CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

April 8, 2013

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Submitted Electronically

Re: Notice of Proposed Rulemaking on Coverage of Certain Preventive Services under the Affordable Care Act,
File Code No. CMS-9968-P

Dear Sir or Madam:

The Christian Legal Society submits the following comments on the Notice of Proposed Rulemaking on Coverage of Certain Preventive Services under the Affordable Care Act (NPRM).[1] The NPRM invites comments on a proposed amendment to the already codified definition of "religious employer" and on a proposed "accommodation" to protect a subset of religious employers from the Health and Human Services Mandate. The Mandate requires most religious employers to provide insurance coverage for certain contraceptives, including Plan B and *ella*, which many persons consider to be abortifacients.

The Mandate remains a radical departure from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience rights in the context of participation in, or funding of, abortion. Moreover, in its codified definition of "religious employer" for purposes

[1] 78 Fed. Reg. 8456-8475 (Feb. 6, 2013). On June 19, 2012, Christian Legal Society filed comments on the Advance Notice of Proposed Rulemaking on Preventive Services (Feb. 15 , 2012), CMS-9968-ANPRM, which are *available at* http://www.clsnet.org/document.doc?id=368&erid=249607&trid=4c956211-0ee9-487b-a655-bcf66c40b5ae (last visited April 5, 2013).

of exemption from the Mandate, the Administration bypassed time-tested federal definitions of "religious employer" -- for example, Title VII's definition of "religious employer" – in favor of a controversial *state* definition.[2] This definition of "religious employer" arbitrarily transformed the majority of *religious* employers into *nonreligious* employers. By administrative fiat, religious educational institutions, hospitals, associations, and other religious employers were deprived of their religious liberty.

The Christian Legal Society joins other commenters in calling upon the Administration to rescind the Mandate. In the alternative, the Administration should adopt a robust exemption to protect the religious liberty and consciences of all stakeholders with religious objections to providing abortifacients, contraceptives, sterilization, and reproductive counseling.

Fundamentally, the NPRM seeks comments on "how best to provide women with contraceptive coverage without cost sharing . . . while protecting eligible organizations[3] from having to contract, arrange, pay, or refer for any contraceptive coverage to which they object on religious grounds." But this is a problem of the Administration's own making.

In both constitutional and practical terms, there is a ready "solution" to the "problem." As a practical matter, Secretary Sebelius has acknowledged that contraceptives are "the most commonly taken drug in America by young and middle-aged women" and are widely "available at sites such as community health centers, public clinics, and hospitals with income-based support."[4] Online pharmacies and vending machines offer contraceptives at modest cost.

---

[2] In observing that the HHS Mandate controversy likely would have been avoided had the government begun with Title VII's definition of "religious employer," Christian Legal Society does not suggest that Title VII's definition encompasses all the entities that should be exempted from the Mandate.

[3] "Eligible organizations" is HHS's euphemism for the religious non-profit organizations that it has arbitrarily transformed from "religious employers" into "non-religious employers" by its decision to deny them the "religious employer exemption," which is available only to a small subset of religious employers.

[4] *See* News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013).

But even if contraceptives were not already so widely available, the government could easily ensure that a religious organization's employees have contraceptives coverage without wading into the bureaucratic morass that the NPRM's proposed rules would create. The government itself has several conventional means to provide contraceptives coverage to any and all employees, including: 1) providing a tax credit to reimburse employees' purchase of contraceptives; 2) distributing contraceptives directly through community health centers, public clinics, and hospitals; 3) offering direct insurance coverage through the state and federal health exchanges; 4) funding programs for willing private actors, *e.g.*, physicians, pharmaceutical companies, or interest groups, to deliver the drugs through their programs; and 5) informing the public through public service announcements about the various publicly-funded means to access contraceptives.

Given that in 2012 HHS spent over $300 million in Title X funding to provide contraceptives directly to women, why is the government unwilling to spend a modest amount to protect our "first freedom"? In light of the bureaucratic expense and waste that implementation of the NPRM's proposed self-certification process, notification process, and adjustments of FFE user fees will necessarily create for not only the government and religious organizations, but also insurers and third-party administrators, it would seem obviously more efficient, economical, and easy for the government itself to provide contraceptives coverage through direct distribution, tax credits, vouchers, or other government programs.

As a constitutional matter, the First Amendment has already resolved the "problem." The government must respect religious liberty by restoring a definition of "religious employer" that protects all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage.

Religious liberty is priceless. A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too

often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty, civil society, and social pluralism.

Part I: A Brief Synopsis of the HHS Mandate Controversy.

To understand the specific comments that follow, it is helpful to briefly review the Administration's action that created this needlessly divisive situation. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA),[5] requires all employers to provide employees with insurance coverage, without cost sharing, of certain drugs and procedures identified as women's "preventive care." On August 1, 2011, the Department of Health and Human Services ("HHS") adopted guidelines requiring that employers' coverage of "preventive care" for women must include all FDA-approved contraceptive methods, including Plan B and *ella*, which many persons regard as potential abortion-inducing drugs.[6]

In August 2011, HHS proposed an exemption for an extraordinarily small set of religious employers. To qualify for the exemption, a religious employer must meet each of four criteria: 1) its purpose must be to inculcate religious values; 2) it must primarily employ members of its own faith; 3) it must serve primarily members of its own faith; and 4) it must be a nonprofit organization described in Internal Revenue Code § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii). (Note that § 501(c)(3) status is irrelevant.)

In response to the sustained outcry from the Catholic, evangelical Christian, and Orthodox Jewish communities against the Mandate and the too-narrow exemption, HHS Secretary Sebelius announced on January 20, 2012, that religious

[5] References to the ACA also encompass the accompanying Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[6] One of the effects of Plan B (Levonorgestrel), according to the FDA, is the likely interference with the implantation of the developing human embryo in the uterus. Ella (ulipristal acetate) is an analog of RU-486 (mifepristone), the abortion drug that causes death of the developing human embryo. Many Christian health care workers cannot in good conscience participate in prescribing these drugs. *See* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (last visited Feb. 18, 2013).

employers who do not qualify for the exemption would have an additional year to come into compliance with the Mandate, if they qualified for a "temporary enforcement safe harbor." A religious employer who does not qualify for the exemption *may* invoke a "temporary enforcement safe harbor" from the Mandate's enforcement for one year, until August 1, 2013, but only if it takes affirmative action to certify that it meets all of the following criteria:

1. It is organized and operated as a non-profit entity;
2. It has not provided contraceptive coverage *as of February 10, 2012*, because of its religious beliefs;
3. It provides notice (on a form provided by HHS) to its employees that contraceptive coverage is not provided for the plan year beginning on or after August 1, 2012;
4. By the first day of its plan year, it self-certifies that the first three criteria have been met.[7]

Announcement of a "temporary enforcement safe harbor" merely intensified the religious community's objections. The Administration seemed to believe that religious employers would simply abandon their religious convictions if given an additional year to consider their plight.

On February 10, 2012, the Administration announced that the too-narrow religious employer regulation would be finalized into law despite the religious community's widespread protest. The Administration also announced that it intended to propose, at a future date, an accommodation for some additional religious employers. Ostensibly, under this still nonexistent accommodation, some religious employers would not be compelled to pay for contraceptive coverage, although their insurance issuers, or third-party administrators, would furnish free contraceptive coverage to the religious employers' employees without any cost to the employer or the employees.

[7] Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, February 10, 2012, at 3.

On March 21, 2012, the Administration issued an Advance Notice of Proposed Rulemaking (NPRM), seeking comments on how this indeterminate accommodation might be structured. Again the Administration proposed no specific accommodation language. The ANPRM basically sought comments as to 1) who among religious employers might be given an accommodation, and 2) who might pay for an accommodation in which neither the employers nor the employees may be asked to pay for the insurance coverage. HHS received approximately 200,000 comments. 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013).

Beginning August 1, 2012,[8] the Mandate required most religious organizations to provide employees with contraceptive coverage by which the religious employers pay for drugs or services in violation of their religious conscience. If a religious employer did not 1) have a grandfathered plan,[9] 2) qualify for the too-narrow exemption for religious employer, or 3) act to qualify for the temporary safe harbor, the religious employer, at the beginning of its next plan year, had to provide insurance coverage for all FDA-approved contraceptives, including Plan B and *ella*, sterilization procedures, and reproductive counseling and education, regardless of the employer's religious convictions.[10]

On August 3, 2012, HHS announced a slight broadening of the temporary enforcement safe harbor to include religious non-profit organizations that objected

[8] An employer must comply with the Mandate when its next insurance plan year begins after August 1, 2012.

[9] "Grandfathered health plans," that is, plans that are materially unchanged since ACA's enactment on March 23, 2010, are exempt from most of ACA's provisions. 42 U.S.C. § 18011. According to HHS estimates, 98 million individuals will be covered by grandfathered group health plans in 2013. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). However, the Administration estimates that half of the grandfathered plans will lose that status by 2013. Bernadette Fernandez, Cong. Research Serv., RL 7-5700, Grandfathered Health Plans under the Patient Protection and Affordable Care Act (ACA) (2012) at 6-7 (table of estimated numbers of employers' plans losing grandfathered status based on numbers provided by the Departments of Health and Human Services, Labor, and Treasury).

[10] An employer with fewer than 50 full-time employees may drop all health insurance coverage for employees; however, the employees are then required by the individual mandate to purchase health insurance that includes contraceptive coverage, even if they have religious objections. If employees do not purchase the objectionable insurance, they must pay a costly penalty. Employers of 50 or more full-time employees do not have the option of dropping coverage without paying heavy penalties.

to coverage of abortifacients, but not to coverage only of true contraceptives, and to allow religious non-profit organizations to invoke the safe harbor if they had tried to exclude the objectionable coverage before February 10, 2012, even if their efforts were unsuccessful.[11]

On February 1, 2013, the government announced the current NPRM, which proposes to amend the hastily codified definition of "religious employer" (77 Fed. Reg. 16501 (Mar. 21, 2012)), by deleting three of its four required criteria. Under the proposed amendment, a religious organization would not need to inculcate values, or hire or serve primarily those of its own faith, in order to qualify as a "religious employer," *if* it were not required to file an IRS Form 990 under IRC § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). That is, *only* a church, association or convention of churches, integrated auxiliary, or religious order's religious activities would qualify for the religious employer exemption.

The NPRM also proposed an "accommodation" for what it euphemistically calls "eligible organizations" by which non-exempted, non-profit religious employers' insurers or third-party administrators purportedly will bear the economic costs of contraceptives coverage for religious organizations' employees, without any cost-sharing by the employees or the employers. 78 Fed. Reg. 8456 (Feb. 6, 2013). This so-called accommodation similarly fails to respect religious liberty.

Part II: The Mandate's Inadequate Definition of "Religious Employer" Departs Sharply from the Nation's Historic Bipartisan Tradition that Protects Religious Liberty, Particularly in the Context of Abortion Funding.

A. Through the NPRM's proposed re-definition of "religious employer" and purported accommodation for "religious non-profit organizations," the government continues to disregard religious liberty.

1. Despite sustained protests from Protestant, Catholic, and Orthodox Jewish organizations, the proposed amendments to the already codified

[11] Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012) *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 18, 2013).

definition of "religious employer" provide no substantive relief to religious organizations.

While the NPRM's proposed amendment to the current "religious employer exemption" is a welcome admission by the government that the definition of "religious employer" that it adopted in February 2012 was completely inadequate, the proposed amended definition perpetuates the inadequacy. HHS seems bent on casting the narrowest net possible, in order to protect the fewest religious employers possible. The NPRM states that the proposed amended definition of "religious employer" is not intended to "expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules." 78 Fed. Reg. 8456, 8461.

After 18 months of public protest from citizens in the evangelical Christian, Orthodox Jewish, and Catholic communities, the government reiterates that it wants as its definition of "religious employer" the narrowest religious exemption in federal law. Remarkably, the government chooses to protect only churches and ignores the reasonable request from other religious employers for respect for their religious consciences. Religious colleges, schools, homeless shelters, pregnancy crisis centers, food pantries, hospitals, and health clinics do not qualify for the exemption.

Until the Mandate, religious educational institutions and religious ministries to society's most vulnerable epitomized the quintessential "religious employer" and, therefore, were protected under any responsible federal definition of "religious employer." But the Mandate unilaterally re-defined most religious employers to be non-religious employers, transforming the majority of *religious* employers into *nonreligious* employers. As the government acknowledged, many quintessential religious employers, such as religious schools, may no longer qualify as "religious employers" under the Mandate. 77 Fed. Reg. 16501, 16502 (Mar. 21, 2012) (implicitly acknowledging that some religious schools may not be covered by the Mandate's definition of "religious employer").

The government tenaciously clings to a definition of "religious employer" that links vital religious conscience exemptions to provisions of the tax code that have nothing to do with health care or conscience. And there is no substantive

attempt to explain its decision. Again, the rationale seems to be to cast the narrowest net possible to protect the fewest religious employers possible.

Many religious ministries do not qualify as the "right" § 6033 organizations because many faith-based organizations are not formally affiliated with a religious congregation or denomination.[12] For example, a religious school that is controlled by a church may now be considered a religious employer, while an independent religious school does not qualify as a "religious employer," even though its purpose, curriculum, and faculty are just as religious as the church-controlled school. The proposed amendment would protect only religious ministries that are integrated auxiliaries of a church; however, many religious educational institutions and religious ministries are independent of any specific church. In particular, many evangelical Christian organizations are intentionally unaffiliated with a particular church or denomination. This is particularly true for religious groups that have an intentional interdenominational or ecumenical affiliation. Many ministries, including leading religious colleges and schools, are unaffiliated with any church, yet their rights of religious conscience should be no less protected.

Surprisingly, the NPRM actually materially narrows the "religious employer exemption." Under the February 2012 exemption, a qualified religious employer's insurance plan seemingly could include affiliated religious organizations that did not otherwise qualify for an exemption. 77 Fed. Reg. 16501, 16502 (March 21. 2012). For example, a soup kitchen's insurance plan could be covered by the exemption for the church with which the school was affiliated. But the NPRM proposes to restrict the exemption solely to the qualifying religious employer and not to any affiliated organizations that are covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.")

[12] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama, responding to a concern that the exemption would be broadened only to include faith-based organizations affiliated with a specific denomination. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, December 21, 2011, http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

The proposed rule would continue to violate the free exercise and establishment clauses because the government would continue to squeeze religious institutions into an impoverished, one-size-fits-all misconception of "religious employer."

2. The purported accommodation is an Enron-like accounting stratagem.

As to the purported accommodation, the NPRM again makes a welcome, albeit implicit, admission: the Administration's repeated assurances that for-profit insurance companies will simply absorb the cost of the Mandate, without charging either employer or employee, have been hyperbole. Instead, in the NPRM, the Administration acknowledges that someone must pay for "free" contraceptives – and that the insurance companies are not volunteering.

Yet again, the NPRM's purported accommodation fails to recognize legitimate religious liberty needs. The government's insistence that religious organizations are not buying objectionable insurance simply because the government wishfully deems contraceptive coverage to be cost-neutral does not accord with economic or legal reality. The NPRM makes it obvious that the government has no credible plan for providing contraceptives coverage for which employers do not pay. 78 Fed. Reg. at 8462-63.

The so-called accommodation also fails because it forces religious organizations to purchase group health insurance with objectionable coverage provisions. In this way, many religious organizations understand that they are wrongly assisting conduct that violates their religious beliefs, which in itself constitutes a substantial burden on the organizations' exercise of religion.

Perhaps most glaringly, the purported accommodation fails to protect individuals, insurers, third-party administrators, non-profit employers that are not explicitly religious organizations (for example, crisis pregnancy centers), or for-profit organizations that have religious objections to providing coverage of contraceptives and abortifacients. As to self-insured religious organizations, it is self-evident that the so-called accommodation is bogus for the basic reason that

there is no insurance company providing medical insurance to the self-insured organization to pay for the objectionable coverage. The costs are simply passed back to the self-insured organization by the self-insured claim administrator. *In fact, the costs are paid for from the self-insured organization's own account set up for medical claims.* On this basic fact, the NPRM stumbles from the start because it cannot offer a realistic explanation as to how *self-insured* religious employers can provide the objectionable coverage without paying for it. 78 Fed. Reg. at 8463-64.

Instead, the Administration posits three possible "approaches." But it is highly questionable whether the ACA itself authorizes the government to require third-party administrators to provide the coverage, or whether such coverage might violate ERISA or other federal or state laws. As the Self-Insurance Institute of America, Inc., stated in its comments on the NPRM: "[T]he Proposed Rule does not take into account the significant legal liabilities and costs . . . that a TPA would undertake as well as potential conflicts of interest with the plan-sponsor they are contracted with."[13]

As to for-profit employers, under both federal law and judicial precedent, the First Amendment protects the religious conscience rights of for-profit businesses.[14] The federal conscience protections protect both non-profit and for-profit entities and individuals engaged in for-profit commerce.[15] As one scholar has recently explained, in Protestant, Catholic, and Jewish theology, business and profit-making are not viewed as inconsistent with religious exercise.[16] For-profit businesses are widely understood as capable of forming subjective intentions for their actions.

[13] Comment Letter of Self-Insurance Institute of America, Inc., February 25, 2013.

[14] *See, e.g., Stormans, Inc. v. Selecky,* 2012 WL 566775 (W.D. Wash. 2012); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (state conscience law protects individual pharmacists and corporate owners of pharmacies from state regulation requiring pharmacists to fill prescriptions for emergency contraceptives despite their religious objections).

[15] *See, e.g.,* the Weldon Amendment that protects the conscience rights of hospitals, doctors, and other health care providers, regardless of whether they are non-profit or for-profit. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011).

[16] Mark Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?,* 21 George Mason L. Rev. 1, 55 (2013).

The law recognizes this capability in various ways, from finding businesses capable of forming mental intent for crimes, to holding them liable for racial, sexual, or religious discrimination, to acknowledging that they can speak with a particular viewpoint. There is no basis to view these same entities as incapable of forming and acting upon beliefs about religion. Indeed some businesses take actions based on religious beliefs, from closing on the Sabbath to assuring the public that they base their customer treatment on the Golden Rule.

Finally, among the many unsubstantiated "factual" premises underpinning the purported "accommodation" is the government's claim that employees of religious non-profit organizations are less likely to share their employers' religious beliefs, than the employees of a religious organization that qualifies for the religious employer exemption. 78 Fed. Reg. at 8461-62. Yet no evidence is given for this baseless assertion.

Given the pay differential between most religious non-profits and other employers, the opposite most likely is true: persons choose to work for religious non-profits because they agree with their religious employers' mission to the degree that they are willing to make financial sacrifices. As one well-known example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[17] These individuals will be forced to contribute to a pool of funds from which the insurer will pay for contraceptives coverage to which they have religious objections. Despite their objections, they will be forced to pay for such coverage for themselves and their minor children.

The NPRM tries to mask the fundamental question of whether basic economics theory supports the notion that for-profit companies will absorb the cost of drugs, surgeries, and counseling without charging employers or employees. But the more fundamental question is *why* the Administration has grudgingly treated religious liberty as a nuisance rather than our Nation's first freedom.

---

[17] According to an Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. The survey is available at http://www.acsiglobal.org/acsi-2012-13-school-survey.

B. Exemptions for religious objectors run deep in American tradition.

Religious liberty is embedded in our Nation's DNA. Respect for religious conscience is not an afterthought or luxury, but the very essence of our political and social compact.

America's tradition of protecting religious conscience predates the United States itself. In seventeenth century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court. Jews were sometimes granted exemptions from marriage laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches spread in the eighteenth century. Exemptions for Quakers and other religious objectors to military service became common. Even though perpetually outnumbered in battle, George Washington urged respect for Quakers' exemptions from military service. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1466-73 (1990) (religious exemptions in early America); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause,* 81 Notre Dame L. Rev. 1793, 1804-1808 (2006) (same). During a more recent struggle against totalitarianism, the Supreme Court exempted Jehovah's Witness schoolchildren from compulsory pledges of allegiance to the flag. *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943).

"Religion-specific exemptions are relatively common in our law, even after [*Employment Division* v.] *Smith*[, 494 U.S. 872 (1990)]." Michael W. McConnell, *The Problem of Singling Out Religion,* 50 DePaul L. Rev. 1, 3 (2000). In response to *Smith,* with overwhelming bipartisan support, Congress passed the Religious Freedom Restoration Act of 1993, providing a statutory exemption to all federal laws for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means. 42 U.S.C. § 2000bb-1. Congress has enacted other modern exemptions, including the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (protecting religious congregations and prisoners); the American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996 (protecting Native Americans); and the Religious Liberty and Charitable Donation Protection Act, 11 U.S.C. §§ 548(a)(2) (protecting donors).

C. Exemptions for religious conscience have been a bipartisan tradition in the health care context for four decades.

For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose *not* to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.[18]

Before the ink had dried on *Roe v. Wade*, 410 U.S. 113 (1973), a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from forced participation in abortion or sterilization, as well as to protect from discrimination doctors and nurses who refuse to participate in abortion. 42 U.S.C. § 300a-7. The Senate vote was 92-1.[19]

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion.[20] In upholding its constitutionality, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).[21] Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, 42 U.S.C. § 238n, to prohibit federal, state, and local governments

---

[18] *See* Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records*, April 30, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5306 (last visited Feb. 18, 2013).

[19] Nearly all states have enacted conscience clauses, specifically 47 states as of 2007. James T. Sonne, *Firing Thoreau: Conscience and At-will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007).

[20] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976).

[21] In the companion case to *Roe*, the Supreme Court noted with approval that Georgia law protected hospitals and physicians from participating in abortion. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("[T]he hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.")

from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded coverage of abortion or other services. Hospitals, doctors and other health care workers who refused to participate in the performance of any health care service on the basis of religious belief or moral conviction were protected. Commercial insurance companies and self-insurers likewise were protected.[22]

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[23] While the Church, Hyde, and Weldon Amendments are the preeminent conscience protections, numerous other federal statutes protect religious conscience in the health care context.[24]

---

[22] Doerflinger, *supra*, n. 12. *See* 103rd Congress, Health Security Act (S. 2351), introduced Aug. 2, 1994 at pp. 174-75 (text at www.gpo.gov/fdsys/pkg/BILLS-103s2351pcs/pdf/BILLS-103s2351pcs.pdf); Sen. Finance Comm. Rep. No. 103-323, *available at* www.finance.senate.gov/library/reports/committee/index.cfm?PageNum_rs=9 (last visited Feb. 18, 2013).

[23] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011).

[24] *See, e.g.*, 20 U.S.C. § 1688 (federal sex discrimination law cannot be interpreted to force anyone to participate in an abortion); 18 U.S.C. § 3597 (protecting persons who object for moral or religious reasons to participating in federal executions or prosecutions); 42 U.S.C. § 1396w-22(j)(3)(B) (protecting Medicare managed care plans from forced provision of counseling or referral if they have religious or moral objections); Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 (since 1999, protects religious health plans in federal employees' health benefits program from forced provision of contraceptives coverage, and protects individual religious objectors from discrimination); Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act, Pub. L. No. 112-74, Div. I, Title III (since 1986, prohibits discrimination in the provision of family planning funds against applicants who offer only natural family planning for religious or conscience reasons).

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." *Id.* § 18023(b)(1)(A)(i). "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii).

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that "longstanding Federal Laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide*, *pay for*, *provide coverage of*, or refer for abortions." 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added). Former Representative Bart Stupak (D-Mich.) and several other pro-life Democrats voted for ACA based on their belief that Executive Order 13535 would protect conscience rights as to ACA's implementation. Former Representative Stupak has stated that the Mandate "clearly violates Executive Order 13535."[25] Indeed, former Representative Stupak has filed an amicus brief in recent HHS Mandate challenges, explaining why the Mandate violates the ACA and Hyde-Weldon Amendments.[26]

The Mandate is badly out of step with this tradition of bipartisan protection of religious conscience. The Administration should respect this tradition of bipartisan protection of citizens' right not to participate in, or fund, abortion on religious or moral grounds by broadening the "religious employer exemption" to

[25] Statement of Former Congressman Bart Stupak Regarding HHS Contraception Mandate, Democrats for Life Panel Discussion, September 4, 2012, *available at* http://www.democratsforlife.org/index.php?option=com_content&view=article&id=773:bart-stupak-on-contraception-mandate&catid=24&Itemid=205 (last visited Feb. 18, 2013).

[26] Brief *Amici Curiae* of Bart Stupak and Democrats for Life of America in Support of Plaintiffs/Appellees and Supporting Affirmance, Newland, *et al.*, v. Sebelius, *et al.*, No. 12-1380 (10th Cir. March 1, 2013).

protect all entities with sincerely held religious objections to the controversial coverage.

Part III: Specific Comments on the Current Definition of "Religious Employer" and the Possible Accommodation.

Comment 1-1: For Twenty Months, Many Religious Organizations Have Sought a Definition of "Religious Employer" that Respects All Faith Communities' Religious Liberty.

By its very existence, the current exemption establishes that the Administration realizes the Mandate creates a substantial religious liberty burden on religious employers by forcing them to provide contraceptives and abortifacients in violation of their religious beliefs. Despite that realization, for nearly 20 months, the Administration has resisted broadening the exemption to protect all religious employers with the same religious conscience objections as those protected by the too-narrow exemption.

In adopting this definition of "religious employer," the Administration unilaterally re-defined religion. Inward-focused religions are favored. Religious organizations that provide assistance to all persons, regardless of religion or creed, are penalized for their inclusivity. Charities that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded in return by a government mandate that assails their conscience rights.[27]

Forty-five Protestant, Jewish, and Catholic organizations immediately informed HHS that its proposed definition of "religious employer" was too narrow.[28] In a meager response to sustained criticism, HHS announced on January 20, 2012, that religious employers who did not qualify for the Mandate's narrow

[27] Furthermore, the exemption is entirely discretionary and could be withdrawn at any time. The Mandate speaks in terms of "may", not "must", regarding its grant of religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A).

[28] Letter to Joshua DuBois, Executive Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, *et al*., August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322.

exemption would have an additional year to comply if they qualified for a "temporary enforcement safe harbor" that expires in August 2013.[29]

Comment 1-2: The Mandate's definition of "religious employer" imposes a two-class concept of religious organizations that is unprecedented. In a letter to the HHS Secretary, one hundred twenty-five Christian organizations, mostly Protestant, explained their objections to the government's attempt to bifurcate the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations -- outwardly oriented and given a lesser degree of protection." The letter continued:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that 'pure religion' is 'to look after orphans and widows in their distress' (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes both religion and authentic ministry. [30]

The letter continued:

[29] *See* News Release, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013). Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (February 10, 2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Feb. 18, 2013). *See also,* Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012) *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited Feb. 18, 2013).

[30] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367. The Council for Christian Colleges & Universities ("CCCU") expressed similar objections to a two-tier exemption in a letter to the President on behalf of its 138 member and affiliate schools. Letter to President Obama from Paul Corts, President, CCCU, March 9, 2012, *available at* http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation.

> [T]here is one adequate remedy: eliminate the two-class scheme of religious organization in the preventive services regulations. Extend to faith-based service organizations the same exemption that the regulations currently limit to churches. This would bring the preventive services regulations into line with the long-standing, respected, and court-tested provisions of Title VII of the 1964 Civil Rights Act [§§702, 703e] which provide a specific employment exemption for every kind of religious organization, whether they be defined as 'a religious corporation, association, educational institution, or society.'

Comment 1-3: The Administration ignored the federal definition of "religious employer," used for five decades in Title VII of the 1964 Civil Rights Act, and instead reached for a controversial state definition of "religious employer." In 1964, a Democratic Congress and Democratic President adopted a definition of "religious employer" that has been a mainstay of federal law for almost 50 years. In Title VII of the 1964 Civil Rights Act, signed into law by President Lyndon Johnson, federal law provides a broad definition of "religious employer." Rather than use this time-honored definition of "religious employer," the Administration seemingly scoured state law for the narrowest conceivable definition of "religious employer."

At a bare minimum, the Administration should start with Title VII's definition of "religious employer." Title VII permits "a religious corporation, association, educational institution, or society" to hire based on religious criteria without violating federal religious discrimination prohibitions. 42 U.S.C. § 2000e-1(a). In addition, Title VII explicitly protects "a school, college, university, or other educational institution or institution of learning . . ., in whole or substantial part, owned, supported, controlled, or managed by a particular religion[,] . . . religious corporation, association, or society, or if the curriculum of such [institution] . . . is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e)(2). Finally, Title VII protects an employer's right to "hire employees . . . on the basis of [their] religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Title VII's protections for religious employers should serve as the starting point -- the floor, not the ceiling[31] -- for any federal definition of religious employer. Had the Administration used Title VII's established definition, this damaging controversy likely would have been avoided. Inexplicably, the federal government ignored an established definition of religious employer, adopted nearly fifty years ago in Title VII, for three states' newly minted definition that had been challenged in court by Catholic charities.

Comment 1-4: The Administration chose a too-narrow exemption, knowing that many religious charities could not live with it. HHS reached for a controversial definition of religious employer that was seriously problematic for religious charities. Used by only three states, the definition had twice been challenged in state court.[32] The fact that two state courts upheld the exemption against Catholic Charities' religious liberty challenge merely signifies that HHS officials knew the exemption would be unacceptable to many religious organizations. Furthermore, religious organizations in those three states could avoid the contraceptive mandates by utilizing federal ERISA strategies, an option now blocked by the ACA.

Comment 1-5: Religious employers have been able to bypass any state mandate by self-insuring, dropping prescription drug coverage, or adopting ERISA plans that were not subject to state law regulation. Unlike the 28 states that have some form of contraceptives mandate, the federal mandate is ironclad. In the states, religious employers can structure their insurance coverage to avoid providing coverage for contraceptives and abortifacients. For starters, most states have a much broader explicit exemption for religious employers. But even in the three states from which the federal mandate was borrowed, the religious employers can structure their insurance to avoid objectionable coverage by self-insuring, dropping prescription drug coverage, or offering ERISA plans not subject to state

[31] Just as the *Washington Post* does not lose its claim to freedom of the press because it makes a profit and is incorporated, nothing in the Constitution or the Religious Freedom Restoration Act suggests that an individual or organization loses its religious liberty protection for its sincerely held religious beliefs by the act of incorporating or making a profit.

[32] *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

regulation. The ACA forecloses these options, leaving religious employers stranded.

Comment 1-6: The Mandate's "religious employer" definition fails to cover most religious ministries that serve as society's safety net for the most vulnerable. As the NPRM acknowledges, the current definition of religious employer does not cover most religious colleges, schools, preschools, hospitals, homeless shelters, pregnancy crisis centers, food pantries, health clinics, and other basic ministries of churches in communities across the country. Many, if not most, of these ministries do not qualify as § 6033 organizations and, therefore, do not qualify for the exemption. The Administration seems bent on casting the narrowest net possible, in order to protect the fewest religious employers possible. In so doing, the Administration needlessly damages the safety net for our society's most vulnerable.

Comment 1-7: There is no basis for the Administration's repeated assertions that the exemption will not be adopted in other federal and state statutes and regulations. In the NPRM, HHS continues to assert that the alarmingly narrow exemption for religious employers will not be transferred to any other regulatory context. 78 Fed. Reg. 8456, 8468. But that claim is simply not credible. We agree with the Administration that the exemption *ought* not be used in any other context. But we would respectfully submit that if it is not a sound exemption for other purposes, it is not an acceptable exemption in this context.

The Administration's own decision to pluck an obscure definition from a few states' law demonstrates that an obscure and inadequate exemption in *state* law can nonetheless infect *federal* law. The reverse is, of course, likely. Federal law often serves as a model for state laws in a variety of contexts.

Nor is there anything that the Administration can do to prevent the exemption's adoption outside the federal executive branch. Any of the fifty states is free to adopt the exemption in any context it chooses. It is also quite predictable that other federal law, including tax and regulatory schemes, will adopt this definition as well. Nor is the federal government bound by HHS' promises. Independent federal agencies are free to ignore HHS' professed intent. The

doctrine of separation of powers prevents the President from ordering federal judges or Congress to forgo use of the exemption.

Comment 1-8: In the context of the "ministerial exception," the Supreme Court recently rejected the Administration's flawed understanding of religious liberty by a unanimous vote. The Mandate and the "religious employer" exemption were both crafted without the benefit of the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). The exemption, however, was codified four weeks after the Court's unanimous decision that broadly protected churches' and religious schools' religious liberty in the employment context.

In so ruling, the Court rejected the Administration's argument that the Free Exercise and Establishment Clauses did not protect churches from governmental interference into their employment decisions as to who would serve as their ministers. The Court deemed "untenable" the Administration's position that there was "no need – and no basis – for a special rule for ministers grounded in the Religion Clauses themselves." *Id.* at 706. Instead, the Court explained that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations." *Id.* The Court would not "accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." *Id.*

The grudging spirit underlying the religious employer exemption echoes the Administration's argument in *Hosanna-Tabor*. But this religion-adverse attitude ignores the fact that, as explained by Justices Alito and Kagan in their concurring opinion, "[t]hroughout our Nation's history, religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." *Id.* at 712 (Alito, J., concurring) (quotation marks and citation omitted). Even "where the goal of the civil law in question . . . is so worthy[,] . . . [t]o safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.*

Comment 2-1: The Mandate continues to violate federal laws protecting conscience in the abortion context, including the ACA itself.[33] The Mandate violates the ACA itself, as well as the Weldon Amendment,[34] by requiring religious entities and individuals who object to abortion to nonetheless provide coverage for drugs that they believe cause abortion. Since 2004, the Weldon Amendment has prohibited federal funds for the HHS and Labor Departments from being "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for abortions."[35]

The ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits." *Id.* § 18023(b)(1)(A)(i). "[T]he issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]." *Id.* § 18023(b)(1)(A)(ii). At bottom, under the ACA itself, plan issuers, not the government, are to determine whether a health plan covers abortion. Thus the Mandate violates the ACA itself.[36]

[33] Former Congressman Bart Stupak and Democrats for Life of America provide a compelling discussion of the Mandate's violation of the conscience protections found in both the Affordable Care Act and the Hyde-Weldon Amendment in their Brief *Amici Curiae* of Bart Stupak and Democrats for Life of America in Support of Plaintiffs/Appellees and Supporting Affirmance, Newland, *et al.*, v. Sebelius, *et al.*, No. 12-1380 (10th Cir. March 1, 2013) ("Stupak Brief").

[34] Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011).

[35] *Id.* (emphasis added).

[36] Similarly, the Mandate is at odds with 21 states' laws that restrict abortion coverage in all plans or in all exchange-participating plans. The ACA itself states that it does not preempt any state law regarding abortion coverage. 42 U.S.C. § 1301(c)(1).

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms that "longstanding Federal Laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness *to provide, pay for, provide coverage of,* or refer for abortions."[37] The Mandate also violates the Executive Order.[38]

Comment 2-2: Federal conscience protections are not limited to non-profit religious conscientious objectors. The federal conscience protections protect both non-profit and for-profit entities and individuals engaged in for-profit commerce. Under these federal laws, hospitals, nurses, and doctors do not forfeit their conscience rights because they are paid for their services. The Hyde-Weldon Amendment and the ACA both protect health insurance plans, contrary to the Mandate's requirements, and also hospitals, HMOs, and provider-sponsored entities. Nor does RFRA distinguish between for-profit and non-profit institutions in its protection. 42 U.S.C. § 2000bb.[39] The First Amendment protects the religious conscience rights of for-profit businesses. *See, e.g., Stormans, Inc. v. Selecky*, 2012 WL 566775 (W.D. Wash. 2012); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (state conscience law protects individual pharmacists and corporate owners of pharmacies from state regulation requiring pharmacists to fill prescriptions for emergency contraceptives despite their religious objections).

Comment 2-3: If the government may force religious employers to pay for contraceptives and abortifacients, nothing prevents the government from forcing them to pay for all abortions. For forty years, it has been a goal of many pro-abortion organizations to compel everyone to pay for abortions. *See, e.g., Harris v. McRae,* 448 U.S. 297 (1980). If the Administration succeeds in forcing

[37] 75 Fed. Reg. 15599 (Mar. 29, 2010) (emphasis added).

[38] Stupak Brief at 9.

[39] Mark Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?,* 21 George Mason L. Rev. 1, 55 (2013).

religious employers to pay for contraceptives and abortifacients, the Mandate can be easily amended at a later date to compel religious employers to pay for all abortions. The arguments advanced for making religious employers pay for contraceptives and abortifacients – women's economic equality and avoidance of childbirth – are the core arguments used to justify all abortions.

Indeed, the Institute of Medicine report that recommended coerced coverage of contraceptives and abortifacients suggests that coverage of "abortion services" was discussed, when it notes: "Finally, despite the potential health and well-being benefits to some women, abortion services were considered to be outside of the project's scope, given the restrictions contained in the ACA." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011) at 22.[40]

Comment 3: The Administration's quandary as to how to finance a possible accommodation -- by which contraceptives, sterilization procedures, and reproductive counseling are provided to employees without cost sharing and without the employer being charged -- seems insolvable. The NPRM asks for comments on how to pay for a possible accommodation by which coverage of contraceptives, as well as costly procedures and counseling, are to be paid for by someone other than the employee or employer. Quite frankly, we doubt there is a feasible solution to the problem but offer a few observations.

Basic economics offers cold comfort. For starters, no commodity is truly free. The NPRM is adamant that the employees may not be required to pay a co-payment, co-insurance, or deductible for contraceptives, sterilization procedures, or reproductive counseling. The NPRM also claims that the financing will not come out of the religious employers' pockets. Therefore, the NPRM seeks ideas as to how insurance companies and third-party administrators may be cajoled into paying for these drugs and services without using the religious employers' premiums. Yet even the March 2012 ANPRM recognized that insurers will have to pay coverage costs from the employers' premiums when it observes that "[t]ypically, issuers build into their premiums projected costs and savings from a set of services. Premiums from multiple organizations are pooled in a 'book of

[40] Presumably "the restrictions contained in the ACA" refers to the conscience provisions in the ACA, discussed above.

business' from which the issuer pays for services." 77 Fed. Reg. 16506. Unfortunately, religious employers are still paying for the religiously objectionable drugs if payment is from a pool to which the religious employers have contributed.

The Mandate's supporters sometimes justify the Mandate as necessary because contraceptives are costly. Yet the same supporters simultaneously claim that insurance companies and third-party administrators will absorb these costs without balking. Both statements cannot be true. Even if oral contraceptives are relatively inexpensive, as the empirical evidence suggests, even small costs when aggregated add up to a considerable amount of money. For-profit insurance companies seem unlikely to pick up the tab willingly.

The Administration posits that insurance companies can fund contraceptives without charging anyone because covering contraceptive services is cost neutral. But that begs the question why the insurance companies, on their own initiative, have not previously funded contraceptives in order to recognize these savings.

The ACA does not provide statutory authority for the government to order insurance companies or third-party administrators to pick up the Mandate's cost. Indeed, in its comments, filed March 15, 2013, the Self-Insurance Institute of America, Inc., observed that several of the ideas floated in the NPRM, regarding third-party administrators covering the cost of contraceptives without charging the religious employers and without employee cost sharing, were likely to be unlawful.[41]

Finally, as to those religious employers who self-insure (in part to avoid plans with contraceptives and abortion coverage), the accommodation is obviously illusory. Instead it would be an exercise in which the dog chases its tail: the religious employer does not have to pay for the abortifacients because its insurer must pay for them, but the insurer is the religious employer.

Comment 4: The Mandate violates the Religious Freedom Restoration Act, as well as the First Amendment. Our national commitment to exemptions for religious individuals and institutions is exemplified by the

[41] Comment Letter of Self-Insurance Institute of America, Inc., February 25, 2013.

Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb. Passed by overwhelming, bipartisan margins in the Senate (97-3) and the House of Representatives (unanimous voice vote), RFRA was signed into law by President Clinton in 1993. RFRA provides religious citizens and institutions with a presumptive exemption when federal laws substantially burden their religious consciences. As the Supreme Court recently explained in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006):

> Under RFRA, *the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability*.' § 2000bb-1(a). The only exception recognized by the statute requires the Government to satisfy the compelling interest test -- to 'demonstrat[e] that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' § 2000bb-1(b). A person whose religious practices are burdened in violation of RFRA 'may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.' § 2000bb-1(c).

The Mandate and the religious employer exemption are mere administrative regulations[42] and violate the Establishment and Free Exercise Clauses, as well as the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb ("RFRA"). By exempting a small subset of religious employers, the government has already recognized that a substantial burden exists for religious employers. Nor can the government meet its burden to demonstrate a compelling interest, unachievable by less restrictive means, that justifies burdening religious employers' conscience right to avoid participating in, or funding, abortion-inducing drugs and procedures to which they have religious objections. Both ACA and the Mandate provide

[42] Arguably, the Mandate's adoption bypassed the normal Administrative Procedure Act process. Serious doubts have been raised whether HHS' hasty adoption of the Mandate, which circumvented the prescribed notice-and-comment rulemaking procedure, violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Claiming that the APA did not apply, HHS asserted "it would be impractical and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed." Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41726, 41730 (July 19, 2010).

numerous exemptions for both secular and religious employers, including those with: 1) grandfathered plans; 2) fewer than 50 employees; 3) membership in a 'recognized religious sect or division' that objects on conscience grounds to acceptance of public or private insurance funds, 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(a)(i) and (ii); or 4) the qualifications necessary to meet the Mandate's "religious employer" definition. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales,* 546 U.S. at 433, *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah,* 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted).

Forcing religious employers to fund contraceptives and abortion-inducing drugs is hardly the least restrictive means of achieving the government's purported interests. This is a solution in search of a problem. No one seriously disputes that contraceptives are widely available. HHS itself has ordered religious employers to inform their employees that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[43] The government has many other policy options available to it, including expanding existing programs.

But even if contraceptives were not already widely available, the government could easily ensure that a religious organization's employees have contraceptives coverage without wading into the bureaucratic morass that the NPRM's proposed rules would create. The government itself has several conventional means to provide contraceptives coverage to any and all employees, including: 1) providing a tax credit to reimburse employees' purchase of contraceptives; 2) distributing contraceptives directly through community health centers, public clinics, and hospitals; 3) offering direct insurance coverage through the state and federal health exchanges; 4) funding programs for willing private actors, *e.g.*, physicians, pharmaceutical companies, or interest groups, to deliver the drugs through their programs; and 5) informing the public through public

[43] Statement by U.S. Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Feb. 18, 2013).

service announcements about the various publicly-funded means to access contraceptives.

For these reasons, the Mandate as applied to religious individuals and organizations violates the Religious Freedom Restoration Act and First Amendment. Not surprisingly, the Mandate -- and its accompanying narrow exemption for a handful of religious employers and the purported accommodation -- violate fundamental federal law because they sharply depart from America's bipartisan tradition of broad protection for religious liberty and religious conscience, particularly in the abortion context.[44] At the end of the day, the Mandate is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive -- but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths.

Respectfully submitted,

Kim Colby
Senior Counsel
Center for Law and Religious Freedom
Christian Legal Society

[44] The Mandate also violates the Free Exercise Clause for reasons quite similar to the reasons it violates RFRA. In *Hosanna-Tabor*, the federal nondiscrimination law at issue was "a valid and neutral law of general applicability," yet the Supreme Court nonetheless held that the church's and church school's free exercise rights had been violated. 132 S. Ct. at 706-707. The Mandate also violates the Establishment Clause by creating excessive entanglement and oversight of religious employers by the government. The unbridled discretion given government officials to determine which religious organizations qualify for the exemption creates a risk of viewpoint discrimination that violates the Free Speech and Establishment Clauses, as do the compelled speech requirements of the Mandate as applied to religious employers.