

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ROMAN CATHOLIC ARCHBISHOP
OF WASHINGTON, a corporation
sole; THE CONSORTIUM OF
CATHOLIC ACADEMIES OF THE
ARCHDIOCESE OF
WASHINGTON, INC.;
ARCHBISHOP CARROLL HIGH
SCHOOL, INC.; CATHOLIC
CHARITIES OF THE
ARCHDIOCESE OF
WASHINGTON, INC.; and THE
CATHOLIC UNIVERSITY OF
AMERICA,

Appellants,

v.

KATHLEEN SEBELIUS, in her
official capacity as Secretary of the
U.S. Department of Health and Human
Services; SETH D. HARRIS, in his
official capacity as Acting Secretary of
the U.S. Department of Labor, JACOB
J. LEW, in his official capacity as
Secretary of the U.S. Department of
Treasury; U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES;
U.S. DEPARTMENT OF LABOR;
and U.S. DEPARTMENT OF
TREASURY,

Appellees.

Case No. 13-5091

**APPELLANTS' REPLY TO APPELLEES' OPPOSITION TO MOTION
FOR SUMMARY REVERSAL**

Despite finding “no reason” why this Court’s decision in *Wheaton* “should not apply equally to the facts of this case,” the district court refused to hold this case in abeyance, as this Court had done in *Wheaton*, and instead dismissed the case outright. *Roman Catholic Archbishop of Washington v. Sebelius* (“*Archbishop*”), No. 12-cv-0815, slip op. at 6-8 (D.D.C. Jan. 25, 2013) (attached as Exhibit A to Appellants’ Mot. for Summ. Reversal). The district court did not justify its departure from this Court’s approach in *Wheaton* by attempting to distinguish this case. Nor could it: The “relevant facts in this case are nearly identical to those in . . . *Wheaton*,” and the cases presented the “same issues,” as Appellees and the district court both recognized when Appellees requested, and the district court granted, a stay pending this Court’s *Wheaton* decision. Tr. of Nov. 2, 2012 Hr’g at 3:11–12, 29:10–11 (attached as Exhibit B to Appellants’ Mot. for Summ. Reversal). Instead, the district court justified its refusal to follow *Wheaton* (1) by relying on an out-of-circuit district court decision that expressly *repudiated* this Court’s approach as unpersuasive, *Archbishop*, slip op. at 7–8 (citing *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188, at *8 (D. Colo. Jan. 7, 2013) (“Although the D.C. Circuit held the cases before it in abeyance, as opposed to dismissing them, it offered no compelling reason for doing so, nor is any such reason apparent to the Court.”)); and (2) by observing that dismissal is the “regular[.]” practice of courts “in this circuit,” *id.* at 8.

Neither of these grounds can possibly sustain the district court's decision to disregard *Wheaton*. The district court is bound by *this* Court's precedents. It therefore plainly erred in following an out-of-circuit decision criticizing this Court's decision in *Wheaton*, which the district court itself acknowledged was "nearly identical" to this case. The district court also erred in choosing to follow what it perceived to be the "regular[]" practice of courts in this circuit in other cases, rather than this Court's decision in the "nearly identical" *Wheaton* case. In short, having failed to identify any factual or legal basis for distinguishing *Wheaton*, the district court had no basis for refusing to follow it. Accordingly, this Court should summarily reverse the decision below and order that the case be held in abeyance, as this Court did in *Wheaton*.

Appellees make virtually no effort to defend the district court's decision as written. They do not argue that the district court justifiably relied on *Colorado Christian University*. Nor do they argue that the district court's holding here—that Appellants' claim was unripe—is any different than this Court's ripeness holding in *Wheaton*. Instead, they raise three arguments in defense of the district court's decision, all of which should be rejected.

1. Like the district court, Appellees repudiate this Court's decision to hold the *Wheaton* case in abeyance by contending that "the ordinary disposition is to dismiss without prejudice." Appellees' Opp'n at 7. Even so, there is no

question that courts may—and often do—choose abeyance over dismissal. *See, e.g., Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) (holding unripe case in abeyance pending proposed rulemaking that would amend the challenged regulation); *CTIA-The Wireless Ass’n v. FCC*, 530 F.3d 984 (D.C. Cir. 2008) (holding unripe case in abeyance pending review of the challenged rule by the Office of Management and Budget (“OMB”)). Holding a case in abeyance helps “to protect against the unlikely and the unpredictable,” *Am. Petroleum Inst.*, 683 F.3d at 389, in circumstances, like this one, where the Government promises to change the law in order to solve a problem and then fails to do so. And that is precisely what this Court chose to do in *Wheaton*. Unless there is some material factual or legal reason to treat this case differently, the district court is obligated to follow this Court’s precedent. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (“[D]istrict judges . . . are obligated to follow controlling circuit precedent until either [this Court], sitting en banc, or the Supreme Court, overrule[s] it.”). Having disclosed no factual or legal basis for distinguishing this case from *Wheaton*, the district court’s refusal to hold this case in abeyance is plainly erroneous and merits summary reversal.

Appellees, moreover, have consistently argued that this case is indistinguishable from *Wheaton*. In urging the district court to stay the case pending the *Wheaton* appeal, Appellees claimed that *Wheaton* “involve[d] the

same legal claims and relevant facts as plaintiffs allege in this case” and that resolution of the *Wheaton* appeal would therefore “control the outcome” of this case. Mot. to Stay (Dist. Ct. Dkt. No. 26) at 1–2; *see also* Appellants’ Mot. for Summ. Reversal at 5–6 (quoting similar additional statements). As noted above, the district court agreed, which is why it granted Appellees’ motion to stay the proceedings below pending this Court’s disposition of the *Wheaton* appeal. *See* Appellants’ Mot. for Summ. Reversal at 6–7 (quoting the district court’s findings). Now, Appellees argue that this case is different and that abeyance is not appropriate because, unlike *Wheaton* and other cases where courts chose abeyance, Appellants brought this suit after the “prudential ripeness problem” had arisen and Appellees had not consented to abeyance. *See* Appellees’ Opp’n at 9–11.

It is wrong to suggest that abeyance is proper only when the event triggering the ripeness problem occurs after the suit is brought or when the parties otherwise consent. In *CTIA-The Wireless Association v. FCC*, for example, this Court held the case in abeyance because the challenged rule did not take effect until the OMB approved certain provisions of the rule. 530 F.3d at 987. The case was unripe from the beginning, and not a word was mentioned by the Court about the parties’ consent. More importantly, neither of these circumstances was relevant to this

Court's decision to hold *Wheaton* in abeyance.¹ This Court did not cite the timing of the *Wheaton* plaintiffs' suit or the parties' consent as reasons for choosing abeyance over dismissal. To the contrary, this Court chose abeyance on account of Appellees' "binding representations" that they would "*never*" enforce the Mandate "in its current form against the appellants or those similarly situated" and that they would issue a new rule soon. *Wheaton College v. Sebelius*, 703 F.3d 551, 552–53 (D.C. Cir. 2012) (per curiam) (emphasis in original). Appellees have made the same representations in this case, and "[j]ust as the Circuit Court did in *Wheaton College*," the district court stressed that it would "take the government at its word and will hold it to it." *Archbishop*, slip op. at 6–7 (quotation marks and alteration omitted). Because this Court's rationale for holding *Wheaton* in abeyance is equally applicable here, there is no reason—and the district court cited none—to treat this case differently.

¹ The same was true for *American Petroleum Institute v. EPA* as well. See 683 F.3d at 389 (choosing abeyance, not because of the timing of the proposed rulemaking or because of the parties' consent, but "to protect against the unlikely and the unpredictable"). And as for the other cases cited by Appellees, there was no indication that the *absence* of either or both circumstances would preclude holding an unripe case in abeyance, as opposed to dismissing it outright. See *Devia v. NRC*, 492 F.3d 421, 426 (D.C. Cir. 2007) (noting only that the parties did not "object to our holding the case in abeyance as compared to dismissing the petitions"); *Town of Stratford v. FAA*, 285 F.3d 84 (D.C. Cir. 2001), *reh'g denied*, 292 F.3d 251, 252 (2002) (noting only that the court was "taken aback" to learn at oral argument of prudential ripeness considerations that required holding the case in abeyance).

2. Appellees' next argument—that nothing in this Court's decision in *Wheaton* requires that case or similarly situated cases to be held in abeyance, *see* Appellees' Opp'n at 10—is beside the point. The district court was obligated to follow *Wheaton*, not simply because this Court held that abeyance was appropriate in these circumstances, but more importantly, because like cases should be treated alike. This Court determined that, “in reliance upon the [Appellees'] binding representations,” abeyance was the best disposition for the *Wheaton* case. *Wheaton College*, 703 F.3d at 553. Both the district court and Appellees have acknowledged that *Wheaton* involves the same issues and relevant facts as this case, and Appellees have made the same representations. Because, insofar as this appeal is concerned, this case is indistinguishable from *Wheaton*, the district court should have followed this Court's precedent and likewise held Appellants' case in abeyance. *See Ellis v. Dist. of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (stating that a court must follow precedent that is “directly on point”).

3. Finally, Appellees contend that *Wheaton* is distinguishable because the plaintiffs in that case filed suit before it was clear that the safe harbor would apply to them, whereas Appellants here allegedly lack standing because they filed suit knowing that the safe harbor applied. Appellees' Opp'n at 11. Appellees' standing argument is irrelevant because the district court did not address it. Instead, the district court, like this Court in *Wheaton*, disposed of the suit *solely* on the basis

of prudential ripeness. *See Archbishop*, slip op. at 8–9. Since the district court’s disposition is irreconcilable with *Wheaton*, summary reversal is warranted.²

In any event, Appellees’ argument that Appellants lack standing is plainly wrong. Article III standing exists if (1) a plaintiff has suffered an injury (2) fairly traceable to the defendant’s challenged action and (3) likely redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). “The [Supreme] Court,” moreover, “[has] made it particularly clear that there is a readiness to find standing conferred by non-economic values in order to consider issues concerning . . . the Free Exercise Clause.” *Allen v. Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970). Appellees do not question that the second and third standing factors exist here; instead, their sole argument is that Appellants’ asserted injury-in-fact is speculative given the safe harbor, which expires in August, and the Appellees’ promise to change the law—a change which, as Appellants have demonstrated, will *not* solve the problem. *See* Appellees’ Opp’n at 11–12.

This argument is clearly wrong. Standing “requires only a minimal showing of injury.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (citing *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–84 (2000)); *see also Lujan*, 504 U.S. at 561–62 (if “the plaintiff is

² At a minimum, the Court should summarily reverse the district court’s decision to dismiss this case, rather than to hold it in abeyance, and instead, remand the case to the district court to address the standing issue.

himself an object of the [government] action,” “there is ordinarily little question that the action . . . has caused him injury”). Here, Appellants filed in the district court extensive, undisputed fact affidavits showing that (1) right now, they are suffering a competitive disadvantage in the labor market as a result of the Mandate³; (2) right now, they are incurring significant costs in order to structure their affairs in anticipation of the fines they expect to pay under the Mandate⁴; and (3) right now, they must undertake extensive planning to make the necessary changes to their insurance plans in anticipation of the safe harbor’s expiration.⁵ Indeed, even the district court found that Appellants “will suffer some hardship . . . because they must begin planning for the possibility that they will be forced to

³ See Duffy Aff. ¶¶ 34–35 (attached as Exhibit 1) (“The Mandate, therefore, is currently placing the Archdiocese at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.”); Houle Aff. ¶¶ 7–14 (attached as Exhibit 2) (same); Conley Aff. ¶¶ 12–13 (attached as Exhibit 3) (same); Blaufuss Aff. ¶¶ 12–15 (attached as Exhibit 4) (same); Enzler Aff. ¶¶ 11–12 (attached as Exhibit 5) (same); Persico Aff. ¶ 13 (attached as Exhibit 6) (same).

⁴ See Duffy Aff. ¶¶ 13–27 (explaining that the expected fines “are so large, the Archdiocese must begin to prepare immediately to pay these fines”); Conley Aff. ¶¶ 14–18 (same); Blaufuss Aff. ¶¶ 16–17 (same); Enzler Aff. ¶¶ 13–16 (same); Persico Aff. ¶¶ 8–14 (same).

⁵ See Compl. (Dist. Ct. Dkt. No. 1) ¶¶ 22, 171 (“Health plans do not take shape overnight.”); 75 Fed. Reg. 41,726, 41,730 (July 19, 2010) (acknowledging that the “requirements in the[] interim final regulations require significant lead time in order to implement”); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294 (D. Colo. 2012) (noting the “extensive planning involved in preparing and providing [an] employee insurance plan”).

change their health insurance plans in advance of the date that the insurance plans take effect.” *Archbishop*, slip op. at 7.

Nor is the Supreme Court’s recent decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), even arguably to the contrary. *Clapper* involved a “highly speculative fear” of possible future surveillance. *Id.* at 1148. Here, in contrast, there is nothing speculative about the harm that Appellants face. As noted, Appellants are *currently* laboring under a competitive disadvantage in the labor market, which is *currently* undermining their ability to hire and retain employees, *see supra* at 8 & n. 3—a classic injury-in-fact that easily establishes standing here. *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925) (finding challenge to law banning private schools justiciable well before its effective date due to its impact on schools’ recruiting); *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 486 (D.C. Cir. 2007) (“The court has repeatedly recognized that parties suffer constitutional injury in fact when agencies . . . allow increased competition against them.” (internal quotation marks omitted)); *Great Lakes Gas Transmission Ltd. P’ship v. FERC*, 984 F.2d 426, 430 (D.C. Cir. 1993) (finding actual injury where a potential future action impacted an entity’s “competitive posture within the industry”). Nor is there anything speculative about Appellants’ other injuries. The safe harbor expires in August. At that point, Appellants will be required to choose among (1) including services in their health plans that violate

their religious beliefs, (2) attempting to meet the unconstitutional religious employer exemption, or (3) exposing themselves to onerous fines. *See* Duffy Aff. ¶¶ 5–12. It would be the height of recklessness for Appellants to do nothing in the naive hope that Appellees will change the rules so as to solve the problem, particularly where, as here, Appellees' promised solution is no solution at all and, in fact, actually makes the problem significantly worse. *See* Appellants' Mot. for Summ. Reversal at 13–20. Consequently, unlike in *Clapper*, Appellants have no choice but to undertake *now* the changes necessary to comply with the Mandate.

4. In sum, summary reversal is required here because the district court disregarded the elementary principle that it is bound by the precedents of *this* Court. In *Wheaton*, this Court held the case in abeyance on account of Appellees' representations that the Mandate would be amended in a meaningful way to accommodate religious objections and would not be enforced in its current form against objecting religious employers. In this case, which involves the same issues and relevant facts as *Wheaton*, Appellees have made the same hollow representations. The two cases are virtually identical, and yet the district court treated this case differently without articulating any factual or legal basis for doing so. In so doing, the district court acted arbitrarily and contrary to law. The district court's decision thus merits immediate correction without further briefing or argument.

Respectfully submitted, this the 24th day of April, 2013.

/s/ Noel J. Francisco

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EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,**

Civil Action No. 12-cv-00815

Plaintiffs,

v.

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

Defendants.

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Thomas Duffy, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Chief Financial Officer for the Archdiocese of Washington (hereinafter “the Archdiocese”). I have been employed by the Archdiocese since 2007 and have been the CFO since 2008.

3. In my capacity as CFO, I oversee a number of areas including real estate, human resources, property casualty and health insurance, information technology, and finance and accounting.

4. I am very familiar with the process by which the Archdiocese’s Central Pastoral Administration sets its budget for each fiscal year, and with the state of its finances, and I am familiar with the budget process for archdiocesan parishes, schools, and affiliated corporations. I am also familiar with the process by which the Archdiocese recruits and retains employees, establishes ongoing compensation for employees, and the self-insured healthcare program that is provided to benefits-eligible employees and their eligible dependents. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

I. The Mandate Presents an Impossible Dilemma

5. The U.S. Government Mandate (“the Mandate”) presents the Archdiocese with an impossible dilemma. It is unthinkable that the very institution that has championed health care services and benefits for all individuals for over 200 years in the United States would be forced to deny its own employees health care benefits due to a government regulation. The Archdiocese is morally committed to providing health insurance to its employees. Yet, under the Mandate, the Archdiocese is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related

counseling, unless it can prove, among other things, that its “purpose” is the “inculcation of religion,” that it “primarily employs” people who share its religious tenets, and that it “primarily serves” people who share its religious tenets. The provision or facilitation of contraceptives, sterilization, and abortion-inducing drugs is inconsistent with the core moral and religious beliefs of the Archdiocese. It therefore is not possible for the Archdiocese to offer an employee health plan that covers these products and services.

6. Based on the criteria that I have been advised that we would have to meet to qualify for an exemption, the Archdiocese also cannot gain the benefit of the religious employer exemption. This is because, as a practical matter, the Archdiocese does not know whether it primarily serves and primarily employs individuals who share its religious tenets, and the steps that would be necessary to gather such information are themselves offensive to the Archdiocese’s religious commitment to serve all in need, with no regard to religious affiliation, through its parishes, schools, social service programs, and employment opportunities.

7. For example, the Archdiocese does not know whether, and therefore cannot claim that, it serves “primarily” Catholics. Although the Archdiocese tracks the religious affiliation of the students in its schools, it does not track—or even inquire into—the religious beliefs of the many people who are served through the social service programs the Archdiocese conducts through its parishes and its schools. In fact, even attempting to conduct an invasive census of the religious beliefs of those the Archdiocese serves through its social service programs—as the religious employer exemption would require—would itself be fundamentally contrary to the Archdiocese’s religious commitment to serve all. The Archdiocese serves where it sees need, not where it sees people who share its religious tenets.

It therefore will not violate its religious commitments by asking the recipients of its services where their own religious commitments lay.

8. In addition, based on the information available to the Archdiocese, it cannot claim that it “primarily” employs Catholics. With the exception of those positions that directly involve teaching Catholic doctrine, the Archdiocese does not inquire into the religious beliefs of employees either before or after hiring, and so does not know how many of its employees are Catholic. Moreover, the Human Resources Department lacks the technological capability to determine and track the religious persuasion of all of its employees. And inquiring into the religious beliefs of all of its employees would likewise be offensive to the Archdiocese’s religious commitment to serve individuals (including through employment opportunities) without regard to their religious beliefs.

9. Consequently, based on the criteria that I have been advised that we would have to meet, the Archdiocese is not capable of qualifying for the exemption, and is faced with complying with the Mandate that forces it to violate its sincerely held religious beliefs. It can either (1) continue to provide health insurance to employees but refuse to provide the mandated contraception, sterilization, abortion-inducing drugs, and related counseling, or (2) be forced to stop providing health coverage for employees altogether. The first choice subjects the Archdiocese to devastating fines, which will place an enormous burden on the Archdiocese’s resources that it is unprepared to absorb. The second choice would also subject the Archdiocese to burdensome fines and, in addition, be a violation of the Archdiocese’s moral commitment to its employees.

10. I understand that if the Archdiocese were to continue offering health insurance to its employees without the mandated products and services, then the fine

applicable would be \$100 per individual, per day. Because the Archdiocese has approximately 2100 benefits-eligible employees that participate in the health plan (this number does not account for the dependants who are also covered on the Archdiocese's insurance), I calculate that the Archdiocese could incur a fine of as much as \$76.65 million per year at a minimum. This amount constitutes over two times the entire operating budget of the Archdiocese's Central Pastoral Administration.

11. I understand that the fine applicable if the Archdiocese were to cancel its employee health plan altogether would be \$2000 per benefits-eligible employee, beyond the first thirty, per year. With more than 2100 benefits-eligible employees, I calculate that the Archdiocese would incur, at a minimum, a fine of more than \$4 million per year. This amount is over 10% of the Archdiocese's annual operating budget.

12. In light of these options—the only ones available to the Archdiocese under the Mandate that will enable the Archdiocese to comply with its sincerely held religious beliefs—the Mandate is currently causing the Archdiocese to suffer significant, adverse harms now, and will cause additional such harm in the very near future, in three distinct ways: (1) budgeting for the payment of these fines, (2) taking the steps necessary to reduce and/or eliminate the Archdiocese's educational, charitable, and religious programs and services as necessary if it is required to pay such fines, and (3) undermining the Archdiocese's ability to recruit and retain employees. These immediate and ongoing harms are described in greater detail below.

II. The Archdiocese Must Begin to Prepare Now to Pay Millions in Fines

13. The Archdiocese has a limited budget. It has not previously been obligated to pay fines for not providing health insurance coverage for contraception, abortion-

inducing drugs, sterilization, and related counseling. As part of its upcoming budgeting process, it therefore must allocate funds previously designated for other purposes to the payment of these fines. And, because the fines are so large, the Archdiocese must begin to prepare immediately to pay these fines, which will begin to accrue on January 1, 2014. Again, even the lower fine of \$4.14 million per year is over 10% of the Archdiocese's annual operating budget.

14. The Archdiocese's fiscal year begins on July 1. Under normal circumstances, the process of preparing a budget begins approximately seven months prior to the start of a new fiscal year. Thus, the budgeting process normally begins on or around November 30. The first aspect of the budget that must be addressed is the budget for the Archdiocesan schools, which must be finalized in time to set tuition by January 31, the start date for the annual registration drive. This is necessary because the schools must be able to inform parents and prospective parents of the tuition that the schools will charge. Failure to do so would not only jeopardize the ability of the schools to properly educate the students and honor commitments to teachers and school employees, but also put the schools' sponsor (the Archdiocese) at significant financial risk.

15. The Code of Canon Law is a legal system established by the Roman Catholic Church that governs all members of the Catholic Church and Catholic entities. The Code contains provisions that regulate Church sacraments, property, and procedures that the Church and its institutions must follow. The Code of Canon Law is binding on the Archdiocese and all of its affiliated entities, such as parishes and corporations.

16. It is the practice of the Archdiocese to finalize the proposed budget for the next fiscal year in April, prior to the start of its fiscal year on July 1. This date was

established by the archdiocesan Finance Department and is based upon Canon 493 of the Code of Canon Law, which requires the Archdiocesan Finance Council (a group of lay advisors that meets quarterly) to prepare a budget before the start of a fiscal year. Incorporated in the Canon is the requirement that budgets must be approved by the Archdiocesan Finance Council prior to the start of the fiscal year. In order to fulfill this requirement, the budget materials need to be prepared and distributed in advance so that the Finance Council, and its sub-committees, have adequate time to review, discuss, and assess the budget materials prior to the meeting which occurs in May. If, as the Government has suggested, the Archdiocese were to wait until August 1, 2013, to prepare its budget, the Archdiocese would violate the canonical requirement that the Finance Council must approve the budget for the fiscal year (which, for the Archdiocese, begins on July 1, 2013).

17. As a standard business practice observed by the Archdiocesan Central Pastoral Administration, all significant changes to the budget (including the payment of the fines required by the Mandate) must undergo a further layer of review that involves multiple advisory bodies—not just the Finance Council. These additional review bodies include the Archbishop of Washington, his Administrative Board (which consists of the senior staff of the Archdiocese), and the Archdiocesan Priest Council (which is a canonically required body of advisors selected from the clergy of the Archdiocese).

18. This already lengthy budgeting process will of necessity become even lengthier now that the Archdiocese must be prepared to pay massive fines and consider which of its programs must be curtailed or eliminated in order to pay for those fines. The Mandate will apply to the Archdiocese beginning on January 1, 2014—the start date for our first health plan year after the Mandate becomes effective on August 1, 2013—and the fines required by

the Mandate will begin to accrue that day. This means that the Archdiocese's budget for the fiscal year beginning on July 1, 2013, must account for payments of the fines required by the Mandate.

19. Under normal circumstances, the planning process for the July 1, 2013 budget would begin in late November of this year (2012). But the planning process must now begin before November because the Archdiocese must also plan for the payment of millions of dollars of annual fines. This is not simply an effort to avoid a reckless business practice, but an obligation to address the implications that payment of such fines will have on the employees of the Archdiocese, the nearly 15,000 students in our elementary schools, and the hundreds of thousands of individuals who benefit from our religious and charitable ministries. It would be reckless to put their respective livelihoods, educations, and spiritual and social welfare at risk without planning for the massive changes that will be required if relief is not granted.

20. First, extra time will be required in order to prudently determine which programs and services currently provided by the Archdiocese will need to be curtailed or eliminated to be able to pay millions of dollars in fines each year, a portion of which will accrue during the upcoming fiscal year.

21. These fines, moreover, will have a disproportionate impact on a service organization like the Archdiocese. Because the Archdiocese does not manufacture or sell products, or charge for services performed, there is no way to roll the cost of the fines into a source of income. Instead, the Archdiocese must simply absorb the fines.

22. Absorbing millions of dollars in annual fines, however, will require massive cuts in programming and the elimination of a significant number of jobs.

23. A determination of which programs and ministries to cut can only be responsibly made after development of a long-range strategic plan. The Archdiocese is not staffed to conduct this study internally while maintaining its current level of services; instead, it will need to hire a consultant to assist with the project, producing another direct financial loss. To avoid a reckless approach and unnecessary risks, the Archdiocese would ordinarily prepare a request for proposal, submit it to members of the consulting market, and after an appropriate period of time to permit thoughtful responses, analyze the submissions, interview the leading candidates, and negotiate a final agreement.

24. Finally, the Archdiocese will also attempt to pay at least a portion of the fines incurred by its affiliated entities whose employees receive health insurance through the Archdiocesan health plan. This, too, will increase the financial strain on the Archdiocese's budget beginning with the upcoming fiscal year. Consequently, it also must be accounted for in the Archdiocese's budget as well as the budgets of the affiliated entities. Because these affiliated entities include multiple schools that need to publish tuition rates no later than January 31, 2013, the Archdiocese must communicate whatever level of support can be made available to the school by November 2012, so that it can be incorporated into the schools' budget processes. Failure to do so puts a severe financial burden on the schools, and puts their ability to deliver a quality education to their students at risk. Knowing of these financial changes, parents may not be willing to gamble with their children's education, and may seek enrollment elsewhere. The Archdiocese will need to devote resources, which are currently unavailable, to address this issue for its schools.

25. Under normal circumstances, the budgeting process for the fiscal year beginning on July 1, 2013—the first fiscal year in which the Archdiocese will be subject to

finer under the Mandate—must begin no later than November 30, 2012. But because of the enormous additional costs that must be accounted for in the budget for the fiscal year beginning on July 1, 2013, the Archdiocese must commence the budgeting process even earlier. In fact, it is likely already too late to engage an outside consultant to finish the required strategic planning in time for the budget process to begin by late November.

26. The Government has stated that it will attempt to finalize an unspecified accommodation by August 1, 2013. But the Archdiocese cannot possibly wait until August 1, 2013, to begin preparing for the payment of massive fines, on the hope that the Government will eliminate the intolerable burden on the Archdiocese's religious beliefs. For if the Government does not eliminate the burden, then it will be too late to budget for the payment of these fines, because the Archdiocese will have already entered the very fiscal year in which fines for noncompliance will start to accrue.

27. Consequently, the Archdiocese has no choice but to begin budgeting for that massive financial burden immediately.

III. The Archdiocese Must Begin the Administrative Processes Necessary to Respond to the Mandate

28. In addition to the protracted budgeting process that will be necessary in order for the Archdiocese to prepare for the annual fines and the other new costs that will result from the Mandate, the Archdiocese must also undertake additional administrative review and preparations to prepare for the fines.

29. First, as mentioned, the budget process normally involves review and approval by the Archdiocesan Finance Council. Significant changes to the budget may also require review and approval by the Administrative Board and the Priest Council, as well.

30. Paying millions of dollars in fines, as the Mandate requires in order for the Archdiocese to avoid violating the Church's teachings, would involve yet another layer of review. The Code of Canon Law requires that before taking any action which can worsen the financial condition of the Archdioceses, the Archbishop must obtain the consent not only of the Archdiocesan Finance Council, but also of the College of Consultors, which is a consultative body consisting of members of the clergy who advise the Archbishop. Obtaining the consent of the College of Consultors and the Finance Council for this decision, however, will involve additional time outside of the typical budgeting timeframe, as I will need to prepare to make a presentation to these two bodies, and each body must meet, deliberate, and render a decision.

31. Second, any programmatic changes necessitated by the Mandate will require substantial additional time to implement. The Archdiocese cannot reasonably decide which programs and personnel to cut without consulting with those affected and then obtaining the advice of an outside consultant, as discussed. Although I cannot say with certainty which programs would be cut, the magnitude of the fine is such that very dramatic changes will be required, including potentially the elimination or reduction of tuition assistance for students at the Archdiocesan schools, closing schools altogether, and/or eliminating social services for those in need.

32. Large-scale changes like these will require yet more layers of review, and more time. Changes to or eliminations of archdiocesan programs requires the careful analysis of pastoral priorities. In addition, the standard practice of the Archdiocese when implementing other, less significant changes, has been to hold town hall style meetings across

the Archdiocese, inviting the faithful to provide input on the decision, and to make recommendations on how to address the devastating impact of these fines.

33. Consequently, the administrative planning process involved in preparing to pay these fines required by the Mandate should begin within the next few months, at the very latest.

IV. The Mandate Hinders the Archdiocese's Efforts at Recruiting and Retaining Employees

34. In my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertainty regarding these factors undermines the Archdiocese's ability to retain existing employees and recruit new ones.

35. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, the Archdiocese is faced with the impossible dilemma: (1) paying an annual \$76.65 million fine and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a \$4.14 million fine and eliminating its health insurance plan. Employers who, unlike the Archdiocese, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing the Archdiocese at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

V. **The ANPRM Does Not Resolve the Archdiocese's Concerns**

36. The Government's proposal to alter the Mandate in some way by August 1, 2013, set forth in the Government's Advanced Notice of Proposed Rulemaking ("ANPRM"), does not alleviate any of the foregoing harms.

37. In terms of budgeting for the proposed fines, the Archdiocese cannot wait until August 1, 2013, in the hope that the Government will eliminate the burden on the Archdiocese's religious beliefs. For if the Archdiocese does not begin immediately to undertake the costly and complex measures described herein, and discovers on August 1, 2013, that the Government has not eliminated the burden on the Archdiocese's religious beliefs, it will then be too late for the Archdiocese to make the necessary preparations to pay the massive fines that the Mandate requires. Likewise, in terms of the current impact on the Archdiocese's ability to recruit new and retain current employees, that impact exists now, and will not be alleviated between now and whenever the Government finalizes any possible change in the law. Consequently, all of these harms currently exist, and will continue to exist, regardless of the ANPRM.


38. Indeed, it would be financially and morally reckless to not begin planning for the payment of substantial fines, on the gamble that, this time, the Government will solve the problem. It would, moreover, be particularly imprudent given the Government's recent actions with respect to this matter. The Government received approximately 200,000 comments when it first proposed the Mandate, and those comments resulted in no meaningful changes. Instead, the Government finalized the Mandate and narrow "religious employer" definition. Moreover, the possibilities the Government has proposed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on the Archdiocese's religious

beliefs. Rather, they would still require the Archdiocese to provide, pay for, and/or facilitate the provision of services that violate the Archdiocese's sincerely held religious beliefs or pay the devastating fines discussed above.

39. For example, the Government has suggested that it will "accommodate" the concerns of objecting self-insured entities like the Archdiocese by requiring their third party administrator ("TPA") to arrange for the mandated products and services "for free." This, however, ignores the practical reality that if the TPA arranges for the provision of these services to participants by virtue of their employment with the Archdiocese, the TPA will have direct additional expenses, and no opportunity to reduce other expenses through lower healthcare services that could otherwise accrue to the benefit of an insurer. Obviously, it is inconsistent with free markets to believe that the TPA will not pass along their financial losses to the Archdiocese. In any event, this arrangement still requires the Archdiocese to facilitate the provision of products and services antithetical to the Catholic faith, since the Archdiocese's employees would only receive free contraceptives, sterilization, abortifacients, and related counseling by virtue of their employment at the Archdiocese.

38. Consequently, the existence of the ANPRM does alleviate any of the foregoing existing harms that the Mandate is currently imposing on the Archdiocese.

FURTHER AFFIANT SAYETH NOT.




Thomas Duffy

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me
this 27 day of August, 2012



Notary Public in and for the

State of Maryland

Commission Expires: 6/16/16

EXHIBIT 2

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,**

Plaintiffs,

v.

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

Defendants.

Civil Action No. 12-cv-00815

AFFIDAVIT OF THE ARCHDIOCESE OF WASHINGTON

I, Matthew Houle, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this declaration. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I serve as the Director of Talent Selection within the Department of Human Resources at the Archdiocese of Washington (hereinafter “the Archdiocese”). I have been so employed since August 2011.

3. Prior to my employment at the Archdiocese, I worked in the field of talent recruitment in various locations on the Eastern Seaboard for over two decades.

4. In addition to my official position at the Archdiocese, I also serve as a Deacon in the Roman Catholic Church.

5. I am very familiar with the process by which the Archdiocese screens and hires its employees. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

6. In my capacity as the Director of Talent Selection for the Archdiocese, I am responsible for overseeing the recruiting and hiring of employees at the Archdiocese’s Central Pastoral Administration (Archdiocesan “headquarters,” essentially.) I occasionally also assist the parishes of the Archdiocese with their hiring.

7. The ability to offer and provide health benefits to current and prospective employees is crucial to retaining existing employees and recruiting new ones. In my experience, a job applicant almost always inquires very early on in the hiring process about the health benefits offered with the position. And employee health benefits are a key factor in the decision-making process of most job applicants. Consequently, any uncertainty regarding the Archdiocese’s ability to offer a competitive healthcare package undermines its ability to retain existing employees and recruit new ones.

8. The U.S. Government Mandate (the “Mandate”) is currently creating just such uncertainty. Under the Mandate, the Archdiocese is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its “purpose” is the “inculcation of religion,” that it “primarily employs” people who share its religious tenets, and that it “primarily serves” people who share its religious tenets. This is in direct contravention of Catholic beliefs. I understand that if the Mandate remains in place, the Archdiocese will be forced to choose either to drop its health plan (and pay the attendant fines), or to maintain a health plan without the mandated services and pay extraordinary fines, rather than violate its beliefs.

9. As a result of this Mandate, there is, therefore, currently significant uncertainty as to the Archdiocese’s ability to continue to offer health insurance benefits to existing and future employees, which, as discussed, undermines our ability to retain existing employees and recruit new ones.

10. I am already beginning to witness the effects of this uncertainty.

11. Since beginning my current position, I have interviewed hundreds of job applicants for a variety of positions, including Attorney, Accountant, Human Resource Generalist, Director of Curriculum & Instruction, Manager of Property Analysis, Administrative Assistant, and many others. I do not recall a single incident, prior to the Government’s announcement of the Mandate on January 20, 2012, in which the Archdiocese’s decision not to offer contraceptives, sterilization, abortion-inducing drugs, and related counseling to its employees was even referenced by a job applicant; nor am I aware of any such incident occurring prior to my own employment at the Archdiocese. But since the

Government announced the Mandate, applicants for positions with the Archdiocese have asked me directly how the employee health benefits offered by the Archdiocese will be affected by the Mandate. I have had to respond that the Archdiocese's obligations under the Mandate are ill-defined at present and that I cannot answer the question.

12. Likewise, during my over twenty years of work in the field of recruiting and hiring, I have found that it is extremely unusual for job applicants who have a scheduled interview to fail to attend the interview. This is particularly so in the current economic climate, in which jobs are scarce and the demand for jobs is high. Moreover, in my experience, the rare occasion of a missed interview is almost always followed by an explanation or apology.

13. Since the announcement of the Mandate, however, I have seen an unprecedented number of "no shows." In particular, during a span of about eight weeks, from late May to late July of this year, four applicants—constituting approximately 10% of the second-round interviews scheduled during that time period—were confirmed for second-round interviews but failed to appear, and subsequently failed to respond to my repeated attempts at reaching them after the missed interview. Until that time, this type of "no-show" had never occurred during the time in which I had worked at the Archdiocese.

14. In my opinion, the questions I am receiving during the interview process, the answers that I am required to give, and the "no show" interviews, all discussed above, are a result of the Mandate. The existence of the Mandate, therefore, has already impacted the Archdiocese's hiring, and it will continue to have an impact on the Archdiocese until a court or the government definitively relieves us of our obligation to comply with the Mandate. Indeed, if the Mandate remains in place, in my opinion, the impact of the Mandate

on the Archdiocese's ability to hire and retain employees will be catastrophic. I say this because the Archdiocese cannot now definitely affirm to its applicants and employees whether the Archdiocese will be able to offer health insurance to them after the government's so-called enforcement moratorium ends on August 1, 2013. The inability to guarantee such benefits puts the Archdiocese at a severe and significant disadvantage when it comes to employee recruiting and retention. Consequently, the Mandate currently is, and, as long as it remains in place, will continue to damage the Archdiocese's ability to attract and retain individuals in a competitive environment.

FURTHER AFFIANT SAYETH NOT.

Matthew Dale
[Name]

STATE OF MARYLAND)
)
COUNTY OF CALVERT)

Sworn to and subscribed before me
this 24th day of August, 2012

Brenda L. Spence

Notary Public in and for the
State of Maryland

Commission Expires: 6/16/16

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 12-cv-00815

**AFFIDAVIT OF THE CONSORTIUM OF CATHOLIC ACADEMIES
OF THE ARCHDIOCESE OF WASHINGTON, INC.**

I, Marguerite Conley, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Executive Director of The Consortium of Catholic Academies of the Archdiocese of Washington, Inc (the "Consortium"). I have been in that position since June 2010.

3. I am very familiar with the employee hiring and retention efforts made by the Consortium, as well as with its finances and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. The U.S. Government Mandate (the "Mandate") has put the Consortium in an impossible position. Under the Mandate, the Consortium is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its "purpose" is the "inculcation of religion," that it "primarily employs" people who share its religious tenets, and that it "primarily serves" people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs, and the Consortium cannot and will not comply with it.

5. The Consortium cannot gain the benefit of the religious employer exemption, described above, and will not even attempt to do so. The notion of employing and serving primarily fellow Catholics is inconsistent with the Consortium's institutional values and the values of the Catholic faith.

6. As a practical matter, the Consortium cannot meet the religious employer exemption because it does not serve primarily Catholics. The Consortium consists of four schools: St. Anthony School, St. Francis Xavier Academy, Sacred Heart School, and

St. Thomas More Academy. Three of the four schools serve a student body that is not primarily Catholic; overall, fifty-nine percent of the Consortium's students are not Catholic. Moreover, with the exception of a few positions that directly involve teaching Catholic doctrine, the Consortium does not inquire into the religious beliefs of employees either before or after hiring, and so cannot certify that it employs primarily Catholics.

7. Consequently, the Consortium is not a "religious employer" under the exemption. The Consortium's employees are offered health insurance through the Archdiocese of Washington's (the "Archdiocese") health plan. The Archdiocese's determination of how to respond to the Mandate will govern the Consortium as well.

8. The Archdiocese and the Consortium are committed to following the teachings of the Catholic Church, and as a result, the Consortium is unable to comply with the Mandate. Specifically, the Consortium cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and the Consortium will and must remain faithful to those teachings. As a result, like the Archdiocese, the Consortium is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

9. For example, if the Archdiocese and the Consortium decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, the Consortium will incur a \$100 per day per individual fine. Because there are 80 benefits-eligible individuals employed by the

Consortium (this number does not account for dependents covered on the Consortium's insurance), the Consortium could incur a fine of as much as \$2.92 million every year. The Consortium's entire annual budget is approximately \$8 million and as a result, the Consortium cannot possibly pay such a fine.

10. The fine that applies if the Consortium and the Archdiocese cancel their employee health plan would be \$2,000 per benefits-eligible employee, beyond the first 30, per year. Because the Consortium has approximately 80 benefits-eligible employees, I calculate that the Consortium would incur a fine of as much as \$100,000 per year. This is a significant amount of money to the Consortium, and an annual fine of that magnitude will require the Consortium to limit or eliminate education and extracurricular programs and opportunities for its students. Moreover, eliminating its employee health plan would place the Consortium in violation of its moral commitment to provide health benefits to its employees.

11. Consequently, the Mandate is currently harming the Consortium in at least two distinct ways.

12. First, in my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertainty regarding these factors undermines the Consortium's ability to retain existing employees and recruit new ones. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, the Consortium is faced with the choice of (1) paying a fine of as much as \$2.92 million and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a fine of approximately \$100,000 and eliminating its health

insurance plan. Employers who, unlike the Consortium, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing the Consortium at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

13. The Consortium provides its employees with letters of intent—soliciting employees' interest in returning for the next academic year, and officially beginning the process of retaining its staff from one year to the next—in February of the preceding school year. The Consortium must know by around that time whether it will be able to assure its employees that they will continue to receive health benefits.

14. Second, the Mandate impacts the Consortium's budgeting process. The changes to the budget required by the Mandate must be accounted for in the Consortium's budget for fiscal year 2013, which begins on July 1, 2013. The Consortium will begin the budgeting process for fiscal year 2013 no later than December 2012. Moreover, by January 2013, the Consortium must make decisions regarding the tuition its schools will charge for the 2013-2014 school year. Planning to pay a massive penalty will have to be factored into the tuition setting process.

15. The Consortium cannot, however, pay for such a large annual fine solely by increasing tuition, as its schools primarily serve underprivileged children. Approximately 60% of the Consortium's students receive tuition assistance from the Archdiocese; another portion receives other forms of financial aid. Only about 10% of Consortium students pay full tuition, often with great sacrifice on behalf of the families. Further tuition increases will drive students away.

16. The Consortium will therefore be forced to cut programming and alter its academic plans for its schools. In particular, the Consortium is currently making plans to extend both the school day and the academic year at its schools beginning with the 2013 academic year, in an effort to further enhance its students' scholastic experience. The extended calendar will benefit the Consortium students but will place a major strain on the Consortium's already limited resources. If forced to account for a huge fine while planning its budget for fiscal year 2013, the Consortium will be forced to forego its plans to move to the extended calendar. Setting aside the plan to move to the extended calendar will be detrimental to our students, and it will result in a massive waste of the time and resources already being poured into this plan.

17. The Consortium will also need to divert money from necessary facility maintenance in order to account for such a large fine.

18. The Consortium has already calculated its projected annual budgets through Fiscal Year 2020. These projected budgets guide fundraising efforts as well as long-range planning, like the planning for the extended calendar. A large annual fine would render these projections useless, and the time and effort put into making them would be wasted.

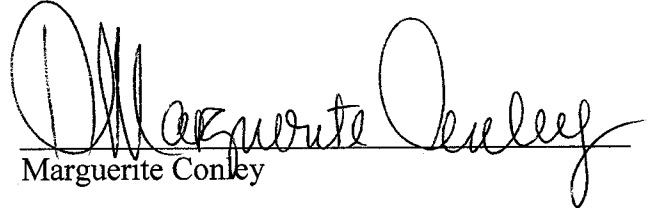
19. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking ("ANPRM") that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to the Consortium.

20. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on the Consortium's religious beliefs. Rather, they still require the Consortium to provide, pay for, and/or facilitate the provision of services that violate the Consortium's sincerely held religious beliefs.

21. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is wholly insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, the Consortium must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees. If the Consortium remains incapable of offering that assurance, its schools could likely be devastated by a departure of employees that will occur months before the finalization of any “accommodation,” as the Consortium’s teachers and staff would reasonably consider seeking other employment for the 2013-14 school year.

22. Consequently, the existence of the ANPRM does not alleviate the harms that the Mandate poses for the Consortium.

FURTHER AFFIANT SAYETH NOT.

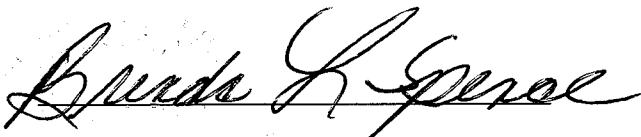

Marguerite Conley

STATE OF MARYLAND)

)

COUNTY OF CALVERT)

Sworn to and subscribed before me
this 27th day of August, 2012



Notary Public in and for the

State of Maryland

Commission Expires: 6/16/16

EXHIBIT 4

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,**

Plaintiffs,

v.

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

Defendants.

Civil Action No. 12-cv-00815

AFFIDAVIT OF ARCHBISHOP CARROLL HIGH SCHOOL

I, Mary Elizabeth Blaufuss, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Vice-Principal for Academic Affairs at Archbishop Carroll High School. (“ACHS”). I have been so employed since 2006. Beginning in October 2012, I will be the Acting Principal and Chief Executive Officer at ACHS.

3. I am very familiar with the employee hiring and retention efforts made by ACHS, as well as with its finances and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. The U.S. Government Mandate (the “Mandate”) has put ACHS in an impossible position. Under the Mandate, ACHS is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its “purpose” is the “inculcation of religion,” that it “primarily employs” people who share its religious tenets, and that it “primarily serves” people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs, and ACHS cannot and will not comply with it.

5. ACHS cannot gain the benefit of the religious employer exemption, described above, and will not even attempt to do so. The notion of employing and serving primarily fellow Catholics is inconsistent with ACHS’s institutional values and the values of the Catholic faith.

6. As a practical matter, ACHS cannot meet the religious employer exemption because it does not serve primarily Catholics. For the 2012-2013 school year, approximately 70% of ACHS students are not Catholic. Nearly all receive some kind of scholarship or tuition assistance.

7. Consequently, the Mandate applies to ACHS. ACHS employees are offered health insurance through the Archdiocese of Washington's health plan. The Archdiocese's determination of how to respond to the Mandate will govern ACHS as well.

8. The Archdiocese and ACHS are committed to following the teachings of the Catholic Church, and as a result, ACHS is unable to comply with the Mandate. Specifically, ACHS cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and ACHS will and must remain faithful to those teachings. As a result, like the Archdiocese, ACHS is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

9. If the Archdiocese and ACHS decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, ACHS will incur a \$100 per day per individual fine. Because there are over 59 individuals covered on ACHS insurance, I calculate that ACHS could incur a fine of as much as \$2.15 million every year. ACHS's entire annual budget is approximately \$6.55 million, and as a result, ACHS cannot possibly pay such a fine.

10. The fine that applies if the Archdiocese and ACHS cancel their employee health plan would be \$2000 per benefits-eligible employee, beyond the first 30, per year. Because ACHS has approximately 69 benefits-eligible employees, I calculate that ACHS would incur a fine of as much as \$78,000 per year. This is a significant amount of money to ACHS, and an annual fine of that magnitude will require ACHS to limit or eliminate

education and extracurricular programs and opportunities for its students. Moreover, eliminating its employee health plan would place ACHS in violation of its moral commitment to provide health benefits to its employees.

11. Consequently, the Mandate is currently harming ACHS in at least two distinct ways.

12. First, in my experience, two key factors to an employer's ability to retain existing employees and recruit new ones are (1) the employer's financial strength, and (2) the ability to offer and provide health benefits to current and prospective employees. Consequently, any uncertainty regarding these factors undermines ACHS's ability to retain existing employees and recruit new ones.

13. The Mandate is currently creating just such uncertainty. As noted, under the Mandate, ACHS is faced with the choice of (1) paying a fine of at least \$2.15 million and providing its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying a \$78,000 fine and eliminating its health insurance plan. Employers who, unlike ACHS, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing ACHS at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

14. ACHS provides its employees with appointment letters and asks employees to return those letters by February of each year. These appointment letters invite employees to return for the next academic year, and officially begin the process of retaining staff from one year to the next. ACHS must know by February, therefore, whether it will be able to assure its employees that they will continue to receive health benefits.

15. The departure of employees that is likely to occur if ACHS remains incapable of affirming for its teachers and staff that the school will continue to provide health benefits would devastate ACHS.

16. Second, the Mandate also stands to impact ACHS's budgeting process. ACHS cannot account for the large annual fine it will owe annually by increasing tuition. Two-thirds of ACHS students already receive financial aid, and further increases to tuition will drive families away. Instead, ACHS will be forced to cut programming at the school.

17. The changes to the budget required by the Mandate must be in place by the start of the fiscal year beginning on July 1, 2013. The budgeting process must begin in December 2012, when the Finance Committee of the ACHS Board of Directors will convene to begin to discuss the budget for the upcoming year. This means that beginning in December of this year, ACHS will begin to plan how it will: be able to pay a massive annual fine; notify its employees that ACHS may not be able to continue to offer them health insurance coverage; reduce and eliminate programs in order to pay the annual fine; prepare for the potential departures of faculty and staff; find qualified staff and faculty who are willing to work at ACHS under circumstances of serious financial instability; and determine whether it will have to reduce enrollment due to departures by faculty and staff.

18. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking ("ANPRM") that it may finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to ACHS.

19. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on ACHS's religious beliefs. Rather, they would still require

ACHS to provide, pay for, and facilitate the provision of services that violate ACHS's sincerely held religious beliefs.

20. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is wholly insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, ACHS must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees. If it remains incapable of offering that assurance, the school will likely be devastated by the departure of employees that will occur months before the finalization of any "accommodation," as our teachers and staff will reasonably consider seeking other employment for the 2013-14 school year.

21. In addition, as noted above, long before August 1, 2013, ACHS must begin to plan for the payment of the fines that will apply if the Mandate's narrow religious employer exemption remains unchanged.

22. Consequently, the existence of the ANPRM does not alleviate any of the foregoing harms that the Mandate poses for ACHS.

EXHIBIT 5

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,**

Plaintiffs,

v.

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

Defendants.

Civil Action No. 12-cv-00815

**AFFIDAVIT OF CATHOLIC CHARITIES OF THE ARCHDIOCESE OF
WASHINGTON**

I, Rev. Msgr. John Enzler, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the President and CEO at Catholic Charities of the Archdiocese of Washington, Inc. (“Catholic Charities”). I have been so employed since July 2011.

3. I am familiar with Catholic Charities’ finances, as well as with its employee hiring and retention efforts, and its health plan. The facts set forth herein are based upon my personal knowledge and information available to me in the above-referenced capacity, and if I were called upon to testify to them, I could and would competently do so.

4. I understand that the U.S. Government Mandate (“the Mandate”) requires that a group health plan provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, except to employees of any entity that can prove, among other things, that its “purpose” is the “inculcation of religion,” that it “primarily employs” people who share its religious tenets, and that it “primarily serves” people who share its religious tenets.

5. Catholic Charities cannot gain the benefit of the religious employer exemption, and will not even attempt to do so, because it does not apply to our organization. Catholic Charities does not ask the religious affiliation of those whom it serves, but I estimate that approximately 80% of those we serve are not Catholic. Asking those we serve to tell us their religious affiliation would violate our mission to serve all regardless of creed. Additionally, Catholic Charities does not ask the religious affiliation of its employees, so we do not know how many of our employees are Catholic. I estimate, however, that 40 to 60% of our employees are not Catholic. Finally, Catholic Charities would not be able to certify that its purpose is the inculcation of religion. Catholic Charities is the *charitable* arm of the Archdiocese. Our purpose is to serve the needs of the less fortunate.

6. Consequently, Catholic Charities is not a “religious employer” under the exemption. Catholic Charities’ employees are offered health insurance through the Archdiocese of Washington’s (the “Archdiocese”) health plan. The Archdiocese’s determination of how to respond to the Mandate will govern Catholic Charities as well.

7. The Archdiocese and Catholic Charities are committed to following the teachings of the Catholic Church, and as a result, Catholic Charities is unable to comply with the Mandate. Specifically, Catholic Charities cannot provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling and remain faithful to the teachings of the Catholic Church, and Catholic Charities will and must remain faithful to those teachings. As a result, like the Archdiocese, Catholic Charities is faced with the impossible choice of either dropping its employee health plan (and paying the attendant fines), in violation of its moral commitment to provide health insurance to its employees, or maintaining a health plan that does not provide the mandated products and services, thereby incurring even more devastating fines.

8. I have been advised that if the Archdiocese and Catholic Charities decide to continue providing insurance coverage that does not include contraception, abortion-inducing drugs, sterilization procedures and related counseling, Catholic Charities will incur a \$100 per day per individual fine. I am advised that Catholic Charities has approximately 549 benefits-eligible employees (this number does not account for dependents covered on Catholic Charities insurance). Consequently, Catholic Charities could incur a fine of as much as \$20 million every year. Catholic Charities’ annual budget, however, is approximately \$60 million; a \$20 million fine, therefore, would be one-third of Catholic Charities’ annual budget.

9. I have been advised that the fine that applies if the Archdiocese and Catholic Charities cancel their employee health plan would be \$2000 per benefits-eligible employee, beyond the first 30, per year. Because Catholic Charities has approximately 549 benefits-eligible employees, Catholic Charities would incur a fine of as much as \$1 million per year.

10. Consequently, the Mandate is currently harming Catholic Charities in at least two distinct ways.

11. First, the Mandate is currently creating uncertainty that undermines Catholic Charities' efforts to recruit and retain employees. As noted, under the Mandate, Catholic Charities is faced with the impossible dilemma of (1) paying a fine of approximately \$20 million in order to provide its employees with health insurance that does not cover contraception, abortion-inducing drugs, sterilization, and related counseling; or (2) paying an approximate \$1 million fine and being required to eliminate its health insurance plan. Employers who, unlike Catholic Charities, do not object to the Mandate on religious grounds do not face this dilemma. The Mandate, therefore, is currently placing Catholic Charities at a competitive disadvantage in its ability to recruit new and retain existing employees relative to employers who do not have religious objections to the Mandate.

12. I understand that Catholic Charities has already begun to witness the negative effects of the uncertainty caused by the Mandate. I am advised by the Human Resources Department that several employees have already approached HR staff and said that if Catholic Charities eliminates its employee health plan, they will quit and find employment elsewhere.

13. Second, the Mandate impacts Catholic Charities' budgeting process. The annual operating budget of Catholic Charities is approximately \$60 million per year. However, approximately \$45 million—a full three-quarters—of this budget comes from grants, contracts, and foundations that obligate us to use those moneys for particular programs. The fine would have to come out of the remaining one-quarter, or approximately \$15 million, of our budget. In other words, the approximate \$1 million annual fine would be approximately 7% of Catholic Charities' unrestricted budget and the alternative, the potential \$20 million fine, is more than our entire unrestricted budget. Consequently, payment of either of these fines would force Catholic Charities to either reduce or eliminate many programs.

14. In addition to cutting programming, Catholic Charities would likely have to reduce overhead by eliminating positions in the accounting, human resources, and information technology departments. This will mean that the entire agency will run less efficiently and effectively. Our mission of serving our needy clients would likely suffer.

15. Moreover, any amount of money that Catholic Charities must pay to the Government in order to avoid violating its religious beliefs is money that is not available for Catholic Charities to spend on direct service to those in need.

16. All changes to the budget required by the Mandate must be in place by the start of the fiscal year beginning on July 1, 2013. Typically, the budgeting process begins in January 2013, when the executive staff asks senior management at each of Catholic Charities' 77 programs to begin building their proposed budgets for the upcoming fiscal year. The proposed budgets must then go through a lengthy series of approvals and revisions, including review by the division directors of our programming, then the Finance Committee of the Catholic Charities Board of Directors, then the full Board of Directors.

17. I understand that the Government has stated in an Advanced Notice of Proposed Rulemaking (“ANPRM”) that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not provide any relief to Catholic Charities.

18. The possibilities discussed in the ANPRM would not, in fact, eliminate the burden that the Mandate imposes on Catholic Charities’ religious beliefs. Rather, they still require Catholic Charities to provide, pay for, and/or facilitate the provision of services that violate Catholic Charities’ sincerely held religious beliefs.

19. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations is insufficient. The Government has suggested that it may finalize an altered rule by August 1, 2013. But for the reasons explained above, long before that date, Catholic Charities must account for the fines required by the Mandate in its current budgeting process and be able to assure its employees that it will continue to provide health benefits to employees.

20. Consequently, the existence of the ANPRM does not alleviate the harms that the Mandate poses for Catholic Charities.

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF
WASHINGTON, a corporation sole; THE
CONSORTIUM OF CATHOLIC
ACADEMIES OF THE ARCHDIOCESE
OF WASHINGTON, INC.; ARCHBISHOP
CARROLL HIGH SCHOOL, INC.;
CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF WASHINGTON,
INC.; and THE CATHOLIC
UNIVERSITY OF AMERICA,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 12-cv-00815

AFFIDAVIT OF THE CATHOLIC UNIVERSITY OF AMERICA

I, Frank G. Persico, being duly sworn, declare and state as follows:

1. I am over the age of 21 and competent to make this statement. I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss in the above-captioned matter.

2. I am employed as the Chief of Staff and Vice President for University Relations at The Catholic University of America (hereinafter “Catholic” or “University”). I have been so employed in this capacity, under different titles, since 2000 and have worked for the University in a variety of executive capacities, including as dean of students, executive director of alumni relations and associate dean of the university's law school since 1974.

3. As Chief of Staff, I am responsible for or aware of most aspects of the University's day-to-day operations, I coordinate the senior staff, and personally advise the University president.

4. I am very familiar with the University's mission and all aspects of the process by which Catholic University sets its budget for each fiscal year, and with the state of its finances. I sit on the University's Budget Committee. The facts set forth herein are based upon my personal knowledge and information available to me as Chief of Staff, and if I were called upon to testify to them, I could and would competently do so.

5. The U.S. Government Mandate (the “Mandate”) has put Catholic University in an impossible position. Under the Mandate, the University is required to provide insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling, unless it can prove, among other things, that its “purpose” is the “inculcation of religion,” that it “primarily employs” people who share its religious tenets, and that it “primarily serves” people who share its religious tenets. This Mandate is in direct contravention of Catholic beliefs.

6. The Catholic University of America cannot gain the benefit of the religious employer exemption, described above, and to even attempt to do so would contravene the University's commitment to serve people of all faiths. It employs

approximately 426 full-time faculty members and an additional 417 temporary faculty members. Catholic University employs over 1,147 staff members. Although our full-time faculty is approximately 55% Catholic, the University does not inquire into the religious beliefs of staff members either before or after hiring (and does not currently have the technology to track such information), and so does not know how many of its employees are Catholic.

7. Catholic University is therefore faced with three untenable options: 1) to continue to provide health insurance to employees but refuse to provide the mandated contraception, sterilization, and abortion-inducing drugs and pay a massive penalty, 2) cease health insurance coverage for employees altogether and pay a massive penalty, or 3) comply with the Mandate in contravention of Catholic University's institutional values and the values of the Catholic faith.

8. The first option would expose the University to massive fines that will start to accrue on January 1, 2014—the start date of the first plan year to which the Mandate will apply. Thus, the University's budget for the fiscal year beginning on May 1, 2013 would have to account for payments of any such fines required by the Mandate. If the University continues to offer health coverage to its employees, but refuses to offer the mandated coverage for contraceptives, sterilization, and abortion-inducing drugs, it will face fines of \$100 per day per individual insured on its employee plan. Because approximately 1,710 individuals are eligible to be insured¹ on Catholic University's employee health plan, this fine would amount to approximately \$62.4 million, annually, for as long as Catholic is subject to the Mandate. The University's current annual budget is approximately \$220 million, so it

¹ The total of eligible individuals includes dependents, so this is a larger number than the number of employees.

cannot possibly pay such a fine—which would constitute approximately 28% of its entire budget.

9. Likewise, the second option (cease health insurance coverage for employees altogether) would also expose the University to massive fines starting January 1, 2014. In particular, if Catholic decides to discontinue its employee health insurance coverage altogether, the University will face fines of \$2,000 per benefits-eligible employee, beyond the first 30, per year. Because the University has approximately 1,381 benefits-eligible employees, it has calculated that its fines for failing to provide an employee health plan will amount to approximately \$2.7 million annually, for as long as it is subject to the Mandate.

10. The \$2.7 million annual fine is not the only cost that must be factored into the budgeting process in the event Catholic University elects to cancel its health plan. In an effort to avoid a mass exodus of employees, the University would have to increase employee salaries so that employees could purchase their own health insurance. Catholic would have to survey current pay levels and increase employee pay to above the market rate in order to enable employees to purchase health insurance. As discussed more fully below, the survey would be a time-consuming process, and the salary increases would escalate the University's labor costs significantly, because different sectors of the University are at different levels of market competitiveness. An additional cost at the level of magnitude of these fines would greatly harm the University's competitive position.

11. Catholic University's fiscal year begins on May 1. Under normal circumstances, the process of preparing a budget begins approximately seven months prior to the start of a new fiscal year. Thus, for the May 1, 2013 fiscal year—the first fiscal year in which the University would be subject to the fines discussed above—the budgeting process

normally would begin October 2012. The University's Budget Committee typically makes recommendations to the University President. Once the President approves the budget, the Vice President for Finance and Treasurer presents it to the Board's Finance Committee, which reviews the budget in detail. The Finance Committee normally makes recommendations regarding tuition increases to the University's Board in December and submits a final proposed operating and capital budget to the Board in March.

12. This budgeting process would become significantly more complicated if Catholic were forced to pay substantial fines or taxes to the government or to compensate its employees for the loss of benefits. To ensure its fiscal integrity, the University's budget process is strictly defined and regulated; consequently, any deviation from the process – including to pay unforeseen costs during the fiscal year – would be highly irregular and require consultation and approval by the committees and the Board, as described in paragraph 11. It would have to make dramatic, short-term changes to be able to pay the fine. For instance, many University employees are currently paid below-market wages. Catholic University would have to analyze each job code and analyze positions and groups of positions in enough detail to determine whether a pay adjustment was appropriate. The University is not staffed to conduct this type of analysis, so it will need to hire a consultant to assist with the project, producing another direct financial loss.

13. Once the market adjustment analysis was complete, Catholic would have to determine how much it will increase each employee's pay above market in order to compensate for the loss of medical benefits. This will take time. And, regardless of the ultimate salary increases, the University will likely have a difficult time hiring and retaining employees because they will have to deal individually with health insurance companies

instead of being part of a collective group—a fact that will put them at a significant competitive disadvantage and likely result in higher costs to each employee and correspondingly higher labor costs for the University. The ability to offer and provide health benefits to current and prospective employees is crucial to retaining existing employees and recruiting new ones. In my experience, employees and job applicants can be as concerned about health benefits as they are about salary. Consequently, any uncertainty regarding Catholic's ability to offer a competitive health care package will undermine its ability to recruit new faculty and staff and retain existing ones. The Mandate, however, is currently creating just such uncertainty, because it means that the University cannot confidently forecast the way that it will meet the health insurance needs of its current and prospective employees.. This puts CUA at a significant competitive disadvantage in its ability to recruit and retain employees.

14. Absorbing a \$2.7 million annual fine along with the costs of increased salaries to offset not having a health plan could require massive cuts in University programs and the elimination of jobs. Indeed, the \$2.7 million fine is more than Catholic's budgets for certain of its colleges. A determination of which programs and positions to cut can only be made after significant deliberation and analysis, and likely require revisions of the time tables or priorities associated with implementing the University's recently developed Strategic Plan – and ultimately require consultation with or approval by the Board of Trustees. This analysis would take time and may require creating a reserve in anticipation of having to pay the fine, all of which would be part of the budgeting process. Another option, of course, would be to increase tuition to cover these costs, but that would directly undermine the University's competitiveness in the higher education marketplace.

15. The third option (comply with the Mandate) is untenable. The University is committed to following the teachings of the Catholic Church. As such, the University opposes providing insurance coverage for contraception, abortion-inducing drugs, sterilization procedures, and related counseling. To provide such coverage would be an affront to the University's institutional values and the values of the Catholic faith.

16. I understand that the Government has stated that it will finalize a change to the Mandate by August 1, 2013. But even if true, this will not alleviate the current burdens on the University to plan for and anticipate the fines.

17. The accommodations suggested in the Government's Advanced Notice of Proposed Rulemaking ("ANPRM") will not alter the core requirement of the Mandate that forces the Catholic University of America to provide, pay for, or facilitate the provision of abortifacients, sterilization, and contraception, in contravention of Catholic doctrine to which the University adheres.

18. The only concrete proposal contained in the ANPRM would require our insurance issuer, United Healthcare, to provide those services, free of charge, to our covered employees and their beneficiaries. By paying premiums to the issuer, the University will indirectly pay for these "free" services. The University will also be facilitating the provision of these services since the objectionable coverage will be triggered by Catholic's health insurance plan. The University also is currently evaluating, for its own business reasons, whether to self-insure, in accordance with the trend of educational institutions of similar size. The Mandate would discourage the University from making what might otherwise be a wise business decision because the University, even with a third party administrator, would be the

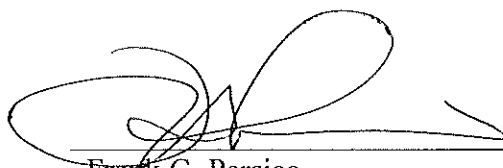
effective agent of and revenue source for abortifacients, sterilization, and contraception for its employees.

19. Under the ANPRM's proposed accommodations, Catholic University will thus be forced, whether it continues with conventional insurance or self-insures, to facilitate the provision of abortifacients, sterilization, and contraception by providing both the insurer relationship and the employment through which its employees will have access to health care coverage and, thus, coverage for the services at issue. Consequently, the existence of the ANPRM does not in any way ameliorate the foregoing existing harms that the Mandate is currently imposing on the University.

20. More importantly, the timeline on which the Government proposes to finalize an accommodation for religious organizations adds additional complexity to the University's budget process. The Government has suggested that it may finalize an altered rule by August 1, 2013. But long before that date, the University must begin to plan for the payment of the enormous fines that will apply if it is ultimately forced to choose noncompliance with the government requirement, and to make a decision whether to continue to offer insurance, and to plan for the consequences of such a decision.

21. The Catholic University of America therefore cannot wait until August 1, 2013, to begin planning to pay the fines required by the Mandate on the hope that the Government will solve the problem, for if the Government does not solve the problem, the University will have insufficient time to undertake all of the steps, discussed above, necessary to implement the only viable options available to it under the Mandate. The proposals contained in the ANPRM would not alleviate the burden on the University's religious beliefs.

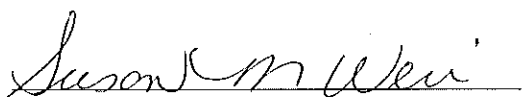
FURTHER AFFIANT SAYETH NOT.



Frank G. Persico

District of Columbia)
)
)

Sworn to and subscribed before me
this 27th day of August 2012



Notary Public in and for the
District of Columbia

Commission Expires: September 30, 2015

Susan M. Weir
Notary Public, District of Columbia
My Commission Expires 9/30/2015

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Noel J. Francisco

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