

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 1:13-cv-03263-MSK-KMT

FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS,
a Colorado non-profit corporation,
CURTIS A. MARTIN,
CRAIG A. MILLER,
BRENDA CANNELLA, and
CINDY O'BOYLE,

Plaintiffs,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health
and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
THOMAS PEREZ, Secretary of the United States Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JACOB J. LEW, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants,

SECOND AMENDED VERIFIED COMPLAINT AND JURY DEMAND

PLAINTIFFS FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS
("FOCUS"), a Colorado non-profit corporation, CURTIS A. MARTIN, CRAIG A. MILLER,
BRENDA CANNELLA, and CINDY O'BOYLE, by and through their attorneys with Alliance
Defending Freedom, pursuant to the Court's order directing the filing of an amended complaint
(Doc. 49), for their Second Amended Complaint against the Defendants above-named, state as
follows:

I. NATURE OF THE ACTION

1. Plaintiffs seek declaratory and injunctive relief as a result of Defendants' implementation of the "preventive care and screenings" provisions in the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148 (March 23, 2010)), and Pub. L. No. 111-152 (March 30, 2010) (the "ACA") in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (the "APA").

2. Defendants have to date promulgated at least seven different regulations which define "preventive care and screenings" to require FOCUS and other similarly situated non-exempt non-profit religious organizations (except the thousands of employers and individuals that Defendants have exempted) to provide for its employees and their family members or otherwise facilitate free coverage as a part of FOCUS's health insurance plan of so-called FDA-approved contraceptives, *i.e.*, contraceptives, abortion-inducing drugs and devices, sterilization, and related education and counseling. All statutes, including, without limitation, 42 U.S.C. § 300gg-13, 26 U.S.C. § 4980D, 4980(H), and 29 U.S.C. § 1132, and regulations, rules, and guidelines promulgated by Defendants which implement or interpret 42 U.S.C. § 300gg-13 to require FOCUS, its health insurer, its insurance plan administrator (or any other similarly situated non-profit religious organizations) to provide or facilitate coverage or payments to participants and beneficiaries in FOCUS's health insurance plan for such contraceptives, abortion-inducing drugs and devices, sterilization, and related education and counseling are referred to herein as Defendants' "HHS Contraceptive Mandate."

3. Defendants' HHS Contraceptive Mandate, by requiring FOCUS to provide or facilitate free coverage of these objectionable drugs and devices to its employees and their

family members, including the Individual Plaintiffs, illegally and unconstitutionally coerces FOCUS, the Individual Plaintiffs, and thousands of other non-exempt non-profit religious organizations to violate their religious beliefs.

4. FOCUS, founded in 1998 by Curtis A. Martin and Archbishop Charles J. Chaput, O.F.M. Cap., currently Archbishop of Philadelphia, and others is a quintessential Catholic religious organization. Its college outreach program employs more than 550 persons, more than 450 of which are “missionaries.” Through its missionaries, FOCUS serves on 99 college campuses across the United States and presents the Gospel of Jesus Christ and the tenets of the Catholic Church to college students and others.

5. FOCUS’s purpose is to raise up a generation of missionary disciples who will advance the teachings of Jesus Christ and His Church -- and respond to the Church's call for a New Evangelization to hasten the coming of the 'culture of life' and 'civilization of love' – by spreading the truth of the Catholic Faith at colleges and universities, foreign and domestic mission sites, and within the parish through staff, students, and alumni who are equipped for evangelization and discipleship and to cooperate with and supporting other projects and organizations that are organized and operated for similar purposes. *See* Amended and Restated Articles of Incorporation of Fellowship of Catholic University Students dated April 24, 2014.

6. In accord with nearly 2,000 years of consistent Catholic teaching and in accord with the Catholic Church’s “New Evangelization,” FOCUS believes, affirms, and teaches each of its employees, missionaries, and college students it ministers to that every person is created in the image of God and that it is contrary to God’s will to interfere with human *conception* with contraceptives or to destroy innocent human life by abortion or with abortion-inducing drugs and devices. Thus, FOCUS holds, as a matter of religious conviction, that it is immoral for

FOCUS to intentionally participate in, pay for, train others to engage in, enable, or otherwise support or facilitate access to these objectionable drugs and devices.

7. Though a religious organization, FOCUS does not qualify for the extraordinarily narrow religious exemption from the HHS Contraceptive Mandate that Defendants have created. That narrow religious exemption protects thousands of “churches, their integrated auxiliaries, conventions or associations of churches” and “the exclusively religious activities of any religious order”, but it does not protect FOCUS and the Individual Plaintiffs from the forced violation of their religious convictions should the HHS Contraceptive Mandate be imposed upon them.

8. In addition, though Defendants have exempted thousands of secular organizations from the HHS Contraceptive Mandate for purely secular reasons, FOCUS has not been so exempted. For example, employers with so-called “grandfathered” plans, *i.e.*, plans in existence before March 23, 2010, are exempted from the HHS Contraceptive Mandate. As a result, tens of millions of women have been exempted. Defendants have also acknowledged that “church plans” that are exempt from ERISA are also exempt from penalties attached to the HHS Contraceptive Mandate. Those plans likewise encompass thousands of non-exempt non-profit religious organizations and their employees, organizations that are indistinguishable from FOCUS.

9. After delaying implementation of the HHS Contraceptive Mandate against all non-exempt non-profit religious organizations, including FOCUS, for a time, Defendants offered FOCUS and other non-exempt non-profit religious organizations what Defendants termed an “accommodation,” *i.e.*, Defendants’ “Final Rule.”

10. Following massive objections by non-exempt non-profit religious organizations and others and following a plethora of court-ordered injunctions against the implementation of Defendants' "Final Rule," including the issuance of an injunction by this Court in favor of FOCUS (Doc. 39), Defendants created an alternative mechanism for implementation of their HHS Contraceptive Mandate and, effective August 27, 2014, promulgated Defendants' "Interim Final Regulations."

11. Defendants' "Interim Final Regulations" mandate that FOCUS choose to select either Defendants' "Final Rule" or Defendants' "Interim Final Regulations." The "Interim Final Regulations," like Defendants' "Final Rule," still require FOCUS to provide or facilitate free coverage of objectionable contraceptives and abortifacients as a part of or in connection with FOCUS's employee health insurance plan.

12. Defendants' HHS Contraceptive Mandate, as implemented either by Defendants' "Final Rule" or by Defendants' "Interim Final Regulations," does not offer religious liberty protections to FOCUS or the Individual Plaintiffs. If FOCUS follows its religious convictions and declines to allow Defendants to hijack its health insurance plan, FOCUS will face, among other injuries, enormous fines that could exceed \$16,000,000 per year.

13. Defendants' HHS Contraceptive Mandate, as implemented either by Defendants' "Final Rule" or by Defendants' "Interim Final Regulations," also forces the Individual Plaintiffs, FOCUS employees CURTIS A. MARTIN, CRAIG A. MILLER, BRENDA CANNELLA, and CINDY O'BOYLE, along with the vast majority of FOCUS's employees, to participate in a health insurance plan that causes them and members of their family, including their daughters, to receive coverage of morally and religiously objectionable contraceptives and abortifacients and related services.

14. The statement of then-Secretary of HHS Kathleen Sebelius evidences Defendants' intention to force FOCUS and other similarly situated non-exempt non-profit religious organizations to comply with Defendants' HHS Contraceptive Mandate. Sebelius stated that, "[A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the [HHS Contraceptive Mandate] benefit package," and "Catholic hospitals, Catholic universities, other religious entities will be providing [contraceptive and abortifacient] coverage to their employees starting August 1st." Remarks at the Forum at Harvard School of Public Health (Apr. 8, 2013), <http://theforum.sph.harvard.edu/eents/conversation-kathleen-sebelius> (Part 9, Religion and Policymaking, at 4:40 and 2:48).

15. The enforcement date referred to by then-Secretary Sebelius has, as a result of the huge outcry from American citizens and others, come and gone. Nevertheless, Defendants seek yet again to impose the HHS Contraceptive Mandate on FOCUS and on the Individual Plaintiffs and their families.

16. In view of unconscionable position in which Defendants have placed FOCUS and the Individual Plaintiffs, FOCUS and the Individual Plaintiffs respectfully request that this Court vindicate their religious rights (a) by declaring that Defendants HHS Contraceptive Mandate violates the Religious Freedom Restoration Act, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the United States Constitution, due process and equal protection as guaranteed by the Fifth Amendment to the United States Constitution, and the Administrative Procedure Act and (b) by entering a judgment in favor of FOCUS and permanently enjoining enforcement as to FOCUS of Defendants' HHS Contraceptive Mandate."

II. JURISDICTION AND VENUE

17. This action arises under the Constitution and laws of the United States. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361, jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 2000bb-1, 5 U.S.C. § 702, and Fed. R. Civ. P. 57 and 65, and to award reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and under 42 U.S.C. § 1988.

18. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) in that FOCUS is resident in this district and a substantial part of the events or omissions giving rise to FOCUS's claims occurred in this district.

III. IDENTIFICATION OF PARTIES

19. FOCUS is a Colorado non-profit corporation organized and recognized by the Internal Revenue Service as a 501(c)(3) organization. Its headquarters office is in Jefferson County, Colorado. FOCUS was born out of a passion and zeal to share how a relationship with Jesus Christ and the Catholic Faith can transform the world. FOCUS sends teams of young, trained missionaries to college campuses in order to reach students with the Gospel of Jesus Christ. In partnership with a local Catholic Parish and other Catholic organizations, FOCUS missionaries host large group outreach events, weekly Bible studies, and one-on-one mentoring sessions with student leaders. FOCUS presently has a staff of approximately 550 persons (of which about 450 are missionaries) and a presence on nearly 100 college campuses across the United States.

20. CURTIS A. MARTIN is the founder and chief executive officer of FOCUS and, in 2011, was appointed as Consulter to the Pontifical Council of the New Evangelization by Pope

Benedict XVI and, in October 2012, participated with Catholic Bishops and Catholic lay people in a three week conference in Rome on the work of evangelization by the Catholic Church. Mr. Martin and his wife have nine children, one of whom is a teenage daughter. Mr. Martin and his entire family hold and live the same religious beliefs as are held and lived by FOCUS. Mr. Martin and his entire family support FOCUS's religious liberty rights and do not want to have any part in participating in Defendants' immoral HHS Contraceptive Mandate. The Oath of Fidelity to the Catholic Church which reflects both FOCUS's faith beliefs and those of Mr. Martin (shared by his family) and which was signed by Mr. Martin when he began to work for FOCUS is attached hereto as Exhibit A and incorporated herein by this reference.

21. CRAIG A. MILLER is currently president of FOCUS. Mr. Miller and his wife have six children, including four daughters, three of whom are teenagers. Mr. Miller and his entire family hold and live the same religious beliefs as are held and lived by FOCUS. Mr. Miller and his entire family support FOCUS's religious liberty rights and do not want to have any part in participating in Defendants' HHS Contraceptive Mandate. The Oath of Fidelity to the Catholic Church which reflects both FOCUS's faith beliefs and those of Mr. Miller (shared by his family) and which was signed by Mr. Miller when he began to work for FOCUS is attached hereto as Exhibit B and incorporated herein by this reference.

22. BRENDA CANNELLA is currently vice president of finance of FOCUS. Ms. Cannella and her husband have five children, including two daughters, one of whom is a teenager. Ms. Cannella and her entire family hold and live the same religious beliefs as are held and lived by FOCUS. Ms. Cannella and her entire family support FOCUS's religious liberty rights and do not want to have any part in participating in Defendants' HHS Contraceptive Mandate. The Oath of Fidelity to the Catholic Church which reflects both FOCUS's faith

beliefs and those of Ms. Cannella (shared by her family) and which was signed by Ms. Cannella is attached hereto as Exhibit C and incorporated herein by this reference.

23. CINDY O'BOYLE served as a missionary for two years on campus and is currently a program director serving with the West Regional Team at FOCUS's headquarters in Golden, CO. Ms. O'Boyle, who is in her early twenties, is single. Ms. O'Boyle holds and lives the same religious beliefs as are held and lived by FOCUS. Ms. O'Boyle supports FOCUS's religious liberty rights and does not want to have any part in participating in Defendants' HHS Contraceptive Mandate. The Oath of Fidelity to the Catholic Church which reflects both FOCUS's faith beliefs and those of Ms. O'Boyle and which was signed by Ms. O'Boyle when she began to work for FOCUS is attached hereto as Exhibit D and incorporated herein by this reference.

24. Defendants are all appointed officials of the United States government responsible for promulgating and enforcing Defendants' HHS Contraceptive Mandate.

25. Defendant Sylvia Burwell ("Burwell") is the Secretary of the United States Department of Health and Human Services ("HHS"). In that capacity, she is responsible for the operation and management of HHS. Burwell is sued in her official capacity only.

26. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Defendants' HHS Contraceptive Mandate.

27. Defendant Thomas E. Perez ("Perez") is the Secretary of the United States Department of Labor ("DOL"). In that capacity, he is responsible for the operation and management of DOL. Perez is sued in his official capacity only.

28. Defendant DOL is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Defendants' HHS Contraceptive Mandate.

29. Defendant Jacob J. Lew ("Lew") is the Secretary of the United States Department of the Treasury ("Treasury"). In that capacity, he is responsible for the operation and management of Treasury. Lew is sued in his official capacity only.

30. Defendant Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of Defendants' HHS Contraceptive Mandate.

IV. FACTUAL ALLEGATIONS

A. FOCUS's Religious Beliefs.

31. With the blessing and approval of Archbishop Samuel Aquila of Denver and with the blessings and approval of the local Bishop in each diocese in which a specific college is located and to which FOCUS missionaries minister, FOCUS's mission is to equip and enable qualified FOCUS-trained missionaries to serve as the hands and feet of the Catholic Church and its auxiliaries by meeting college students where they live and recreate, i.e., dorms, intramural sports, student unions, Greek life, etc., by making a personal, sacrificial investment in the lives of those students, and by stressing 'incarnational evangelization' and God's love to each student. *See, e.g.,* <http://www.focus.org/about/faqs.html>.

32. FOCUS's primary purpose or "main thing" is "[i]nviting college students into a growing relationship with Jesus Christ and His Church [and i]nspiring and equipping them for a lifetime of Christ-centered evangelization, discipleship, and friendship in which they lead others to do the same."

33. FOCUS's mission is "[t]o know Christ Jesus, and to fulfill His great commission by first living and then communicating the fullness of life within the family of God, the Church." Thus, a relationship with Jesus Christ and a commitment to the teachings of the Catholic Faith are central to FOCUS, the Individual Plaintiffs, and FOCUS's employees.

34. FOCUS holds and actively professes religious beliefs in accordance with the traditional Christian teachings on the sanctity of life. FOCUS believes 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 until natural death.

35. FOCUS follows the teachings of the Catholic faith as defined by the Magisterium (teaching authority) of the Catholic Church. FOCUS lives out its religious faith daily by helping and assisting its employees and the college students it serves to follow the teachings of the Catholic Church so as to strengthen their faith.

36. FOCUS's religious beliefs include traditional Christian teaching on the nature and purpose of marriage and human sexuality. In particular, FOCUS believes, teaches, and lives, in accordance with Pope Paul VI's July 25, 1968 encyclical entitled *Humanae Vitae*, that:

- "The transmission of human life is a most serious role in which married people collaborate freely and responsibly with God the Creator."
- "Marriage and conjugal love are by their nature ordained toward the procreation and education of children. Children are really the supreme gift of marriage and contribute in the highest degree to their parents' welfare."
- "[T]he exercise of responsible parenthood requires that husband and wife . . . recognize their own duties toward God, themselves, their families and human society."
- "The sexual activity, in which husband and wife are intimately and chastely united with one another, through which human life is transmitted, is . . . 'noble and worthy.'"

- “[E]ach and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.”
- Thus, “the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children. Equally to be condemned . . . is the direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation – whether as an end or as a means.”

37. Accordingly and in following Pope Paul VI’s encyclical *Humanae Vitae*, FOCUS and the Individual Plaintiffs believe and actively profess that “to use this divine gift while depriving it, even if only partially, of its meaning and purpose, is equally repugnant to the nature of man and of woman, and is consequently in opposition to the plan of God and His holy will.”

38. FOCUS believes, as Pope Paul VI prophetically stated in *Human Vitae*, that “a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner whom he should surround with care and affection.”

39. This authoritative Catholic teaching was again set forth in Pope John Paul II’s March 25, 1995 encyclical *Evangelium Vitae* in which Pope John Paul II reaffirmed “the value of human life and its inviolability” and urged all persons “in the name of God [to] respect, protect, love and serve life, every human life!”

40. Based on the teachings of the Catholic Church, and its own sincerely held religious beliefs, FOCUS does not believe that contraceptives, abortifacients, abortion, or sterilization may properly be understood to constitute medicine, health care, or a means of providing for the well-being of humankind. Indeed, FOCUS believes these procedures involve gravely immoral

practices. FOCUS believes, in accordance with Pope John Paul II's 1995 encyclical *Evangelium Vitae*, that "[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life."

41. FOCUS cannot therefore participate, through its health insurance plan or otherwise, in any scheme to facilitate access to contraceptives, abortifacients, abortion, sterilization, or related counseling and education without violating its sincerely held religious convictions.

42. In fact, FOCUS exercises its fundamental constitutional and statutory rights to the free exercise of religion, the freedom of speech, and expressive association and its devotion to the teachings and the tenets of the Catholic Church by emphatically opposing and speaking out against the use of contraceptives, abortifacients, abortion, and sterilization.

43. It would be a violation of FOCUS's mission to strengthen the faith of the college students it serves and to teach such students to follow the teachings of the Catholic Church and comply with Defendants' HHS Contraceptive Mandate.

44. Over the past several months, leaders within the Catholic Church have publicly spoken out about how various iterations of Defendants' HHS Contraceptive Mandate, including the most recent one, are direct violations of Catholic Faith.

45. Cardinal Timothy Dolan, Archbishop of New York and past President of the United States Conference of Catholic Bishops, wrote, "Since January 20 [2012], when the final, restrictive HHS [Contraceptive Mandate] . . . was first announced, we have become certain of two things: religious freedom is under attack, and we will not cease our struggle to protect it. We recall the words of our Holy Father Benedict XVI to our brother bishops on their recent *ad*

limina visit: ‘Of particular concern are certain attempts being made to limit that most cherished of American freedoms, the freedom of religion.’ We have made it clear in no uncertain terms to the government that we are not at peace with its invasive attempt to curtail the religious freedom we cherish as Catholics and Americans.” (<http://www.usccb.org>., March 2, 2012).

46. Archbishop Charles J. Chaput, the Archbishop of Philadelphia and a founding FOCUS board member and board member emeritus, has expressed that Defendants’ HHS Contraceptive Mandate seeks “to coerce Catholic employers, private and corporate, to violate their religious convictions . . . [t]he HHS [Contraceptive] mandate, including its latest variant, is belligerent, unnecessary, and deeply offensive to the content of Catholic belief . . . The HHS [Contraceptive] mandate needs to be rescinded. In reality, no similarly aggressive attack on religious freedom in our country has occurred in recent memory . . . [t]he HHS [Contraceptive] mandate is bad law; and not merely bad, but dangerous and insulting. **It needs to be withdrawn—now.**” (<http://the-american-catholic.com/2012/02/14/archbishop-chaput-hhs-mandate-dangerous-and-insulting/>, Feb. 14, 2012) (emphasis added).

47. Archbishop Samuel J. Aquila of Denver said:

The Obama Administration’s [HHS Contraceptive] mandate is a **forceful intrusion by the government on the rights of Catholics to act on their beliefs in the public square**. Furthermore, it violates the principle of the freedom to follow one’s conscience. This mandate runs contrary to the long-held principle of religious freedom that our Founders, who came here to escape religious persecution, enshrined in our Constitution. Catholics, Evangelical Christians, Baptists, and Jews are among the people of faith who have spoken out against the mandate and its requirements, to which they have moral objections. The government should not force its beliefs upon people of faith. (emphasis added).

48. On November 13, 2013, the U.S. Conference of Catholic Bishops, at the conclusion of their fall General Assembly in Baltimore, Maryland, issued a “Special Message”. In part, the

Bishops, who promised to resist Defendants' HHS Contraceptive Mandate if it is not corrected or rescinded, said:

The current impasse is all the more frustrating because the Catholic Church has long been a leading provider of, and advocate for, accessible, life-affirming health care. We would have preferred to spend these recent past years working toward this shared goal instead of resisting this intrusion into our religious liberty. We have been forced to devote time and resources to a conflict we did not start nor seek.

As the government's implementation of the mandate against us approaches, we bishops stand united in our resolve to resist this heavy burden and protect our religious freedom. We will continue our efforts in Congress and especially with the promising initiatives in the courts to protect the religious freedom that ensures our ability to fulfill the Gospel by serving the common good.

49. On November 26, 2013, Pope Francis released an Apostolic Exhortation in which he stated:

[T]his defence of unborn life is closely linked to the defence of each and every other human right. It involves the conviction that a human being is always sacred and inviolable, in any situation and at every stage of development. Human beings are ends in themselves and never a means of resolving other problems. Once this conviction disappears, so do solid and lasting foundations for the defence of human rights, which would always be subject to the passing whims of the powers that be. Reason alone is sufficient to recognize the inviolable value of each single human life, but if we also look at the issue from the standpoint of faith, **every violation of the personal dignity of the human being cries out in vengeance to God and is an offence against the creator of the individual.** (emphasis added).

50. On October 8, 2014,¹ the United States Conference of Catholic Bishops again expressed the bishops' opposition to Defendants' latest version of Defendants' HHS

¹ See October 8, 2014, "Comments on Interim Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act" from United States Conference of Catholic Bishops to U.S Department of Labor Office of Health Plan Standards and Compliance Assistance at www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-proposed-rule-on-for-profits-10-8.pdf (last visited October 13, 2014).

Contraceptive Mandate, i.e., Defendants’ Interim Final Regulations issued August 27, 2014,

The bishops stated:

The interim final rules do not change the content of the mandate.

The interim final rules do not change the limited scope of the exemption for some religious organizations. As before, only churches, their integrated auxiliaries, conventions and associations of churches, and the “exclusively religious activities” of religious orders are exempt from the mandate. . . . The resulting gerrymander of the religious community into those organizations and activities deemed “religious enough,” and those deemed “not religious enough,” to qualify for the exemption is entirely arbitrary and unsupported by any legitimate, let alone compelling, government interest.

The mandate continues to substantially burden the religious liberty of stakeholders with religious objections. Because it does not further a compelling government interest by the means least restrict of religious exercise, the mandate continues to violate the Religious Freedom Restoration Act (“RFRA”).

[T]he administration continues to propose an unjust and unlawful mandate; an arbitrarily narrow exemption for houses of worship; no exemption at all for most stakeholders; and an ‘accommodation’ that still requires employers that fall outside the narrow government definition of ‘religious employer’ to facilitate the objectionable coverage.

51. Because FOCUS believes, affirms, and teaches that it that it is contrary to God’s will to interfere with conception with contraception or to destroy innocent human life by abortion or by the use of abortion-inducing drugs and devices and affirmatively speaks out against contraceptives, sterilization, abortion, and abortion-inducing drugs and devices, it would be a violation of FOCUS’s deeply held religious beliefs for it to be required to provide, fund, facilitate, cause, or participate in employee health insurance which, directly or indirectly, complies with Defendants’ HHS Contraceptive Mandate.

52. CURTIS A. MARTIN, CRAIG A. MILLER, BRENDA CANNELLA, and CINDY O'BOYLE ("the Individual Plaintiffs") are employees of FOCUS who, like other FOCUS employees, hold to and live out the same religious beliefs as does FOCUS, support FOCUS's religious liberty rights, and, for themselves and their wives or daughters, do not want to have any part in participating in Defendants' Contraceptive Mandate, including by receiving promises of payments for objectionable drugs and devices as may be arranged by FOCUS's third party administrator or by participating in a health insurance plan by which FOCUS enables Defendants to direct FOCUS's third party administrator, in violation of FOCUS's contract with its third party administrator, to comply with Defendants' HHS Contraceptive Mandate.

53. The Individual Plaintiffs also object to losing the health insurance coverage they and their family members currently have and to be forced in such a circumstance to buy for themselves and their families a health insurance plan from another source that (because of Defendants' HHS Contraceptive Mandate challenged here) will very probably require them to participate in a plan that, against their sincere religious beliefs, includes coverage of objectionable drugs and devices.

54. FOCUS, the Individual Plaintiffs, and these other officials of the Catholic Church who support FOCUS all continue to oppose Defendants' HHS Contraceptive Mandate.

B. FOCUS's Health Insurance Plan

55. FOCUS created, by contract, its own self-insurance plan which covers its employees and their dependents. FOCUS thus acts as its own insurer and its plan provides generous health insurance benefits for its employees and their family members.

56. By virtue of FOCUS's religious beliefs, these benefits purposefully do not now include (and have never included) coverage of the drugs and devices required by Defendants'

HHS Contraceptive Mandate. Indeed, by virtue of its religious beliefs, FOCUS has taken great pains throughout the years to ensure that its health insurance plans have not covered these objectionable drugs and devices.

57. FOCUS has selected and contracted with a third party administrator which, for a fee, administers FOCUS's health insurance plan to its employees and their family members, including to the Individual Plaintiffs and their family members.

C. The ACA and Defendants' HHS Contraceptive Mandate.

58. Effective March 23, 2010, Congress passed and President Obama signed into law the ACA.

59. Pursuant to the ACA, employers with over 50 full-time employees are required to provide a certain level of health insurance to their employees.

60. One provision of the ACA requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for "preventive care and screenings" without "any cost sharing" by covered employees or beneficiaries. 42 U.S.C. § 300gg-13(a)(1)-(4). However, the ACA left to Defendants to define "preventive care and screenings."

61. Regulations promulgated by Defendants defined "preventive care and screenings" to include so-called FDA-approved contraceptives and required that these drugs and devices be covered in health insurance plans on or after August 1, 2012.

62. A non-exempt employer which provided a health insurance plan that did not cover these objectionable drugs and devices was subject to heavy fines approximating \$100 per employee per day and to lawsuits by the Secretary of Labor or by health insurance plan participants. 26 U.S.C. § 4980D(b).

63. An employer with more than 50 employees could not avoid the requirement of Defendants' HHS Contraceptive Mandate by simply refusing to provide health insurance to its employees because the ACA imposed annual monetary penalties of \$2,000 times the number of employees after the first 30 employees. *Id.* § 4980(H)(a), (c)(1).

64. Additionally, dropping health insurance coverage for employees altogether would harm an employer's ability to attract and keep good employees or cause the employer to have to increase employee compensation so that its employees could purchase health insurance themselves. It would also deprive employees not only of a good health insurance plan, but also of a health insurance plan that many employees desired for religious and moral reasons.

65. From its inception, Defendants have exempted numerous health insurance plans from their HHS Contraceptive Mandate which cover millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from Defendants' HHS Contraceptive Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v). As of December 2013, the government has estimated that over 90 million individuals participated in health insurance plans that need not comply with Defendants' HHS Contraceptive Mandate. 75 Fed. Reg. 34538, 34552-53 (June 17, 2010).

66. In addition, Defendants exempted so-called "religious employers." Under this exemption, religious employers are permitted to offer "conscience-compliant" employee health insurance plans through an insurance company or a third party administrator that need not comply with the HHS Contraceptive Mandate. 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); *see also* 77 Fed. Reg. 8725, 8727-28, 8730 (Feb. 15, 2012).

67. Although Defendants have recently announced that they will postpone implementing the annual fine of \$2,000 per employee (minus 30) for organizations that drop

health insurance altogether, this postponement is only until 2015 (in the middle of FOCUS's current plan year) and does not delay the daily fines under 26 U.S.C. § 4980D or lawsuits under 29 U.S.C. § 1132.

68. If imposed, this could result in fines of between \$1,040,000 per year and \$19,800,000 per year being levied against this quintessential religious non-profit organization.

69. Nevertheless and despite sustained criticism of Defendants' HHS Contraceptive Mandate, Defendants continue to seek to force FOCUS and other similarly situated non-profit religious organizations to comply with their HHS Contraceptive Mandate.

1. The Interim Final Rule.

70. On July 19, 2010, HHS published an Interim Final Rule regarding the ACA's requirement that "preventive care and screenings" services be covered without cost sharing. 75 Fed. Reg. 41726, 41728.

71. In violation of the APA, HHS issued this Interim Final Rule without prior notice of rulemaking or opportunity for public comment. Defendants determined for themselves that "it would be impracticable and contrary to the public interest to delay putting the provisions . . . in place until a full public notice and comment process was completed." 75 Fed. Reg. at 41730.

72. Defendants stated they would later "provide the public with an opportunity for comment, but without delaying the effective date of the regulations," thus demonstrating their intent to impose Defendants' HHS Contraceptive Mandate on non-profit religious organizations regardless of the legal flaws identified in or public opposition expressed by such public comments. *Id.*

73. Defendants' Interim Final Rule made it clear that "cost sharing" referred to "out-of-pocket" expenses for health insurance plan participants and covered beneficiaries. 75 Fed. Reg. at 41730.

74. Defendants' Interim Final Rule acknowledged that expenses "previously paid out-of-pocket" would "now be covered by group health plans and issuers" and that those expenses would, in turn, result in "higher average premiums for all enrollees." *Id.*; *see also id.* at 41737. ("Such a transfer of costs could be expected to lead to an increase in premiums.").

75. HHS then directed a private health policy organization, the Institute of Medicine ("IOM"), to define which drugs, procedures, and services should be defined as "preventive care and screenings."

76. IOM, presumably in coordination with HHS, invited a select number of generally pro-abortion groups and individuals to make presentations on which drugs, procedures, and services should be included as "preventive care and screenings."

77. To make presentations, IOM selected, among others, the Guttmacher Institute (an entity related to Planned Parenthood Federation of America which "advances sexual and reproductive health rights" including abortion)², the American Congress of Obstetricians and Gynecologists ("ACOG") (which also favors sexual and reproductive health rights including abortion), John Santelli (who, among other things, serves as senior consultant for the Guttmacher Institute),³ the National Women's Law Center (an organization which, among other things, works "to protect women's reproductive rights" including abortion and contraception

² Guttmacher Institute, "Mission," *available at* <http://www.guttmacher.org/mission.html> (last visited Nov. 27, 2013).

³ Columbia University, "John S. Santelli," *available at* <http://www.mailman.columbia.edu/our-faculty/profile?uni=js2637> (last visited Oct. 22, 2014).

access),⁴ the National Women’s Health Network (an organization dedicated to preserve “access to contraceptive and abortion care”),⁵ Planned Parenthood Federation of America (a contraception and abortion providing organization dedicated to “reproduction self-determination”),⁶ and Sara Rosenbaum, a longtime contraception advocate.

78. No religious groups or individuals or other groups that oppose government-mandated coverage of contraceptives, abortion-inducing drugs and devices, abortion, sterilization, and related education and counseling were invited to be presenters by IOM.

79. On July 10, 2011, IOM published guidelines which defined “preventive care and screenings” as “[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures” and related “patient education and counseling for women with reproductive capacity.” Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, at 102–10 and Recommendation 5.5 (July 19, 2011).

80. These Food and Drug Administration (“FDA”) “approved contraceptive methods” include contraceptives, including birth control pills and prescription contraceptive devices and abortion-inducing drugs and devices, including Plan B drugs (also known as the “morning after pill”) and its chemical cognates; ulipristal (also known as “ella” or the “week-after pill”); and certain abortion-inducing IUDs.

⁴ National Women’s Law Center, “Our Issues,” available at <http://www.nwlc.org/our-issues> (last visited Oct. 22, 2014).

⁵ National Women’s Health Network, “Securing Sexual & Reproductive Health and Autonomy,” available at <http://nwhn.org/securing-sexual-reproductive-health-and-autonomy> (last visited Oct. 22, 2014).

⁶ Planned Parenthood, “Mission,” available at <http://www.plannedparenthood.org/about-us/who-we-are/vision-4837.htm> (last visited Nov. 27, 2013).

81. Many of these drugs and devices – including “emergency contraceptives” such as Plan B and ella and IUDs – are known or acknowledged by their manufacturers to be abortion-inducing drugs or devices, i.e., drugs or devices that can cause the death of a human embryo by preventing the embryo from implanting in the wall of a woman’s uterus.

82. Indeed, FDA’s own Birth Control Guide states that an effect of Plan B (Levonorgestrel) is to “prevent[] attachment (implantation) to the womb (uterus).” FDA, Office of Women’s Health, Birth Control Guide, *available at* <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.html> (last visited Oct. 22, 2014).

83. Defendants’ HHS Contraceptive Mandate requirement for related “education and counseling” would very likely result treatment by medical providers who favor of the use of drugs, devices, and methods that are objectionable to FOCUS and the Individual Plaintiffs. *See* comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), <http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf>.

84. On August 1, 2011, a mere 13 days after IOM issued its recommendations, the Health Resources and Services Administration (“HRSA”), an HHS agency, adopted IOM’s recommendations in full. *See* <http://www.hrsa.gov/womensguidelines> (last visited Oct. 22, 2014); 26 C.F.R. § 54.9815-2713(A)(1)(iv); 29 C.F.R. § 2590.715-2713(A)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv).

2. Second Interim Rule - The Religious Employer Exemption.

85. On August 1, 2011, the very same day that HRSA rubber-stamped the IOM’s recommendations, HHS promulgated its “Second Interim Final Rule.” 76 Fed. Reg. 46621.

86. This Second Interim Final Rule granted HRSA “discretion to exempt certain religious employers from [Defendants’ HHS Contraceptive Mandate] where contraceptive services are concerned.” 76 Fed. Reg. 46621, 46623. The term “religious employer” was narrowly 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) “serves primarily persons who share the religious tenets of the organization”; and (4) “is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (ii) of the Internal Revenue Code of 1986, as amended. 75 Fed. Reg. at 46626.

87. HRSA promulgated this “religious employers” exemption via a footnote on its website listing the Women’s Preventive Services Guidelines. *See* <http://www.hrsa.gov/womensguidelines> (last visited Oct. 22, 2014).

88. Although non-profit religious organizations like FOCUS share the same religious beliefs and concerns as do objecting, but exempt, Catholic churches, integrated auxiliaries, and religious orders, Defendants deliberately ignored the offensive impact on FOCUS’s religious liberty interests and limited the exemption 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.

89. As a result, the vast majority of non-profit religious organizations with conscientious objections to providing contraceptives, abortifacients, and related services, including FOCUS, were not eligible for Defendants’ “religious employer” exemption.

90. Like the original Interim Final Rule, this Second Interim Final Rule was, in violation of the APA, made effective immediately and without any prior notice or opportunity for public comment.

91. Defendants acknowledged that “while a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations.” However, Defendants represented they had “good cause” to conclude that public comment was “impracticable, unnecessary, or contrary to the public interest” in this instance. 76 Fed. Reg. at 46624.

92. Plaintiffs are informed and believe that, after this Second Interim Final Rule was put into effect, over 100,000 comments were submitted to HHS which opposed the narrow scope of Defendants’ “religious employer” exemption and protested the gross infringement on the rights of religious individuals and organizations such as FOCUS.

93. Defendants ignored these concerns. Instead, Defendants imposed the HHS Contraceptive Mandate on non-profit religious organizations, like FOCUS, in violation of their rights of conscience and religious liberties protected by the U.S. Constitution and RFRA.

94. On February 10, 2012 Defendants adopted the definition of religious employer in the 2011 amended interim final regulations without modification. 77 Fed. Reg. 8725.

3. The Temporary Enforcement Safe Harbor.

95. As a result of another enormous public outcry for a broader “religious employer” exemption, on January 20, 2012, HHS acknowledged “the important concerns some have raised about religious liberty” and stated that religious objectors would be “provided an additional year [i.e., to August 1, 2012] . . . to comply with this new law.” *See* Jan. 20, 2012 Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, available at <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> (last visited Oct. 22, 2014).

96. On February 10, 2012, HHS formally announced a “temporary enforcement safe harbor” for non-exempt non-profit religious organizations, like FOCUS, that objected to covering contraceptives and abortifacient services in their health insurance plans as required by the Second Interim Final Rule.

97. HHS agreed that it would not take any enforcement action against an eligible non-exempt non-profit religious organization like FOCUS during this “Temporary Enforcement Safe Harbor” period which would extend until the first plan year beginning on or after August 1, 2013, *i.e.*, as to FOCUS, on and after July 1, 2014. *See* 79 Fed. Reg. 51093.

98. HHS also indicated it would develop and propose changes to its Second Interim Final Rule to accommodate the religious liberty objections of non-exempt non-profit religious organizations following expiration of the safe harbor.

99. Instead, on February 10, 2012, HHS announced a final rule “finalizing, without change,” the narrow religious employer exemption and thus placing FOCUS and similarly situated non-exempt non-profit religious organizations in a precarious position. 77 Fed. Reg. 8725 (published Feb. 15, 2012).⁷

4. The Advance Notice of Proposed Rulemaking.

100. However, shortly thereafter, on March 21, 2012, HHS issued an Advance Notice of Proposed Rulemaking (“ANPRM”) presenting “questions and ideas” to “help shape” a discussion of how to “maintain the provision of contraceptive coverage without cost sharing”

⁷ 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, originally issued on February 10, 2012 and reissued on August 15, 2012 and June 28, 2013 *available at* <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf>.

while accommodating the religious objections of non-exempt religious organizations. 77 Fed. Reg. 16501, 16503.

101. The ANPRM conceded that forcing non-exempt non-profit religious organizations to “**contract, arrange, or pay for**” the objectionable contraceptive and abortifacient services coverage in their health insurance plans would infringe their “religious liberty interests.” *Id.* (emphasis added).

102. The ANPRM proposed, in vague terms, that the “health insurance issuers” for objecting religious employers could, as an alternative, be required to “assume the responsibility for the provision of contraceptive coverage without cost sharing.” *Id.*

103. For the first time, and contrary to the earlier definition of “cost sharing,” Defendants suggested in their ANPRM that insurers and third party administrators of self-insured plans could be directed by Defendants to “assume this responsibility” of implementing their HHS Contraceptive Mandate. *Id.*

104. This time, “approximately 200,000 comments” were submitted in response to the ANPRM which, for the most part, restated religious liberty objections which remained unresolved by Defendants’ ANPRM.

4. The Notice of Proposed Rulemaking.

105. On February 1, 2013, HHS issued a Notice of Proposed Rulemaking (“NPRM”) proposing regulations which purportedly addressed these 200,000 plus comments to the ANPRM. 78 Fed. Reg. 8456 (published Feb. 6, 2013).

106. The NPRM proposed but two changes to the then-existing regulations.

107. 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 only persons of their same faith. 78 Fed. Reg. 8461.

108. Under the NPRM’s proposal, a “religious employer” would be one “that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code.” 78 Fed. Reg. at 8461.

109. However and as acknowledged by HHS, this NPRM proposal did “not expand the universe of employer plans that would qualify for the [religious] exemption beyond those entities which qualified for the religious employer exemption pursuant to the 2012 final rules,” *i.e.*, a formal church, an integrated auxiliary of a church, or a religious order. 78 Fed. Reg. 8456, 8461.

110. Though HHS had pledged to “accommodate” non-exempt non-profit religious organizations like FOCUS, the NPRM did not do so.

111. Defendants required FOCUS (and other similarly situated non-exempt non-profit religious organizations) to comply with Defendants’ HHS Contraceptive Mandate by requiring FOCUS to execute and file Defendants’ EBSA Form 700 (attached hereto as Exhibit E) to “designate” their insurers or third party administrators as FOCUS’s “agent” to provide health insurance plan participants and beneficiaries with free access to contraceptive and abortifacient drugs, devices, and services.

112. This NPRM received 408,907 comments, again mostly objecting on religious grounds, a new record for comments. *See* 78 Fed. Reg. 8457 and <http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-63161> (government’s website tally of comments) (last visited Nov. 27, 2013).

113. Non-exempt non-profit religious organizations characterized Defendants' new proposed "accommodation" as a sham and as a gross violation of their religious liberties as their health insurance plans of were still being conscripted by Defendants to comply with their HHS Contraceptive Mandate.

114. On April 8, 2013, the very same day that the notice-and-comment period ended, then-HHS Secretary Sebelius answered questions about Defendants' HHS Contraceptive Mandate in a presentation at Harvard University. Sebelius stated:

We have just completed the open comment period for the so-called accommodation, and by August 1st of this year, every employer will be covered by the law with one exception. Churches and church dioceses as employers are exempted from this benefit. But Catholic hospitals, Catholic universities, other religious entities **will be providing coverage** to their employees starting August 1st. . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese **will be included** in the benefit package.

See Remarks at the Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, *available at* <http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/> (at 49:45)

(emphasis added) (last visited Oct. 22, 2014).

115. Given the date and timing of these remarks, it is clear that Defendants had no intention to comply with the APA and to give any (and indeed gave no) consideration to the thousands of comments submitted by religious organizations and others in opposition to the NPRM's proposed "accommodation."

5. Defendants' Final Rule.

116. On June 28, 2013, Defendants issued their Final Rule which again wholly ignored the objections raised by the more than 400,000 religious organizations and others and continued to conscript objecting employers, like FOCUS, into the Defendants' scheme of coercing from

such religious organizations, including FOCUS, free access to contraceptives and abortifacients, and related services. 78 Fed. Reg. 39870 (July 2, 2013).

117. Under Defendants' Final Rule, the "discretionary religious employer" exemption, which was implemented via footnote on the HRSA website, *see* <http://hrsa.gov/womensguidelines>, remained limited to formal churches and their integrated auxiliaries and religious orders. 78 Fed. Reg. at 39874.

118. Defendants attempted to justify the extraordinarily narrow religious employer exemption as follows:

The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement. 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. 39874.

119. An organization like FOCUS was eligible for Defendants' latest "accommodation" if it (1) "[o]ppose[d] providing coverage for some or all of the contraceptive services required"; (2) "[was] organized and operates as a nonprofit entity"; (3) "[held] itself out as a religious organization"; and (4) "self-certifie[d] that it satisfie[d] the first three criteria." 78 Fed. Reg. 39874; 26 C.F.R. § 54.9815-2713A(a)(4).

120. However, Defendants mandated that, to "take advantage" Defendants' latest "accommodation," FOCUS was required to execute and deliver to Defendants government form

EBSA Form 700 self-certification (see attached Exhibit E) to its third party administrator and to thereby expressly designate its 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. 39879.

121. This EBSA Form 700 effectively designated the “[o]bligations of the third party administrator” under ERISA to include, by virtue of that designation, a fiduciary duty to provide promises of payments for the contraceptives and abortion-inducing drugs and devices to which FOCUS objected. 78 Fed. Reg. 39892-95.

122. Defendants’ EBSA Form 700 self-certification specifically provided that it constituted “one of the instruments under which the employer’s plan is operated under ERISA section 3(16)(A)(i). . . .[and] will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA.” 78 Fed. Reg. 39879.⁸

123. Once a religious non-profit completed and delivered Defendants’ EBSA Form 700 self-certification, the non-profit was thereafter forbidden from communicating, *i.e.*, speaking, its pro-life religious beliefs to its third party administrator, to withdraw its designation from its third party administrator, or to urge its third party administrator to not provide coverage of or payments for objectionable contraceptives and abortion-inducing drugs and devices. 78 Fed. Reg. at 39895.

124. Finally, Defendants’ Final Rule created yet another massive, built-in “exception” to Defendants’ HHS Contraceptive Mandate. Defendants have admitted that if non-exempt,

⁸ In other words, without the completion and delivery by FOCUS of Defendants’ EBSA Form 700 self-certification, Defendants essentially acknowledges that they had no legal authority to compel either FOCUS or its third party administrator to comply with Defendants’ HHS Contraceptive Mandate.

non-integrated-auxiliary organizations otherwise identical to FOCUS are participants in self-insured “church plans” that are exempt from ERISA, Defendants have refrained from imposing (and/or lack authority to impose) this “accommodation” requirement on such entities’ third party administrators and to require such third party administrators to promise abortifacient/contraceptives/sterilization payments or coverage for the plan’s participants.

125. As a result, thousands of non-exempt, non-integrated-auxiliary religious organizations that are indistinguishable from FOCUS for these purposes face no penalty whatsoever for non-compliance, while FOCUS still faces that pressure for reasons that serve no rational basis in Defendants’ HHS Contraceptive Mandate scheme.

126. While FOCUS is eligible for this so-called “accommodation” provided in Defendants’ Final Rule, Defendants’ Final Rule is objectionable to FOCUS as it requires FOCUS to play an explicit, central, and necessary role in the implementation of Defendants’ HHS Contraceptive Mandate to which FOCUS religiously objects.

127. Inasmuch as Defendants’ Final Rule went into effect “for plan years beginning on and after January 1, 2014,” (78 Fed. Reg. 39870, 39871 (July 2, 2013)), FOCUS was obliged to seek sought injunctive relief from this Court.

128. This Court agreed that FOCUS was entitled to such injunctive relief and, on April 29, 2014, this Court granted FOCUS a preliminary injunction against Defendants’ HHS Contraceptive Mandate (Doc. 39), which preliminary injunction remains in place to date.

129. This Court’s injunction against Defendants here, along with other injunctions in other jurisdictions and other factors, led Defendants to promulgate yet another set of administrative rules, *i.e.*, Defendants’ Interim Final Regulations which are again designed to

force FOCUS to comply with Defendants' HHS Contraceptive Mandate scheme and to which FOCUS still objects.

6. Defendants' Interim Final Regulations.

130. Defendants' Final Rule⁹ described above was not so "final" after all. However, it remains one of the two alternatives by which Defendants seek to force FOCUS to comply with their HHS Contraceptive Mandate. Effective on and after August 27, 2014, Defendants amended and readopted their Final Rule as Defendants' new Interim Final Regulations by which Defendants provide FOCUS (and other similarly situated non-profits) a second alternative which is no better than the first alternative as it still forces FOCUS to comply with Defendants' HHS Contraceptive Mandate. 79 Fed. Reg. 51092 *et seq.*; 26 C.F.R. § 54.9815-2713A(a)(1)-(4); 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii).

131. Defendants' new Interim Final Regulations provide that, as an alternative to Defendants' Final Rule, if FOCUS still religiously objects to Defendants' HHS Contraceptive Mandate, as it does, FOCUS must:

- a. Use Defendants' "Model Notice" (attached Exhibit F) to notify HHS in writing of its religious objection;
- b. Upon receipt of this notice, HHS will then send a separate notification to FOCUS's health insurance plan third party administrator which, among other things, describes the obligations of FOCUS's health insurance plan third party administrator to

⁹ Defendants' Final Rule has been revised and restated in Defendants' new Interim Final Regulations. *See* 79 Fed. Reg. 51092 *et seq.* However, for ease of reference, this Final Rule is referred to herein as "Defendants' Final Rule." It was the promulgation of Defendants' Interim Final Regulations that caused the Court to request that Plaintiffs file an amended complaint. *See* Doc. 49.

provide coverage for contraceptives services to participants and beneficiaries of FOCUS's health insurance plan 79 Fed. Reg. 51094-95.

132. Defendants' Model Notice" does not even purport to designate FOCUS's third party administrator as FOCUS's agent for purposes of complying with Defendants HHS Contraceptive Mandate as does Defendants' EBSA Form 700 self-certification. Rather, Defendants contend that, if and when FOCUS completes and delivers to HHS Defendants' "Model Notice:"

"DOL (working with HHS) will send a separate notification to each third party administrator of the ERISA plan. DOL's notification will inform each third party administrator of the eligible organization's religious objection to funding or administering some or all contraceptive coverage and will designate the relevant third party administrator(s) as plan administrator under section 3(16) of ERISA for those contraceptive benefits that the third party administrator would otherwise manage. The DOL notification will be an instrument under which the plan is operated and shall supersede any earlier designation. In establishing and implementing this alternative process, DOL is exercising its broad rulemaking authority under Title I of ERISA, which includes the ability to interpret and apply the definition of a plan administrator under ERISA section 3(16)(A). Fed. Reg. 51095.

133. While Defendants had previously acknowledged that, without the completion and delivery of Defendants' EBSA Form 700 self-certification, Defendants had no legal authority by which to compel either FOCUS or its third party administrator to comply with Defendants' HHS Contraceptive Mandate, Defendants claim that, with the "Model Notice," DOL is able to exercise "its broad rulemaking authority under Title I of ERISA, which includes the ability to interpret and apply the definition of a plan administrator under ERISA section 3(16)(A)" to require FOCUS's third party administrator to comply with Defendants' HHS Contraceptive Mandate.

134. Though Defendants' attempts to implement their HHS Contraceptive Mandate against non-exempt non-profit religious organizations has spanned more than 3 years,

Defendants continue to represent that “notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest . . . [and] that it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process is completed.” 79 Fed. Reg. 51095.

135. Thus, as with all prior rules, Defendants’ new Interim Final Regulations were, in violation of the APA, made effective virtually immediately and without any prior notice or opportunity for public comment. 79 Fed. Reg. 51096.

136. The ultimate effect of FOCUS’s completion and delivery of Defendants’ “Model Notice” is the same as if FOCUS were to complete and deliver Defendants’ EBSA Form 700 self-certification. Notwithstanding FOCUS’s contract for health insurance coverage and its contract with its third party administrator, FOCUS’s third party administrator becomes obligated, and incentivized to arrange “payments for contraceptive services” for beneficiaries enrolled in FOCUS’s health insurance plan for “so long as [beneficiaries] are enrolled in [FOCUS’s] health plan.” 26 C.F.R. § 54.9815-2713A(a)-(c); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).

137. Though Defendants have absolutely no authority under the ACA or otherwise to modify FOCUS’s health insurance plan (which does not include these objectionable drugs and devices) or to coerce FOCUS’s third party administrator, in contravention to FOCUS’s express religious objections, to violate the third party administrator’s contract with FOCUS, Defendants purport to have the authority to order FOCUS’s third party administrator to comply with Defendants’ HHS Contraceptive Mandate. *See, e.g.*, 78 Fed. Reg. at 39880 (third party administrators are under no obligation “to enter into or remain in a contract with the eligible organization.”).

138. Both Defendants' Final Rule and Defendants' new Interim Final Regulations, one of which Defendants mandate must be selected by FOCUS, force FOCUS to:

- a. Deliberately provide health insurance that would facilitate free access to contraceptives and abortifacients regardless of the ease with which insured persons could obtain these drugs and devices from other sources. Facilitating this government-dictated access directly undermines the express speech and messages concerning the sanctity of life that FOCUS seeks to convey; and
- b. Directly force FOCUS to speak by designating its third party administrator to provide promises of payments for abortifacients, contraception, and sterilization, in violation of FOCUS's beliefs.

139. FOCUS's decision to offer health insurance thus continues to serve as the sole trigger for creating access to FOCUS's employees, including the Individual Plaintiffs and their family members – present and future - of Defendants' mandate of free contraceptives, abortifacients, and related counseling and education.

140. Inasmuch as Defendants' new Interim Final Regulations are effective immediately, FOCUS now faces the choice of (a) executing and delivering Defendants' EBSA Form 700 or (b) executing and delivering Defendants' Model Notice, either of which explicitly identifies FOCUS's third party administrator to Defendants so that Defendants may arbitrarily and without any legal authority order FOCUS's third party administrator to breach its contract with FOCUS and provide coverage of objectionable drugs and devices to FOCUS's employees, including the Individual Plaintiffs, and members of their family.

141. In the alternative, FOCUS could elect to drop its existing morally acceptable health insurance plan made available to and possessed by FOCUS's employees, including the

Individual Plaintiffs and their families, so as to avoid being complicit in the provision of coverage of such objectionable drugs and devices. But to do so would cause FOCUS to face crippling annual fines, harm to its employees who rely on FOCUS's health insurance plan, a severe impact on FOCUS's ability to recruit and keep good employees, a consequent need that employee compensation would have to be substantially increased so that employees could obtain health insurance for their families themselves (but leaving them to a market in which virtually all insurance products they might be able to buy, even assuming the government's exchange system ever works, will likely include unwanted coverage of abortifacient, contraceptive, and sterilizing drugs and devices). This impact falls on the Individual Plaintiffs and violates their religious beliefs as well.

142. Thus, both Defendants' Final Rule and Defendants' new Interim Final Regulations impose a number of substantial burdens on the religious beliefs and exercise of FOCUS. And to the extent that either Defendants' Final Rule or Defendants' new Interim Final Regulations impacts FOCUS's religious beliefs and its health insurance coverage, it impacts the Individual Plaintiffs' religious beliefs and their participation in that coverage as well.

143. For all these reasons, neither Defendants' Final Rule nor Defendants' new Interim Final Regulations do anything to relieve FOCUS or other non-exempt non-profit religious organizations with self-insured plans from being co-opted as the central cog in Defendants' scheme to implement Defendants' HHS Contraceptive Mandate even when the organization, as does FOCUS, objects to facilitating those services.

144. Defendants' new Interim Final Regulations, just as does Defendants' Final Rule, in no way affects the propriety and necessity of injunctive relief in favor of FOCUS enjoining Defendants from requiring FOCUS to provide or facilitate the provision of FDA-approved

contraceptive methods, abortifacient drugs and devices, sterilization procedures, and patient education and counseling to its employees, including the Individual Plaintiffs and their families, pursuant to the ACA's "preventive care and screenings" provision set forth at 42 U.S.C. § 300gg-13(a)(4) and including the substantive requirements of any and all regulations implementing that provision in a form similar to Defendants' HHS Contraceptive Mandate, including the applicability of the penalties found in 26 U.S.C. §§ 4980D & 4980H and 29 U.S.C. § 1132.

7. The Governmental Interests Allegedly Underlying Either the Final Rule or the Interim Final Regulations and the Availability of Other Means of Pursuing Those Interests.

145. Coercing FOCUS to facilitate access to morally objectionable contraceptives and abortifacients advances no compelling governmental interest and is hardly the least restrictive means of achieving the government's purported interest.

146. Contraceptives and abortion-inducing drugs, devices, and related services required by Defendants' HHS Contraceptive Mandate and to which FOCUS religiously objects are already widely available at little or no cost to any interested person. Indeed, former HHS Secretary Sebelius has acknowledged that contraceptives are "the most commonly taken drug in America by young and middle-aged women" and are widely "available at sites such as community health centers, public clinics, and hospitals with income-based support." *See* Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> (last visited Oct. 22, 2014).

147. Defendants have many other policy options available to them by which Defendants could implement Defendants' HHS Contraceptive Mandate and provide free access to these

objectionable drugs, devices, and services without conscripting FOCUS and its employee health insurance plan in violation of its religious beliefs.

148. Defendants could pay for such objectionable drugs, devices, and services in, among other ways (a) through existing government programs, including Title XIX, Title X, and Title XX; (b) by subsidizing the government's existing network of abortion and family planning services providers, many of which are already being paid by the government as "Navigators" to promote the government's overall health insurance program known as "Obamacare;" or (c) through direct government payments, or tax deductions, refunds, or credits to those who claim to use and pay for such drugs, devices and services.

149. In the ACA, Congress chose to specify and impose a variety of requirements on grandfathered health plans, but did not even think contraceptives and abortifacients were important enough to codify in the ACA; as far as Congress was concerned, Defendants' HHS Contraceptive Mandate need not include contraceptives and abortifacients at all.

150. As it is only Defendants' ever-shifting regulations, not the ACA itself, that requires the provision of these objectionable drugs and devices, Defendants could simply exempt all conscientiously objecting organizations, like FOCUS, just as it has already exempted the subset of nonprofit religious employers that are referred to in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code or participants in ERISA-exempt self-insured church plans.

151. In one form or another, Defendants have also provided exemptions or reduced penalties for grandfathered plans, 42 U.S.C. § 18011; 75 Fed. Reg. 41726, 41731 (2010), small employers with fewer than 50 employees, 26 U.S.C. § 4980H(c)(2)(A), and certain religious denominations, 26 U.S.C. § 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of

public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of “health care sharing ministry” that meets certain criteria).

152. Employers who do not make modifications to their insurance plans that deprive the plans of “grandfathered” status may continue to use those grandfathered plans indefinitely.

153. Indeed, HHS itself has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans until at least 2014 and beyond, and that a third of medium-sized employers with between 50 and 100 employees may do likewise. 75 Fed. Reg. 34,538 (June 17, 2010); *see also* <http://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html> (archived version); https://www.cms.gov/CCIIO/Resources/Files/Factsheet_grandfather_amendment.html (noting that amendment to regulations “will result in a small increase in the number of plans retaining their grandfathered status relative to the estimates made in the grandfathering regulation”).

154. The government’s postponement of the employer mandate (and its attendant penalties) also belies any claim that a compelling government interest justifies coercing FOCUS into complying with Defendants’ HHS Contraceptive Mandate, as employers may now decide not to provide their employee health plans without incurring fines under 26 U.S.C. § 4980H, at least for one additional year, although such a course is not an option for FOCUS itself.

155. These broad exemptions demonstrate that FOCUS and its 550 employees could easily be exempted from Defendants’ HHS Contraceptive Mandate without measurably undermining any sufficiently important governmental interest allegedly served by Defendants’ HHS Contraceptive Mandate.

156. These broad exemptions also demonstrate that Defendants' HHS Contraceptive Mandate is not a general law entitled to some measure of judicial deference.

157. Defendants were willing to exempt various secular organizations, religious organizations, and church plan participants, and postpone the employer mandate, while adamantly refusing to provide anything but the narrowest of exemptions for religious organizations, none of which apply to FOCUS.

158. Defendants' HHS Contraceptive Mandate was promulgated by government officials, and supported by non-governmental organizations, who strongly oppose traditional Catholic religious teachings and beliefs regarding marriage, family, and sanctity of life and who strongly support an unlimited abortion rights and free access to contraceptives.

159. Former HHS Secretary Sebelius, for example, has long been a staunch supporter of abortion rights and a vocal critic of those religious teachings and beliefs, such as those held by FOCUS and the Individual Plaintiffs, which regard abortion and contraception as morally repugnant.

160. On October 5, 2011, six days after the comment period for the original Interim Final Rule had ended, Former HHS Secretary Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America at which time she told the assembled crowd that "we are in a war."

161. Former HHS Secretary Sebelius further criticized individuals and entities whose beliefs differed from those held by her and the others at this pro-abortion fundraising event, stating: "Wouldn't you think that people who want to reduce the number of abortions would champion the cause of widely available, widely affordable contraceptive services? Not so much."

162. On July 16, 2013, Former HHS Secretary Sebelius further compared opponents of the ACA generally to “people who opposed civil rights legislation in the 1960s,” stating that upholding the ACA requires the same action as was shown “in the fight against lynching and the fight for desegregation.” *See* <http://www.hhs.gov/secretary/about/speeches/sp20130716.html>.

163. Consequently, the Plaintiffs are informed and believe that the clear and underlying purpose of Defendants’ HHS Contraceptive Mandate, including the restrictively narrow scope of the religious employer’s exemption, is to discriminate against religious organizations and people that oppose contraception and abortion on religious and moral grounds.

FIRST CLAIM FOR RELIEF
Violation of the Religious Freedom Restoration Act
42 U.S.C. § 2000bb

164. Plaintiffs reallege the factual allegations of paragraphs 1 through 163 and incorporate them herein by this reference.

165. FOCUS’s sincerely held religious beliefs prohibit it from providing, paying for, making accessible, or otherwise facilitating coverage or payments for abortion, abortifacients, embryo-harming drugs and devices, contraceptives, and related education and counseling, or providing or facilitating a health insurance plan that causes access to the same through its selected third party administrator or any through any other third party. The Individual Plaintiffs’ religious beliefs similarly prohibit them from participating in such a health insurance scheme for themselves and for their families.

166. When Plaintiffs oppose Defendants HHS’ Contraceptive Mandate, they comply with the Ten Commandments’ prohibition on murder and with their sincerely held religious beliefs that the Holy Bible and the Catholic Church teach 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. Thus, they exercise religion within the meaning of the Religious Freedom Restoration Act (“RFRA”).

167. Defendants’ HHS Contraceptive Mandate imposes a substantial burden on Plaintiffs’ religious exercise and coerces them to either change or violate their religious beliefs and the beliefs of the overwhelming majority of FOCUS’s employees.

168. Defendants’ HHS Contraceptive Mandate chills Plaintiffs’ religious exercise and pressures them to abandon their religious convictions and religious practices.

169. Defendants’ HHS Contraceptive Mandate exposes FOCUS to substantial fines and/or financial burdens for its religious exercise and not complying. It likewise imposes harms on the Individual Plaintiffs to participate in morally acceptable health insurance or threaten the quality and cost of their insurance coverage, which harms are exacerbated by the ACA’s penalties on individuals if they do not obtain health insurance.

170. Defendants’ HHS Contraceptive Mandate exposes FOCUS to substantial competitive disadvantages because of uncertainties about its health insurance plan and its benefits caused by Defendants’ HHS Contraceptive Mandate.

171. Defendants’ HHS Contraceptive Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest.

172. Defendants’ HHS Contraceptive Mandate is not the least restrictive means of furthering Defendants’ stated interests. In any event, there is no substantial evidence that Defendants’ stated interests are matters of compelling concern.

173. Defendants’ HHS Contraceptive Mandate and Defendants’ threatened enforcement thereof violates Plaintiffs’ rights protected by RFRA.

174. Absent injunctive and declaratory relief against the application and enforcement of Defendants' HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

SECOND CLAIM FOR RELIEF
**Violation of Free Exercise Clause of the First Amendment
to the United States Constitution**

175. Plaintiffs reallege the factual allegations of paragraphs 1 through 174 and incorporate them herein by this reference.

176. FOCUS's sincerely held religious beliefs prohibit it from providing, paying for, making accessible, or otherwise facilitating coverage or payments for abortion, abortifacients, embryo-harming drugs and devices, contraceptives, and related education and counseling, or providing or facilitating a health insurance plan that causes access to the same through its third party administrator or through any other third party. The Individual Plaintiffs' beliefs similarly prohibit them from participating in such a health insurance scheme for themselves or their families.

177. When Plaintiffs oppose Defendants HHS' Contraceptive Mandate, they comply with the Ten Commandments' prohibition on murder and with their sincerely held religious beliefs that the Holy Bible and the Catholic Church teach 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, they exercise religion within the meaning of the Free Exercise Clause of the First Amendment to the United States Constitution.

178. Defendants' HHS Contraceptive Mandate imposes a substantial burden on Plaintiffs' religious exercise and coerces them to either change or violate their religious beliefs and the beliefs of most of FOCUS's employees.

179. Defendants' HHS Contraceptive Mandate chills Plaintiffs' religious exercise within the meaning of RFRA and pressures them to abandon their religious convictions and religious practices.

180. Defendants' HHS Contraceptive Mandate exposes FOCUS to substantial fines and/or financial burdens for its religious exercise. It likewise imposes harms on the Individual Plaintiffs to participate in morally acceptable health insurance or threaten the quality and cost of their insurance coverage, which harms are exacerbated by the ACA's penalties on individuals if they do not obtain health insurance.

181. Defendants' HHS Contraceptive Mandate forces Plaintiffs to choose between either following their religious convictions and suffering debilitating punishments or violating their religious beliefs in order to avoid those punishments.

182. Defendants' HHS Contraceptive Mandate exposes FOCUS to substantial competitive disadvantages because of uncertainties about its health insurance benefits caused by Defendants' HHS Contraceptive Mandate.

183. Defendants' HHS Contraceptive Mandate violates the free exercise of religion of FOCUS and its employees (including the Individual Plaintiffs) who share FOCUS's beliefs about human life and abortion, abortifacients, embryo-harming drugs and devices, and contraceptives, and who do not wish to pay for or participate in a plan that causes promised payments for abortifacients, embryo-harming drugs and devices, and contraceptives for their fellow employees, families, wives, and daughters, but for whom Defendants' HHS Contraceptive Mandate gives no option.

184. Defendants' HHS Contraceptive Mandate is not neutral and is not generally applicable.

185. Defendants have created categorical exemptions and individualized exemptions to Defendants' HHS Contraceptive Mandate.

186. Despite being informed in substantial detail of FOCUS's religious objections, as well as the objections of thousands of non-exempt non-profit religious organizations like FOCUS, Defendants designed Defendants' HHS Contraceptive Mandate and the "religious employer" exemption therefrom in a way that makes it impossible for FOCUS and other similarly situated non-profit religious organizations to simultaneously comply with their religious beliefs and Defendants' HHS Contraceptive Mandate.

187. Defendants promulgated Defendants' HHS Contraceptive Mandate's narrow "religious employer" exemption, and its implicit exemption of self-insured church plan participants, so that it Defendants' HHS Contraceptive Mandate is not neutral in that it exempts from Defendants' HHS Contraceptive Mandate some nonprofit religious organizations which are religious but not others, like FOCUS, which are equally religious, thereby discriminating among religious organizations on the basis of their religious views or status.

188. The Free Exercise Clause, along with the Establishment Clause, protect the right of religious organizations to decide for themselves, free from government interference, matters of internal organizational governance as well as matters of faith and doctrine.

189. The Free Exercise Clause thus prohibits the government from interfering with a religious organization's internal decisions concerning its religious structure, leadership, doctrine, and policies, or the degree to which it is an integrated auxiliary or a church.

190. The government may not interfere with a religious organization's internal decisions if that interference would affect the faith and mission of the organization itself.

191. Based on Biblical teachings, the 2,000 year old teachings of the Catholic Church, and its own sincerely held religious beliefs, FOCUS has made the internal organizational decision that its employee health plan may not, as a matter of faith and practice, subsidize, provide, arrange, or otherwise facilitate access to contraception, sterilization, abortifacients, or abortion and counseling and education related to the same.

192. Defendants' HHS Contraceptive Mandate directly interferes with FOCUS's internal organizational decision concerning its structure and mission by requiring it to subsidize, provide, arrange, or otherwise facilitate free access to contraception, sterilization, abortifacients, or abortion and counseling and education related to the same.

193. Defendants' HHS Contraceptive Mandate's interferes with FOCUS's internal organizational decisions and thus affects its faith and religious mission by requiring it to subsidize, provide, arrange, or otherwise facilitate free access to contraception, sterilization, abortifacients, or abortion and counseling and education related to the same in direct violation of its religious beliefs.

194. Defendants' HHS Contraceptive Mandate's interference with FOCUS's internal organizational decision-making in a manner that affects its faith and mission violates the Free Exercise Clause.

195. Defendants promulgated and implemented Defendants' HHS Contraceptive Mandate and the "religious employer" exemption and its implicit exemption of self-insured church plan participants among organizations like FOCUS in order to suppress the religious exercise of FOCUS and other similarly situated religious organizations.

196. Defendants' HHS Contraceptive Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest.

197. Defendants’ HHS Contraceptive Mandate and/or its penalties, by Defendants’ creation, do not apply to, *inter alia*, (a) an enormous number of health insurance plans that enjoy “grandfathered” status; (b) plans sponsored by employers that qualify for the “religious employer” exemption (including integrated auxiliaries that are similar to FOCUS); or (c) self-insured church plans for organizations like FOCUS, thus, conclusively demonstrating the less-than-compelling nature of the interest that allegedly underlies Defendants’ HHS Contraceptive Mandate.

198. Indeed, access to contraceptives or abortifacients and related counseling and education is not a significant social problem as the availability of such items is ubiquitous, and compelling FOCUS to play an essential role in facilitating free access to such objectionable drugs, devices, and services is not the least restrictive means of advancing any interest Defendants may conceivably have.

199. Defendants’ HHS Contraceptive Mandate violates Plaintiffs’ rights secured to it by the Free Exercise Clause of the First Amendment to the United States Constitution.

200. Absent injunctive and declaratory relief against application and enforcement of Defendants’ HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

THIRD CLAIM FOR RELIEF
Violation of the Establishment Clause of the
First Amendment to the United States Constitution

201. Plaintiffs reallege the factual allegations of paragraphs 1 through 200 and incorporate them herein by this reference.

202. The First Amendment’s Establishment Clause requires governmental neutrality toward religion and prohibits the government from discriminating among religions and preferring some religious denominations or views over others.

203. Defendants' HHS Contraceptive Mandate discriminates among religions and favors some religions and religious views over others.

204. Defendants' HHS Contraceptive Mandate's narrow exemption for "religious employers," and its refraining from imposing a penalty on third party administrators of self-insured church plans for organizations similar to FOCUS, discriminates among religions on the basis of religious views, religious status, or incidental institutional structure or affiliation by determining that some religious employers are "religious enough" to qualify for a full exemption while others are not.

205. Defendants' HHS Contraceptive Mandate's exemption of integrated auxiliaries of churches, coupled with its refusal to exempt organizations such as FOCUS, is irrational and discriminatory.

206. Thus, Defendants' HHS Contraceptive Mandate discriminates among individual religious believers who work at exempted entities and those who do not, crediting the significance of the beliefs of the former but not of the latter.

207. Defendants' HHS Contraceptive Mandate adopts a particular theological view of what is acceptable moral complicity in the provision of contraceptives and abortifacients and imposes it through Defendants' Final Rule and Defendants' Final Interim Regulation upon most religionists like FOCUS (except those Defendants favor via the "religious employer" exemption) who must either conform their consciences or suffer penalty. Yet Defendants choose other, situationally indistinguishable religionists and arbitrarily chooses not to impose Defendants' HHS Contraceptive Mandate and resulting penalties for non-compliance on them.

208. Defendants' HHS Contraceptive Mandate's narrow "religious employer" exemption, and its refraining from imposing a penalty on third party administrators of self-

insured church plans of organizations substantially like FOCUS, exempts some religious employers but not others, thereby discriminating among religious organizations and favoring some religions and religious views over others.

209. Defendants' HHS Contraceptive Mandate furthers no governmental interest.

210. Defendants' HHS Contraceptive Mandate violates FOCUS's rights secured to it by the Establishment Clause of the First Amendment to the United States Constitution.

211. Absent injunctive and declaratory relief against the application and enforcement of Defendants' HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

FOURTH CLAIM FOR RELIEF
**Violation of the Free Speech Clause of the First Amendment
to the United States Constitution**

212. Plaintiffs reallege the factual allegations of paragraphs 1 through 211 and incorporate them herein by this reference.

213. Defendants' requirement that FOCUS provide insurance coverage that includes education and counseling regarding objectionable contraceptives and abortifacients forces FOCUS to communicate, i.e., speak, in a manner contrary to its religious beliefs. Likewise, Defendants' HHS Contraceptive Mandate censors FOCUS from speaking in a manner consistent with its religious beliefs.

214. FOCUS lives, practices, and teaches that abortion, contraceptives, and abortifacients violate God's law and that any participation in the unjustified taking of an innocent human life or artificial anti-conception contradicts its religious beliefs and convictions.

215. Defendants' HHS Contraceptive Mandate compels FOCUS to either speak or to facilitate speech relating to contraception, abortifacients, abortion, and sterilization that is

contrary to the religious beliefs, values, expressions, and practices that FOCUS and the individual Plaintiffs speak, live, practice, and teach.

216. Defendants' HHS Contraceptive Mandate compels FOCUS to facilitate access to government-dictated education and counseling related to abortion, contraception, and abortifacients.

217. Defendants' HHS Contraceptive Mandate also requires FOCUS to engage in specific speech to its third party administrator that expressly and/or operatively designates the third party administrator to provide the exact same promises of payments for contraceptives and abortifacients that FOCUS religiously objects to providing or facilitating.

218. Defendants thus violate FOCUS's right to be free from compelled speech, a right secured to it by the Free Speech Clause of the First Amendment to the United States Constitution.

219. Defendants' HHS Contraceptive Mandate's compelled speech and censorship requirements do not advance a compelling governmental interest.

220. Defendants have no narrowly tailored compelling interest to justify this compelled speech or censorship.

221. Defendants thus violate FOCUS's freedom of speech, and impose censorship on FOCUS's religiously motivated speech, rights secured to it by the Free Speech Clause of the First Amendment to the United States Constitution.

222. Absent injunctive and declaratory relief against application and enforcement of the HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

FIFTH CLAIM FOR RELIEF

**Violation of Due Process and Equal Protection As Guaranteed by the
Fifth Amendment to the United States Constitution**

223. Plaintiffs reallege the factual allegations of paragraphs 1 through 222 and incorporate them herein by this reference.

224. The Due Process Clause of the Fifth Amendment requires that government actors treat equally all persons similarly situated.

225. This requirement of equal treatment applies to organizations as well as to individuals.

226. Through Defendants' HHS Contraceptive Mandate's narrow "religious employer" exemption, Defendants have exempted certain religious organizations that object, based on deeply held religious beliefs, to complying with Defendants' HHS Contraceptive Mandate, but have refused to exempt others, including FOCUS, from complying with Defendants' HHS Contraceptive Mandate.

227. By extending the "religious employer" exemption to certain religious groups, but failing and refusing to extend it to FOCUS, Defendants have treated FOCUS differently than similarly situated religious groups.

228. Defendants' HHS Contraceptive Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest there may be.

229. Because Defendants' HHS Contraceptive Mandate sweepingly infringes upon religious exercise and speech rights that are constitutionally protected, it is unconstitutionally vague in violation of the due process rights of FOCUS and others not before this Court.

230. Persons of common intelligence must necessarily guess at the meaning, scope, and application of Defendants' HHS Contraceptive Mandate and its exemptions.

231. Defendants' HHS Contraceptive Mandate lends itself to discriminatory enforcement by Defendants in an arbitrary and capricious manner, and to lawsuits by private persons, based on the Defendants' vague standards.

232. Defendants' HHS Contraceptive Mandate vests Defendants with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations that possess religious beliefs and/or that meet the Defendants' definition of a "religious employer."

233. Defendants' HHS Contraceptive Mandate violates Plaintiffs' due process rights under the Fifth Amendment to the United States Constitution.

234. Absent injunctive and declaratory relief against application and enforcement of Defendants' HHS Contraceptive Mandate, FOCUS and the Individual Plaintiffs will suffer irreparable harm.

SIXTH CLAIM FOR RELIEF

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

235. Plaintiffs reallege the factual allegations of paragraphs 1 through 234 and incorporate them herein by this reference.

236. FOCUS and its employees, including the Individual Plaintiffs, associate with FOCUS for an expressive purpose, to live and promote their common religious beliefs, which include the teachings outlined above.

237. Defendants' HHS Contraceptive Mandate compels FOCUS and its employees to facilitate expression and activities that are inconsistent with Plaintiffs' religious beliefs, expression, and practices.

238. Defendants' actions thus violate Plaintiffs' right of expressive association protected by the Free Speech Clause of the First Amendment to the United States Constitution.

239. Absent injunctive and declaratory relief against the application and enforcement of Defendants' HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

SEVENTH CLAIM FOR RELIEF
Violation of the Administrative Procedure Act (“APA”)

240. Plaintiffs reallege the factual allegations of paragraphs 1 through 239 and incorporate them herein by this reference.

241. The APA forbids agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). The APA further forbids agency action that is “in excess of statutory jurisdiction, authority, or limitations.” 5. U.S.C. § 706(2)(C).

242. Defendants relied upon a flawed study by IOM which, presumably in concert with HHS, was made up of individuals and organizations whose bias was the support of mass distribution, at public taxpayer expense, of abortion, abortion-inducing drugs and devices, and contraceptives.

243. Notwithstanding the fact that it has taken three years for Defendants to implement their HHS Contraceptive Mandate against FOCUS and other similarly situated non-profit religious organizations, Defendants did not give proper notice and an opportunity for public comment.

244. Thus, Defendants did not take into account the full implications of Defendants' regulations by completing a meaningful consideration of the relevant matters and objections presented.

245. Further, Defendants did not consider or respond to the hundreds of thousands of comments they received in opposition to their regulations.

246. Each regulation promulgated by Defendants was issued and implemented and on a final basis and only then were comments requested. Yet, as is clear from the regulatory text of each of Defendants' regulations, coupled with the public comments of representatives of Defendants as described above, Defendants had no intention of considering either the objections of religious organizations or the requests by such religious organizations to provide them with exemptions, or to hold off on the effective date of their regulations until after Defendants had received and analyzed all such comments as were submitted.

247. Thus, Defendants imposed Defendants' rules without the required "open-mindedness" that government agencies must have when notice-and-comment occurs.

248. Defendants also did not have good cause to impose the objectionable regulations without prior notice and comment.

249. Moreover, Defendants issued its Final Rule implementing their HHS Contraceptive Mandate (which applies to FOCUS) on June 28, 2013, and declared it effective on August 1, 2013 and their "Interim Final Regulations (which also apply to FOCUS) on August 22, 2014, and declared them effective on August 27, 2014 with the result, considering Defendants' so-called "safe harbor," that imposes the HHS Contraceptive Mandate on FOCUS immediately.

250. The ACA provides, and Defendants admit, that any rule issued by Defendants requiring coverage of preventive care and screenings under 42 U.S.C. § 300gg-13 (which language is the genesis of Defendants' HHS Contraceptive Mandate) cannot go into effect until at least a year after the rule is finalized.

251. Thus, under these provisions, Defendants' Final Rule implementing their HHS Contraceptive Mandate (which applies to FOCUS) was not effective until on and after August 1, 2014.

252. However, on April 29, 2014, this Court granted FOCUS a preliminary injunction against Defendants' HHS Contraceptive Mandate (Doc. 39), which preliminary injunction remains in place to date.

253. Likewise, Defendants' "Interim Final Regulations" (which also apply to FOCUS) should not be effective as to FOCUS or others similarly situated to FOCUS until on or after August 27, 2015. Nevertheless, though this Court's injunction serves to bar the implementation of this iteration of Defendants' HHS Contraceptive Mandate, Defendants purport to be able to require FOCUS to comply with their HHS Contraceptive Mandate pursuant to Defendants' "Interim Final Regulations" immediately.

254. Thus, in addition to this Court's injunction order, immediate implementation of Defendants' HHS Contraceptive Mandate pursuant to Defendants' "Interim Final Regulations" violates the ACA and/or violates the APA's requirement that government agencies be open-minded to comments before finalizing any rules.

255. In promulgating the HHS Contraceptive Mandate, Defendants failed to consider the constitutional and statutory implications of the HHS Contraceptive Mandate on FOCUS and similar organizations.

256. Defendants' explanation (and lack thereof) for its decision not to exempt FOCUS and similarly situated religious organizations from their HHS Contraceptive Mandate runs counter to the evidence submitted by religious organizations during the comment period. And Defendants lack any explanation or rationale for withholding their penalty on third party

administrators or self-insured church plans, despite the participation of many entities indistinguishable from FOCUS in those plans.

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

258. Therefore, Defendants have violated the notice and comment requirements of 5 U.S.C. §§ 553(b) and (c), have taken agency action not in accordance with procedures required by law as a result of which Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D), and have taken action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

259. As set forth above, the HHS Contraceptive Mandate violates RFRA and the First and Fifth Amendments to the U.S Constitution.

260. In addition, the HHS Contraceptive Mandate is also contrary to the provision of the ACA that states that "nothing in this title"—i.e., Title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." Section 1303(b)(1)(A).

261. Implementation of Defendants' HHS Contraceptive Mandate pursuant to Defendants' "Final Interim Regulations" is also not in accord with the law.

262. As set forth above, Defendants essentially acknowledged in their Final Rule (see 78 Fed. Reg. 39879) that, without the completion and delivery by FOCUS of Defendants' EBSA Form 700 self-certification form, Defendants had no legal authority by which to compel

either FOCUS or its third party administrator to comply with Defendants' HHS Contraceptive Mandate.

263. In Defendants' new Interim Final Regulations, Defendants baldly claim that DOL is able to exercise "its broad rulemaking authority under Title I of ERISA and to interpret and apply the definition of a plan administrator under ERISA section 3(16)(A) to require FOCUS's third party administrator to comply with Defendants' HHS Contraceptive Mandate by virtue of FOCUS's completion and delivery of Defendants' Model Notice which, unlike Defendants' EBSA Form 700 self-certification form, does not designate FOCUS's third party administrator as FOCUS's agent for the purpose of implementing Defendants' HHS Contraceptive Mandate.

264. Thus, Defendants' HHS Contraceptive Mandate violates the ACA itself, 42 U.S.C. § 300gg-13, which give Defendants no authority whatsoever to impose mandates that cause access to contraceptive or abortifacient coverage or payments in a vehicle outside of or separate from FOCUS's own health insurance plan, or to impose requirements on FOCUS to designate or otherwise agree that its third party administrator may do so. No other federal statute gives Defendants any such authority.

265. Defendants' HHS Contraceptive Mandate is also contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008), which provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

266. Defendants' HHS Contraceptive Mandate also violates the provisions of the Church Amendment, 42 U.S.C. § 300a-7(d), which provides that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions."

267. The HHS Contraceptive Mandate is therefore illegal, contrary to existing law, and in violation of the APA under 5 U.S.C. §§ 706(2)(A) and 706(2)(C).

268. Absent injunctive and declaratory relief against application and enforcement of the HHS Contraceptive Mandate, Plaintiffs will suffer irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Fellowship of Catholic University Students, Curtis A. Martin, Craig A. Miller, Brenda Cannella, and Cindy O'Boyle respectfully request the following relief:

A. That this Court enter judgment declaring the HHS Contraceptive Mandate and its application to Plaintiff Fellowship of Catholic University Students and its insurance issuers or third party administrators to be a violation of its rights protected by the Religious Freedom Restoration Act, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the United States Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Administrative Procedure Act;

B. That this Court enter a permanent injunction prohibiting Defendants from applying the HHS Contraceptive Mandate to Plaintiff Fellowship of Catholic University Students and to its insurance issuers or third party administrators or in a way that violates the legally protected rights of any person, and prohibiting Defendants from continuing to illegally

discriminate against Plaintiff Fellowship of Catholic University Students by requiring it to provide, arrange, or facilitate health insurance coverage or access to separate payments for contraceptives, abortifacients, and related counseling through any mechanism which uses FOCUS's health insurance plan for its present and future employees, including the Individual Plaintiffs;

C. That this Court award Plaintiffs their court costs and reasonable attorney's fees, as provided by the Equal Access to Justice Act and Religious Freedom Restoration Act (as provided in 42 U.S.C. § 1988); and

D. That this Court grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 22nd day of October, 2014.

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VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I, Curtis A. Martin, declare under penalty of perjury that the foregoing allegations regarding Fellowship of Catholic University Students and the Individual Plaintiffs (of which I am one) are true and correct to the best of my knowledge, information and belief.

Executed on this 22nd day of October, 2014.

s/ Curtis A. Martin
Curtis A. Martin
Founder and Chief Executive Officer
Fellowship of Catholic University Students

**I CERTIFY THAT I HAVE SIGNED THE ORIGINAL OF THIS DOCUMENT, WHICH IS AVAILABLE FOR INSPECTION AT ANY TIME BY THE COURT OR A PARTY TO THIS ACTION.*

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs, Michael J. Norton, hereby certifies that, on the 22nd day of October, 2014, the foregoing was served on all parties or their counsel of record through the Court's CM/ECF system, all of whom are registered users, to wit:

bradley.p.humphreys@usdoj.gov

s/ Michael J. Norton
Michael J. Norton