

54000-76231 (JDB)

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE**

UNION UNIVERSITY,

Plaintiff,

vs. No.

1:14-cv-01079

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

Defendant s.

COMPLAINT

I. Introduction

Union University brings this action challenging on religious grounds the Patient Protection and Affordable Care Act's requirement that Union University's employee healthcare plan include access to certain contraceptives that function as abortifacients, or that destroy human life by preventing the implantation of the embryo in the uterine wall. These requirements interfere with Union University's rights under the First Amendment and the Religious Freedom Restoration Act. The government cannot establish that the required employer-provided access to these contraceptives furthers a compelling government interest. But even if the government were to establish a compelling interest Union University is still entitled to relief because the government

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cannot show that requiring Union University to provide this coverage is the least restrictive means of furthering the compelling interest.

II. Parties

1. Union University is a private, four-year, coeducational, liberal arts-based university offering bachelor's, master's, and doctoral degrees. Founded in 1823, Union is the oldest institution affiliated with Southern Baptist life.

2. Union University's core values include being a Christ-centered institution. This means introducing men and women to an understanding and appreciation of God, His creation and grace, and humanity's place of privilege and responsibility in God's creation.

3. Union University's core values extend beyond its students to its employees.

4. As part of recognizing humanity's place of privilege in God's creation, Union University cannot provide or be part of facilitating access to abortifacients.

5. Based on its Christian-based belief in the sanctity of life, Union University considers drugs and devices that prevent the embryo from implanting in the uterine wall to be abortifacients.

6. Defendants are officials of the United States government and agencies of United States government that are responsible for implementing the Affordable Care Act.

7. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services. Secretary Sebelius is responsible for operating and managing the Department of Health and Human Services.

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8. The Department of Health and Human Services is an executive agency of the United States government and it is responsible for promulgating, administering, and enforcing the Affordable Care Act and its various regulations.

9. Defendant Thomas Perez is the Secretary of the United States Department of Labor and he is responsible for operating and managing the Department of Labor.

10. The Department of Labor is an executive agency of the United States government and it is responsible for promulgating, administering, and enforcing the Affordable Care Act and its various regulations.

11. Defendant Jacob J. Lew is the Secretary of the Department of the Treasury. Secretary Lew is responsible for operating and managing the Department of the Treasury.

12. The Department of the Treasury is an executive agency of the United States government and is responsible for promulgating, administering, and enforcing the Affordable Care Act and its various regulations.

III. Jurisdiction and venue

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and the laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-1(c).

14. Under 28 U.S.C. § 1391(e) venue is in this district because Union University maintains its principal place of business in this district and a substantial part of the events or omissions giving rise to this claim occurred in this district.

IV. Factual background

15. The Patient Protection and Affordable Care Act requires group health plans and health insurers offering group or individual health insurance coverage to include, among other things, women's "preventive care and screenings." These must be provided without cost sharing. 42 U.S.C. § 300gg-13(a)(4).

16. Congress did not define "preventive care and screenings," but left defining this phrase to the Health Resources and Services Administration. HRSA is part of the Department of Health and Human Services. HRSA then asked the Institute of Medicine to develop guidelines to help implement these requirements.

17. In drafting the guidelines, the Institute of Medicine invited several groups that are sympathetic to the government's position to make presentations on the preventive care that the government should mandate.

18. But the IOM did not seek presentations from groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling.

19. The IOM recommended that preventive services include all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling.

20. These FDA-approved contraceptive methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women.

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21. Four of the twenty approved methods include two types of intrauterine devices and emergency contraceptives commonly known as Plan B and Ella.

22. Thirteen days after IOM published its recommendations, HRSA adopted the recommendations. The Defendants issued an amended interim rule on the same day. This rule reiterated the mandate and provided a narrow exemption for “religious employers.”

23. Although HHS accepted comments until September 30, 2011, HHS’s final rule was not responsive to the comments of individuals and groups who opposed the mandate.

24. Nor does the government’s mandate consider the statutory and constitutional limits on the government’s ability to infringe on the free-exercise rights of institutions like Union University.

25. Union University believes that drugs or medical devices that prevent the implantation of the human embryo into the uterine wall cause the death of the embryo.

26. Plan B, Ella, and certain intrauterine devices prevent the embryo from implanting in the uterine wall. These drugs and devices are covered under the mandate.

27. Union University’s belief in the sanctity of human life derives from its interpretation of Scripture.

28. Preventing the embryo from implanting in the uterine wall causes the death of the embryo. Causing the death of the embryo conflicts with Union University’s beliefs based on Scripture. Therefore, Union University has religious-based objections to drugs and devices that kill the embryo and to education and counseling related to the use of these abortion-causing drugs and devices.

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29. The mandate requires Union University to ignore its religious-based objections and provide coverage for these items or at least facilitate the providing of coverage for these items.

30. Union University's opposition to the government's mandate to provide or facilitate providing these drugs or devices springs from its sincerely held religious beliefs that the mandate is contrary to Scripture. The mandate forces Union University to choose between its sincerely held religious beliefs and the government-imposed adverse consequences of not adhering to the government's mandate.

31. Union University opposes mandatory counseling or education about abortion in general and mandatory counseling or education regarding the use of these drugs or devices. Union University's opposition to the counseling and education springs from its sincerely held religious beliefs about the sanctity of human life and that life begins at conception. The mandate forces Union University to choose between its sincerely held religious beliefs and the government-imposed adverse consequences of not adhering to the government's mandate.

32. Union University's decision to follow its conscience rather than the government mandate, forces it to pay penalties to the government.

33. Union University's health plan does not qualify for the grandfather exception. Because Union University's health plan does not enjoy the grandfathered-plan exception, the university must provide the coverage outlined above. This coverage must commence by May 1, 2014.

34. The government allows eligible organizations, such as Union University, to avoid the contraceptive requirement through a self-certification process. Under this

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process, the government requires Union University to file paperwork with its insurer certifying that it objects on religious grounds to providing contraception. This self-certification process facilitates the providing of the objected-to contraceptive methods. This self-certification method is not the least-restrictive method for furthering the government's claimed interests.

35. The government is forcing Union University to pay a penalty to the federal government if it follows its sincerely held religious beliefs about the sanctity of human life, including its sincerely held religious belief that life begins at conception.

36. The Religious Freedom Restoration Act prevents the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" RFRA, however, carves out a narrow exception if "the burden is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 200bb-1(a)-(b).

37. Union University qualifies as a "person" entitled to the protection of RFRA.

38. Under RFRA, "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 200bb-2(4) (citing § 2000cc-5).

39. The government substantially burdens the exercise of religion when it forces one to choose between following the tenants of one's religion and receiving a government benefit. The government also substantially burdens one's exercise of religion when it coerces one to act contrary to one's religious beliefs by threat of civil or criminal sanctions.

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40. The government asserts that its compelling interests are promoting public health and ensuring equal access by women to healthcare services.

41. The government cannot show that providing Union University a limited religious exception from providing coverage for contraceptives that prevent fertilized eggs from implanting in the uterine wall would undermine the government's interests. This is highlighted by the fact that if Union University had a grandfathered health plan, it would not be required to provide this coverage; and because the mandate establishes a procedure for a government agency to grant exceptions from compliance to various groups.

42. The government cannot show that the mandate is the least restrictive means of furthering the government's interests. There are other means by which the government could further its interests that are less intrusive, e.g., the government could provide the contraceptive services, the government could work with third parties to provide the services, or the employees could self-certify that their employer is a religious-based organization who objects to providing these services, or the government could provide tax credits to employees who have to purchase these services.

43. The government's forcing Union University to choose between its religious beliefs and other consequences, including paying a penalty to the government, substantially burdens Union University's free exercise of religion.

44. The government's conduct violates Union University's rights to free exercise of religion under the Religious Freedom Restoration Act.

45. The mandate violates Union University's free-exercise rights under the First Amendment because it does not further a compelling government interest.

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46. The mandate is so riddled with exceptions that it is not a generally applicable rule.

47. Assuming the government established that the mandate furthered a compelling government interest, Union University is still entitled to relief under the First Amendment because the mandate is not the least restrictive means of accomplishing such an interest.

48. The Act is not generally applicable because it does not apply equally to all individuals, plans, insurers, or employers.

49. The Act is not neutral because some secular and religious groups and individuals have received statutory exceptions and HHS waivers while others have not.

50. The Act is not neutral because the government has issued a “safe harbor” that protects certain non-exempt non-profit religious objects from the contraceptive mandate, but the government does not allow religious businesses or their owners, or institutions like Union University to be within this “safe harbor.”

51. The Affordable Care Act regulates the National Health Insurance Market by directly regulating group health plans and health insurance issuers.

52. Certain provisions of the Act do not apply equally to members of certain religious groups. See, e.g., 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii); 26 U.S.C. § 5000A(d)(2)(b)(ii).

53. Employers who follow the guidelines of the Department of Health and Human Services may continue to use grandfathered plans indefinitely.

54. According to the Department of Health and Human Services, a majority of large employers, employing more than 50,000,000 Americans, will continue to use

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grandfathered plans through at least 2014, and that a third of small employers between 50 and 100 employees may do likewise. The Act creates a system of individualized exemptions.

55. The Department of Health and Human Services has the authority under the Act to grant compliance waivers to employers and other health insurance plan issuers.

56. These waivers release employers and other plan issuers from complying with the Act.

57. Union University is in the process of looking for health plans for its employees. And the nature of the government's mandate confronts Union University with a Hobson's choice: follow its sincerely held religious beliefs or not.

58. For Union University to follow its sincerely held religious beliefs—as it surely will—it must pay a penalty to the government.

V. Causes of action

A. Religious Freedom Restoration Act

59. As the basis for its claims under RFRA, Union University incorporates paragraphs 1-58.

60. The mandate is a substantial burden on Union University's exercise of its religious beliefs.

61. The mandate does not further an overwhelming or compelling government interest.

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62. Assuming the government is able to show an overwhelming governmental interest, the substantial burden imposed on Union University is not the least restrictive means of furthering the government's interest.

63. Union University's allegations establish that the mandate is not the least restrictive means because the government creates exceptions, including religious-based exceptions, with no significant impairment of furthering its interests.

64. Therefore, Union University is entitled to relief under RFRA.

B. First Amendment

65. In support of Union University's First Amendment claims, it relies on the allegations in paragraphs 1-64.

1. Free-exercise clause

66. Union University's allegations establish that the ACA, its regulations, and the resulting mandate are not rules of general applicability.

67. Furthermore, the many exceptions to the ACA and its mandate prevent the government from establishing that the ACA and its regulations are rules of general applicability.

68. Because the ACA and its regulations are not rules of general applicability, they violate Union University's First Amendment right to freely exercise its religious beliefs by imposing a substantial burden on Union University's sincerely held religious beliefs.

69. The mandate is government-imposed pressure to cause Union University to abandon or change its sincerely held religious beliefs.

70. Such coercion is not in furtherance of a compelling government interest.

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71. By ignoring and discouraging the input of individuals, businesses, universities, etc. who do not share the government's views of abortion or abortion inducing drugs or devices, the government has discriminated against Union University because of its sincerely held religious beliefs.

72. The government's mandate discriminates against Union University by placing it at a disadvantage because it cannot maintain its sincerely held religious beliefs and offer health care benefits to employees and potential employees. This is a disadvantage in the recruitment and retention of employees.

73. The government's mandate violates Union University's freedom of speech because it compels Union University to provide education and counseling related to abortion-inducing drugs and devices.

74. Because the mandate is not narrowly tailored to further any governmental interest; it is not a rule of general applicability; it compels Union University to engage in speech; and there is no compelling governmental interest justifying it, the government's mandate violates the First Amendment.

2. Establishment clause

75. The establishment clause prevents the government from favoring one religious organization over another.

76. The mandate grants the government unbridled discretion to determine to which religious organizations it will grant an exception from compliance.

77. For the government to grant exceptions to some religious organizations it must "approve" of the belief systems of those organizations.

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78. Because there is no compelling government interest justifying the mandate, there is no compelling government interest justifying the government's preference of one set of religious beliefs over another.

79. The establishment clause also prohibits the government from becoming excessively entangled with one's religious beliefs.

80. The government's unbridled discretion allows it to grant exceptions to religious organizations that the government determines serves the purpose of inculcating religious values. For the government to make such a determination, it must approve the organization's purpose.

81. A system that allows the government to approve or disapprove the purpose of a religious organization violates the First Amendment's establishment clause.

3. Freedom of speech

82. The First Amendment protects Union University's freedom of speech.

83. The government's mandate requires Union University to provide or to facilitate the providing of counseling or education regarding the use of abortifacients.

84. This is contrary to the sincerely held religious beliefs of Union University. Such compelled speech violates Union University's right to speak without the government's approval.

85. Absent injunctive and declaratory relief against the government's enforcement of the mandate, Union University is in immediate danger of irreparable harm.

C. Fifth Amendment equal protection

86. Union University adopts the allegations in paragraphs 1-85.

87. The due process clause of the Fifth Amendment requires that the government not discriminate against similarly situated organizations.

88. As alleged above, the mandate authorizes the government to grant exceptions to some religious organizations while denying exceptions to other religious organizations.

89. The government's discretion is limited, at most, to the government's determination as to whether it agrees with the views of the various groups.

90. Such differing treatment violates the equal-protection rights guaranteed by the Fifth Amendment's due-process clause.

D. Violation of the Administrative Procedures Act

91. Union University adopts the allegations in paragraphs 1-90.

92. The government did not give proper notice or opportunity for public comment before enacting its regulations. Therefore, the government did not take into account the implications that its regulations would have on organizations such as Union University.

93. The government has not met its burden of establishing that its failure to solicit and consider comments was based on good cause and violates 5 U.S.C. § 706 (2) (D).

94. Because the government did not consider the constitutional and statutory implications of the mandate on Union University and similar organizations, the regulations are arbitrary and capricious and violate 5 U.S.C. § 706 (2) (A).

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95. The Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008), provides that “none of the funds made available in this Act may be made available to a Federal agency or program . . . if such agency, program or government subjects any institutional or individual health care entity to discrimination the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”

96. The mandate requires issuers, including Union University, to provide coverage or access to coverage of all FDA-approved contraceptives.

97. Some of these FDA-approved contraceptives cause abortions by preventing the embryo from implanting in the uterine wall.

98. Because the mandate violates RFRA, the First Amendment, and the Fifth Amendment, the mandate is contrary to existing law and violates the Administrative Procedures Act.

99. Section 1303 (b)(1)(A) of the ACA states that “nothing in this title”—i.e., title I of the Act, which includes the provision dealing with the “preventative services”—“shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year.”

100. The issuer of the plan is to determine whether the plan provides such coverage.

101. Because the mandate seeks to grant the authority of determining whether the plan provides such coverage to the government, it is contrary to existing law and violates the Administrative Procedures Act.

Prayer for relief

Based on the facts of this case, Union University is entitled to the following relief:

- a. A judgment declaring that the enforcement of the mandate violates Union University's rights under the Religious Freedom Restoration Act;
- b. A judgment declaring that the enforcement of the mandate violates Union University's First Amendment rights to be free from the government's compelling it to abandon its sincerely held religious beliefs, the establishment clause, and Union University's right to free speech;
- c. A judgment declaring that the enforcement of the mandate violates the Fifth Amendment;
- d. A judgment declaring that the enforcement of the mandate violates the Administrative Procedures Act;
- e. Issue a preliminary and a permanent injunction prohibiting the government from enforcing the mandate against Union University;
- f. Award Union University the costs of this action and its reasonable attorney's fees; and
- g. Award Union University such other relief as the Court deems appropriate based on the proof in this case.

Union University demands a jury to try all issues that can be tried by a jury.

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Respectfully submitted,

RAINEY, KIZER, REVIERE & BELL, PLC

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