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

EAST TEXAS BAPTIST UNIVERSITY, and HOUSTON BAPTIST UNIVERSITY,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

Civil No. 12-3009

Jury Demanded

COMPLAINT

Come now Plaintiffs East Texas Baptist University and Houston Baptist University, by and through their attorneys, and state as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations issued under the 2010 "Affordable Care Act" that force thousands of religious organizations to violate their deepest religious beliefs.

2. Plaintiffs East Texas Baptist University and Houston Baptist University ("the Universities") are Christian liberal arts universities. East Texas Baptist University is located in Marshall, Texas. Houston Baptist University is located in Houston, Texas. The Universities' religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion. The Universities are among the many American religious organizations that hold these beliefs.

3. With full knowledge of these beliefs, the government issued an administrative rule ("the Mandate") that runs roughshod over the Universities' religious beliefs, and the beliefs of millions of other Americans by forcing them to provide health insurance coverage for abortifacient drugs and related education and counseling.

4. The government's Mandate unconstitutionally coerces the Universities to violate their deeply-held religious beliefs under threat of heavy fines and penalties. The Mandate also forces the Universities to facilitate government-dictated speech that is incompatible with their own speech and religious teachings. Having to pay a fine to the taxing authorities for the privilege of practicing one's religion or controlling one's own speech is un-American, unprecedented, and flagrantly unconstitutional.

5. The government's refusal to accommodate conscience is also highly selective. The government obviously does not believe every single insurance plan in the country needs to cover these services. Rather, the government has provided ***thousands*** of exemptions from the Affordable Care Act for other groups, including large corporations, often for reasons of commercial convenience. And the government allows a variety of other reasons—from the age

of the plan to the size of the employer—to qualify a plan for an exemption. But the government refuses to give the same level of accommodation to groups exercising their fundamental First Amendment freedoms.

6. Defendants' actions therefore violate the Universities' rights to freedom of religion, as secured by the First Amendment of the United States Constitution and the Religious Freedom Restoration Act ("RFRA").

7. Defendants' actions also violate the Universities' rights to the freedom of speech, as secured by the First Amendment of the United States Constitution.

8. Furthermore, the Mandate is also illegal because it was imposed by Defendants without prior notice or sufficient time for public comment, and otherwise violates the Administrative Procedure Act, 5 U.S.C. § 553.

9. Had the existence of religious objections to abortifacient drugs been obscure or unknown, the government's actions might have been an accident. But because the government acted with full knowledge of those beliefs, and because it allows plans not to cover these services for a wide range of reasons *other than* religion, the Mandate can be interpreted as nothing other than a deliberate attack by the government on the religious beliefs of the Universities and millions of other Americans. The Universities seek declaratory and injunctive relief to protect against this attack.

JURISDICTION AND VENUE

10. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to

render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1.

11. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). A substantial part of the events or omissions giving rise to the claim occurred in this district, and Plaintiff Houston Baptist University is located in this district.

IDENTIFICATION OF PARTIES

12. Plaintiff East Texas Baptist University is a Christian liberal arts university located in Marshall, Texas. Established in 1912, East Texas Baptist University is committed to offering a complete education that develops students spiritually, intellectually, and professionally.

13. Plaintiff Houston Baptist University is a Christian liberal arts university located in Houston, Texas. Established in 1960, Houston Baptist University is committed to offering a complete education that develops students spiritually, intellectually, and professionally.

14. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the Mandate.

15. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.

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

17. Defendant Hilda Solis is the Secretary of the United States Department of Labor. In this capacity, she has responsibility for the operation and management of the Department of Labor. Solis is sued in her official capacity only.

18. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

19. Defendant Timothy Geithner is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department. Geithner is sued in his official capacity only.

20. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

FACTUAL ALLEGATIONS

I. The Universities' Religious Beliefs and Practices Related to Insurance for Abortion.

21. East Texas Baptist University is a Christian liberal arts university located in Marshall, Texas. Established in 1912, East Texas Baptist University is committed to offering a complete education that develops students spiritually, intellectually, and professionally.

22. Faith is central to the educational mission of East Texas Baptist University. East Texas Baptist University describes itself as providing "academic excellence while integrating faith with learning," and commits, in its mission, to "Christian stewardship and to providing and maintaining and environment conducive to learning, leadership development, and academic excellence."

23. Consistent with its mission, East Texas Baptist University works to manifest its Christian faith in all aspects of its administration. All East Texas Baptist University employees profess faith in Jesus Christ, which establishes the essential framework within which members of the University both unite in shared beliefs and explore differences.

24. East Texas Baptist University holds religious beliefs that include traditional Christian teachings on the sanctity of life. East Texas Baptist University believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. East Texas Baptist University therefore believes and teaches that abortion ends a human life and, with rare exceptions, is a sin.

25. East Texas Baptist University has more than 1,290 graduate and undergraduate students.

26. East Texas Baptist University has approximately 227 full-time and 56 part-time employees.

27. As part of its commitment to Christian education, East Texas Baptist University also promotes the spiritual and physical well-being and health of its students and employees. This includes provision of generous health services and health insurance for its employees.

28. It is a violation of East Texas Baptist University's religious beliefs to deliberately provide insurance coverage for drugs, devices, services, or procedures inconsistent with its faith, in particular abortion-inducing drugs, abortion procedures, and related services.

29. It is similarly a violation of East Texas Baptist University's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-inducing drugs, abortion procedures, and related services

30. East Texas Baptist University has no conscientious objection to providing coverage for non-abortion-inducing contraceptive drugs and devices.

31. The plan year for East Texas Baptist University's employee insurance plans begins on January 1 of each year.

32. East Texas Baptist University's employee insurance plans are not eligible for grandfather status. *See* 45 C.F.R. § 147.140(a)(1)(i), 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i).

33. **Houston Baptist University** is a Christian liberal arts university located in Houston, Texas. Established in 1960, Houston Baptist University is committed to offering a complete education that develops students spiritually, intellectually, and professionally.

34. Faith is central to the educational mission of Houston Baptist University. Houston Baptist University describes itself as "dedicated to the development of moral character, the enrichment of spiritual lives, and the perpetuation of growth in Christian ideals," and commits, in its mission, to "provide a learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of our central confession, 'Jesus Christ is Lord.'"

35. Consistent with its mission, Houston Baptist University works to manifest its Christian faith in all aspects of its administration. All Houston Baptist University employees profess faith in Jesus Christ, which establishes the essential framework within which members of the University both unite in shared beliefs and explore differences.

36. Houston Baptist University holds religious beliefs that include traditional Christian teachings on the sanctity of life. Houston Baptist University believes and teaches that each human being bears the image and likeness of God, and therefore that all human life is sacred and precious, from the moment of conception. Houston Baptist University therefore believes and teaches that abortion ends a human life and, with rare exceptions, is a sin.

37. Houston Baptist University has more than 2,589 graduate and undergraduate students.

38. Houston Baptist University has approximately 309 full-time and 111 part-time employees.

39. As part of its commitment to Christian education, Houston Baptist University also promotes the spiritual and physical well-being and health of its students and employees. This includes provision of generous health services and health insurance for its employees.

40. It is a violation of Houston Baptist University's religious beliefs to deliberately provide insurance coverage for drugs, devices, services, or procedures inconsistent with its faith, in particular abortion-inducing drugs, abortion procedures, and related services.

41. It is similarly a violation of Houston Baptist University's religious beliefs to deliberately provide health insurance that would facilitate access to abortion-inducing drugs, abortion procedures, and related services.

42. Houston Baptist University has no conscientious objection to providing coverage for non-abortion-inducing contraceptive drugs and devices.

43. The plan year for Houston Baptist University's employee insurance plans begins on January 1 of each year.

44. Houston Baptist University's employee insurance plans are not eligible for grandfather status. *See* 45 C.F.R. § 147.140(a)(1)(i), 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i).

II. The Affordable Care Act

45. In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act."

46. The Affordable Care Act regulates the national health insurance market by directly regulating "group health plans" and "health insurance issuers."

47. The Act does not apply equally to all plans.

48. The Act does not apply equally to all insurers.

49. The Act does not apply equally to all individuals.

50. The Act applies differently to employers with fewer than 50 employees, not counting seasonal workers. 26 U.S.C. § 4980H(c)(2)(A).

51. According to the United States census, more than 20 million individuals are employed by firms with fewer than 20 employees. http://www.census.gov/econ/smallbus.html. Employers with less than 50 employees would therefore employ an even higher number of workers.

52. Certain provisions of the Act do not apply equally to members of certain religious groups. *See*, *e.g.*, 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).

53. The Act's preventive care requirements do not apply to employers who provide so-called "grandfathered" health care plans.

54. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

55. HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of small employers with between 50 and 100 employees may do likewise. http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html.

56. The Act is not generally applicable because it provides for numerous exemptions from its rules.

57. The Act is not neutral because some groups, both secular and religious, enjoy exemptions from the law, while certain religious groups do not.

58. The Act creates a system of individualized exemptions.

59. The Department of Health and Human Services has the authority under the Act to grant compliance waivers to employers and other health insurance plan issuers ("HHS waivers").

60. HHS waivers release employers and other plan issuers from complying with the provisions of the Act.

61. HHS decides whether to grant waivers based on individualized waiver requests from particular employers and other health insurance plan issuers.

62. Upon information and belief, thousands of HHS waivers have been granted.

63. The Act is not neutral because some secular and religious groups have received statutory exceptions while other religious groups and individuals have not.

64. The Act is not generally applicable because Defendants have granted numerous waivers from complying with its requirements.

65. The Act is not generally applicable because it does not apply equally to all individuals and plan issuers.

66. Defendants' waiver practices create a system of individualized exemptions.

III. The Preventive Care Mandate

67. One of the provisions of the Affordable Care Act mandated that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" and directed the Secretary of Health and Human Services to determine what would constitute "preventative care" under the mandate. 42 U.S.C § 300gg–13(a)(4).

68. On July 19, 2010, HHS, along with the Department of Treasury and the Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010).[1] The interim final rule required providers of group health insurance to cover preventive

[1] For ease of reading, references to "HHS" in this Complaint are to all three Departments.

care for women as provided in guidelines to be published by the Health Resources and Services Administration at a later date. 75 Fed. Reg. 41759 (2010).

69. The Mandate also requires group health care plans and issuers to provide education and counseling for all women beneficiaries with reproductive capacity.

70. The Mandate went into effect immediately as an "interim final rule."

71. HHS accepted public comments to the 2010 interim final rule until September 17, 2010. A number of groups filed comments warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of health care, including contraception, sterilization, and abortion.

72. HHS directed a private health policy organization, the Institute of Medicine ("IOM"), to suggest a list of recommended guidelines describing which drugs, procedures, and services should be covered by all health plans as preventative care for women. *See* http://www.hrsa.gov/womensguidelines.

73. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), Prof. John Santelli, a Senior Fellow at the Guttmacher Intitute, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America and Prof. Sara Rosenbaum, a proponent of government-funded abortion.

74. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.

75. One year after the first interim final rule was published, on July 19, 2011, the IOM published its recommendations. It recommended that the preventative services include "All Food and Drug Administration approved contraceptive methods [and] sterilization procedures." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).

76. FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices, including IUDs; levonorgestral, also known as the "morning-after pill" or "Plan B"; and ulipristal, also known as "Ella" or the "week-after pill"; and other drugs, devices, and procedures. The FDA birth control guide specifically notes that Plan B and Ella may work by preventing "attachment (implantation)" of a fertilized egg to a woman's uterus. *See* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf.

77. Thirteen days later, on August 1, 2011, HRSA issued guidelines adopting the IOM recommendations. *See* http://www.hrsa.gov/womensguidelines. On the same day HHS, the Department of Labor, and the Department of Treasury promulgated an amended interim final rule which reiterated the Mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

78. HHS did not take into account the concerns of religious organizations and individuals in the comments submitted before the Mandate was issued.

79. The Mandate was unresponsive to the concerns stated in the comments submitted by religious organizations and individuals.

80. When it issued the Mandate, HHS requested comments from the public by September 30, 2011, and indicated that comments would be available online.

81. Upon information and belief, over 100,000 comments were submitted against the Mandate and its narrow "religious employer" exemption.

82. On October 5, 2011, six days after the comment period ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war."

83. The Mandate fails to take into account the statutory and constitutional conscience rights of religious organizations like the Universities, even though those rights were repeatedly raised in the public comments.

84. The Mandate requires that the Universities provide coverage or access to coverage for abortion-causing drugs and related education and counseling against their consciences in a manner that is contrary to law.

85. The Mandate constitutes government-imposed pressure and coercion on the Universities to change or violate their religious beliefs.

86. The Mandate exposes the Universities to substantial fines and other penalties and pressures for refusal to change or violate their religious beliefs.

87. The Mandate imposes a burden on the Universities' employee recruitment efforts by creating uncertainty as to whether the Universities will be able to offer health insurance beyond 2012.

88. The Mandate places the Universities at a competitive disadvantage in their efforts to recruit and retain employees.

89. The Mandate forces the Universities to provide coverage or access to coverage for Plan B, Ella, and other abortifacient drugs in violation of the Universities' religious beliefs.

90. The Universities have a sincere religious objection to providing coverage for Plan B and Ella since they believe that those drugs could prevent a human embryo—which they understand to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo.

91. The Universities consider the prevention by artificial means of the implantation of a human embryo to be an abortion.

92. The Universities believe that Plan B and Ella can cause the death of the embryo.

93. Plan B can prevent the implantation of a human embryo in the wall of the uterus.

94. The drug Ella can prevent the implantation of a human embryo in the wall of the uterus.

95. Plan B and Ella can cause the death of the embryo.

96. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus constitutes an "abortion" as that term is used in federal law.

97. The use of artificial means to cause the death of a human embryo constitutes an "abortion" as that term is used in federal law.

98. The Mandate forces the Universities to provide insurance coverage or access to insurance coverage for emergency contraception, including Plan B and Ella free of charge, regardless of the ability of insured persons to obtain these drugs from other sources.

99. The Mandate forces the Universities to provide insurance coverage or access to insurance coverage for education and counseling concerning abortion that directly conflicts with the Universities' religious beliefs and teachings.

100. Providing this counseling and education is incompatible and irreconcilable with the explicit messages and speech of the Universities.

101. The Mandate forces the Universities to choose among violating their religious beliefs, incurring substantial fines, or terminating their employee health insurance coverage.

102. Group health plans and issuers will be subject to the Mandate starting with the first insurance plan year that begins on or after August 1, 2012.

103. The Universities have already had to devote significant institutional resources, including both staff time and funds, to determining how to respond to the Mandate. The Universities anticipate continuing to make such expenditures of time and money up until the time that the Mandate goes into effect.

IV. The Narrow and Discretionary Religious Exemption

104. The Mandate indicates that that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A).

105. The Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

106. The Mandate imposes no constraint on HRSA's discretion to grant exemptions to some, all, or none of the organizations meeting the Mandate's definition of "religious employers."

107. HHS stated that it based the exemption on comments on the 2010 interim final rule. 76 Fed. Reg. 46621.

108. Most religious organizations, including the Universities, have more than one purpose.

109. For most religious organizations, including the Universities, the inculcation of religious values is only one purpose among others.

110. The Universities are not organizations described in Section 6033(a)(1) and Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

111. The Universities reasonably expect that they will be subject to the Mandate despite the existence of the exemption.

112. On January 20, 2012, Defendant Sebelius announced that there would be no change to the "religious employer" exemption. Instead, she added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will

be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. At the same time, however, Sebelius announced that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." *See* Statement by U.S. Dep't of Health and Human Services Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited February 7, 2012).

113. On February 10, 2012, President Obama held a press conference at which he announced an intention to initiate, at some unspecified future date, a separate rulemaking process that would work toward creating a different insurer-based mandate. This promised mandate would, the President stated, attempt to take into account the kinds of religious objections voiced against the original Mandate contained in the interim final rule.

114. On that same day—February 10, 2012—the Defendants issued a "guidance bulletin" describing a "Temporary Enforcement Safe Harbor" ("Safe Harbor") from the Mandate. The Safe Harbor applies to "non-exempted, non-grandfathered group health plans established and maintained by non-profit organizations with religious objections to contraceptive coverage (and any health insurance coverage offered in connection with such plans)." Under the Safe Harbor, the Defendants state that qualifying organizations will not be subject to enforcement of the

Mandate "until the first plan year that begins on or after August 1, 2013," provided they meet certain criteria outlined in the guidance bulletin.[2]

115. Those Safe Harbor criteria require an organization to self-certify that (1) it operates as a non-profit; (2) it has not, from February 10, 2012 onward, offered "contraceptive coverage . . . by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization"; and (3) it has provided (for the first plan year beginning on or after August 1, 2012) a notice to plan participants stating that "[t]he organization that sponsors your groups health plan has certified that it qualifies for a temporary enforcement safe harbor with respect to the Federal requirement to cover contraceptive services without cost sharing," and that "[d]uring this one-year period, coverage under your group health plan will not include coverage of contraceptive services."

116. On February 15, 2012, the Defendants adopted as final, "without change," the Mandate and its narrow "religious employers" exemption. 77 Fed. Reg. 8725, 8727.

117. On March 16, 2012, the Defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM"). The ANPRM announced the Defendants' intention to create an "accommodation" for non-exempt religious organizations under which the Defendants would require a health insurance issuer (or third party administrator) to provide coverage for these drugs and services—

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[2] *See* "Guidance on 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," U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 10, 2012), at 3, *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited October 4, 2012).

without cost sharing and without charge—to employees covered under the organization's health plan. The ANPRM solicited public comments on structuring the proposed accommodation, and announced the Defendants' intention to finalize an accommodation by the end of the Safe Harbor period. *See* https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-06689.pdf (published on March 21, 2012).

118. The ANPRM also announced Defendants' intention to apply the Temporary Safe Harbor provision to student insurance plans provided by "nonprofit institutions of higher education that meet comparable criteria" to those established for the employer safe harbor. *See id.* at 14.

119. The ANPRM did not announce any intention to alter the Mandate or its narrow "religious employer" exemption, which were made "final, without change" on February 15, 2012.

120. East Texas Baptist University will certify that it excluded coverage for emergency contraceptives because of its religious beliefs prior to February 10, 2012 and will thus be protected temporarily from government enforcement of the Mandate.

121. Houston Baptist University will certify that it excluded coverage for emergency contraceptives because of its religious beliefs prior to February 10, 2012 and will thus be protected temporarily from government enforcement of the Mandate.

122. While the Safe Harbor, by its terms, will temporarily protect the Universities from government enforcement of the Mandate, the Mandate also triggers a right to private enforcement under ERISA to which leaves the Universities completely exposed to private suits.[3]

123. The Universities will be subject to enforcement action by Defendants under the Mandate no later than January 1, 2014.

124. On January 1, 2014, the Universities will face an unconscionable choice: either violate the law, or violate their faith.

CLAIMS

COUNT I

Violation of the Religious Freedom Restoration Act
Substantial Burden

125. The Universities incorporate by reference all preceding paragraphs.

126. The Universities' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion or related education and counseling. The Universities' compliance with these beliefs is a religious exercise.

127. The Mandate creates government-imposed coercive pressure on the Universities to change or violate their religious beliefs.

128. The Mandate chills the Universities' religious exercise.

129. The Mandate exposes the Universities to substantial fines for their religious exercise.

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[3] *See* 29 U.S.C. § 1132(a) ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"); 29 U.S.C. § 1185d(a)(1) (incorporating portions of ACA).

130. The Mandate exposes the Universities to substantial competitive disadvantages, in that they will no longer be permitted to offer health insurance.

131. The Mandate imposes a substantial burden on the Universities' religious exercise.

132. The Mandate furthers no compelling governmental interest.

133. The Mandate is not narrowly tailored to any compelling governmental interest.

134. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

135. The Mandate and Defendants' threatened enforcement of the Mandate violate the Universities' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

136. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT II

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Substantial Burden

137. The Universities incorporates by reference all preceding paragraphs.

138. The Universities' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion or related education and counseling. The Universities' compliance with these beliefs is a religious exercise.

139. Neither the Affordable Care Act nor the Mandate is neutral.

140. Neither the Affordable Care Act nor the Mandate is generally applicable.

141. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

142. The Mandate furthers no compelling governmental interest.

143. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

144. The Mandate creates government-imposed coercive pressure on the Universities to change or violate their religious beliefs.

145. The Mandate chills the Universities' religious exercise.

146. The Mandate exposes the Universities to substantial fines for their religious exercise.

147. The Mandate exposes the Universities to substantial competitive disadvantages, in that they will no longer be permitted to offer health insurance.

148. The Mandate imposes a substantial burden on the Universities' religious exercise.

149. The Mandate is not narrowly tailored to any compelling governmental interest.

150. The Mandate and Defendants' threatened enforcement of the Mandate violate the Universities' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

151. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT III

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination

152. The Universities incorporate by reference all preceding paragraphs.

153. The Universities' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion or related education and counseling. The Universities' compliance with these beliefs is a religious exercise.

154. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate and the religious exemption to the Mandate in a way that made it impossible for the Universities to comply with their religious beliefs.

155. Defendants promulgated both the Mandate and the religious exemption to the Mandate in order to suppress the religious exercise of the Universities and others.

156. The Mandate and Defendants' threatened enforcement of the Mandate thus violate the Universities' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

157. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT IV

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Discrimination Among Religions

158. The Universities incorporate by reference all preceding paragraphs.

159. By design, Defendants imposed the Mandate on some religious organizations but not on others, resulting in discrimination among religions.

160. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

161. The Mandate and Defendants' threatened enforcement of the Mandate thus violate the Universities' rights secured to them by the Free Exercise Clause of the First Amendment of the United States Constitution.

162. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT V

Violation of the First Amendment to the United States Constitution
Establishment Clause
Selective Burden/Denominational Preference (*Larson* v. *Valente*)

163. The Universities incorporate by reference all preceding paragraphs.

164. By design, defendants imposed the Mandate on some religious organizations but not on others, resulting in a selective burden on the Universities.

165. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

166. The Mandate and Defendants' threatened enforcement of the Mandate therefore violate the Universities' rights secured to them by the Establishment Clause of the First Amendment of the United States Constitution.

167. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT VI

Violation of the First Amendment to the United States Constitution
Free Exercise and Establishment Clauses
Excessive Entanglement

168. The Universities incorporate by reference all preceding paragraphs.

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

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

171. In order to qualify for the "religious employers" exemption to the Mandate, entities must submit to an invasive government investigation into an organization's religious beliefs, including whether the organization's "purpose" is the "inculcation of religious values" and whether the organization "primarily employs" and "primarily serves" individuals who share the organization's religious tenets.

172. It is unclear how the government will determine whether an organization meets the Mandate's definition of a sufficiently "religious" organization, leading to the government's unbridled discretion to determine whether to exempt an organization.

173. The Mandate thus requires the government to engage in invasive inquiries and judgments regarding questions of religious belief or practice.

174. The Mandate results in an excessive entanglement between religion and government.

175. The Mandate is therefore unconstitutional and invalid.

176. The enactment and impending enforcement of the Mandate violates the Free Exercise Clause and the Establishment Clause of the First Amendment.

177. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT VII

Violation of the First Amendment to the United States Constitution
Free Exercise and Establishment Clauses
Excessive Interference in Matters of Internal Governance

178. The Universities incorporate by reference all preceding paragraphs.

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

180. Under these Clauses, the government may not interfere with a religious organization's internal decisions concerning the organization's religious structure, ministers, or doctrine.

181. Under these Clauses, the government may not interfere with a religious organization's internal decision if that interference would affect the faith and mission of the organization itself.

182. The Universities are religious organizations.

183. It is a violation of the Universities' religious beliefs to deliberately provide insurance coverage for drugs, devices, services, or procedures inconsistent with their faith, in particular abortion-inducing drugs, abortion procedures, and related services. Likewise, it is a violation of the Universities' religious beliefs to provide health insurance for such drugs, procedures, or services even if those items were paid for by an insurer and not by the Universities.

184. The government may not interfere with the Universities' religious beliefs on abortion-inducing drugs, abortion procedures, and related services.

185. The Mandate interferes with the Universities' internal decisions by requiring it either to facilitate practices that directly conflict with their religious beliefs or face substantial penalties.

186. The Mandate and its religious employer exemption interfere with the organizational structure of the Universities by requiring the Universities to include or facilitate coverage for practices that directly conflict with their religious beliefs but purporting to exempt churches.

187. Because the Mandate interferes with the internal decisionmaking and organizational structure of the Universities in a manner that affects their faiths and missions, the Mandate violates the Establishment Clause and the Free Exercise Clause of the First Amendment.

188. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT VIII

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech

189. The Universities incorporate by reference all preceding paragraphs.

190. The Universities teach that abortion violates their religious beliefs.

191. The Mandate would compel the Universities to cooperate in activities through their provision of health insurance that the Universities teach are violations of the Universities' religious beliefs.

192. The Mandate would compel the Universities to provide education and counseling related to abortion.

193. Defendants' actions thus violate the Universities' rights to be free from compelled speech as secured to it by the First Amendment of the United States Constitution.

194. The Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.

195. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT IX

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

196. The Universities incorporates by reference all preceding paragraphs.

197. The Universities teach that abortion violates their religious beliefs.

198. The Mandate would compel the Universities to cooperate in activities through their provision of health insurance that the Universities teach are violations of the Universities' religious beliefs.

199. The Mandate would compel the Universities to provide, through their provision of health insurance, education and counseling related to abortion.

200. Defendants' actions thus violate the Universities' rights of expressive association as secured to them by the First Amendment of the United States Constitution.

201. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT X

Violation of the First Amendment to the United States Constitution
Free Exercise Clause and Freedom of Speech
Unbridled Discretion

202. The Universities incorporate by reference all preceding paragraphs.

203. By stating that HRSA "may" grant an exemption to certain religious groups, the Mandate vests HRSA with unbridled discretion over which organizations can have their First Amendment interests accommodated.

204. The Mandate vests HRSA with unbridled discretion to determine whether a religious organization such as the Universities "primarily" serves and employs members of the same faith as the organization.

205. Defendants' actions therefore violate the Universities' rights not to be subjected to a system of unbridled discretion when engaging in speech or when engaging in religious exercise, as secured to them by the First Amendment of the United States Constitution.

206. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT XI

Violation of the Administrative Procedure Act
Lack of Good Cause

207. The Universities incorporates by reference all preceding paragraphs.

208. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute 'good cause.'

209. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented." Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

210. Therefore, Defendants have taken agency action not in observance with procedures required by law, and the Universities are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

211. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT XII

Violation of the Administrative Procedure Act Arbitrary and Capricious Action

212. The Universities incorporate by reference all preceding paragraphs.

213. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the mandate on the Universities and similar organizations.

214. Defendants' explanation for its decision not to exempt the Universities and similar religious organizations from the Mandate runs counter to the evidence submitted by religious organizations during the comment period.

215. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rules fail to consider the full extent of their implications and they do not take into consideration the evidence against them.

216. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT XIII

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Weldon Amendment
Religious Freedom Restoration Act
First Amendment to the United States Constitution

217. The Universities incorporate by reference all preceding paragraphs.

218. The Mandate is 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).

219. The Weldon Amendment 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."

220. The Mandate requires issuers, including the Universities, to provide coverage or access to coverage of all Federal Drug Administration-approved contraceptives.

221. Some FDA-approved contraceptives cause abortions.

222. As set forth above, the Mandate violates RFRA and the First Amendment.

223. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

224. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

COUNT XIV

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Affordable Care Act

225. The Universities incorporate by reference all preceding paragraphs.

226. The Mandate is contrary to the provisions of the Affordable Care Act.

227. Section 1303(b)(1)(A) of the Affordable Care Act 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."

228. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

229. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

230. The Mandate requires issuers, including the Universities, to provide coverage or access to coverage for all Federal Drug Administration-approved contraceptives.

231. Some FDA-approved contraceptives cause abortions.

232. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

233. Absent injunctive and declaratory relief against the Mandate, the Universities have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, the Universities request that the Court:

a. Declare that the Mandate and Defendants' enforcement of the Mandate against the University violate the First Amendment of the United States Constitution;

b. Declare that the Mandate and Defendants' enforcement of the Mandate against the University violate the Religious Freedom Restoration Act;

c. Declare that the Mandate was issued in violation of the Administrative Procedure Act;

d. Issue an order prohibiting Defendants from enforcing the Mandate against the Universities and other organizations that object on religious grounds to providing insurance coverage for contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling;

e. Award the Universities the costs of this action and reasonable attorney's fees; and

f. Award such other and further relief as it deems equitable and just.

JURY DEMAND

The Universities request a trial by jury on all issues so triable.

Respectfully submitted this 9th day of October, 2012.

s/ *Eric Rassbach*
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