and non-discriminatory standard.

The Defendants have cited no rationale, and there is no rationale, that furthers any governmental interest for classifying the one type of religious organization separately from the other for purposes of applying the exemption. The Defendants have suggested that churches in the traditional sense can be expected to have greater unity of religious views within their ranks, particularly regarding abortion, than other forms of religious institutions, but that is patently untrue, and, in light of the Declaration of Dr. Jeffrey K. Jue attached to this Memorandum as

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[23] *Schweiker v. Wilson*, 101 S. Ct. 1074, 1078, fn. 6 (1981) ("This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment. See, *e. g., Weinberger* v. *Salfi*, 422 U.S. 749, 768-770 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).").

Exhibit A, it is manifestly untrue as to Westminster. To the contrary, given the careful boundaries of belief to which all trustees, administrators and faculty at Westminster subscribe, the unity of faith convictions within Westminster is far more secured than in any traditional church.

The Defendants have simply borrowed a concept of "church" from the Internal Revenue Code in a section that deals with exemptions from liability for federal income taxes, which, for its own purposes, does not distinguish between churches in the traditional sense and non-profit religious educational institutions such as Westminster, and, unlike the Internal Revenue Code, then makes a distinction between those types of religious entities the essential classification for applying or denying the exemption. There is no rational basis for their having done so.

The irrationality of the distinction the Mandate imposes regarding the availability of the exemption is underscored by the fact that Westminster bears many of the "characteristics" to which the Internal Revenue Service points for discerning what is a "church."[24] Westminster

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[24] The term *church* is found, but not specifically defined, in the Internal Revenue Code. With the exception of the special rules for church audits, the use of the term *church* also includes conventions and associations of churches as well as integrated auxiliaries of a church.

Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include:

A. a distinct legal existence
B. a recognized creed and form of worship
C. a definite and distinct ecclesiastical government
D. a formal code of doctrine and discipline
E. a distinct religious history
F. a membership not associated with any other church or denomination
G. a complete organization of ordained ministers ministering to their congregations
H. ordained ministers selected after completing prescribed courses of study
I. a literature of its own
J. established places of worship
K. regular congregations
L. regular religious services
M. Sunday schools for religious instruction of the young

meets many of these characteristics, specifically at least A, B, D, E, possibly G (all of its trustees must be and are ordained as teaching [preaching] or ruling elders in a Presbyterian church), H (same point as for "G"), I and N (Westminster is a school for preparation of ministers for the church). Ex. A, ¶¶ 3-5, 9-12 and 14.

Westminster adheres to religious beliefs and concerns as much or more than do traditional churches and religious orders, but HHS deliberately ignored the regulation's impact on Westminster's religious liberty (as well as religious educational institutions like it), stating that the exemption sought only "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46621, 46623. There is no rational basis for that distinction and limitation and no rational relationship between that distinction and limitation and any legitimate governmental interest. *Frontiero v. Richardson*, 93 S. Ct. 1764, 1768 (1973). Accordingly, that distinction and that limitation fail the standard the United State Supreme Court has imposed for gauging constitutionality under the Fifth Amendment. That is all the more true because free exercise of religion is a fundamental right.[25]

N. Schools for the preparation of its ministers.

The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes.

Source: *Publication 1828, Tax Guide for Churches and Religious Organizations*.

[25] *W. Va. State Bd. of Educ. v. Barnette*, 63 S. Ct. 1178, 1185-1186 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

II. This Court should grant a preliminary injunction.

Westminster needs interim injunctive relief, at the latest before November 1, 2014, to which enforcement has theoretically been extended, because its plan year after January 1, 2014 begins on November 1. Ex. A ¶¶ 22, 35 and 56. Therefore, regardless of how the Court rules on the motion for partial summary judgment, Westminster requests the entry of a preliminary injunction to last during the pendency of litigation in this Court and until the resolution of any subsequent appeal. For the reasons stated below, Westminster easily meets all four preliminary injunction factors. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

A. Westminster has a substantial likelihood of success on the merits.

For the same reasons set forth in Section I above, the Court should also find that Westminster's burden has been met by demonstrating a substantial likelihood of success on the merits. Indeed, showing a substantial likelihood of success on the merits is by definition a lower standard than the standard governing whether the Court may grant summary judgment on the same claim. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) ("A plaintiff is not required to prove its entitlement to summary judgment in order to establish 'a substantial likelihood of success on the merits' for preliminary injunction purposes.")

B. Westminster faces a substantial threat of irreparable injury if the injunction is not issued.

It is settled law that a potential violation of a plaintiff's rights under the First Amendment and RFRA threatens irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "By extension, the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First

Amendment." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012), appeal dismissed, 2013 WL 2395168 (D.C. Cir. May 3, 2013). See also *Newland*, 881 F. Supp. 2d at 1294-95 (irreparable harm established under RFRA claim against Mandate); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 997-98 (E.D. Mich. 2012) (same). Here, coercing Westminster to facilitate access to abortion-causing drugs in direct violation of its faith is the epitome of irreparable injury. Once it has been forced to violate its conscience and disobeying the God it serves by providing access to objectionable drugs and services, future remedies cannot change that violation.

The impending enforcement of the Mandate is also causing significant disruption to Westminster's hiring and human-resources planning. Ex. A ¶¶ 51-59. Health plans do not take shape overnight, but instead require a number of analyses, negotiations, and decisions before Westminster can offer a health benefits package to its employees. Ex. A ¶¶ 51-59. Employers like Westminster that are insured under consortium-type health plans must negotiate with their health plan provider. Ex. A ¶¶ 25, 51-59. Under normal circumstances, Westminster must begin the process of determining their health care package for a plan year several months before the plan year begins. Ex. A ¶ 57. Indeed, the Mandate has already placed Westminster in a confrontational position with its current insurer over whether it must already accept coverage of abortifacient drugs in its current plan. Ex. A. ¶ 22. The multiple levels of uncertainty surrounding the Mandate only add to Westminster's perplexity over how, faithfully to its beliefs, it can provide health coverage for its employees. Westminster is facing an immediate need to make some emergency adjustment in the coverage it provides, even before its next plan year commences on November 1, 2013. In addition, if Westminster chooses to follow its religious conscience instead of complying with the Mandate, or even allowing its current insurer force the effects of the

Mandate down its throat, it will either violate its faith convictions or be subject to massive fines and penalties. Ex. A ¶¶ 56-59. Westminster requires needs immediate protection from the Mandate in a form that will protect not only itself, but its insurer, from enforcement actions by the government if Westminster's employee health plan excludes abortifacient drugs. Time is of the essence for Westminster in this regard. The current overhang of this dilemma is adversely affecting Westminster's ability to hire and retain employees and constitutes irreparable injury difficult to evaluate in terms of money damages. Ex. A ¶¶ 45-55.

C. The threatened injury to Westminster far outweighs any harm that might result.

There is no real dispute that, absent an injunction, Westminster faces grievous harm—namely, government compulsion to violate their religious beliefs or face crippling fines of over as much as $120,000 and over $2 million per year. Ex. A ¶¶ 46-49. Nor has anyone questioned the reality and severity of the fines Westminster faces for exercising those sincerely held religious beliefs. In contrast, granting the injunction will merely prevent the government from enforcing one element of the Mandate (the requirement to cover emergency contraceptives) against one employer during the pendency of this appeal. Especially in light of the extensive exemptions from the Mandate already in place for others, any impact on the government's general efforts to spread the evil of these abortifacients would be minimal.

In other words, an injunction will merely preserve the status quo. The government has never mandated health insurance coverage for abortifacients before, and there is no urgent need for it to enforce the Mandate immediately against Westminster before the constitutionality and statutory permissibility of its doing so can be adjudicated. When the government has "alternative, constitutional ways of regulating . . . to achieve its goals," as it does here, compared to the denial of "First Amendment freedoms," the government cannot show that its interest outweighs

constitutional freedoms. See *RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866, 875 (S.D. Tex. 2007). Both the ubiquity of access to these drugs and government subsidization thereof, and the fact that the government has exempted "over 190 million health plan participants and beneficiaries," *Newland*, 881 F. Supp. 2d at 1298, make it impossible for the government to claim that it will be harmed by a temporary delay in enforcement against Westminster. Moreover, while a "preliminary injunction would forestall the government's ability to extend [coverage for] all twenty approved contraceptives" to Westminster's employees, Westminster "will continue to provide [coverage for] sixteen of the twenty contraceptive methods, so the government's interest is largely realized while coexisting with" Westminster's' "religious objections." *Hobby Lobby*, 2013 WL 3216103, at *26.

Any claim of harm by the Government is further undermined by the fact that it consented to or did not oppose preliminary injunctive relief in numerous other cases challenging the Mandate. See, e.g., Mot. to Stay, *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 11, 2013) (Dkt. 41); Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo. Feb. 28, 2013) (Dkt. 9); Order, *Hall v. Sebelius*, No. 13-cv-00295 (D. Minn. Apr. 2, 2013) (Dkt. 11). The government "cannot claim irreparable harm in this case while acquiescing to preliminary injunctive relief in several similar cases." *Geneva Coll. v. Sebelius*, 2013 WL 1703871, at *12 (W.D. Pa. Apr. 19, 2013). "If the government is willing to grant exemptions for no less than one third of all Americans, and it is willing to consent to injunctive relief in cases that do not fall within those exemptions, then it can suffer no appreciable harm" were an injunction entered here. *Beckwith Elec. Co., Inc. v. Sebelius*, 2013 WL 3297498, at *18 (M.D. Fla. June 25, 2013). In short, especially when balanced against the serious

irreparable injury being inflicted on Westminster, any harm the Defendants might claim from a preliminary injunction is negligible.

D. An injunction will not disserve the public interest.

Finally, issuing a preliminary injunction will not disserve the public interest. In this matter, there are two statutory schemes in potential conflict with each other. While the ACA requires Westminster to purchase insurance coverage for abortion-causing drugs for all its employees, RFRA would protect it in exercising its religion by not purchasing insurance coverage for those same drugs. The public interest in enforcing long-standing First and Fifth Amendment and religious freedom protections certainly outweighs the interest in immediate enforcement of a new law that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted." *Hobby Lobby Stores, Inc. et al. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. Nov. 19, 2012), rev'd on other grounds, 2013 WL 3216103 (10th Cir. June 27, 2013); see also *Newland*, 881 F. Supp. 2d at 1295 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro*, 389 F.3d at 1010).

Congress decided the RFRA trumps the ACA in this battle between statutes when it enacted RFRA; the statute reads: "[f]ederal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). "Congress thus obligated itself to explicitly exempt later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a constitutional right." *Hobby Lobby*, 2013 WL 3216103, at *26. Here, "Congress did not exempt

the ACA from RFRA." Id. And of course the protection of Westminster's constitutional rights is also very much in the public interest.

Furthermore, any government interest in uniform application of the Mandate is again "undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans." *Newland*, 881 F. Supp. 2d at 1295.

In sum, all of the factors weigh heavily in favor of granting a preliminary injunction to stay application of the Mandate to avoid grave harm to Westminster's conscience and First and Fifth Amendment liberties.

CONCLUSION

Westminster respectfully requests that the Court grant it summary judgment on its RFRA, Free Exercise, Establishment Clause, Free Speech and Due Process claims, and issue a preliminary injunction protecting it, and its insurers in regards to Westminster, from enforcement of the Mandate during the pendency of this litigation, including any appeals.

Respectfully submitted,

WYNNE & WYNNE LLP

/s/ Kenneth R. Wynne

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel listed below either electronically pursuant to the District Court's ECF noticing system or via direct e-mail on this the 9th day of September, 2013.

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EXHIBIT A

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

WESTMINSTER UNIVERSITY, and HOUSTON BAPTIST UNIVERSITY, *Plaintiffs*, v. KATHLEEN SEBELIUS, *et al.* *Defendants*.	4:12-cv-03009

Declaration of Jeffrey K. Jue, Ph.D
Provost and Stephen Tong Professor of Reformed Theology,
Westminster Theological Seminary

1. My name is Jeffrey K. Jue. I am over the age of 18 and have personal knowledge of the contents of this declaration. I am the current Provost of Westminster Theological Seminary ("Westminster") and occupy the Stephen Tong Chair of Reformed Theology. I have served in faculty and administrative positions at Westminster since 2002. I submit this Declaration based on my personal knowledge and my familiarity with Westminster's history and legacy and faith convictions.

2. I understand that Westminster will face millions of dollars in annual fines–along with other potential penalties and lawsuits–if, based on its religious beliefs, it refuses to offer health insurance that covers abortion-causing drugs and devices. As Provost, I know the kind of

strain that this would place on this small theological seminary, and as Provost, I know that Christian faith and mission in the Reformed tradition are what animates Westminster, indeed, what constitute Westminster's reason for being.

Westminster's history and beliefs

3. Westminster is a graduate level Christian theological seminary. Its physical campus is located in Glenside, Pennsylvania. It was founded in 1929 by five former professors at Princeton Theological Seminary who left esteemed faculty positions at that venerable institution and started Westminster in order to preserve Princeton's original legacy, the legacy of what became known as "Old Princeton." Exhibit A-1, Preamble to Constitution. Westminster is not formally affiliated with any denomination, but it is dedicated to the Reformed understanding of the Christian faith that is often associated with Presbyterianism. Westminster operates in accordance with a Charter and Constitution, pertinent sections of which are attached to this Declaration as Exhibit A-1.

4. As recorded in in pertinent part in its Charter, Westminster's purpose is "to form men for the gospel ministry, who shall truly believe, and cordially love, and therefore endeavor to propagate and defend, in its genuineness, simplicity, and fullness, that system of religious belief and practice which is set forth in the Confession of Faith and Catechisms of the Orthodox Presbyterian Church and the Presbyterian Church in America in the form they possessed in 1936 and 1973, respectively and that is integrally related to the fundamental principles of Presbyterian church government; thereby, cultivating and sustaining genuine Christian devotion with sound learning. … It is, in addition, to furnish training in Scripture and theology to men and women who are preparing to serve Christ and his church in vocations other than the gospel ministry so that the whole body of Christ may be enriched." Ex. A-1 (Charter Article II).

5. Westminster's brief mission statement is drawn from Habakkuk 2:14 to say "Westminster Theological Seminary (PA) exists to serve Christ and his kingdom by extending the knowledge of the glory of God in Christ until that knowledge covers the earth as the waters cover the sea." Ex. A-1 (Westminster's Statement of Distinctives).

6. Today, Westminster serves approximately 625 students in six graduate degree programs.

7. Reformed Christians, by virtue of their history, are acutely sensitive to coercive government actions that infringe upon religious liberty. Their heritage reaches to the early American settlers who fled England and who became known on these shores as "Puritans" and to oppressed Protestants who fled France for these shores and were known as Huguenots. The Presbyterian form of government, and its system of checks and balances, was adapted by the framers in the Constitution of this Nation.

8. John Calvin, known in Reformed circles as "The Reformer," fled France and operated mainly from Geneva where he captured and summarized in his *Institutes of the Christian Religion* (and other writings) the theological underpinnings for Reformed Presbyterianism, to the point that Reformed theology is often referred to as "Calvinism." John Knox, a student of Calvin's and the founder of Presbyterianism in Scotland, was imprisoned and indentured as an oarsman on a French galley ship and later exiled to Switzerland because of his faith and his boldness for it in the face of governmental power. Westminster is decidedly Calvinistic in its religious understanding and intends to be as faithful to its tenets as were its namesake and John Knox and many other martyrs for the faith.

9. Westminster is governed by a Board of Trustees, all of whom are either teaching or ruling elders in a Presbyterian church. Indeed, being such an elder is a requirement of service on that board. Exhibit A-1, Charter Article VI.

10. Faculty members at Westminster must subscribe *ex animo* to the Westminster Standards, which includes the Westminster Confession of Faith, the Larger and Shorter Catechisms, and the Directory of Public Worship, the quintessential expression of the Reformed understanding of faith and pledge, "not to inculcate, teach or insinuate anything which shall appear to me to contradict or contravene, either directly or impliedly, any element in that system of doctrine …." Ex. A-1 (Constitution Section V.3).

11. As prescribed in its Employment Policy Manual, "Westminster Theological Seminary hires only personnel who belong to a Christian church and subscribe to biblical orthodoxy (belief) and orthopraxy (practice)." Ex. A-1 (Employment Policy Manual, p. 8).

12. The entire curricula in Westminster's courses of study is biblical and theological, and they support only graduate level studies. Although students at Westminster come from a variety of denominational persuasions and from diverse locations around the world, they are all oriented in their enrollment at Westminster to its Reformed heritage.

Westminster's beliefs and teachings on abortion

13. Westminster affirms that Scripture calls Christians to uphold the God-instilled sanctity of human life, grounded in His creation of every human being in His image, from conception to death. As Genesis 1 says, "God created mankind in his own image." Genesis 1:27a (NIV). And as Psalm 139 says, "For you [God] created my inmost being; you knit me together in my mother's womb. . . . all the days ordained for me were written in your book before one of them came to be." Psalm 139:13, 16 (NIV).

14. As stated earlier, Westminster's Board and Faculty are required to subscribe to the Westminster Standards. The Westminster Larger Catechism Question and Answer 135 clearly states, "[t]he duties required in the sixth commandment are, all careful studies, and lawful endeavors, to preserve the life of ourselves and others …" The preservation of life is a mandate

according to our confessional standards. The catechism goes on further to include in this mandate "protecting and defending the innocent"; and we believe this extends to unborn children as well.

15. Westminster affirms that Scripture condemns the taking of innocent human life (Exodus 20:13 (NIV)) and commands Christians to protect the weak and vulnerable. As the Scriptures say, we are to "[d]efend the weak and the fatherless," "[r]escue the weak and the needy," and "speak up for those who cannot speak for themselves." Psalm 82:3-4b (NIV); Proverbs 31:8a (NIV).

16. Westminster believes and teaches that abortion ends a human life and is a sin. But it also believes and teaches that it is important to care for every life involved in a crisis pregnancy: the unborn, the mother, the father, and the extended family.

17. It is a violation of Westminster's teachings and religious beliefs to deliberately provide insurance coverage for, fund, sponsor, underwrite, or otherwise facilitate access to abortion-inducing drugs, abortion procedures, and related services.

18. Westminster has a sincere religious objection to providing coverage for the emergency contraceptive drugs Plan B and Ella and their variants, since it believes those drugs could prevent a human embryo–which it understands to include a fertilized egg before it implants in the uterus–from implanting in the wall of the uterus, causing the embryo to die. The same objection applies to abortion-causing IUDs.

19. Westminster considers preventing implantation of a human embryo by artificial means to be an abortion.

20. Therefore it is a violation of Westminster's teachings and religious beliefs for it to deliberately fund, sponsor, underwrite, or otherwise facilitate access to Plan B and Ella, or abortion-causing IUDs.

21. It is similarly a violation of Westminster's religious beliefs to deliberately take any action (including providing access to health insurance) that would facilitate access to abortion-causing drugs, abortion procedures, and related services, even if those items were paid for by an insurer or a third party administrator and not by Westminster.

22. Consistent with these religious beliefs, Westminster would never condone insurance coverage for abortion-causing drugs, procedures or related services in the health insurance plan it provides to its employees. Without Westminster's awareness, however, its health insurer inserted such coverage into Westminster's plan. Westminster has made every effort to cause coverage of such drugs to be removed from its current plan, but it has not convinced its insurer as yet to do so. Even with the assurances provided in this litigation that the Defendants are applying the benefits of the former so-called "safe harbor" to Westminster, Westminster's plan provider still fears possible enforcement of the mandate against it and therefore refuses to remove coverage for the offensive drugs in Westminster's plan. Westminster's insurance plan year begins on November 1. Westminster is trying to find an insurer that will honor its requirements by providing health insurance without the offensive coverages, but has so far not found a viable alternative. This difficulty poses an immediate and critical problem for Westminster. It is a genuine crisis in light of Westminster's faith convictions.

Westminster's health benefits and practices

23. As an aspect of its religious convictions, Westminster promotes the well-being and health of its employees. This includes provision of generous health services and health benefits for its employees. *See generally* Ex. A-1 (Employment Policy Manual, p. 32-33).

24. Westminster has about 60 full-time employees and 65 part-time employees. All of these employees profess a commitment to "to biblical orthodoxy (belief) and orthopraxy (practice)." Ex. A-1 (Employment Policy Manual, p. 8).

25. Westminster's health plan provider is Independent Blue Cross of Pennsylvania ("IBX"). IBX provides that coverage to a consortium of schools that includes Westminster. The coverage for Westminster's employees is distinct from that for the other members in the consortium, but the coverages are priced and placed in connection with each other.

26. Westminster has contracted with Armstrong, Doyle & Carroll, Inc. to act as its consultant for its employee health insurance plan.

27. I have been informed that Westminster's employee health plan does not meet the definition of a "grandfathered" plan under 42 U.S.C. § 18011 and 75 Fed. Reg. 41,726, 41,731 (2010).

28. Westminster wishes to continue to provide high-quality, affordable health benefits for its employees. Doing so is consistent with Westminster's religious commitment to support its faculty, staff, and their families.

29. If Westminster were to terminate health insurance coverage for its employees and stop offering health benefits, it would create a serious hardship for most faculty and staff. Westminster would also suffer serious competitive disadvantages in recruiting and retaining faculty and staff. If that happened, Westminster would also suffer impairment to the quality of its programs and instruction and, therefore, its overall effectiveness of service to the Lord.

The final form of the Mandate and Westminster's choice

30. The regulations imposing the requirement that Westminster provide access to abortion-causing drugs, including Plan B, Ella, and abortion-causing IUDs (the "Mandate") violate Westminster's religious beliefs. The Mandate also forces Westminster to provide access to education and counseling concerning abortion that directly conflicts with Westminster's religious beliefs and teachings. Providing these drugs, counseling, and education is incompatible and irreconcilable with Westminster's religious beliefs, express messages, and speech.

31. I am aware of the Mandate's exemption provision for religious employers. Westminster cannot qualify for this exemption. Westminster is not 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. Specifically, it is not a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order.

32. Because it does not qualify for an exemption to the Mandate, Westminster sincerely hoped the U.S. Department of Health and Human Services ("HHS") would decide to broaden the exemption to cover religious institutions like Westminster.

33. On July 2, 2013, HHS published its final amendments to the Mandate. 78 Fed. Reg. 39,870 ("Final Rule"). Despite over 400,000 comments urging it to do so, HHS did not abolish the distinction between churches and religious institutions like Westminster. Instead, HHS adopted an "accommodation" that requires Westminster to play a central role in facilitating access to abortion-causing drugs and devices by either paying for such coverage directly or by self-certifying and notifying our insurance provider in such a way as to trigger such coverage for its employees.

The effects of the "accommodation" on Westminster

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

35. Thus, Westminster would need to execute the self-certification prior to its first plan year that begins on or after January 1, 2014, and notify its insurer that it had so self-certified. 78 Fed. Reg. at 39879. Notification of the self-certification would trigger an obligation on the part of insurance provider to provide Westminster employees with payment coverage for abortion-causing drugs and devices. Westminster would be taking action that, under the Mandate, would force its insurer to provide coverage for the offensive drugs to Westminster's employees.

36. As a condition of complying with the "accommodation," Westminster would also have to refrain from "[d]irectly or indirectly interfering with a third party administrator's efforts to provide or arrange separate payments for contraceptive services for participants or beneficiaries in the plan" or "directly or indirectly seeking to influence a third party administrator's decision to provide or arrange such payments." 78 Fed. Reg. at 39879-80. The Mandate assumes that once it receives notice of the self-certification, the plan provider will be willing to make "separate payments for contraceptive services for participants and beneficiaries in the plan." 78 Fed. Reg. at 39880.

37. However, I understand that HHS has acknowledged that "there is no legal obligation for a third party administrator to enter into or remain in a contract with the eligible organization if it objects to any of these responsibilities." 78 Fed. Reg. at 39880.

38. At this time, I do not know whether Westminster will be able to find a plan provider who will be willing to carry out the obligations of the Mandate under those circumstances.

39. Thus, the burden remains on Westminster to find an insurance provider that will agree to providing free access to the same abortifacient drugs and services that Westminster cannot, consistently with its faith convictions, directly provide. However, even if it could, Westminster cannot in good conscience and consistently with its faith convictions, even take the self-certifying action that it knows will result in providing health coverage for the abortifacient drugs to its employees.

40. Westminster's religious beliefs preclude it from soliciting, contracting with, or designating an insurer or third party to provide these drugs and services. From Westminster's perspective, forcing an insurer or third party administrator to provide free access to abortifacient drugs and services is no different from paying for that access directly. Westminster cannot ignore its conscience and its obligation to the God it serves by the sleight of hand, self-certification and notice expedient proffered in the Mandate.

41. Moreover, it is my understanding that the Mandate requires that when a third party administrator is involved, even if the third party administrator consents, the religious organization–via its self-certification–must expressly designate the third party administrator as "an ERISA section 3(16) plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39879.

42. Under the so-called "accommodation," Westminster would have to identify its employees to the insurer or third party administrator for the distinct purpose of assisting the government's scheme to provide free access to contraceptive and abortifacient services to

Westminster's employees, and Westminster would have to continue to coordinate with its insurer or third party administrator whenever it added or removed employees and beneficiaries from its healthcare plan and, as a result, add them to or remove them from the contraceptive and abortifacient services payment (or payment-avoidance) scheme.

43. Thus, even under the so-called "accommodation," Westminster and every other non-exempt objecting religious organization would continue to play a central role in facilitating free access to contraceptive and abortifacient services.

44. I understand that the Mandate sets forth complex means through which a third party administrator may seek to recover its costs incurred in making payments for contraceptive and abortifacient services, but I also understand that there is no way to ensure that the cost of administering the abortifacient services would not be passed down to Westminster through increased fees.

The Mandate's impact on Westminster

45. Westminster will be subject to enforcement under the Mandate–enforcement that includes fines, other regulatory penalties, and potential lawsuits–starting on January 1, 2015. However, because Westminster's current insurer does not recognize that it is protected from governmental enforcement against it, Westminster's effective deadline for finding insurance coverage consistent with its faith convictions is the beginning of its next plan year, November 1, 2013. The only way Westminster can avoid the harsh consequences threatened by the Mandate would be to publicly abandon its faith commitments and violate its religious convictions. This is no choice at all, because Westminster's faith is central to its identity, its mission, and its very existence.

46. If Westminster chooses to violate the law–by ceasing to offer employee health insurance altogether, or by, if it can procure such coverage, offering insurance that excludes the

offensive drugs–then it will be penalized with fines of $2000 per full-time employee per year, or roughly $120,000 per year, every year. That amount would be a devastating blow to Westminster. For example, Westminster already often operates at a financial deficit.

47. 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.

48. In addition to the $2000 per-employee penalty, Westminster could also face tax penalties of $100 per day "for each individual to whom such failure relates" 26 U.S.C. § 4980D(b)(1), for offering insurance that fails to comply with the ACA, which would come to $2,190,000 per year for our 60 full-time employees alone.

49. A $2 million fine would be devastating for nearly any educational institution, but it is particularly devastating for a small Christian seminary like Westminster.

50. I also understand that Westminster could also face regulatory action and lawsuits under ERISA.

51. The Mandate imposes a burden on Westminster's employee recruitment and retention efforts by creating uncertainty as to whether Westminster will be able to offer health benefits beyond 2013.

52. The Mandate places Westminster at a competitive disadvantage in its efforts to recruit and retain employees.

53. The Mandate forces Westminster to choose between, on the one hand, violating its religious beliefs, and, on the other hand, incurring substantial fines and terminating its employee health benefits.

54. Westminster wants to continue to provide high-quality health benefits for its employees. It has no objections to providing almost all of the mandated services, including

gestational diabetes screenings, well-woman visits, and most prescription contraceptives. It asks only that it be permitted to follow its beliefs by continuing to refuse to pay for, or provide access to, abortifacients.

55. Westminster does not have a real choice in this matter. Its religious beliefs are deep, longstanding, and sincere.

The need for immediate action

56. The plan year for Westminster's health benefits begins on November 1, 2013. Westminster is already out of time to plan reasonably for that insurance plan year.

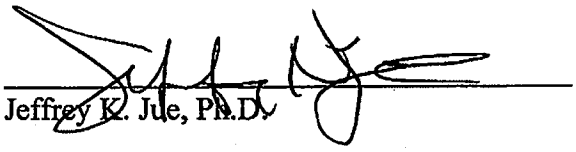
57. Every fall, Westminster works with its consultant to set the terms of its health insurance plan for the upcoming year. The process is time consuming: Westminster's staff must negotiate and work with its consultant/administrator on plan changes and on the production and distribution of plan materials and employee health benefit cards. This process typically takes several months.

58. Westminster has already begun its search for an acceptable insurance plan to begin November 1, 2013, but has so far encountered only obstacles because of the Mandate. Westminster needs to implement major changes before November 1, 2013, the first date of the two-week open enrollment period for employees and their families. Delay could lead to a lapse in coverage. Denial of immediate relief will force Westminster to choose between violating the Mandate or its core faith convictions.

59. Westminster needs immediate relief from the Mandate in order to arrange for and continue providing employee health insurance coverage.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Glenside, Pennsylvania on September 4, 2013.



Jeffrey K. Jue, Ph.D.

Exhibit A-1
Charter Excerpts

CHARTER (Amended 12/3/08)

On March 31, 1930, a Charter was granted to Westminster Theological Seminary under an Act of Assembly of the Commonwealth of Pennsylvania approved April 29, 1874. This charter has been amended in certain sections by subsequent actions of the courts of the Commonwealth. The body of its text, as amended, now reads as follows:

I. The name or title by which said Corporation shall be known is WESTMINSTER THEOLOGICAL SEMINARY.

II. The said Corporation is formed for the purpose of establishing and maintaining a Theological Seminary of high educational efficiency and one at all times fitted for continuing, defending and teaching the theological standards and attaining the ends hereinafter expressed, which are substantially the same as those set forth in the Introduction to the Plan of the Theological Seminary of the Presbyterian Church in the United States of America (commonly known as Princeton Theological Seminary), which was adopted by the General Assembly of the Presbyterian Church in the United States of America in 1811.

Westminster Theological Seminary is to form men for the gospel ministry, who shall truly believe, and cordially love, and therefore endeavor to propagate and defend, in its genuineness, simplicity, and fullness, that system of religious belief and practice which is set forth in the Confession of Faith and Catechisms of the Orthodox Presbyterian Church and the Presbyterian Church in America in the form they possessed in 1936 and 1973, respectively and that is integrally related to the fundamental principles of Presbyterian church government; thereby, cultivating and sustaining genuine Christian devotion with sound learning. (Amended 12/08)

It is to provide men who are capable and competent in interpreting and applying the Word of God, who will be humble, zealous, and faithful pastors devoted to the upbuilding and strengthening of the Church of Jesus Christ.

It is to provide for the church, primarily the Presbyterian and Reformed churches that share the Seminary's commitments and heritage, ministers and others who understand contemporary culture and are able intelligently and faithfully to defend and proclaim the Christian faith and to oppose heresy and unbelief.

It is to support and advance the labors of those engaged in the ministry of the Gospel by offering the means for continuing theological education.

It is, in addition, to furnish training in Scripture and theology to men and women who are preparing to serve Christ and his church in vocations other than the gospel ministry so that the whole body of Christ may be enriched.

It is to promote harmony and unity among all of those who, by their words and their deeds, demonstrate that they believe and love and live by the teachings of God's Word.

It is to provide for the church leadership that is theologically and intellectually excellent with talents related to vocation.

It is to serve as a center of training and study for the ministry to the non-Christian world, that the mission of the church may be advanced through the provision of theological education to present and future leaders in the worldwide mission of the church.

Also, it is to prescribe courses of study; to employ all necessary professors, teachers, assistants, and officers; to acquire, receive, hold, employ and deal with such property, real or personal, as may be lawful and necessary to carry on the work of the corporation; to publish and dispose of such pamphlets, literature, or books, as may be required in the conduct of such work; to grant such certificates and diplomas as are usually granted by like institutions; to grant the degrees: Master of Divinity (M.Div.), Master of Theology (Th.M.) and Doctor of Philosophy (Ph.D.), and such other degrees as may from time to time be approved by the State Council of Education or its successors, and to perform such other functions as are usually or properly connected with the work of educational institutions of similar character.

Section VI (excerpt):

VI. The governance of said Corporation shall be vested in a Board of Trustees, consisting of at least fifteen but not more than thirty men, of whom at least one-half but not more than three fifths shall be ministers of the Gospel. Ultimately the Seminary serves the church, specifically the Presbyterian and Reformed Churches that share in the Seminary's commitment and heritage. In recognition (1) of this subservience and (2) of the wisdom committed to the widespread and diverse body of Christ, the Board determines that all newly elected Board members (as of May 1986) shall have been previously recognized by a church of this tradition by election and ordination to the office of (teaching or ruling) elder, and shall have the appropriate qualifications for that office as those qualifications are outlined in I Timothy 2 and 3 and in Titus 1.

Constitution Excerpts

Preamble

Being convinced that it is highly important to the cause of true religion and the advancement of the Kingdom of our Lord and Savior Jesus Christ that candidates for the ministry of the Gospel be trained in accordance with the Westminster Standards as containing the system of doctrine taught in the Holy Scriptures, we have established in the city of Philadelphia an institution to be known as Westminster Theological Seminary (Pennsylvania), to carry on and perpetuate the policies and traditions of Princeton Theological Seminary, as it existed prior to the reorganization thereof in the year 1929, in respect to scholarship and militant defense of the Reformed Faith.

Section V.3:

Section 3. The voting members of the Faculty, before assuming office, shall subscribe to the following pledge:

"I do solemnly declare, in the presence of God, and of the Trustees and Faculty of this Seminary, that (1) I believe the Scriptures of the Old and New Testaments to be the Word of God, the only infallible rule of faith and practice; and (2) I do solemnly and ex animo adopt, receive, and subscribe to the Westminster Confession of Faith and Catechisms in the form in which they were adopted by this Seminary in the year of our Lord 1936, as the confession of my faith or as a summary and just exhibition of that system of doctrine and religious belief, which is contained in Holy Scripture, and therein revealed by God to man for his salvation; and I do solemnly ex animo, profess to receive the fundamental principles of the Presbyterian form of church government, as agreeable to the inspired oracles. And I do solemnly promise and engage not to inculcate, teach or insinuate anything which shall appear to me to contradict or contravene, either directly or impliedly, any element in that system of doctrine, nor to oppose any of the fundamental principles of that form of church government, while continue a member of the Faculty in this Seminary.

"I do further solemnly declare that, being convinced of my sin and misery and of my inability to rescue myself from my lost condition, not only have I assented to the truth of the promises of the Gospel, but also I have received and rest upon Christ and His righteousness for pardon of my sin and for my acceptance as righteous in the sight of God."

Employment Policy Manual

Page 8 (excerpt):

Westminster Theological Seminary hires only personnel who belong to a Christian church and subscribe to biblical orthodoxy (belief) and orthopraxy (practice).

Pages 32-33 (excerpt):

Medical, Vision and Dental Insurance Westminster Theological Seminary provides health insurance to fulltime employees and their dependents with access to medical, prescription, vision and dental care insurance benefits. Employees are eligible to participate in medical, vision and dental insurance plans with the first day of employment.

Employees may participate in medical, vision and dental insurance plans subject to all terms and conditions of the agreement between the seminary and the medical, vision and dental insurance companies. Employees have a 30-day period from the date of hire or the date of a qualifying event to enroll or change coverage. Human Resources must be notified when new dependents are added or when an employee's name or address changes within 30 days of the change.

The seminary pays the majority percentage of the premium for medical, vision, and dental insurance for the employee, spouse, and dependent children, if applicable. Employees contribute to the rest of the insurance premium through salary reductions.

Occasionally an employee may wish to waive medical and vision insurance coverage. All waivers are voluntary. They are not to be considered a condition of employment or used in negotiating employment offers. For those employees who have waived insurance coverage, reimbursements, up to the cost of what the seminary would pay to cover the employee and dependents, may be available to the spouse of an employee for his or her contribution toward dependent coverage.

In the event that an employee wishes to resume participation in the seminary's benefit plans, he or she should contact Human Resources. In general, resumed participation will not become effective until the next open enrollment period.

A change in employment classification that would result in loss of eligibility to participate in the health insurance plan may qualify an employee for benefits continuation under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Westminster Seminary Distinctives (excerpt)

Westminster Theological Seminary (PA) exists to serve Christ and his kingdom by extending the knowledge of the glory of God in Christ until that knowledge covers the earth as the waters cover the sea.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY,
and
HOUSTON BAPTIST UNIVERSITY,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *et al.*

Defendants.

Civil No. 12-3009

DECLARATION OF DIANA M. VERM

I, Diana M. Verm, hereby state under penalty of perjury as follows:

1. I am one of the counsel representing Plaintiffs in the above-captioned matter and am admitted *pro hac vice* before this Court in connection with this case. I have personal knowledge of everything testified to in this declaration.

2. Attached hereto as Exhibit C-1 is a true and complete copy of Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011).

3. Attached hereto as Exhibit C-2 is a true and complete copy of the FDA Birth Control Guide (Aug. 2012).

4. Attached hereto as Exhibit C-3 is a true and complete copy of the January 20, 2012 Statement of U.S. Department of Health and Human Services Secretary Kathleen Sebelius.

5. Attached hereto as Exhibit C-4 is a true and complete copy of the Department of Health and Human Services *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code* (updated June 28, 2013).

6. Attached hereto as Exhibit C-5 is a true and complete copy of The White House, *The Affordable Care Act Increases Choice and Saving Money for Small Businesses.*

7. Attached hereto as Exhibit C-6 is a true and complete copy of the Department of Health and Human Services' "Keeping the Health Plan You Have: The Affordable Care Act and 'Grandfathered' Health Plans" document (2010).

8. Attached hereto as Exhibit C-7 is a true and complete copy of Mark J. Mazur, Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner* (July 2, 2013), *available at* http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

Executed this 30th day of August, 2013, in Washington, D.C.

Diana M. Verm

Exhibit C-1

Women's Preventive Services Guidelines

Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being

The Affordable Care Act – the health insurance reform legislation passed by Congress and signed into law by President Obama on March 23, 2010 – helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Women's Preventive Services Guidelines Supported by the Health Resources and Services Administration

Under the Affordable Care Act, women's preventive health care – such as mammograms, screenings for cervical cancer, prenatal care, and other services – generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS commissioned an IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depending on a woman's health status, health needs, and other risk factors.* (see note)
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for pregnant women identified to be at high risk for diabetes.
Human papillomavirus testing.		Screening should begin at 30 years of age and should occur

Learn More

Clinical Preventive Services for Women: Closing the Gaps Institute of Medicine report

HealthCare.gov
Prevention

	High-risk human papillomavirus DNA testing in women with normal cytology results.	no more frequently than every 3 years.
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.
Counseling and screening for human immune-deficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.	As prescribed.
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.	

** Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs, Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.*

*** The guidelines concerning contraceptive methods and counseling described above do not apply to women who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF - 327 KB)*

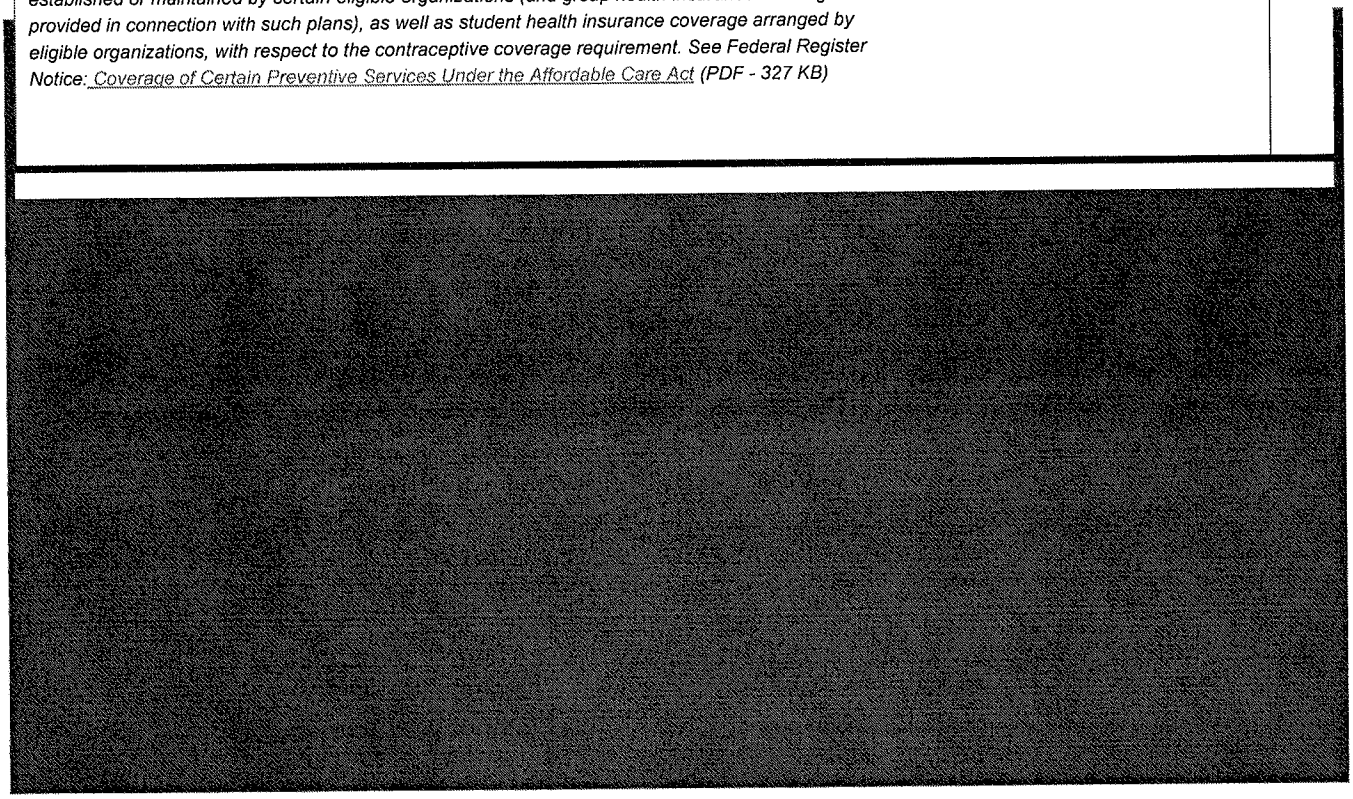
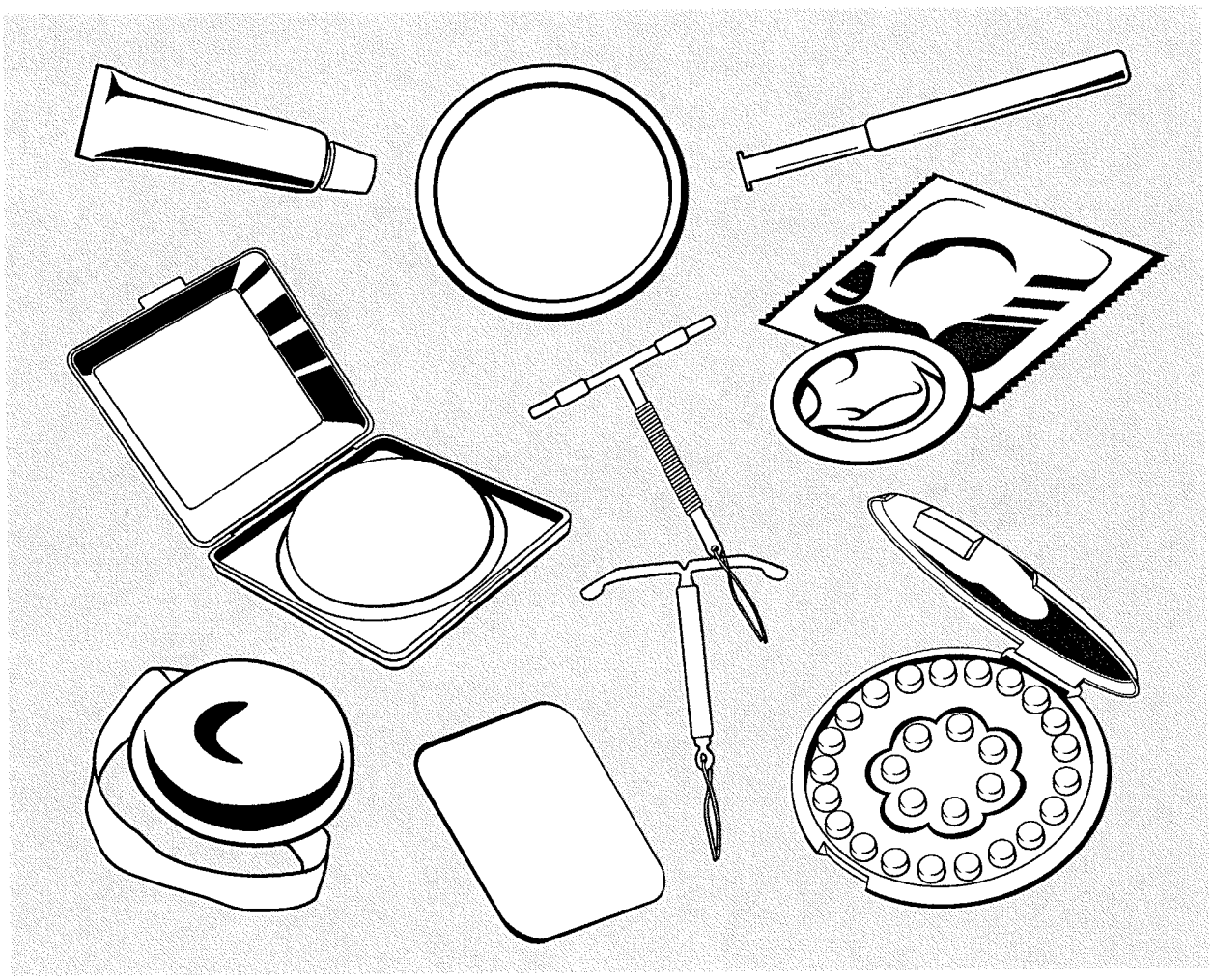


Exhibit C-2

FDA Office of Women's Health

Birth Control Guide

This guide gives the basic facts about the different kinds of FDA-approved medicines and devices for birth control. Ask your doctor to tell you about all of the risks and benefits of using these products.



If you do not want to get pregnant, there are many birth control options to choose from. No one product is best for everyone. The only sure way to avoid pregnancy and sexually transmitted infections (STIs or STDs) is not to have any sexual contact (abstinence). This guide lists FDA-approved products for birth control. Talk to your doctor, nurse, or pharmacist about the best method for you.

There are different kinds of medicines and devices for birth control:

To Learn More:

This guide should not be used in place of talking to your doctor or reading the label for your product. The product and risk information may change. To get the most recent information for your birth control go to:

Drugs
Go to http://www.accessdata.fda.gov/scripts/cder/drugsatfda
(type in the name of your drug)

Devices
http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm
(type in the name of your device)

Some things to think about when you choose birth control:

- Your health
- How often you have sex.
- How many sexual partners you have.
- If you want to have children in the future.
- If you will need a prescription or if you can buy the method over-the-counter.
- The number of pregnancies expected per 100 women who use a method for 1 year. For comparison, about 85 out of 100 sexually active women who do not use any birth control can expect to become pregnant in a year.
- This booklet lists pregnancy rates of **typical use**. Typical use shows how effective the different methods are during actual use (including sometimes using a method in a way that is not correct or not consistent).
- For more information on the chance of getting pregnant while using a method, please see Trussell, J. (2011). "Contraceptive failure in the United States." Contraception 83(5):397-404.

Tell your doctor, nurse, or pharmacist if you:

- Smoke.
- Have liver disease.
- Have blood clots.
- Have family members who have had blood clots.
- Are taking any other medicines, like antibiotics.
- Are taking any herbal products, like St. John's Wort.

To avoid pregnancy:

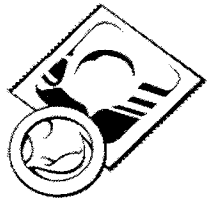
- No matter which method you choose, it is important to follow all of the directions carefully. If you don't, you raise your chance of getting pregnant.
- The best way to avoid pregnancy and sexually transmitted infections (STIs) is to practice total abstinence (do not have any sexual contact).

BARRIER METHODS

Block sperm from reaching the egg

Male Condom

(Latex or Polyurethane)



What is it?

- A thin film sheath placed over the erect penis.

How do I use it?

- Put it on the erect penis right before sex.
- Pull out before the penis softens.
- Hold the condom against the base of the penis before pulling out.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, 18 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions (If you are allergic to latex, you can try condoms made of polyurethane).

Does it protect me from sexually transmitted infections (STIs)?

- Except for abstinence, latex condoms are the best protection against HIV/AIDS and other STIs.

Female Condom

What is it?

- A lubricated, thin polyurethane pouch that is put into the vagina.

How do I use it?

- Put the female condom into the vagina right before sex.
- Use it only once and then throw it away.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 21 may get pregnant.
- The most important thing is that you use a condom every time you have sex.

Some Risks

- Irritation
- Allergic reactions

Does it protect me from sexually transmitted infections (STIs)?

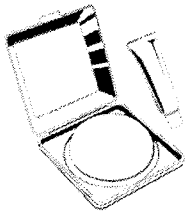
- May give some protection against STIs, but more research is needed.
- Not as effective as male latex condoms.

BARRIER METHODS

Block sperm from reaching the egg

Diaphragm with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.



What is it?

- A dome-shaped flexible disk with a flexible rim.
- Made from latex rubber or silicone.
- It covers the cervix.

How do I use it?

- You need to put spermicidal jelly on the inside of the diaphragm before putting it into the vagina.
- You must put the diaphragm into the vagina before having sex.
- You must leave the diaphragm in place at least 6 hours after having sex.
- It can be left in place for up to 24 hours. You need to use more spermicide every time you have sex.

How do I get it?

- You need a prescription.
- A doctor or nurse will need to do an exam to find the right size diaphragm for you.
- You should have the diaphragm checked after childbirth or if you lose more than 15 pounds. You might need a different size.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 12 may get pregnant.

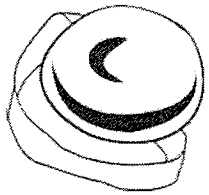
Some Risks

- Irritation, allergic reactions, and urinary tract infection.
- If you keep it in place longer than 24 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Sponge with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner



What is it?

- A disk-shaped polyurethane device with the spermicide nonoxynol-9.

How do I use it?

- Put it into the vagina before you have sex.
- Protects for up to 24 hours. You do not need to use more spermicide each time you have sex.
- You must leave the sponge in place for at least 6 hours after having sex.
- You must take the sponge out within 30 hours after you put it in. Throw it away after you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, 12 to 24 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the sponge may not fit as well.

Some Risks

- Irritation
- Allergic reactions
- Some women may have a hard time taking the sponge out.
- If you keep it in place longer than 24-30 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No.

Cervical Cap with Spermicide

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A soft latex or silicone cup with a round rim, which fits snugly around the cervix.

How do I use it?

- You need to put spermicidal jelly inside the cap before you use it.
- You must put the cap in the vagina before you have sex.
- You must leave the cap in place for at least 6 hours after having sex.
- You may leave the cap in for up to 48 hours.
- You do NOT need to use more spermicide each time you have sex.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 17 to 23 may get pregnant.
- It may not work as well for women who have given birth. Childbirth stretches the vagina and cervix and the cap may not fit as well.

Some Risks

- Irritation, allergic reactions, and abnormal Pap test.
- You may find it hard to put in.
- If you keep it in place longer than 48 hours, there is a risk of toxic shock syndrome. Toxic shock is a rare but serious infection.

Does it protect me from sexually transmitted infections (STIs)? No

Spermicide Alone

Spermicides containing N9 can irritate the vagina and rectum. It may increase the risk of getting the AIDS virus (HIV) from an infected partner.

What is it?

- A foam, cream, jelly, film, or tablet that you put into the vagina.

How do I use it?

- You need to put spermicide into the vagina 5 to 90 minutes before you have sex.
- You usually need to leave it in place at least 6 to 8 hours after sex; do not douche or rinse the vagina for at least 6 hours after sex.
- Instructions can be different for each type of spermicide. Read the label before you use it.

How do I get it?

- You do not need a prescription.
- You can buy it over-the-counter.

Chance of getting pregnant with typical use

(Number of pre

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 28 may get pregnant.
- Different studies show different rates of effectiveness.

Some Risks

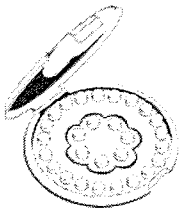
- Irritation
- Allergic reactions
- Urinary tract infection
- If you are also using a medicine for a vaginal yeast infection, the spermicide might not work as well.

Does it protect me from sexually transmitted infections (STIs)? No.

HORMONAL METHODS

Prevent pregnancy by interfering with ovulation and possibly fertilization of the egg

Oral Contraceptives (Combined Pill)
"The Pill"



What is it?

- A pill that has 2 hormones (estrogen and progestin) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps the sperm from getting to the egg.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss 1 or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use
(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects

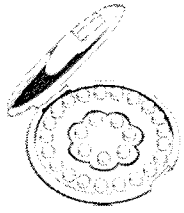
- Changes in your cycle (period)
- Nausea
- Breast tenderness
- Headache

Less Common Serious Side Effects

- It is not common, but some women who take the pill develop high blood pressure.
- It is rare, but some women will have blood clots, heart attacks, or strokes.

Does it protect me from sexually transmitted infections (STIs)? No.

Oral Contraceptives (Progestin-only)
"The Mini Pill"



What is it?

- A pill that has only 1 hormone, a progestin.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- Less often, it stops the ovaries from releasing eggs.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss 1 or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use
(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 9 may get pregnant.

Some Risks

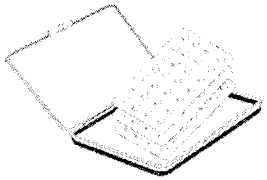
- Irregular bleeding
- Headache
- Breast tenderness
- Nausea
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

Prevent pregnancy by interfering with ovulation and possibly fertilization of the egg

Oral Contraceptives (Extended/Continuous Use)

"The Pill"



What is it?

- A pill that has 2 hormones (estrogen and progestin) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.
- These pills are designed so women have fewer or no periods.

How do I use it?

- You should swallow the pill at the same time every day, whether or not you have sex.
- If you miss 1 or more pills, or start a pill pack too late, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

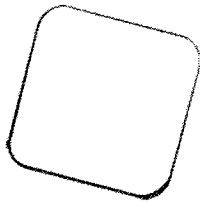
- Out of 100 women who use this method, about 9 may get pregnant.

Some Risks

- Risks are similar to other oral contraceptives with estrogen and progestin.
- You may have more light bleeding and spotting between periods than with 21 or 24 day oral contraceptives.
- It may be harder to know if you become pregnant, since you will likely have fewer periods or no periods.

Does it protect me from sexually transmitted infections (STIs)? No.

Patch



What is it?

- This is a skin patch you can wear on the lower abdomen, buttocks, or upper arm or back.
- It has hormones (estrogen and progestin) that stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put on a new patch and take off the old patch once a week for 3 weeks (21 total days).
- Don't put on a patch during the fourth week. Your menstrual period should start during this patch-free week.
- If the patch comes loose or falls off, you may need to use another method of birth control, like a condom.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, about 9 may get pregnant.

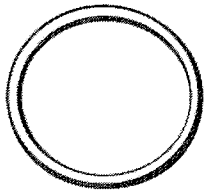
Some Risks

- It will expose you to higher levels of estrogen compared to most combined oral contraceptives.
- It is not known if serious risks, such as blood clots and strokes, are greater with the patch because of the greater exposure to estrogen.

Does it protect me from sexually transmitted infections (STIs)? No.

Prevent pregnancy by interfering with ovulation and possibly fertilization of the egg

Vaginal Contraceptive Ring



What is it?

- It is a flexible ring that is about 2 inches around.
- It releases 2 hormones (progestin and estrogen) to stop the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps sperm from getting to the egg.

How do I use it?

- You put the ring into your vagina.
- Keep the ring in your vagina for 3 weeks and then take it out for 1 week. Your menstrual period should start during this ring-free week.
- If the ring falls out and stays out for more than 3 hours, replace it but use another method of birth control, like a condom, until the ring has been in place for 7 days in a row.
- Read the directions and talk to your doctor, nurse or pharmacist about what to do.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

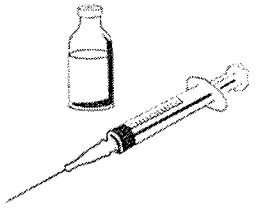
- Out of 100 women who use this method, about 9 may get pregnant.

Some Side Effects and Risks

- Vaginal discharge, discomfort in the vagina, and mild irritation.
- Other risks are similar to oral contraceptives (combined pill).

Does it protect me from sexually transmitted infections (STIs)? No.

Shot/Injection



What is it?

- A shot of the hormone progestin, either in the muscle or under the skin.

How does it work?

- The shot stops the ovaries from releasing eggs.
- It also thickens the cervical mucus, which keeps the sperm from getting to the egg.

How do I get it?

- You need 1 shot every 3 months from a health care provider.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, including women who don't get the shot on time, 6 may get pregnant.

Some Risks

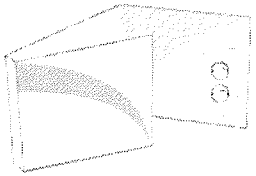
- You may lose bone density if you get the shot for more than 2 years in a row.
- Bleeding between periods
- Headaches
- Weight gain
- Nervousness
- Abdominal discomfort

Does it protect me from sexually transmitted infections (STIs)? No.

EMERGENCY CONTRACEPTION

May be used if you did not use birth control or if your regular birth control fails. It should not be used as a regular form of birth control.

Plan B, Plan B One-Step and Next Choice (Levonorgestrel)



What is it?

- These are pills with the hormone progestin.
- They help prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping the release of an egg from the ovary. It may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the womb (uterus).
- For the best chance for it to work, you should take the pill(s) as soon as possible after unprotected sex.
- You should take emergency contraception within 3 days after unprotected sex.

How do I get it?

- You can get Plan B, Plan B One-Step and Next Choice without a prescription if you are 17 years or older.
- If you are younger than 17, you need a prescription.

Chance of getting pregnant with typical use

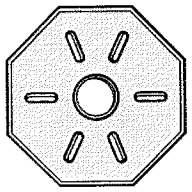
- 7 out of every 8 women who would have gotten pregnant will not become pregnant after taking Plan B, Plan B One-Step, or Next Choice.

Some Risks

- Nausea
- Vomiting
- Abdominal pain
- Fatigue
- Headache

Does it protect me from sexually transmitted infections (STIs)? No.

Ella (ulipristal acetate)



What is it?

- A pill that blocks the hormone progesterone.
- It helps prevent pregnancy after birth control failure or unprotected sex.

How does it work?

- It works mainly by stopping or delaying the ovaries from releasing an egg. It may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation).
- For the best chance for it to work, you should take the pill as soon as possible after unprotected sex.
- You should take Ella within 5 days after having unprotected sex.

How do I get it?

- You need a prescription.

Chance of getting pregnant with typical use

- 6 or 7 out of every 10 women who would have gotten pregnant will not become pregnant after taking Ella.

Some Risks

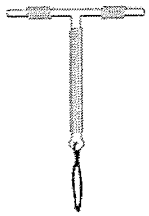
- Headache
- Nausea
- Abdominal pain
- Menstrual pain
- Tiredness
- Dizziness

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED METHODS

Inserted/implanted into the body and can be kept in place for several years

Copper IUD



What is it?

- A T-shaped device that is put into the uterus by a healthcare provider.

How does it work?

- The IUD prevents sperm from reaching the egg, from fertilizing the egg, and may prevent the egg from attaching (implanting) in the womb (uterus).
- It does not stop the ovaries from making an egg each month.
- The Copper IUD can be used for up to 10 years.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

- A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Cramps
- Irregular bleeding

Uncommon Risks

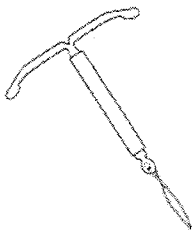
- Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- Life-threatening infection

Does it protect me from sexually transmitted infections (STIs)? No.

IUD with progestin



What is it?

- A T-shaped device that is put into the uterus by a healthcare provider.

How does it work?

- It may thicken the mucus of your cervix, which makes it harder for sperm to get to the egg, and also thins the lining of your uterus.
- After a doctor or other healthcare provider puts in the IUD, it can be used for up to 5 years.
- After the IUD is taken out, it is possible to get pregnant.

How do I get it?

- A doctor or other healthcare provider needs to put in the IUD.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Irregular bleeding
- No periods
- Abdominal/pelvic pain
- Ovarian cysts

Uncommon Risks

- Pelvic inflammatory disease
- Infertility

Rare Risk

- IUD is stuck in the uterus or found outside the uterus.
- Life-threatening infection

Does it protect me from sexually transmitted infections (STIs)? No.

IMPLANTED METHODS

Inserted/implanted into the body and can be kept in place for several years

Implantable Rod

What is it?

- A thin, matchstick-sized rod that contains the hormone progestin.
- It is put under the skin on the inside of your upper arm.

How does it work?

- It stops the ovaries from releasing eggs.
- It thickens the cervical mucus, which keeps sperm from getting to the egg.
- It can be used for up to 3 years.

How do I get it?

- After giving you local anesthesia, a doctor or nurse will put it under the skin of your arm with a special needle.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Side Effects

- Changes in bleeding patterns
- Weight gain
- Breast and abdominal pain

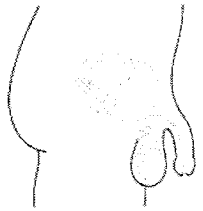
Does it protect me from sexually transmitted infections (STIs)? No.

PERMANENT METHODS

For people who are sure they never want to have a child or do not want any more children.

Sterilization Surgery for Men Vasectomy

This method is for men who are sure they never want to have a child or do not want any more children. If you are thinking about it, a vasectomy may not be right for you. Sometimes it is possible to reverse the operation, but there are no guarantees. Reversal involves complicated surgery that might not work.



What is it?

- This is a surgery a man has only once.
- It is permanent.

How does it work?

- A surgery blocks a man's vas deferens (the tubes that carry sperm from the testes to other glands).
- Semen (the fluid that comes out of a man's penis) never has any sperm in it.
- It takes about 3 months to clear sperm out of a man's system. You need to use another form of birth control until a test shows there are no longer any sperm in the seminal fluid.

How do I get it?

- A man needs to have surgery.
- Local anesthesia is used.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women whose partner has had a vasectomy, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- Infection

Does it protect me from sexually transmitted infections (STIs)? No.

The success of reversal surgery depends on:

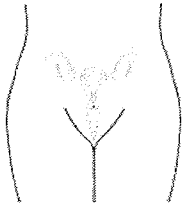
- The length of time since the vasectomy was performed.
- Whether or not antibodies to sperm have developed.
- The method used for vasectomy
- Length and location of the segments of vas deferens that were removed or blocked.

PERMANENT METHODS

For people who are sure they never want to have a child or do not want any more children.

Sterilization Surgery for Women

Surgical Implant (also called trans-abdominal surgical sterilization)



What is it?

- A device is placed on the outside of each fallopian tube.

How does it work?

- One way is by tying and cutting the tubes — this is called tubal ligation. The fallopian tubes also can be sealed using an instrument with an electrical current. They also can be closed with clips, clamps or rings. Sometimes, a small piece of the tube is removed.
- The woman's fallopian tubes are blocked so the egg and sperm can't meet in the fallopian tube. This stops you from getting pregnant.
- This is a surgery a woman has only once.
- It is permanent.

How do I get it?

- This is a surgery you ask for.
- You will need general anesthesia.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Pain
- Bleeding
- Infection or other complications after surgery
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)?

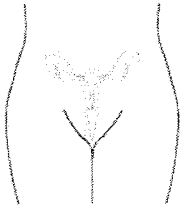
No.

Can it be reversed?

Reversals require complicated surgery. Even though tubes can sometimes be rejoined, there are no guarantees. For many women, reversals are not possible because there is not enough of their tubes left to reconnect.

Sterilization Implant for Women

Transcervical Surgical Sterilization Implant



What is it?

- Small flexible, metal coil that is put into the fallopian tubes through the vagina.
- The device works by causing scar tissue to form around the coil. This blocks the fallopian tubes and stops you from getting pregnant.

How does it work?

- The device is put inside the fallopian tube with a special catheter.
- You need to use another birth control method during the first 3 months. You will need an X-ray to make sure the device is in the right place.
- It is permanent.

How do I get it?

- The devices are placed into the tubes using a camera placed in the uterus.
- Once the tubes are found, the devices are inserted.
- Since it is inserted through the vagina, no skin cutting (incision) is needed.
- You may need local anesthesia.

Chance of getting pregnant with typical use

(Number of pregnancies expected per 100 women who use this method for 1 year)

- Out of 100 women who use this method, less than 1 may get pregnant.

Some Risks

- Mild to moderate pain after insertion
- Ectopic (tubal) pregnancy

Does it protect me from sexually transmitted infections (STIs)?

No.

http://www.fda.gov/birthcontrol

To Learn More:

This guide should not be used in place of talking to your doctor or reading the label for your product. The product and risk information may change. To get the most recent information for your birth control go to:

Drugs

Go to http://www.accessdata.fda.gov/scripts/cder/drugsatfda
(type in the name of your drug)

Devices

http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfRL/LSTSimpleSearch.cfm
(type in the name of your device)

UPDATED AUGUST 2012

TAKE TIME TO CARE ... For yourself, for those who need you.

Exhibit C-3

Newsroom
Speeches and Testimony
Reports
Freedom of Information Act (FOIA)
Audio / Video / Photo
E-mail Updates/RSS Feeds
Social Hub
Contacts

News Release

FOR IMMEDIATE RELEASE
January 20, 2012

Contact: HHS Press Office
(202) 690-6343

A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius

In August 2011, the Department of Health and Human Services issued an interim final rule that will require most health insurance plans to cover preventive services for women including recommended contraceptive services without charging a co-pay, co-insurance or a deductible. The rule allows certain non-profit religious employers that offer insurance to their employees the choice of whether or not to cover contraceptive services. Today the department is announcing that the final rule on preventive health services will ensure that women with health insurance coverage will have access to the full range of the Institute of Medicine's recommended preventive services, including all FDA -approved forms of contraception. Women will not have to forego these services because of expensive co-pays or deductibles, or because an insurance plan doesn't include contraceptive services. This rule is consistent with the laws in a majority of states which already require contraception coverage in health plans, and includes the exemption in the interim final rule allowing certain religious organizations not to provide contraception coverage. Beginning August 1, 2012, most new and renewed health plans will be required to cover these services without cost sharing for women across the country.

After evaluating comments, we have decided to add an additional element to the final rule. Nonprofit 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. Employers wishing to take advantage of the additional year must certify that they qualify for the delayed implementation. This additional year will allow these organizations more time and flexibility to adapt to this new rule. We intend to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support. We will continue to work closely with religious groups during this transitional period to discuss their concerns.

Scientists have abundant evidence that birth control has significant health benefits for women and their families, is documented to significantly reduce health costs, and is the most commonly taken drug in America by young and middle-aged women. This rule will provide women with greater access to contraception by requiring coverage and by prohibiting cost sharing.

This decision was made after very careful consideration, including the important concerns some have raised about religious liberty. I believe this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services. The administration remains fully committed to its partnerships with faith-based organizations, which promote healthy communities and serve the common good. And this final rule will have no impact on the protections that existing conscience laws and regulations give to health care providers.

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Note: All HHS news releases, fact sheets and other press materials are available at *http://www.hhs.gov/news*.

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Follow HHS Secretary Kathleen Sebelius on Twitter @Sebelius.

Last revised: February 2, 2012

Case 4:12-cv-03009 Document 75-3 Filed in TXSD on 09/09/13 Page 23 of 43

Exhibit C-4

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

Date: June 28, 2013[1]

From: Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS)

Title: Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code[2]

I. Purpose

Section 2713(a)(4) of the Public Health Service Act (PHS Act), as added by the Patient Protection and Affordable Care Act (Affordable Care Act), requires non-grandfathered group health plans and health insurance issuers to provide coverage for recommended women's preventive health services without cost sharing. The Affordable Care Act also added section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act (including section 2713) into ERISA and the Code to make them applicable to group health plans.

Interim final regulations were issued by the Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury (collectively, the Departments) on July 19, 2010 (codified at 26 CFR §54.9815-2713T; 29 CFR §2590.715-2713; and 45 CFR §147.130), which provide that a non-grandfathered group health plan or health insurance issuer must cover certain items and services, without cost sharing, as recommended by the U.S. Preventive Services Task Force (USPSTF), the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and the Health Resources and Services

[1] This bulletin was originally issued on February 10, 2012, and reissued on August 15, 2012, to describe the temporary enforcement safe harbor. In reissuing this bulletin, CMS is not changing the substance of the policy; it is only extending the temporary enforcement safe harbor to encompass plan years beginning on or after August 1, 2013 (the prior expiration date of the safe harbor), and before January 1, 2014 (the applicability date of final regulations establishing accommodations for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations that are institutions of higher education, with respect to the contraceptive coverage requirement).

[2] The terms of this bulletin apply to student health insurance coverage in a manner comparable to that in which they apply to insured group health plan coverage.

Administration (HRSA). Among other things, the interim final regulations provide that, if a new recommendation or guideline is issued, a plan or issuer must provide coverage consistent with the new recommendation or guideline (with no cost sharing) for plan years (or, in the individual market, policy years) that begin on or after the date that is one year after the date on which the new recommendation or guideline is issued.

HRSA was charged by statute with developing comprehensive guidelines for preventive care and screenings with respect to women, to the extent not already recommended by USPSTF. On August 1, 2011, HRSA adopted and released guidelines for women's preventive services based on recommendations developed by the Institute of Medicine at the request of HHS (Women's Preventive Services: Required Health Plan Coverage Guidelines, or HRSA Guidelines). One of HRSA's recommendations is that all Food and Drug Administration-approved contraceptives for women, as prescribed by a provider, be covered by non-grandfathered group health plans and health insurance issuers without cost sharing.

That same day, the Departments issued an amendment to the interim final regulations that provided HRSA discretion to exempt group health plans established or maintained by certain religious employers (and any group health insurance provided in connection with such plans) from any requirement to cover contraceptive services, and this discretion was exercised by HRSA in the HRSA Guidelines such that group health plans established or maintained by these religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the contraceptive coverage requirement. Final regulations issued on February 10, 2012, adopted the definition of religious employer in the amended interim final regulations, which has subsequently been modified (see description below).

For all non-exempted, non-grandfathered plans and policies, the regulations require coverage of the recommended women's preventive services, including the recommended contraceptive services, without cost sharing, for plan years (or, in the individual market, policy years) beginning on or after August 1, 2012.

On February 10, 2012, CMS established a temporary enforcement safe harbor with respect to non-grandfathered health plans established or maintained or arranged by certain nonprofit organizations with religious objections to contraceptive coverage (and any health insurance coverage offered in connection with such plans).[3]

This bulletin modifies the applicable time period of the previous version of this bulletin. Originally issued on February 10, 2012, and reissued on August 15, 2012, this bulletin describes the temporary enforcement safe harbor available to non-grandfathered health plans established or maintained or arranged by nonprofit organizations whose plans have consistently not covered all or the same subset of contraceptive services for religious reasons at any point from the original issuance date of this bulletin (i.e., February 10, 2012) onward, consistent with any applicable

[3] The bulletin was originally reissued on August 15, 2012, to clarify that: (1) the safe harbor is also available to nonprofit organizations with religious objection to some but not all contraceptive coverage; (2) group health plans that took some action to try to exclude or limit contraceptive coverage that was not successful as of February 10, 2012, are not for that reason precluded from eligibility for the safe harbor; and (3) the safe harbor may be invoked without prejudice by nonprofit organizations that are uncertain whether they qualify for the religious employer exemption.

State law (and any group health insurance coverage provided in connection with such plans). Under the original terms of the bulletin, the temporary enforcement safe harbor would remain in effect until the first plan year beginning on or after August 1, 2013. A commitment was made to rulemaking during the one-year safe harbor period to accommodate certain additional nonprofit religious organizations with religious objections to contraceptive coverage by providing women in their plans with alternative methods to obtain contraceptive coverage without cost sharing.

Contemporaneous with the reissuance of this bulletin, the Departments are issuing final regulations under section 2713 of the PHS Act and the companion provisions of ERISA and the Code. The final regulations simplify and clarify the definition of religious employer for purposes of the religious employer exemption. The regulations also establish accommodations that are available to group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations that are institutions of higher education, with respect to the contraceptive coverage requirement. The final regulations generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014.[4]

Also contemporaneous with this bulletin and the final regulations, the Departments of HHS and Labor are issuing a self-certification form to be executed by an organization seeking to be treated as an eligible organization for purposes of an accommodation under the final regulations. This self-certification form is applicable in conjunction with the accommodations under the final regulations (i.e., for plan years beginning on or after January 1, 2014), after the expiration of the temporary enforcement safe harbor. The self-certification form associated with the final regulations is different from the self-certification form associated with the temporary enforcement safe harbor and provided at the end of this bulletin. The self-certification associated with the temporary enforcement safe harbor is to be used only for plan years beginning before January 1, 2014.

In reissuing this bulletin, CMS is not changing the substance of the temporary enforcement safe harbor policy; it is only extending the safe harbor to encompass plan years beginning on or after August 1, 2013, and before January 1, 2014. This transitional enforcement safe harbor is intended to maintain the status quo with respect to organizations that qualify for the safe harbor during the period that exists between the prior expiration date of the safe harbor and the applicability date of the final regulations. As described herein, organizations that qualify under the safe harbor are not required to execute another self-certification, but are required to provide another notice to plan enrollees in connection with any new plan year.

The Department of Labor and the Department of the Treasury agree with the need for such transitional relief and will not take any enforcement action against an employer or group health plan that complies with the conditions of the temporary enforcement safe harbor described herein.

II. Temporary Enforcement Safe Harbor

[4] The amendments to the religious employer exemption apply for plan years beginning on or after August 1, 2013.

The temporary enforcement safe harbor will be in effect until the first plan year that begins on or after January 1, 2014. Neither employers, nor group health plans, nor group health insurance issuers will be subject to any enforcement action by the Departments for failing to cover some or all of the recommended contraceptive services without cost sharing in non-grandfathered group health plans established or maintained by an organization, including a group or association of employers within the meaning of section 3(5) of ERISA, (and any group health insurance coverage provided in connection with such plans) meeting all of the following criteria:

1. The organization is organized and operates as a nonprofit entity.

2. From February 10, 2012 onward, the health plan established or maintained or arranged by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required, at any point, consistent with any applicable State law, because of the religious beliefs of the organization.

3. As detailed below, the health plan established or maintained or arranged by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide to plan enrollees the attached notice, as described below, which states that some or all contraceptive coverage will not be provided under the plan during the temporary enforcement safe harbor period.[5]

4. The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed herein.

With respect to the second criterion above, the following exception applies. A health plan will be considered not to have provided all or the same subset of the contraceptive coverage otherwise required if it took some action to try to exclude or limit such coverage that was not successful as of February 10, 2012. Accordingly, such coverage will not disqualify an employer, a group health plan, or a group health insurance issuer from eligibility for the safe harbor. To qualify, the organization must certify that it (or its plan or its issuer) took some action before February 10, 2012, to try to exclude from coverage under the plan some or all contraceptive services because of the religious beliefs of the organization, but that, subsequently, such contraceptive services were covered under the plan despite such action. Section IV describes the specifications for the certification.

Any employer that potentially qualifies for the religious employer exemption may, if eligible, opt to invoke the temporary enforcement safe harbor. Doing so would not preclude the employer from later invoking the exemption, if eligible.

III. Notice

The attached notice must be in any application materials distributed in connection with enrollment (or re-enrollment) in coverage that is effective for each plan year beginning before

[5] Nothing in this bulletin precludes employers or others from expressing their opposition, if any, to the final regulations or to the use of contraceptives.

January 1, 2014.[6] (For example, for a calendar year plan with an open enrollment period beginning November 1, the notice must be in any application materials provided to plan enrollees on or after November 1, 2013.).

This notice is required to be provided by the health plan (although the plan may ask another entity, such as a health insurance issuer or third-party administrator, to accept responsibility for providing the notice on its behalf). With respect to insured coverage, unless it accepts in writing the responsibility for providing the notice, a group health insurance issuer does not lose its protection under the temporary enforcement safe harbor solely because the notice is not distributed by the plan as described herein, or because the issuer relies in good faith on a representation by the plan that turns out to be incorrect.

Organizations that exclude some contraceptive coverage must use the term "some" in the notice where indicated.

IV. Certification

A certification must be made by the organization described in section II.[7] The certification must be signed by an organizational representative who is authorized to make the certification on behalf of the organization. The specifications for the certification are attached.

The certification must be completed and made available for examination by the first day of the plan year(s) to which the temporary enforcement safe harbor applies. Organizations need only complete the certification one time.

Where to get more information:

If you have any questions regarding this bulletin, contact CCIIO at CMS at 410-786-1565 or at marketreform@cms.hhs.gov.

[6] CMS has determined that the notice is not a collection of information under the Paperwork Reduction Act because it is "[t]he public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public." 5 CFR §1320.3(c)(2).

[7] CMS has determined that the certification is not a collection of information under the Paperwork Reduction Act because, although it is a third-party disclosure, it is a certification that does not entail burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument. 5 CFR §1320.3(h)(1).

NOTICE TO PLAN ENROLLEES

The organization that sponsors or arranges your health plan has certified that it qualifies for a temporary enforcement safe harbor with respect to the Federal requirement to cover contraceptive services without cost sharing. During this period, coverage under your health plan will not include coverage of [some] contraceptive services.

CERTIFICATION

(To Be Used for Plan Years Beginning BEFORE January 1, 2014)

This form is to be used to certify that the health plan established or maintained or arranged by the organization listed below qualifies for the temporary enforcement safe harbor, as described in HHS bulletin entitled "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code," pertaining to coverage of FDA-approved contraceptive services for women without cost sharing.

Please fill out this form completely.

	Name of the organization establishing or maintaining or arranging the plan
	Name 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

(Check the applicable box)

☐ I certify that the organization is organized and operated as a nonprofit entity; and that, from February 10, 2012 onward, the plan has consistently not provided all or the same subset of the contraceptive coverage otherwise required, at any point, consistent with any applicable State law, because of the religious beliefs of the organization.

☐ I certify that the organization (or its plan or its issuer) took some action before February 10, 2012, to try to exclude from coverage under the plan some or all contraceptive services because of the religious beliefs of the organization, but that, subsequently, such contraceptive services were covered under the plan despite such action, and that, but for that coverage, I could make the certification above.

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

Failure to provide the requisite notice to plan enrollees renders a health plan ineligible for the temporary enforcement safe harbor.

Exhibit C-5

HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses

WHITEHOUSE.GOV/HEALTHREFORM

HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Small businesses are the backbone of our economy, but high health care costs and declining coverage have hindered small business owners and their employees. Over the past decade, average annual family premiums for workers at small firms increased by 123 percent, from $5,700 in 1999 to $12,700 in 2009, while the percentage of small firms offering coverage fell from 65 to 59 percent. The Affordable Care Act will provide enormous benefits to the millions of small business owners and the tens of millions of small business employees by expanding coverage options, increasing purchasing power, lowering costs and giving consumers, not insurance companies, control over their own health care.

No Employer Mandate, Exempts Small Firms from Employer Responsibility Requirement

The Affordable Care Act does not include an employer mandate. In 2014, as a matter of fairness, the Affordable Care Act requires large employers to pay a shared responsibility fee only if they don't provide affordable coverage and taxpayers are supporting the cost of health insurance for their workers through premium tax credits for middle to low income families.

- The law specifically exempts all firms that have fewer than 50 employees – 96 percent of all firms in the United States or 5.8 million out of 6 million total firms – from any employer responsibility requirements. These 5.8 million firms employ nearly 34 million workers. More than 96 percent of firms with 50 or more employees already offer health insurance to their workers. Less than 0.2 percent of all firms (about 10,000 out of 6 million) may face employer responsibility requirements. Many firms that do not currently offer coverage will be more likely to do so because of lower premiums and wider choices in the Exchange.

> For more information, please visit: **www.healthreform.gov/about/answers.html**.

Small Business Health Care Affordability Tax Credits

Under the Affordable Care Act, an estimated 4 million small businesses nationwide could qualify for a small business tax credit this year, which will provide a total of $40 billion in relief for small firms over the next 10 years.

- Small employers with fewer than 25 full-time equivalent employees and average annual wages of less than $50,000 that purchase health insurance for employees are eligible for the tax credit. The maximum credit will be available to employers with 10 or fewer full-time equivalent employees and average annual wages of less than $25,000. To be eligible for a tax credit, the employer must contribute at least 50 percent of the total premium cost.
- Businesses that receive state health care tax credits may also qualify for the federal tax credit. Dental and vision care qualify for the credit as well.
- For 2010 through 2013, eligible employers will receive a small business credit for up to 35 percent of their contribution toward the employee's health insurance premium. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 25 percent of their contribution.
- For 2014 and beyond, small employers who purchase coverage through the new Health Insurance Exchanges can receive a tax credit for two years of up to 50 percent of their contribution. Tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 35 percent of their contribution.

> For more information on tax credits, please visit: **www.irs.gov/newsroom/article/0,,id=223666,00.html**.

HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Better Information on Affordable Health Care Options

In July 2010, the Department of Health and Human Services will establish a new consumer website with easy to understand information about affordable and comprehensive coverage choices. The website will also provide information to small businesses about available health coverage options, including information on reinsurance for early retirees, small business tax credits, and how to shop for insurance in the Exchanges that will increase the purchasing power of small businesses.

Administrative Simplification

The Affordable Care Act accelerates adoption of standard "operating rules" for health insurance plan administration. Operating rules are the business rules and guidelines for electronic transactions with health insurance plans, and the current non-standard environment is a source of waste, unnecessary cost, and frustration for small business owners and others. Under administrative simplification, there will be one format and one set of codes for claims, remittance advice, service authorization, eligibility verification, and claims status inquiry.

By establishing uniform operating rules, the Affordable Care Act ensures that small businesses, health plans, physicians, hospitals, and patients are all speaking the same language. Benefits include:

- Improved coordination of care for the patient
- Increased payment accuracy and timeliness
- Reduced administrative cost and hassle factor for small businesses
- Payment transparency

The Affordable Care Act requires standard operating rules for eligibility and claims status to be adopted by July1, 2011 and fully implemented by January 1, 2013.

Increases Quality, Affordable Options for Small Businesses

Currently, small businesses face not only premiums that are 18 percent higher than large businesses pay, but also face higher administrative costs to set up and maintain a health plan. The premiums they pay have up to three times as much administrative cost built into them as plans in the large group market. They are also at a disadvantage in negotiating with insurance companies because they lack bargaining power. The Affordable Care Act will change this dynamic. Starting in 2014, small businesses with up to 100 employees will have access to state-based Small Business Health Options Program (SHOP) Exchanges, which will expand their purchasing power. The Congressional Budget Office (CBO) stated that the Exchanges will reduce costs and increase competitive pressure on insurers, driving down premiums by up to 4 percent for small businesses.

- These Exchanges would include web portals that provide standardized, easy-to-understand information that make comparing and purchasing health care coverage easier for small business employees, and reduce the administrative hassle that small businesses currently face in offering plans.
- Starting in 2017, the Affordable Care Act also provides states flexibility to allow businesses with more than 100 employees to purchase coverage in the SHOP Exchange.
- If businesses don't offer coverage, workers at small firms and their families would be eligible for their own tax credits to purchase coverage through the Exchange.
- The Affordable Care Act streamlines health plans to keep premiums lower by instituting a premium rate review process and setting standards for how much insurance companies can spend on administrative costs, also known as the medical loss ratio.

> To learn more, visit: www.healthreform.gov/newsroom/naicletter.html.

HEALTH REFORM FOR SMALL BUSINESSES

The Affordable Care Act Increases Choice and Saving Money for Small Businesses.

Security and Stability that Promotes Entrepreneurship

In 2014, the Affordable Care Act ends the discriminatory insurance industry practices of jacking up premiums by up to 200 percent because an employee got sick or older, or because the business hired a woman. In many cases, women can be charged higher premiums than men, simply because of their gender. It will also reduce "job lock" – the fear of switching jobs or starting a small business due to concerns over losing health coverage – by guaranteeing access to coverage for all Americans. This will encourage more people to launch their own small businesses, or join existing small employers.

Reviews the Impact of Reform on Small Businesses

The Affordable Care Act requires the Government Accountability Office (GAO) to specifically review the impact of Exchanges on increasing access to affordable health care for small businesses to ensure that Exchanges are indeed making a difference for small business owners.

Exhibit C-6

Newsroom

Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans

The Affordable Care Act gives American families and businesses more control over their health care by providing greater benefits and protections for family members and employees. It also provides the stability, and also the flexibility, that families and businesses need to make the choices that work best for them.

During the health reform debate, President Obama made clear to Americans that "if you like your health plan, you can keep it." He emphasized that there is nothing in the new law that would force them to change plans or doctors. Today, the Departments of Health and Human Services, Labor, and Treasury issued a new regulation for health coverage in place on March 23, 2010 that makes good on that promise by:

- Protecting the ability of individuals and businesses to keep their current plan;
- Providing important consumer protections that give Americans – rather than insurance companies – control over their own health care.
- Providing stability and flexibility to insurers and businesses that offer insurance coverage as the nation transitions to a more competitive marketplace in 2014 where businesses and consumers will have more affordable choices through Exchanges.

The rule announced today preserves the ability of the American people to keep their current plan if they like it, while providing new benefits, by minimizing market disruption and putting us on a glide path toward the competitive, patient-centered market of the future. While it requires all health plans to provide important new benefits to consumers, it allows plans that existed on March 23, 2010 to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status. Plans will lose their "grandfather" status if they choose to significantly cut benefits or increase out-of-pocket spending for consumers – and consumers in plans that make such changes will gain new consumer protections.

Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today. Large employer-based plans already offer most of the comprehensive benefits and consumer protections that the Affordable Care Act will provide to all Americans this year – such as preventing lifetime limits on coverage – and in the future.

People who work in smaller firms – which change insurers more often due to annual fluctuations in premiums – and people who purchase their own insurance in the individual market– a group that frequently changes coverage – will enjoy all of the benefits of the Affordable Care Act when they choose a new plan. These Americans also will benefit from the new competitive Exchanges that will be established in 2014 to offer individuals and workers in small businesses with greater choice of plans at more affordable rates – the same choice of plans as members of Congress.

Protecting Patients' Rights in All Plans

All health plans – whether or not they are grandfathered plans – must provide certain benefits to their customers for plan years starting on or after September 23, 2010 including:

- No lifetime limits on coverage for all plans;

- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their application;
- Extension of parents' coverage to young adults under 26 years old; and the

For the vast majority of Americans who get their health insurance through employers, additional benefits will be offered, irrespective of whether their plan is grandfathered, including:

- No coverage exclusions for children with pre-existing conditions; and
- No "restricted" annual limits (e.g., annual dollar-amount limits on coverage below standards to be set in future regulations).

Additional Consumer Protections Apply to Non-Grandfathered Plans

Grandfathered health plans will be able to make routine changes to their policies and maintain their status. These routine changes include cost adjustments to keep pace with medical inflation, adding new benefits, making modest adjustments to existing benefits, voluntarily adopting new consumer protections under the new law, or making changes to comply with State or other Federal laws. Premium changes are not taken into account when determining whether or not a plan is grandfathered.

Plans will lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs to consumers. If a plan loses its grandfathered status, then consumers in these plans will gain additional new benefits including:

- Coverage of recommended prevention services with no cost sharing; and
- Patient protections such as guaranteed access to OB-GYNs and pediatricians.

Under the Affordable Care Act, these requirements are applicable to all new plans, and existing plans that choose to make the following changes that would cause them to lose their grandfathered status.

Compared to their polices in effect on March 23, 2010, grandfathered plans:

- **Cannot Significantly Cut or Reduce Benefits**. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
- **Cannot Raise Co-Insurance Charges.** Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- **Cannot Significantly Raise Co-Payment Charges.** Frequently, plans require patients to pay a fixed-dollar amount for doctor's office visits and other services. Compared with the copayments in effect on March 23, 2010, grandfathered plans will be able to increase those co-pays by no more than the greater of $5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a plan raises its copayment from $30 to $50 over the next 2 years, it will lose its grandfathered status.
- **Cannot Significantly Raise Deductibles.** Many plans require patients to pay the first bills they receive each year (for example, the first $500, $1,000, or $1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-to-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a $1,000 annual deductible, this would mean if they had a hike of $190 or $200 from 2010 to 2011, their plan could then increase the deductible again by another $50 the following year.
- **Cannot Significantly Lower Employer Contributions.** Many employers pay a portion of their employees' premium for insurance and this is usually deducted from their paychecks. Grandfathered plans cannot decrease the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers' share of premium from 15% to 25%).
- **Cannot Add or Tighten an Annual Limit on What the Insurer Pays.** Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as grandfathered plans, plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit (which is more protective of high-cost enrollees).

- **May Change Insurance Companies.** An employer with a group health plan can switch plan administrators as well as buy insurance from a different insurance company without losing grandfathered status--provided the plan does not make any of the above six changes to its cost or benefits structure.*

* Previously, one way an employer group health plan could lose its grandfather status was to change issuers--switch from one insurance company to another. The original regulation allowed only self-funded plans to change third-party administrators without necessarily losing their grandfathered plan status. On November 15, the regulation was amended to allow all group health plans to switch insurance companies and shop for the same coverage at a lower cost while maintaining their grandfathered status, as long as the structure of the coverage doesn't violate one of the other rules for maintaining grandfathered plan status.

Protecting Against Abuse of Grandfathered Health Plan Status

To prevent health plans from using the grandfather rule to avoid providing important consumer protections, the regulation provides for:

- Promoting transparency by requiring a plan to disclose to consumers every time it distributes materials whether the plan believes that it is a grandfathered plan and therefore is not subject to some of the additional consumer protections of the Affordable Care Act. This allows consumers to understand the benefits of staying in a grandfathered plan or switching to a new plan. The plan must also provide contact information for enrollees to have their questions and complaints addressed;
- Revoking a plan's grandfathered status if it forces consumers to switch to another grandfathered plan that, compared to the current plan, has less benefits or higher cost sharing as a means of avoiding new consumer protections; or
- Revoking a plan's grandfathered status if it is bought by or merges with another plan simply to avoid complying with the law.

Projected Impact on Consumers and Plans

Large Employer Plans

The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers) —who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered – more than three-quarters of firms in 2011 – based on the way they changed cost sharing from 2008-2009. Most of these plans already offer the patient protections applied to grandfathered plans such as no pre-existing condition exclusions for children and no rescissions of coverage when a person gets sick. In addition, they are likely to already give their workers and families protections like a choice of OB-GYN and pediatrician and access to emergency rooms in other states without prior authorization. Based on past patterns of behavior, it is expected that large employers will continue to make adjustments to the health plans they offer from year to year so that, by the time the health insurance Exchanges are established in 2014, fewer – but still most – large employer plans will have grandfather status. However, the assumed market changes depend on the choices large employers make in the future.

Small Business Plans

The roughly 43 million people insured through small businesses will likely transition from their current plan to one with the new protections over the next few years. Small plans tend to make substantial changes to cost sharing, employer contributions, and health insurance issuers more frequently than large plans. As such, we estimate that 70% of plans will be grandfathered in the first year, but depending on the choices these employers make, this could drop to about one-third over several years. To help sustain small business coverage, the Affordable Care Act also includes a tax credit for up to 35% of their premium contributions.

Individual Health Market

The 17 million people who are covered in the individual health insurance market, where switching of plans and substantial changes in coverage are common, will receive the new protections of the Affordable Care Act sooner rather than later. Roughly 40 percent to two-thirds of people in individual market policies change plans within a year. Given this "churn," the transition for the 17 million people in this market will be swift. In the short run, individuals whose plan changes and is no longer grandfathered will gain access to free preventive services, protections against restricted annual limits, and patient protections such as improved access to emergency rooms. These Americans also will benefit from the Health Insurance Exchanges that will be established in 2014 to offer individuals and workers in small businesses a much greater choice of plans at more affordable rates.

People in Special Types of Health Plans

Fully-insured health plans subject to collective bargaining agreements will be able to maintain their grandfathered status until their agreement terminates. After that point, they are subject to the same rules as other health plans; in other words, they will lose their grandfathered status if they make any of the substantial changes described above. Retiree-only and "excepted health plans" such as dental plans, long-term care insurance, or Medigap, are exempt from the Affordable Care Act insurance reforms.

Projections of Employer Plans Remaining Grandfathered, 2011-2013

There is considerable uncertainty about what choices employers will make over the next few years as the market prepares for the establishment of the competitive Exchanges and other market reforms such as new consumer protections, middle-class tax credits and other steps to expand affordabilty and choice for millions more Americans. This rule estimates the likely decisions of employers based on assumptions and extrapolations of recent market behavior, including the decisions by employers to change their health plans in 2008 and 2009. The table below depicts the results of this analysis:

Type of Plan	Enrollees	Employer Plans Remaining Grandfathered		Explanation
		2011	2013	
Allowable Percent Change in Co-Payments from 2010		Medical inflation* (4%) + 15% = 19%	Medical inflation* (4%[3] = 12%) + 15% = 27%	Deductibles, copayments can increase faster than medical inflation over time
Large Employer	133 million	Low: 87% remain grandfathered Mid-range: 82% remain grandfathered High: 71% remain grandfathered	Low: 66% remain grandfathered Mid-range: 55% remain grandfathered High: 36% remain grandfathered	Large plans are more stable and often self-insured. Regulation permits plans to make routine changes needed to keep premium growth in check.
Small Employer	43 million	Low: 80% remain grandfathered Mid-range: 70% remain grandfathered High: 58% remain grandfathered	Low: 51% remain grandfathered Mid-range: 34% remain grandfathered High: 20% remain grandfathered	Small businesses typically buy commercial insurance and frequently make changes in insurers and coverage. Limited purchasing power and high overhead often force a trade-off between dramatic changes in benefits and cost sharing and affordable premiums.

* Assumes medical inflation at 4%

The "low" percentage is based on the mid-range percentages plus plans that could stay grandfathered with small premium changes.

The "mid-range" percentage is based on assumptions of the number of plans that would lose their grandfathered status if they made changes consistent with the changes that they made in 2008 and 2009 that would not lead to premium increases.

The "high" percentage assumes that some plans would not be able to make the adjustments to employer premium contribution they would need to keep premiums the same while keeping their other cost-sharing parameters within the grandfathering rules. The estimates in this case assume these plans will choose to relinquish their grandfathered status instead.

Choices in 2014 and Subsequent Years

In 2014, small businesses and individuals who purchase insurance on their own will gain access to the competitive market Exchanges. These Exchanges will offer individuals and workers in small businesses with a much greater choice of plans at more affordable rates – the same choice as members of Congress. In fact, the Congressional Budget Office (CBO) has estimated that, on an apples-to-apples basis, premiums will be 14- 20 percent lower than they would be under current law in 2016 due to competition, lower insurance overhead, and increased pooling and purchasing power. Small

businesses also will have more affordable options. CBO has estimated that a family policy for small businesses would be available in the Exchanges at a premium that is $4,000 lower than under current law in 2016.

These reduced premiums do not take into account the tax credits available to small businesses and middle-class families to help make insurance affordable. These additional new choices may further lower the likelihood that small businesses workers will remain in grandfathered health plans. Consumers insured through large employers are more likely to remain in grandfathered plans in 2014 and beyond.

Read the Press Release at: http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

Read the Questions and Answers on the Regulation at http://www.healthreform.gov/about/grandfathering.html.

You can view the Regulation at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2010_register&docid=DOCID:fr17jn10-25.pdf.

Posted: June 14, 2010

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Exhibit C-7

Continuing to Implement the ACA in a Careful, Thoughtful Manner

Over the past several months, the Administration has been engaging in a dialogue with businesses - many of which already provide health coverage for their workers - about the new employer and insurer reporting requirements under the Affordable Care Act (ACA).

We have heard concerns about the complexity of the requirements and the need for more time to implement them effectively.

We recognize that the vast majority of businesses that will need to do this reporting already provide health insurance to their workers, and we want to make sure it is easy for others to do so.

We have listened to your feedback.

The Administration is announcing that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin. This is designed to meet two goals. First, it will allow us to consider ways to simplify the new reporting requirements consistent with the law. Second, it will provide time to adapt health coverage and reporting systems while employers are moving toward making health coverage affordable and accessible for their employees. Within the next week, we will publish formal guidance describing this transition. Just like the Administration's effort to turn the initial 21-page application for health insurance into a three-page application, we are working hard to adapt and to be flexible about reporting requirements as we implement the law. Here is some additional detail. The ACA includes information reporting (under section 6055) by insurers, self-insuring employers, and other parties that provide health coverage. It also requires information reporting (under section 6056) by certain employers with respect to the health coverage offered to their full-time employees. We expect to publish proposed rules implementing these provisions this summer, after a dialogue with stakeholders - including those responsible employers that already provide their full-time work force with coverage far exceeding the minimum employer shared responsibility requirements - in an effort to minimize the reporting, consistent with effective implementation of the law. Once these rules have been issued, the Administration will work with employers, insurers, and other reporting entities to strongly encourage them to voluntarily implement this information reporting in 2014, in preparation for the full application of the provisions in 2015. Real-world testing of reporting systems in 2014 will contribute to a smoother transition to full implementation in 2015. We recognize that this transition relief will make it impractical to determine which employers owe shared responsibility payments (under section 4980H) for 2014. Accordingly, we are extending this transition relief to the employer shared responsibility payments. These payments will not apply for 2014. Any employer shared responsibility payments will not apply until 2015. During this 2014 transition period, we strongly encourage employers to maintain or expand health coverage. Also, our actions today do not affect employees' access to the premium tax credits available under the ACA (nor any other provision of the ACA).

Mark J. Mazur is the Assistant Secretary for Tax Policy at the U.S. Department of the Treasury.